Harrison v Canal Furniture Corp.
2014 NY Slip Op 30310(U)
January 31, 2014
Sup Ct, New York County
Docket Number: 109757/2010
Judge: Shirley Werner Kornreich
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Landlord argued that failure to have workers compensation insurance is a breach of the lease, making the tenant subject to eviction.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54
Justice

Harrison

- v -

Canal Furniture Corp.

INDEX NO. 109757/2010
MOTION DATE 1/27/14
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	13-57
Answering Affidavits — Exhibits	63-98, 131
Replying Affidavits	101-122, 132-133, 139-14 124-126, 134, 143-145

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 1/31/14

SHIRLEY WERNER KORNREICH J.S.C.
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☒ **REFERENCE**

☐ **SUBMIT ORDER/ JUDG.** ☐ **SETTLE ORDER/ JUDG.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

MARILYN HARRISON,

Plaintiff,

-against-

CANAL FURNITURE CORP.,

Defendant.

----------X

Index No.: 109757/2010
(The New York Action)

CANAL FURNITURE CORP.,

Plaintiff,

-against-

MARILYN HARRISON,

Defendant.

----------X

Index No.: 18467/2010
(The Queens Action)

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Marilyn Harrison (the Landlord) and Canal Furniture Corp. (the Tenant) each move for summary judgment in these consolidated *Yellowstone* and declaratory judgment actions arising from purported breaches of a commercial lease for a property located in Manhattan.

Most of the issues on these motions were decided at oral argument on September 10, 2013, when the court dismissed the New York Action and granted summary judgment to the Tenant on the majority of the alleged defaults in the Queens Action. *See* Dkt. 136 (Transcript). The court reserved judgment on the alleged default for failure to maintain certain occurrence-based insurance policies. After the motion was fully submitted, the court ordered supplemental briefing [*see* Dkt. 137], which the court deems part of the record on the instant motions. *See* Dkt. 139-145. For the reasons that follow, the court grants summary judgment to the Tenant on

the remaining alleged defaults, grants summary judgment on liability to the Landlord for its architectural bills and legal fees, and refers the calculation of such amounts to a Special Referee to hear and report.

I. Procedural History & Factual Background

The material facts are undisputed.

On July 1, 2004, the parties entered into a triple net lease (the Lease) which provides the Tenant with a buyout option for the building of $2 million.[1] Since that time, the value of the property has risen.

Between May 6, 2010 and July 15, 2010, the Landlord served six Notices to Cure on the Tenant in an attempt to evict the Tenant and eliminate its buyout option. On July 21, 2010, the Tenant commenced the Queens Action to obtain a Yellowstone Injunction. Two days later, on July 23, 2010, the Landlord commenced the New York Action in this court, seeking a declaratory judgment regarding the Tenant's alleged violations of the Lease. On March 21, 2011, Justice Kitzes issued the Tenant's requested Yellowstone Injunction and transferred the Queens Action to this court to be consolidated with the New York Action. A preliminarily conference was held on February 15, 2012, and this court has overseen all discovery in both actions.

The Tenant filed a Note of Issue on January 9, 2013, and on January 15, 2013, it filed a motion for summary judgment. On March 11, 2013, the Landlord cross-moved for summary judgment. After the motion was fully submitted in Room 130, the court observed that the parties

[1] The purchase amount increases slightly depending when the option is exercised. *See* Orner Aff., Ex. A, Sch. C., Sec. 1(c) (e.g., the purchase price is $2.1 million if the closing occurs between June 30, 2009 and July 1, 2014).

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filed oversized briefs and directed them to submit new briefs that comply with the court's page limits. *See* Dkt. 130. The court has only considered the parties' conforming briefs and their supplemental briefs, mentioned earlier.

On September 10, 2013, at oral argument, the court dismissed the New York Action, which sought a declaratory judgment on the validity of the property's certificate of occupancy, because the claim is not ripe due to the Landlord's failure to exhaust its administrative remedies or commence an Article 78 proceeding. *See* 9/10/13 Tr. at 4-5. The court then addressed each of the numerous breaches that the Landlord asserted in its notices to cure and held that they had each been cured. In short, the repairs were made,[2] there is currently a valid certificate of occupancy, and the required claims-made insurance policies have been obtained. However, the Landlord identified one potential incurable breach -- the Tenant's failure to obtain the required occurrence-based policies. Specifically, the Tenant did not obtain the required workers' compensation insurance until 2010, creating a six-year period of potential uncovered claims (2004-2010). The court reserved judgment on this issue.

The Tenant does not dispute that it did not have workers' compensation coverage for this time period. Indeed, the New York State Workers' Compensation Board (WCB) fined the Tenant $171,000 for failure to maintain such coverage.[3] However, the Tenant argues that this problem has been cured because: (1) all of the relevant employees signed waivers of their workers' compensation claims; and (2) the statute of limitations for such claims has run. For the

[2] The parties have recently disputed this issue, but it is too late to reopen this controversy for the purposes of this motion. If there really are problems with the repairs, a new cure notice will be needed.

[3] The tenant settled this fine for $1,000. This settlement does not preclude claims arising during the uncovered period.

reasons discussed below, these defenses are not viable. However, this breach is not grounds for eviction under the Lease.

II. Discussion

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A claim under the Workers' Compensation Law (WCL) is subject to a two year statute of limitations, which runs from the date of the accident. *Powell v City of New York*, 6 Misc3d 1033(A) (Sup Ct, NY County 2008). However, when an injury or disease does not manifest

immediately, a WCL claim may be brought "within two years after disablement and after the claimant knew or should have known that the disease is or was due to the nature of the employment." WCL § 28. Additionally, a release of WCL claims is not valid unless it conforms with the requirements of WCL § 32. *See Coleman v Compass Group USA, Inc./Chartwells*, 105 AD3d 129, 131-32 (3d Dept 2013). "Settlement agreements executed pursuant to [WCL] § 32 become binding upon the claimant and employer only when they have been submitted to and approved by [WCB] after the elapse of a 10-day period following submission in which requests to withdraw the agreement may be made." *Velez v Modern Linens & Towels*, 21 AD3d 1239, 1240 (3d Dept 2005).

The Landlord contends that failure to maintain insurance is an incurable breach because obtaining prospective coverage does not "protect defendant against the unknown universe of any claims arising during the period of no insurance coverage." *Kim v Idylwood, N.Y., LLC*, 66 AD3d 528, 529 (1st Dept 2009). However, failure to have maintained occurrence-based coverage can be cured. For instance, a tenant may cure this breach "by retroactively amending the terms of his coverage so that it is consistent with the lease." *Khatari v Shami*, 35 Misc3d 1211(A), at *5 n.6 (Sup Ct, Kings County 2012) (Demarest, J.), citing *Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 32 Misc3d 247, 253-54 (Sup Ct, NY County 2011); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v Red Apple Group, Inc.*, 281 AD2d 296 (1st Dept 2001). Yet, the Tenant has not obtained retroactive coverage, nor, based on its supplemental brief, does the Tenant think it needs to do so.

Moreover, the Tenant's contentions that all possible WCL claims are either time barred or released are wrong as a matter of law. First, potential claims are not necessarily time barred due to the possibility that injuries have yet to be discovered. Given that the Tenant's subtenant,

a dental practice, uses x-ray machines, it is possible that a former employee might have been exposed to radiation that has yet to manifest into an illness. Such a claim would be timely under WCL § 28 if made within two years of discovery of the illness. Second, though the Tenant claims to have obtained releases of all possible claims, such settlements are invalid because they have not been approved by the WCB, as required by WCL § 32.

Nonetheless, these issues are not grounds for eviction because of section 18(a)(iv) of the Lease provides:

> if Tenant shall fail to [perform any provision of the Lease, including the prior subsection requiring the Tenant to maintain insurance coverage] … [this] shall constitute an event of default, entitling Landlord, as its *sole remedies* under this Lease to, at Tenant's sole [cost], pay any sum reasonably necessary to cure such [default] and/or take any other action(s) reasonably necessary to cure [the default] without terminating the Lease. Tenant shall reimburse Landlord [for the amount of money paid by the Landlord to cure the default].

In other words, if the Tenant does not fulfill an obligation, if that obligation can be achieved by the Landlord paying for the cost of such obligation, the Landlord should pay the money and bill the Tenant accordingly. Thus, if there is no actual problem with the nature of the Tenant's occupancy, but, rather, the issue is nonpayment of a monetary obligation, such a problem does not entitle the Landlord to terminate the Lease. Rather, the Landlord must make sure the relevant bill gets paid and then seek payment from the Tenant.

This is the situation with the WCL issue. It is possible that some future claim may arise that might not be precluded by the statute of limitations or the Tenant's settlement with the WBC.[4] However, this problem will persist regardless if the Tenant is evicted. Getting rid of the Tenant will not provide the Landlord with any financial benefit (other than terminating the

[4] Additionally, as the Landlord notes, a claim by an employee of the Tenant's subtenant (the dental practice) is not covered by the umbrella policy, for which the Landlord has coverage as an additional insured, since such coverage is disclaimed in one of the policy's exceptions.

Tenant's buyout option, which may well be the Landlord's real motivation in this case). Indeed, the same can be said of the Tenant's alleged failure to maintain other occurrence-based coverage, such as insufficient general liability coverage. As discussed earlier, the Tenant currently has procured all required coverage mandated by the Lease. Had the Tenant refused to do so, there would be grounds for eviction. But, since any future claims against the Landlord can be resolved by seeking payment from the Tenant, the express terms of the Lease preclude termination.

The Lease was clearly drafted to make it difficult to evict the Tenant, so that minor issues with the Tenant's occupancy could not be used by the Landlord to evade Tenant's option at the agreed-upon price. *See, e.g.*, Orner Aff., Ex. A, p.10-13 (detailing complexity of eviction process, including service of multiple cure notices). The parties existed in relative harmony for years before their current conflict arose. To be sure, the Tenant breached the Lease in various ways, which have, by now, been substantially remedied; the Landlord's qualms are certainly not frivolous.

That being said, under the same provision that precludes eviction – section 18(a)(iv) – the Tenant must reimburse the Landlord for its expenses in remedying the Tenant's breaches, such as its architectural fees. In addition, section 19(c) requires the Tenant to reimburse the Landlord for its legal fees in enforcing its claims for the subject breaches. The calculation of such fees are referred to a Special Referee to hear and report. The Referee is directed to confirm that (1) the architectural fees relate to the subject breaches; and (2) the legal fees are reasonable. Accordingly, it is

ORDERED that the motions for summary judgment are decided in accordance with the September 10, 2013 record (Dkt. 136) and this decision, which grant (1) summary judgment to

Canal Furniture Corp. on the alleged defaults in Marilyn Harrison's cure notices, and converts the preliminary Yellowstone Injunction issued on March 21, 2011 to a permanent injunction only as to the specific cure notice involved in this action; and (2) summary judgment on liability to Marilyn Harrison on her claims for architectural bills and legal fees; and it is further

ORDERED that the calculation of the amount of architectural bills and legal fees that Marilyn Harrison is entitled to recover from Canal Furniture Corp. is referred to a Special Referee to hear and report with recommendations, unless the parties consent to a determination by the Special Referee, in which case the Special Referee may hear and determine said issues; and it is further

ORDERED that pending receipt of the report and a motion pursuant to CPLR 4403, final determination of that branch of the motion is held in abeyance, unless the parties consent to a determination by the Special Referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing before the Special Referee.

Dated: January 31, 2014

ENTER:

J.S.C.