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Board of Directors of Big Deal Realty on Greene St., Inc. v 60G 133 Greene St. Owner, LLC
2020 NY Slip Op 50885(U)
Decided on August 2, 2020
Supreme Court, New York County
Borrok, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

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Supreme Court, New York County

Board of Directors of Big Deal Realty on Greene Street, Inc., Plaintiff,

against

60G 133 Greene Street Owner, LLC, Defendant.

656819/2019

Plaintiff was represented by Cozen O'Conner, 45 Broadway Atrium, Suite 1600, New York NY 10006

Defendant was represented by Schultz Roth & Zabel LLP, 919 3rd Avenue, New York NY 10022

Andrew Borrok, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 were read on this motion to/for DISMISS.

The critical issue before the court is whether a change in the beneficial ownership of a corporate lessee violates a provision of a proprietary lease which requires approval for any assignment of the lease or the shares appurtenant thereto, "including any interest therein," but does not expressly prohibit changes in the beneficial ownership of the lessee. Because the court answers this question in the negative, 60G 133 Greene Street Owner, LLC's (**60G**) motion to dismiss pursuant to CPLR § (a)(1) and (7) is granted.

I. The Relevant Facts

A. Background

Big Deal Realty on Greene Street, Inc. is the owner of a cooperative building located at 133-137 Greene Street, New York, New York (the **Co-Op**) (Compl., ¶¶ 10). 60G is a proprietary lessee and shareholder of the Co-Op (*id.*). In February 2000, the board of the Co-Op (the **Board**) approved a mandatory flip tax of 1% to be paid by a selling shareholder (the **Flip Tax**) (*id.*, ¶ 14). At the annual meeting of the Co-Op's shareholders on November 8, 2000, the shareholders voted to ratify and implement the Flip Tax (*id.*). 60G acquired two shares of the Co-Op appurtenant to the leasehold comprised of Unit 1 and the Basement Unit for a total purchase price of $40 million (*id.*, ¶ 15). Upon its acquisition of the two shares, 60G agreed to be bound by certain governing agreements (*id.*, ¶ 16).

B. The Relevant Agreements

Reference is made to (i) a certain Proprietary Lease (the **Lease**), dated July 18, 1980, by and among the sponsor of the Co-Op and the Lessees (NYSCEF Doc. No. 2), and (ii) the By-Laws of the Co-Op promulgated by the Board (compl., ¶ 13). Paragraph 16 of the Lease provides, in relevant part:

> the Lessee shall not assign this lease or transfer the shares to which it is appurtenant or any interest therein, and no such assignment or transfer shall take effect as against the Lessor for any purpose, until . . . consent to such assignment shall have been authorized by resolution of the Directors, or given in writing by a majority of Directors; or, if the Directors shall have failed or refused to give such consent within 30 days after submission of references to them or Lessor's agent,

> then by lessees owning or record at least 66-2/3% of the then issued shares of the Lessor.

(NYSCEF Doc. No. 2, ¶ 16 [a] [vi]).

In addition, pursuant to Article V, Section 5 of the Co-Op's By-Laws, the Board is authorized to implement and enforce conditions in connection with an assignment or transfer by a Lessee of any interest in a lease or the shares appurtenant thereto (Compl., ¶ 13).

C. The Transfer

In the Fall of 2018, the prior owners of 60G conveyed their entire ownership interest in 60G to a lender to satisfy a debt in lieu of a foreclosure (*id.*, ¶¶ 17-19). 60G did not assign its interest in the Lease or the shares appurtenant thereto, or any interest in either the Lease or the shares.

The change in beneficial ownership of 60G triggered two real estate tax payments: (i) a payment of the New York City Real Property Transfer Tax in the amount of $802,712.15 pursuant to Section 11-2102 of the NYC Administrative Code, and (ii) a payment of the New York State Real Estate Transfer Tax in the amount of $122,320.00 pursuant to Section 1402 of the New York Tax Law (*id.*, ¶ 20; see NYSCEF Doc. No. 3 [Recording and Endorsement Cover Page]). Both payments were made.

The Board asserts that the transfer of the beneficial ownership of 60G was either invalid as the Board did not consent to such transfer or otherwise requires payment of the Flip Tax pursuant to Paragraph 16(a) of the Lease, which has not been paid (Compl., ¶ 21-22). The Board alleges that 60G not only failed to make this payment but also failed to notify the Board of the [*2]transfer (*id.*, ¶ 23).

The Board filed this lawsuit against 60G seeking a declaratory judgment and damages for breach of contract alleging (i) the transfer was invalid from its inception because 60G failed to obtain Board approval, or (ii) in the alternative, if the transfer is not deemed null and void, 60G's failure to seek Board approval or pay the Flip Tax constitutes a breach of the

Lease and the Co-Op's bylaws and the Board is therefore entitled to terminate 60G's interest in the Lease and shares appurtenant thereto and recover the Flip Tax (*id.*, ¶¶ 3, 4, 37, 49).

II. Discussion

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Here, 60G argues that the complaint should be dismissed because Paragraph 16(a) of the Lease was not violated as 60G did not transfer anything at all, and changes in beneficial ownership of lessees do not require approval or payment of the Flip Tax. In its opposition papers, the Board argues that it has sufficiently alleged a transfer of an interest in the Lease or the shares.

The Board's arguments fail.

It is well settled that a transfer of an interest in a tenant does not constitute an assignment of a lease absent a contractual provision which provides otherwise (*Dennis' Natural Mini-Meals, Inc. v 91 Fifth Ave. Corp.*, 172 AD2d 331, 334 [1st Dept 1991]; *Sea Cliff Delicatessen, Inc. v Skrepek*, 199 AD2d 510, 511 [2d Dept 1993]); *Brentsun Realty Corp. v D'Urso Supermarkets, Inc.* (182 AD2d 604 [2d Dept 1992]).

In *Dennis' Natural Mini-Meals, Inc. v 91 Fifth Ave. Corp*, the landlord entered into a commercial lease with a corporate tenant for a street-level retail store and restaurant (*Dennis*,

172 AD2d at 332). The lease permitted the tenant to assign the lease provided that the tenant obtained the landlord's permission and the assignee was in the same business as the tenant (*id.*). The tenant sold all of its common stock to another corporation, which assumed the lease and opened a new restaurant (*id.* at 333). The landlord served a notice to cure claiming, among other things, that the sale of the tenant's stock constituted an unauthorized assignment of the lease (*id.*, at 333-334). The tenant moved for a Yellowstone injunction and sought a declaratory judgment declaring, *inter alia*, that its tenancy had not been properly terminated and it was entitled to immediate possession of the premises (*id.* at 334). Following a non-jury trial, the court dismissed the tenant's complaint in its entirety, declared that that the tenant's lease was properly terminated, [*3]and awarded immediate possession of the premises to the landlord (*id.* at 332). On appeal, the First Department reversed and found in favor of the tenant, reasoning that "a corporate tenant's transfer of all of its stock to a third party does not constitute a breach of a nonassignment provision of a lease even where the landlord's consent to an assignment to the transferee had previously been sought and refused" (*id.* at 334). The First Department noted that it was of no moment that that the sale of stock was not to the originally intended assignee (*id.*). As the First Department explained:

> the rational is that '[a] landlord entering a lease with a corporate tenant should be presumed to know that it is an artificial entity with a life distinct from the individuals who may from time to time be its owners. If a landlord wished to protect itself against such vicissitude, it could easily write into the lease a condition subsequent. One can certainly not be implied, however.

(*id.*, quoting *Rubinstein Bros. v Ole of 34th St.*, 101 Misc 2d 563, 568-569 [Civ Ct, NY County 1979]). Here, like in *Dennis*, the Co-op could certainly have provided that transfers of interests in the tenant required Board approval and payment of the Flip Tax. They did not.

In *Sea Cliff Delicatessen, Inc. v Skrepek*, the landlord entered into a commercial lease with two individual lessees, John Beck and Jonathan Nebel, for a term of ten years (*Sea Cliff*, 199 AD2d at 510). The lease provided that "the Tenant [or] Successors . . . shall not assign this agreement, or underlet or underlease the premises . . . without the Landlord's consent in writing," and that the "Tenant shall have the right to assign said lease to any purchaser of the business or corporation hereinafter formed by Tenant, and the Landlord's consent shall not be unreasonably withheld" (*id.* at 510-511). The lease further provided that the lease term could be renewed for an additional term of ten years at a rent to be determined by the parties, and that if the parties could not agree on the rent, the matter would be referred to arbitration (*id.*).

Two months after signing the lease, Messrs. Beck and Nebel formed Sea Cliff Delicatessen, Inc. (**Sea Cliff**) (*id.* at 511). Mr. Beck assigned the lease to Sea Cliff without first obtaining the Landlord's consent (Mr. Nebel was not a party to the assignment) and, two years later, Mr. Nebel sold all of his shares in Sea Cliff to Mr. Beck (*id.*). Three years later, Mr. Beck transferred his entire interest in Sea Cliff to third-party purchasers (*id.*). Prior to the expiration of the lease term, Sea Cliff attempted to exercise its renewal option, but the landlord refused to negotiate the renewal of the lease (*id.*). Sea Cliff commenced a petition pursuant to CPLR Article 75 to compel arbitration (*id.*). The court denied the petition and Sea Cliff appealed (*id.*). The Second Department reversed on two separate grounds (*id.*). With respect to Mr. Beck's assignment of the lease to Sea Cliff, the Second Department held that the landlord waived the consent requirement by accepting rent checks from Sea Cliff for approximately five years (*id.*). Significantly, as it relates to the instant motion, and citing the First Department's decision in *Dennis*, the Second Department held that the transfer of Sea Cliff's shares to the third-party purchaser did not constitute an assignment (*id.*, citing *Dennis*, 172 AD2d at 334).

Finally, and equally instructive, in *Brentsun Realty Corp. v D'Urso Supermarkets, Inc.*, the landlord entered into a commercial lease with a corporate tenant (*id.* at 604). A rider to a commercial lease provided:

> Tenant further agrees that it will not assign, mortgage, pledge or otherwise encumber this [*4]lease or any interest therein, or sublet the whole or part of the demised premises, without obtaining on each occasion the written consent of the Landlord. Consent to assignment shall not be unreasonably withheld by Landlord, and if consent is granted, Tenant shall remain liable on this Lease. ***Transfer or sale of fifty percent (50%) or more of the stock of the Corporation shall constitute an assignment of this Lease which must require Landlord's consent as set forth above.***

(*id.* [emphasis added]). In other words, unlike the case at bar, the lease contained a specific provision indicating that a transfer of beneficial ownership constituted an assignment. The tenant corporation subsequently merged with its parent corporation without executing an assignment or sublease (*id.* at 605). The landlord sued, alleging that the merger violated the lease's non-assignment provision (*id.*). The Second Department held that the change of ownership and control of the corporate tenant resulting from the merger of the subsidiary corporation into its parent corporation did not constitute an assignment of the lease (*id.*). Inasmuch as the lease in *Brentsun* expressly provided that a transfer of 50% of the stock of the tenant constituted an assignment of the lease, the court explained that this provision did

not apply because "[t]he merger did not change the beneficial ownership, possession, or control of [the tenant's] property or leasehold estate" (*id.*), i.e., the lease terms were not violated.

Here, like in *Dennis*, *Sea Cliff*, and *Brenstun*, the Lease was not violated. In other words, the clear and unambiguous language of the Lease in this case provides that "the Lessee shall not assign this lease or transfer the shares to which it is appurtenant or any interest therein" (NYSCEF Doc. No. 2, ¶ 16 [a] [vi]). Undeniably, the lessee, 60G, did not transfer its interest in the proprietary Lease or transfer the shares appurtenant to the Lease. Nor did it transfer "any interest therein" as in the case where a co-op unit owner may wish to subdivide the co-op unit and transfer an interest in the co-op to another. Here, the transfer was a transfer of an interest in the lessee itself and the Lease does not proscribe any such transfer without Board approval or otherwise require payment of the Flip Tax upon any such transfer. By contrast, Sections 11-2101 (6)-(9) and 11-2102 (b) of the NYC Administrative Code and Sections 1401(b), (e) and 1402(a) of the New York State Tax law specifically provide that a transfer or acquisition of a controlling interest in any entity that owns an interest in real property (i.e., a change in beneficial ownership) is a triggering event requiring payment of the real estate transfer tax. Again, neither the Lease nor the By-Laws contain such a provision.

Having failed to provide a provision in the operative Co-Op documents that transfers in ownership of the Lessee are proscribed without Board approval or otherwise that the Flip Tax shall be due upon such transfer, the court shall not rewrite one under the guise of interpretation (*85th Street Rest. Corp. v Sanders*, 194 AD2d 324, 326 [1st Department 1993]). Put another way, inasmuch as there is no restriction on the transfer of beneficial ownership of a lessee, the transfer was valid without obtaining consent and no Flip Tax is due. Therefore, 60G's motion to dismiss is granted.

Accordingly, it is

ORDERED that 60G's motion to dismiss is granted; and it is further

ADJUDGED and DECLARED that (1) the change of corporate ownership of 60G did not constitute "a transfer of the shares to which [60G's lease] is appurtenant or any interest therein" under Paragraph 16 of the Lease and did not trigger an obligation on 60G's part to comply with [*5]the restrictions on alienation set forth therein, including obtaining the consent of the Board, (2) 60G did not fail to comply with the terms of the Lease by failing to

obtain the consent of the Board and is not in breach thereof, and (3) the change in ownership was not unauthorized and is not null and void, and remains in full force and effect.

DATE 8/2/2020

ANDREW BORROK, J.S.C.

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