

Hamilton 65th Partners, LLC v Smallbone Inc.

2016 NY Slip Op 31935(U)

October 11, 2016

Supreme Court, New York County

Docket Number: 652414/2015

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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HAMILTON 65TH PARTNERS, LLC,

Plaintiff,

DECISION/ORDER

-against-

Index No. 652414/2015
Motion Seq. No. 001

SMALLBONE INC. and CANBURG LIMITED

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action arising from an alleged breach of a commercial lease, defendants Smallbone, Inc. (“Smallbone”) and Canburg Limited move for summary judgment dismissing plaintiff Hamilton 65th Partners LLC’s (“Hamilton”) complaint. Hamilton cross-moves for summary judgment on its complaint, or alternatively for summary judgment on the issue of liability and an immediate trial on damages.

In April 2009, Smallbone entered into a commercial lease with Hamilton, under which Smallbone agreed to lease the first and second floors of a building located at 135 East 65th Street, New York, NY (“the premises”). Smallbone agreed to pay a monthly rent of \$33,333.33 for the term of the lease, which was set to expire on March 31, 2010. In addition, Smallbone agreed that if it continued to occupy the premises after the lease expired, it would pay use and occupancy charges “at the rate of two and one-half (2 ½) times the daily rate of the fixed rent payable during the last month of the term” (hereinafter referred to as “holdover rent”). Lease § 48(b).

On March 31, 2010, the lease expired. Smallbone, however, claims that it continued to occupy the premises until March 2014.

On July 8, 2015, Hamilton commenced this action against Smallbone and Canburg to recover holdover rent pursuant to the terms of the lease. Hamilton alleges that Smallbone failed to pay holdover rent for the time period, May 1, 2010 to December 3, 2014, which resulted in an outstanding balance due of \$3,399,999.58.¹ Hamilton further asserts that Canburg is jointly and severally liable for the holdover rent because it is an alter ego of Smallbone.²

In its motion for summary judgment, Smallbone first argues that the complaint should be dismissed because it is not liable for any holdover rent due under the lease. Smallbone contends that it does not owe any holdover rent because it became a month-to-month tenant after the lease expired, pursuant to Real Property Law § 232-c.

In addition, Smallbone contends that: (a) Hamilton is judicially estopped from denying Smallbone's status as a month-to-month tenant because it previously asserted this position in a prior holdover proceeding before Judge Gerald Lebovits; (b) Hamilton is collaterally estopped from asserting a claim for holdover rent based on Judge Margaret Chan's decision that Smallbone was a month-to-month tenant in a prior nonpayment proceeding; and (c) Hamilton waived its right to collect holdover rent because it accepted Smallbone's rent payments after the lease expired and consented to Smallbone's continued occupation of the premises.

In support of the motion, Smallbone submits an affidavit from its president, Leo Caplan. In his affidavit, Caplan states that Smallbone remained in possession of the premises as a month-to-month tenant from the expiration of the lease until March 2014. Caplan also states that Smallbone

¹ Hamilton reached this calculation by subtracting the amount that Smallbone paid to date (\$1,224,999.96) from the total holdover rent that would be due under the lease (\$4,624,999.54). In its memorandum of law, Hamilton alternatively asserted that it is entitled to damages in the amount of \$5,635,966.75.

² Smallbone describes Canburg as its parent company and stated in its answer that "Canburg holds all of the issued common stock of Smallbone."

made monthly rent payments of \$33,333.33 for April and May 2010, which were accepted by one of Hamilton's owners, Charles Darwish, without objection.

In addition, Caplan explains that during Smallbone's occupation of the premises, Hamilton's principals became embroiled in an action over the management of the building (*Simens v. Darwish*, Index No. 105097/09, Sup. Ct., New York County). As a result of this litigation, Smallbone paid its monthly rent of \$33,333.33 to the court-appointed property manager, Silverstone Property Group, for the period June 2010 to March 2011.

Caplan further states that throughout Smallbone's tenancy, the conditions at the premises deteriorated due to water infiltration and flooding. In consideration of these deteriorating conditions, Caplan asserts that the court-appointed receiver agreed to reduce Smallbone's monthly rent to \$25,000. Smallbone paid this reduced rent for April and May 2011. However, by June 2011, Smallbone began withholding rent due to the worsening conditions at the premises.

In late 2011, Hamilton's receiver commenced a non-payment proceeding against Smallbone (*Fellenbaum v. Smallbone Inc.*, Index No. L&T 87744/11, Civ. Ct., New York County). Caplan states that, after this proceeding was commenced, Smallbone resumed paying rent to the receiver in an effort to negotiate a new lease.

On March 28, 2012, Judge Margaret Chan issued a decision dismissing the non-payment proceeding "without prejudice for petitioner to commence a holdover proceeding and/or plenary action." Judge Chan stated in her decision that "[i]t is not in dispute that respondent is, in fact, a month-to-month tenant. . . Pursuant to RPL § 232-c, the effect of landlord's acceptance of payments following the expiration of the lease resulted in a month to month tenancy." She further found that the non-payment proceeding was fatally defective because Smallbone was "not holding the premises pursuant to an existing rental agreement."

Thereafter, Hamilton's receiver commenced two holdover proceedings against Smallbone in 2012 and 2014. In the first holdover proceeding, Judge Jennifer G. Schecter dismissed the proceeding based on lack of service (*Fellenbaum v. Smallbone Inc.*, Index No. L&T 57366/12, Civ. Ct., New York County). In the second holdover proceeding, Judge Gerald Lebovits awarded possession of the premises to Hamilton (*Hamilton 65th Partners, LLC v. Smallbone Inc.*, Index No. L&T 62378/14, Civ. Ct., New York County).

Hamilton opposes Smallbone's motion for summary judgment and cross-moves for summary judgment in its favor. Hamilton argues that it is entitled to collect holdover rent under the lease because Smallbone is not a month-to-month tenant pursuant to Real Property Law § 232-c. Hamilton further contends that Smallbone's estoppel arguments are meritless because it could not seek contract damages in the prior Civil Court proceedings, and Hamilton is not bound by its receiver's acts or omissions regarding the premises.

Discussion

Smallbone first argues that it is not obligated to pay holdover rent to Hamilton because it became a month-to-month tenant after the lease expired, pursuant to Real Property Law ("RPL") § 232-c. In opposition, Hamilton contends that RPL § 232-c is inapplicable because the existence of the lease agreement precludes application of this statute.

Real Property Law § 232-c states that in the case of "a holding over by the tenant . . . if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term."

Thus, RPL § 232 provides that "if the landlord accepts rent for any period subsequent to the expiration of the lease term, the tenancy thereby created will be from month to month, 'unless an

agreement either express or implied is made providing otherwise.” *North Shore Community Services, Inc. v. Community Drive LLC*, 120 A.D.3d 1142, 1142 (1st Dep’t 2014).

Smallbone and Hamilton entered into a lease agreement in April 2009, which provided that in the event Smallbone continued to occupy the premises after expiration of the lease, it “shall be liable for: (i) use and occupancy charges for every day of the Hold-Over Period commencing 30 days following termination of the Lease (during which 30 day period Tenant shall be liable for use and occupancy at the same rate as the last month of the Lease term) at the rate of two and one-half (2 ½) times the daily rate of the fixed rent payable during the last month of the term.”

The parties do not dispute that Smallbone continued to occupy the premises after the lease expired in March 2010. Although it is true that RPL § 232-c may operate to create a month-to-month tenancy after a lease expires and the landlord continues to accept rent, this statute does not create such a tenancy when an express or implied agreement between the landlord and tenant provides otherwise. Here, the lease contained an express agreement that Smallbone would be liable for 2 ½ times the last month’s rent for the holdover period. Given the existence of this agreement, RPL § 232-c does not apply to create a month-to-month tenancy between Smallbone and Hamilton. *North Shore Community Services, Inc.*, 120 A.D.3d at 1142.

Notwithstanding the foregoing, Smallbone contends that Hamilton should be judicially estopped from taking a position that is inconsistent with its prior stance that Smallbone was a month-to-month tenant in the holdover proceeding before Judge Gerald Lebovits. In that proceeding, Hamilton asserted that Smallbone was a month-to-month tenant, and ultimately secured a judgment of possession of the premises.

“The doctrine of judicial estoppel prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed.” *Becerril v. City of N.Y. Dept. of Health & Mental Hygiene*, 110 A.D.3d 517, 519 (1st Dep’t 2013).

In the proceeding before Judge Lebovits, Hamilton asserted in the petition that its rental agreement with Smallbone “expired by its own terms,” and that Smallbone “remained in possession thereafter as a month to month tenant.” Throughout the proceeding, Hamilton consistently maintained that Smallbone was a month-to-month tenant and it never sought to collect holdover rent under the lease. In fact, Hamilton alleged instead that it had received “[n]o monies for rent and/or ‘use and occupancy’ . . . since March 31, 2014” and sought to recover “the fair value of use and occupancy.” Based on Hamilton’s position that Smallbone was a month-to-month tenant throughout the prior proceeding, I find that Hamilton is judicially estopped from denying Smallbone’s status as a month-to-month tenant and from collecting holdover rent. To allow Hamilton to change its position now and seek holdover rent would be highly prejudicial to Smallbone. *Fourth Fed. Sav. Bank v. Nationwide Associates Inc.*, 183 Misc. 2d 165,170 (Sup. Ct. 1999); *D & L Holdings, LLC v. RCG Goldman Co., LLC*, 287 A.D.2d 65, 71 (1st Dep’t 2001).

Moreover, Hamilton’s conduct of continuing to accept rent paid by Smallbone after the lease expired constitutes a waiver of its right to collect holdover rent. Under New York law, contractual rights may be waived “if they are knowingly, voluntarily and intentionally abandoned.”

Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P., 7 N.Y.3d 96, 104 (2006).

Here, Hamilton continued to accept the rent paid by Smallbone even after the lease expired, and Hamilton never asserted its right to collect holdover rent until now. This conduct by Hamilton amounts to waiver because it is a “clear manifestation of intent to relinquish a contractual protection” – i.e., the right to collect holdover rent under the lease. *Fundamental Portfolio*

Advisors, Inc., 7 N.Y.3d at 104 (internal quotations omitted); *Echostar Satellite L.L.C. v. ESPN, Inc.*, 79 A.D.3d 614, 617 (1st Dep't 2010).

For the above stated reasons, Smallbone and Canburg's motions for summary judgment dismissing the complaint are granted and Hamilton's cross-motion for summary judgment is denied.

In accordance with the foregoing, it is

ORDERED that defendants Smallbone, Inc. and Canburg Limited's motions for summary judgment dismissing the complaint are granted, the complaint is dismissed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff Hamilton 65th Partners LLC's cross-motion for summary judgment on its complaint is denied.

This constitutes the decision and order of this Court.

DATE : 10/10/16


SCARPULLA, SALIANN, JSC