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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

737 PARK AVENUE ACQUISITION LLC,

Plaintiff,

-against-

BARRY SHALOV and JOAN SHALOV,

Defendants.

INDEX NO. 110399/11
MOTION DATE 04-11-2011
MOTION SEQ. NO. 001

BARRY SHALOV and JOAN SHALOV,

Third-Party Plaintiffs,

-against-

KATZ 737 CORPORATION,

Third-Party Defendant.

The following papers, numbered 1 to 6 were read on this motion to dismiss the third-party complaint and cross-motion to dismiss the defendants affirmative defenses:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits cross motion	4 - 6
Replying Affidavits	

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that KATZ 737 CORPORATION's motion pursuant to CPLR §3211[a][1],[7] to dismiss the third-party complaint, is granted. 737 PARK AVENUE ACQUISITION LLC's motion filed under Motion Sequence 002, pursuant to CPLR §3211[b] to dismiss the defendants affirmative defenses is granted to the extent that the fourth, ninth, tenth, thirteenth, fifteenth and sixteenth affirmative defenses are dismissed. Plaintiff is granted use and occupancy.

Katz 737 Corporation ("third-party defendant") seeks an Order pursuant to CPLR §3211[a][1],[7] dismissing the third-party complaint.

737 Park Avenue Acquisition LLC ("plaintiff") has made a separate motion under Motion Sequence 002, pursuant to CPLR §3211[b], to dismiss Barry Shalov and Joan Shalov's ("the Shalov's") fourth, fifth, sixth, ninth, tenth, thirteenth, fifteenth and sixteenth affirmative defenses and for use and occupancy.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (See, Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994] and Blonder & Co., Inc. v. Citibank, N.A., 28 A.D. 3d 180, 808 N.Y.S. 2d 214 [N.Y.A.D. 1st Dept., 2006]).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

A motion to dismiss pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (Leon v. Martinez, 84 N.Y. 2d 83, 614 N.Y.S. 2d 972, 638 N.E. 2d 511 [1994]). Documentary evidence that contradicts the allegations, or pleadings that are conclusory, are a basis for dismissal (Morgenthow & Latham v. Bank of New York Company, Inc., 305 A.D. 2d 74, 760 N.Y.S. 2d 438 [N.Y.A.D. 1st Dept.., 2003]).

A breach of contract cause of action requires an agreement, performance, breach by a party and damages. All the elements of breach of contract must be plead to avoid dismissal (Noise in the Attic Productions, Inc. v. London Records, 10 A.D. 3d 303, 782 N.Y. S. 2d 1 [N.Y.A.D. 1st Dept., 2004]). Parties that enter into a new contract which by its terms assumes and supersedes a previous valid contractual obligation, are reduced to seeking remedy for breach of contract only as to the new agreement (Citibank v. Pechnik,112 A.D. 2d 832, 492 N.Y.S. 2d 752 [N.Y.A.D. 1st Dept., 1985]). A valid enforceable written contract governing a specific subject matter prevents recovery events arising out of the same subject matter (Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y. 2d 382, 516 NE. 2d 190, 521 N.Y.S. 2d 653 [1987]). The covenants of good faith and fair dealing are implied in all contracts (511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y. 2d 144, 773 N.E. 2d 496, 746 N.Y.S. 2d 131 [2002]).

A cause of action asserting fraud requires, "a representation of a material existing fact, falsity, scienter, deception and injury" (Channel Master Corporation v. Aluminum Limited Sales, Inc., 4 N.Y. 2d 403, 176 N.Y.S. 2d 259 [1958]) and Lama Holding v. Smith Barney, Inc., 88 N.Y. 2d 413, 688 N.E.. 2d 1370, 646 N.Y.S. 2d 76 [1996]). General and conclusory allegations of fraud will not sustain the cause of action (Polonetsky v. Better Homes Depot, Inc., 97 N.Y. 2d 46, 760 N.E.. 2d 1254, 735 N.E. 2d 479 [2001]). Absent fraud, parties are presumed to know the contents of an agreement. A party's mistake of fact or merely signing a document without knowing its contents does not constitute fraud (Mars Production Corp. v. U.S. Media Corp., 169 A.D. 2d 550, 564 N.Y.S. 2d 402 [N.Y.A.D. 1st Dept. ,1991] and Li-Shan Wang v. Landmark Capital Investments, Inc., 94 A.D. 3d 418, 941 N.Y.S. 2d 144 [N.Y.A.D. 1st Dept., 2012]).

In 1995, Barry Shalov and Joan Shalov entered into a lease with Katz 737 Corporation which included a covenant that successive two year renewal leases would be offered and that the lease would only terminate and expire upon the last to die of Barry Shalov or Joan Shalov. The parties entered into six consecutive renewal leases. In 2009, a document titled "Lease Renewal" covering a two year period until 2011, was signed and initialed by Joan Shalov on behalf of herself and her husband Barry Shalov. The 2009 Lease Renewal on page 3, paragraph 5, titled "Security Deposit," was crossed out and initialed, there were no other revisions to the agreement. Page 8, of the 2009 Lease Renewal, at paragraph 18 is titled, "No Automatic Right to Renewal." The preamble, on page one, states that any agreements made before 2009 have been written into it and any agreements not written into it are unenforceable. There were no corrections to the preamble or paragraph 18 of the 2009 Lease Renewal.

Commencing in 2011 when the 2009 Lease Renewal expired, the Shalov's did not receive any other renewals. On August 5, 2011, before the 2009 Renewal expired, Katz 737 conveyed the building to 737 Park Avenue Acquisition LLC. The third-party action was commenced against Katz 737 Corporation, based on the 1995 lease, asserting causes of action for breach of contract, breach of implied covenant of good faith and fair dealings, fraud and for attorney fees.

Third-party defendant claims that the signed 2009 Lease Renewal concerns the same subject matter, and constitutes a subsequent contract that supercedes the 1995 lease. It also claims that the 2009 Lease Renewal is unambiguous in its terms and utterly refutes the causes of action. Pursuant to CPLR §3211[a][7], third-party defendant claims the complaint fails to state causes of action for breach of the 1995 lease and breach of the implied covenants of good faith and fair dealing. It states that it cannot be established that there were material misrepresentations or deceptions because the 2009 Lease Renewal clearly indicated in big bold letters at paragraph 18 that there would be no automatic right of renewal. It also states that the cause of action for attorneys fees cannot survive if the Shalov's fail in their other claims and should be dismissed.

Upon review of all the papers submitted, this Court finds the third-party defendant has established a basis to dismiss the third-party complaint. Although this Court is aware of the hardship involved in losing their apartment, the Shalov's have not stated a basis to sustain their causes of action pursuant to the 1995 lease. Having failed to state a cause of action for their other claims the cause of action for attorney fees falls.

A motion to dismiss affirmative defenses pursuant to CPLR §3211[b], requires a liberal reading of the pleading to determine whether it is in any manner legally or factually recognizable. If there is any doubt as to the availability of the defense it should not be dismissed (Matter of Liquidation of Ideal Mut. Ins. Co. [Becker] 140 A.D. 2d 62, 532 N.Y.S. 2d 371 [N.Y.A.D. 1st Dept., 1988], Tenzer, Greenblatt, Fallon & Kaplan v. Ellenberg, 199 A.D. 2d 45, 604 N.Y.S. 2d 947 [N.Y.A.D. 1st Dept., 1993] and 534 East 11th Street Housing Development Fund Corporation v. Hendrick, 90 A.D. 3d 541, 935 N.Y.S. 2d 23 [N.Y.A.D. 1st Dept., 2011]).

Plaintiff in its ejectment action seeks to dismiss the defendants' tenth affirmative defense which it claims is based on third-party defendant's alleged fraudulent inducement, and the related fifth, sixth, ninth, fifteenth and sixteenth affirmative defenses. Plaintiff also seeks to dismiss the defendants' fourth and thirteenth affirmative defenses which it claims allege plaintiff is in breach of the 1995 lease agreement (Mot. Exh. B). Plaintiff also claims that these affirmative defenses are based on defendants claims concerning reformation or recission of the 1995 lease.

There is a heavy presumption that a written and executed instrument manifests the intention of the parties. Reformation requires clear and convincing evidence that the writings were executed under mutual mistake or unilateral mistake together with fraud (Liquidation of Union Indemnity Insurance Company of New York Royal Farms, Inc. v. Superintendent of Insurance, 162 A.D. 2d 398, 557 N.Y.S. 2d 51 [N.Y.A.D. 1st Dept. 1990]).

The ninth affirmative defense states that the 2009 Lease Renewal was signed based on mutual mistake between the defendants and the third-party defendants. The defendants have not established mutual mistake exists or met their burden concerning reformation. The tenth affirmative defense alleges that 737 Katz Corporation fraudulently induced the defendants to sign the lease. The thirteenth affirmative defense refers to a prior course of conduct between the Shalov's and the third-party defendant. The fifteenth and sixteenth affirmative defenses state the exact same thing and repeat the assertions of the ninth and tenth affirmative defenses concerning mutual mistake and fraud in the inducement. The ninth, tenth, thirteenth, fifteenth and sixteenth affirmative defenses do not state a claim against the plaintiff, and shall be dismissed.

The fourth affirmative defense states that both the plaintiff and the third-party defendant have failed to comply with the terms of the 1995 lease and are in breach of contract. This Court has determined that the third-party defendants did not breach the 1995 lease, which has been superseded by the 2009 Lease Renewal. The plaintiff is not in breach of the 1995 lease. The fourth affirmative defense shall be dismissed.

The fifth affirmative defense is based on the doctrine of estoppel and/or waiver and the sixth affirmative defense states plaintiff's claims are barred based on the doctrine of unclean hands. Defendants have stated a potential basis for these defenses based on the 2009 Lease Renewal and the date of sale of the building by the third-party defendant before the 2009 Lease Renewal had expired.

Plaintiff seeks use and occupancy, the defendants claim that they have not opposed paying rent, only that it has been rejected.

Accordingly, it is ORDERED that, KATZ 737 CORPORATION's motion to dismiss the third-party complaint, is granted, and it is further,

ORDERED that the third-party complaint is dismissed, and it is further

ORDERED that 737 PARK AVENUE ACQUISITION LLC's motion filed under Motion Sequence 002, pursuant to CPLR §3211[b] to dismiss defendants' affirmative defenses is granted to the extent that the fourth, ninth, tenth, thirteenth, fifteenth and sixteenth affirmative defenses assert in the answer are severed and dismissed, and it is further,

ORDERED that the relief sought as to the fifth and sixth affirmative defenses is denied, and it is further,

ORDERED that the defendants make all use and occupancy payments now due from September of 2011 through June of 2012, in the sum of $6,562.50 per month to plaintiff, no later than June 29, 2012, and it is further,

ORDERED that the defendants continue to pay use and occupancy in the sum of $6,562.50 per month on at timely basis, going forward from July 1, 2012 until a final disposition of this action, and it is further,

ORDERED, that movant is directed to serve a copy of this Order with Notice of Entry on the Clerk of the Trial Support Office (Room 158), who shall set this matter down for a Preliminary Conference in IAS Part 13.

This constitutes the decision and order of this court.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: June 4, 2012

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE