General Plumbing Corp. v Parklot Holding Co.
2014 NY Slip Op 31961(U)
July 24, 2014
Sup Ct, Kings County
Docket Number: 504231/2013
Judge: Carolyn E. Demarest
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At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of July, 2014.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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GENERAL PLUMBING CORPORATION,

Plaintiff,

- against -

PARKLOT HOLDING COMPANY, JODI B. BRENNER, Individually, JODI B. BRENNER, as trustee of the FB IRREVOCABLE GRANTOR TRUST Agreement #1 dated January 1, 2004, DEBORAH BRENNER, SHARI PANZER, (now SHARI BRENNER), and FRED BRENNER,

Defendants.

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Index No. 504231/2013

DECISION AND ORDER

The following papers numbered:	NYSCEF Papers Numbered
Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	81-88, 91-98
Opposing Affidavits (Affirmations)	107-110, 114-117
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers (Memoranda of Law)	89, 99, 106, 113, 118, 119

This action arises from a dispute between a commercial landlord and tenant over plaintiff's exercise of an option to purchase real property leased to plaintiff by defendants, namely 432/436 Keap Street, Brooklyn, NY. Defendant Fred Brenner ("Fred") moves to dismiss the fifth and sixth causes of action pursuant to CPLR 3211(a)(4), or alternatively as time-barred, the third cause of action as moot, and the fourth cause of action as to Fred as containing no allegations against him individually. Defendant Fred also moves, pursuant to BCL § 724(c), for an order directing General Plumbing Corp. to reimburse him for the attorney's fees and costs he has already incurred defending

himself in this action, and to advance him any attorney's fees and costs he incurs for such defense in the future.

BACKGROUND

Fred founded plaintiff General Plumbing Corp. ("General") in 1964. In 2003, Fred allegedly transferred 80% of his voting stock in General to his son, Irwin Brenner ("Irwin"). However, Fred allegedly continued to be the president of General from 2004 to 2008 and, in 2009, Irwin became the President of General.[1] Prior to 2004, Fred owned two adjacent commercial properties, 432 Keap Street, Brooklyn, NY ("432 Keap") and 436 Keap Street, Brooklyn, NY ("436 Keap"), where General operated its business. In 2004, Fred allegedly transferred 80% of his interest in 436 Keap to his daughters, defendants Jodi, Shari, and Deborah Brenner (respectively, "Jodi", "Shari" and "Deborah"), through defendant FB Irrevocable Grantor Trust Agreement #1 ("Trust"). The amended complaint alleges that Fred transferred 432 Keap to defendant Parklot Holding Company ("Parklot"), a partnership formed by defendants Jodi, Shari, and Deborah.[2]

Plaintiff alleges that Fred, as president of General, signed two leases for General's continued use of 432 and 436 Keap on January 1, 2004. With respect to the 436 Keap lease agreement ("436 Lease"), Fred signed the 436 Lease as both the President of General, the tenant, and as a co-landlord of 436 Keap, and Jodi signed the 436 Lease as co-landlord and trustee of the Trust, the majority owner of the property. The second lease, the 432 Keap lease agreement ("432 Lease"),[3] is between General, the tenant, and Parklot. It was signed by Fred as the president of

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[1] Fred alleges that, "Irwin has been in control of General since 2006, when the shares were transferred to Irwin from Irwin's Trust." However, in a post-trial brief filed in the Summary Nonpayment Proceeding (*see infra.*), Irwin claims that he "did not obtain a majority interest in General Plumbing until 2007, and did not become President until 2008." Accordingly, there are issues of fact as to when Irwin became the majority owner and president of General.

[2] The date of the transfer of 432 Keap to Parklot is unclear. However, it is uncontested that on January 1, 2004, Parklot was the owner of 432 Keap.

[3] The 432 and 436 Leases are collectively referred to as the "Leases".

General and Jodi, Deborah, and Shari as the landlords and partners of Parklot. Its terms are substantially identical to the 436 Lease.

The Leases give General the exclusive and irrevocable option to buy the properties during the terms of the Leases, and the right of first refusal in the event of a bona fide offer to purchase by a third party. The purchase option directs that the purchase price "shall be the then fair market value of the Premises that is determined to be the average of the fair market value of the Premises as appraised by three licensed real estate appraisers." It further directs that the landlord choose one appraiser, the tenant choose a second, and that the two appraisers select a third. Plaintiff alleges that in November 2012, Jodi told Irwin that she had received an offer to purchase both of the subject properties, and asked General to waive its right of first refusal. Irwin declined and, on April 11, 2013, informed Parklot in writing of General's intention to buy the 432 Keap property. Plaintiff also claims that it included a copy of its appraiser's report with the April 11 letter. Defendant Parklot, by letter of counsel dated May 22, 2013, advised General that its appraiser was not a licensed real estate appraiser, as required by the 432 Lease, and that General had failed to pay $53,693.59, in rent including late charges. On July 11, 2013, Fred and Jodi, on behalf of the Trust, notified General that it would not extend the lease on 436 Keap and to quit and surrender the premises by December 31, 2013. On July 12, 2013, Fred and Jodi, on behalf of the Trust, sent a Ten Day Demand for the Payment of Rent to General alleging that it had underpaid its rent on 436 Keap by $274,732.47. On July 12, 2013, Jodi, on behalf of Parklot, also sent a Ten Day Demand for the Payment of Rent to General, alleging that it had underpaid its rent on 432 Keap by $47,621.06. General then commenced the present action on July 25, 2013. The complaint alleges that the demands for rent are based upon the rent increase provisions in the Leases which are calculated using the annual Consumer Price Index ("CPI").[4]

[4] The Leases provided that the annual rent would be increased in a percentage "equal to the percentage increase in the U.S. Bureau of Labor Statistics Consumer Price Index, All Urban Consumers, all items index, for the preceding twelve months."

Subsequently, on July 31, 2013, Fred and Jodi Brenner, as trustees of the Trust, brought a summary proceeding in Civil Court against General for back rent in the amount of $274,732.47 for 436 Keap (*Fred Brenner v General Plumbing*, Index No. 84237/13, "Summary Nonpayment Proceeding"). Plaintiff, in the instant action, sought a stay of the Summary Nonpayment Proceeding, and its removal to this Court, by Order to Show Cause. The Order to Show Cause was denied at oral argument on August 15, 2013. On September 18, 2013, Fred answered the instant complaint with a counterclaim for the cost of renewing his plumbing license. On October 17, 2013, plaintiff filed an amended complaint which added the fifth and sixth causes of action for breach of fiduciary duty and unjust enrichment against Fred.

A trial in the Summary Nonpayment Proceeding was held, both parties submitted post-trial briefs in November 2013, and the parties are now waiting for the adjudication as to the alleged non-payment of rent with respect to 436 Keap.

DISCUSSION

Fred seeks to have the third cause of action seeking a calculation of rent due for 436 Keap dismissed, reasoning that the Summary Nonpayment Proceeding in Civil Court has rendered it moot. In its opposition papers, plaintiff agrees to voluntarily dismiss this cause of action once a decision is reached in the Summary Nonpayment Proceeding and the appeals period has run, if no appeal is filed. As the issue is *sub judice* in the Civil Court, this cause of action is dismissed.

The fourth cause of action for breach of the implied covenant of good faith and fair dealing alleges that defendants have intentionally failed to comply with material portions of the Leases by maliciously blocking plaintiff's attempts to buy 432 Keap. Fred now moves to dismiss this cause of action only as it applies to him. "Within every contract is an implied covenant of good faith and fair dealing. This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. For a complaint to state a cause of

action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff" (*Aventine Inv. Mgmt., Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 513-514 [2d Dept 1999]).

The fourth cause of action must be dismissed as to Fred as the complaint fails to sufficiently state a cause of action against him. The fourth cause of action does not make any specific reference to Fred and the only specific allegation is that, "Defendants, instead, have intentionally failed to perform in the manner agreed-to in the Leases by, for example and without exclusion, maliciously blocking General Plumbing's good faith effort to buy 432 Keap Street." Although Fred signed the 432 Keap Lease on behalf of General, as President, the only parties to the 432 Keap Lease were General and Parklot. Accordingly, Fred was not personally a party to the 432 Lease and cannot be liable for the breach of the implied covenant of good faith and fair dealing inherent in that contract (*see generally, Aventine*, 265 AD2d at 514). Further, the fourth cause of action is redundant of the first cause of action for the breach of contract, "since a breach of the implied duty of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from the breach of the contract" (*Levi v Utica First Ins. Co.*, 12 AD3d 256, 257-258 [1st Dept 2004], citing *Canstar v Jones Constr. Co.*, 212 AD2d 452 [1st Dept 1995]).[5]

In the fifth cause of action, plaintiff alleges that Fred breached his fiduciary duty to General by signing a lease as both president and landlord which forced General to pay Fred double the market rate at the time of the lease, ignoring General's obligation to pay the CPI increases required by the lease while he was president, and failing to inform Irwin of General's

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[5] The first cause of action is for a breach of contract and declaratory judgment regarding the plaintiff's option to buy in the 432 Lease. Plaintiff argues that it was prevented from purchasing 432 Keap pursuant to the terms of the 432 Lease. It is noted that, pursuant to an order of this court dated March 26, 2014, Parklot was directed to sell 432 Keap to plaintiff. The court also takes judicial notice that the parties closed on the sale and Parklot sold 432 Keap to plaintiff pursuant to that order. Plaintiff's claim, as pleaded, appears, therefore, to be moot as pleaded.

obligation to pay the CPI increases under the lease. In the sixth cause of action, plaintiff alleges that Fred was unjustly enriched by having General pay him double rent, and by failing to have General pay the CPI increases, while he was president of General, thereby maximizing his benefits from General at the time. Fred moves to dismiss the fifth and sixth causes of action claiming the Summary Nonpayment Proceeding was previously pending when these claims were interposed in this action,[6] the plaintiff ratified the Leases subsequent to their being signed by Fred in 2004, the claims are barred by the statute of limitations, and the failure to plead a claim of breach of fiduciary duty with specificity.

Pursuant to CPLR 213(7), the statute of limitations for the plaintiff to commence an action against Fred for a breach of fiduciary duty and unjust enrichment is six years (CPLR 213(7); see *Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 650 [2011], holding, "CPLR 213 (7) applies to all 'action[s],' with no differentiation between legal and equitable claims."; *Oxbow Calcining USA Inc. v American Indus. Partners*, 96 AD3d 646, 651-652 [1st Dept 2012]). The fifth and sixth causes of action allege that Fred improperly signed the Leases in January of 2004 for a rent on the properties that was nearly double the fair market value at the time. As the signing of the Leases occurred more than six years prior to the commencement of this action on July 25, 2013, plaintiff's claims are barred by the statute of limitations pursuant to CPLR 213(7) (see *Roslyn*, 16 NY3d at 650; *Oxbow*, 96 AD3d at 651-652). To the extent that plaintiff alleges that, as president of General, Fred failed to pay the rent increases between July 25, 2007 and 2009, that issue was raised by General as a defense in calculating the rent in the Civil Court Summary Nonpayment Proceeding and must be dismissed as subsumed within the other pending action pursuant to CPLR 3211(a)(4). Plaintiff cannot use Fred's failure to pay the

[6] Although the present action was commenced prior to the Summary Nonpayment Proceeding, the fifth and sixth causes of action were first included in the amended complaint which was filed after the Summary Nonpayment Proceeding was commenced.

rent increases as both a sword and a shield.[7] Accordingly, the fifth and sixth causes of action are dismissed.

Fred moves for reimbursement and the advancement of attorney's fees and costs in defending this action, pursuant to BCL §724(c), on the grounds that he is entitled to indemnification as a former officer and director of General Plumbing. Business Corporation Law § 724 states:

> (a) Notwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board or of the shareholders in the specific case under section 723 (Payment of indemnification other than by court award), indemnification shall be awarded by a court to the extent authorized under section 722 (Authorization for indemnification of directors and officers), and paragraph (a) of section 723. Application therefor may be made, in every case, either:
>
> (1) In the civil action or proceeding in which the expenses were incurred or other amounts were paid . . .
>
> (c) Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.

"It is important to note that if the action is not of the kind covered under section 722, then neither Business Corporation Law § 723 nor § 724 are applicable, and the court has no statutory basis to order such indemnification" (*Mercado v Coes FX, Inc.*, 12 Misc 3d 766 [Sup Ct, Nassau County 2006]). Business Corporation Law § 722(c) states:

> A corporation may indemnify any person made, or threatened to be made, a party to an action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he, his testator or intestate, is or was a director or officer of the corporation, or is or was serving at the request of the corporation as a director or officer of any other corporation of any type or kind, domestic or foreign, of any partnership, joint venture, trust, employee benefit plan or other enterprise, against amounts paid in settlement and reasonable expenses, including attorneys' fees, actually and necessarily incurred by him

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[7] In General's Proposed Findings of Fact and Conclusions of Law, submitted in the Summary Nonpayment Proceeding, General sought a judgment declaring that "the rent escalation provision is void" and specifically argued, "it runs contrary to any conception of justice to allow Fred Brenner to recover late fees and interest on back rent that he himself, as President of General Plumbing, did not pay."

> in connection with the defense or settlement of such action, or in connection with an appeal therein, if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in, or, in the case of service for any other corporation or any partnership, joint venture, trust, employee benefit plan or other enterprise, not opposed to, the best interests of the corporation, except that no indemnification under this paragraph shall be made in respect of (1) a threatened action, or a pending action which is settled or otherwise disposed of, or (2) any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation, unless and only to the extent that the court in which the action was brought, or, if no action was brought, any court of competent jurisdiction, determines upon application that, in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such portion of the settlement amount and expenses as the court deems proper.

Fred argues that, through his pleadings and submissions to the court, he has denied any wrongdoing and raised issues of fact regarding whether his actions as president of General were in good faith pursuant to BCL 724(c). Plaintiff argues that Fred is not entitled to indemnification and advanced legal fees because Fred admitted that his actions were not in the best interest of General and that he was balancing the interests of Irwin and his daughters pursuant to his personal "asset allocation" plan. Accordingly, plaintiff argues that pursuant to BCL 722(c), his actions were not in good faith or in the best interests of the corporation.

Where there are issues of fact in a dispute over whether a director participated in alleged wrongful conduct and acted in good faith on behalf of the corporation, courts have generally permitted the relief of advanced litigation expenses, including attorney's fees, subject to reallocation at the end of the action pursuant to BCL 725(a) (*see 136 East 56th St. Owners v Darnet Realty Assocs.*, 248 AD2d 327 [1st Dept 1998]; *Cohen v Cohen*, 2010 NY Slip Op 33005(U) [Sup Ct, Suffolk County 2010]; *Kliger v Drucker*, 2011 NY Slip Op 33649(U) [Sup Ct, Nassau County 2011]; *Sequa Corp. v Gelmin*, 828 F Supp 203 [SD NY 1993]).

Fred has successfully defended this action and properly moved for the advancement of legal fees pursuant to BCL 724 as the action was pending against him at the time the motion was filed. Accordingly, Fred's motion for the advancement of attorney's fees pursuant to BCL 724(C) is granted (see BCL §724(c); *136 East 56th St.*, 248 AD2d 327). Further, as Fred's motion to

dismiss the causes of action against him has been granted, Fred is entitled to indemnification, in the present action only, for reasonable legal fees, pursuant to BCL §723(a).[8]

However, the first and second causes of action do not include allegations with respect to Fred and the third and fourth causes of action only involve acts allegedly taken by Fred in 2013. As none of the allegations in the original complaint included actions taken by Fred while he was a director or officer of General, for the benefit of General, Fred is not entitled to indemnification with respect to the costs and expenses of defending this case prior to October 17, 2013 when the plaintiff amended the complaint to include causes of action against Fred for his breach of duty while president of General (see BCL 724(c); BCL 722(c); *Bensen v American Ultramar*, 1996 US Dist LEXIS 10930, *8-9 [SD NY 1996]; *Booth Oil Site Admin. Group v Safety-Kleen Corp.*, 137 F Supp 2d 228, 238 [WD NY 2000]).

CONCLUSION

Defendant Fred Brenner's motion to dismiss the third, fourth, fifth and sixth causes of action, as alleged against him, is granted.

Defendant Fred Brenner's motion for indemnification and the advancement of legal fees is granted with respect to legal fees and costs incurred in this action on or after October 17, 2013.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. CAROLYN E. DEMAREST

[8] It is noted that this indemnification award does not apply to the Summary Nonpayment Proceeding or any other action.