

Hili v 517 Third Ave. LLC
2012 NY Slip Op 33281(U)
January 27, 2012
Supreme Court, New York County
Docket Number: 651946/2011
Judge: Carol R. Edmead
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NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 651946/2011
HILI, MICHAEL
vs.
517 THIRD AVENUE, LLC,
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE 10.13.12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 1.27.2012


_____, J.S.C.

HON. CAROL EDMEAD

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 35

-----X

Michael Hili,

Plaintiff,

Index Number:

-against-

651946/2011

517 Third Avenue LLC, as
successor to Jane Goldman,
Allan Goldman and Louisa
Little as Executors for
the Estate of Sol Goldman,
and Solil Management, LLC,

Defendants.

-----X

Carol R. Edmead, J:

517 Third Avenue LLC (517) and Solil Management, LLC (Solil) (together, defendants) move to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (a) (7) for failure to state a cause of action and based upon documentary evidence.

Parties and Their Allegations

Plaintiff is a former commercial tenant in a building (the Building) located at 517 Third Avenue, New York, New York pursuant to a lease (the Lease) dated December 19, 2000 (plaintiff affidavit, ¶¶ 1, 3). 517 is the owner of the commercial space (the Premises) in the Building and its predecessors-in-interest executed the Lease as the landlord (complaint, ¶ 2; Weeks affidavit, ¶¶ 2-3). Solil was the property manager for the Premises (complaint, ¶ 3). Plaintiff and non party Vincent Ronacher executed the Lease as tenants.

Plaintiff alleges that he was running a business in the

Premises known as Imperial Pizza and that, on February 7, 2007, he entered into an agreement (the Sales Agreement) with Joseph Calcagno (Calcagno) to sell his business and for Calcagno to run a pizzeria in the Premises (plaintiff affidavit, ¶¶ 4-5). He states that, in January 2007, he spoke to defendants' agent and made an oral agreement with him to consent to the assignment of the Lease, but that after he entered into the Sales Agreement, defendants demanded a \$50,000 payment (the Payment) as a condition of agreeing to the assignment (plaintiff affidavit, ¶¶ 4-7). Consequently, he contends that, since he refused to make the Payment, defendants refused to consent to the assignment and the Sales Agreement fell through (*id.*, ¶¶ 4-7).

Plaintiff's complaint has two causes of action: 1) breach of contract for unreasonably refusing to consent to the assignment of the Lease; and 2) extortion.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and determine whether the facts as alleged fit within any cognizable legal theory (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a

matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

Lease Provisions

The Lease provides, in Article 4 (the Assignment Provision), as follows:

"Neither Tenant, nor Tenant's successors or assigns shall assign ... this lease, in whole or in part, or sublet the demised premises, in whole or in part, or permit the same to be used or occupied by others, nor shall this lease be assigned or transferred by operation of law, without the prior consent in writing of the Landlord in each instance."

The Lease provides, in Article 31 (the No Oral Modification Provision) as follows:

"This lease constitutes the entire agreement between the parties and cannot be changed or terminated orally, but only by an instrument in writing executed by the parties."

The Lease provides, in Article 45 (the Transfer Provision), as follows:

"It is understood and agreed that the transfer of partnership interest between the partners Michael Hill [sic.] and Vincent Ronacher shall be permitted without the

landlord's consent."

Contract Interpretation

Generally, "when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]).

The Lease was signed by 517's predecessors-in-interest (Weeks affidavit, ¶¶ 2-3; complaint, ¶ 2), but not by Solil. Since Solil "was not a signatory to the [Lease], no cause of action for breach of contract can be asserted against it" (*Hampton Hall Pty Ltd. v Global Funding Servs., Ltd.*, 82 AD3d 523, 524 [1st Dept], *lv denied* 17 NY3d 707 [2011]; *Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193 [1st Dept 2005]). Therefore, the cause of action against Solil for breach of contract is dismissed.

The Assignment Provision, by its terms, is clear and unambiguous in requiring written consent of the owner prior to any assignment and the Transfer Provision establishes that the parties were able to craft an exception to this requirement, when

they chose to do so. Moreover, the No Oral Modification Provision shows the parties' intent to avoid oral modifications.

Plaintiff asserts that 517 waived these contractual provisions (plaintiff affidavit, ¶¶ 5-7).

Waiver

"[A] contractual prohibition against oral modification may itself be waived" (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]). This may be done "[o]nce a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification" (*id.* at 344). However, "partial performance [must be] unequivocally referable" to the alleged oral modification (*Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009]; *Rose*, 42 NY2d at 344).

In this case, plaintiff has presented "no writings evidencing the alleged oral waiver" (*Prudential Sec. Credit Corp. v Teevee Toons*, 5 AD3d 226, 226 [1st Dept 2004]) and "the alleged modification was unsupported by consideration" (*Taylor v Blaylock & Partners*, 240 AD2d 289, 290 [1st Dept 1997]). The Sales Agreement is not "unequivocally referable to the oral modification [and] ... if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls" (*Rose*, 42 NY2d at 343-344; *Matter of Irving O. Farber, PLLC v Kamalian*, 16 AD3d 506, 506-507

[2d Dept 2005]; *Tsabbar v Auld*, 289 AD2d 115, 115-116 [1st Dept 2001], *lv denied* 98 NY2d 613 [2002]). Plaintiff has not shown that 517 waived its contractual rights under the Assignment Provision and the No Oral Modification Provision. 517 was, therefore, entitled to enforce its contractual rights and plaintiff's cause of action for breach of contract against it must be dismissed.

Extortion

The second cause of action for extortion must be dismissed since "at common law there was never a private cause of action for extortion [which is rather a criminal offense]" (*Minnelli v Soumayah*, 41 AD3d 388, 389 [1st Dept 2007], *lv dismissed* 9 NY3d 1028 [2008]; *Nigro v Pickett*, 39 AD3d 720, 721 [2d Dept 2007]; *Niagara Mohawk Power Corp. v Testone*, 272 AD2d 910, 911 [4th Dept 2000]).

Order

It is, therefore,

ORDERED that defendants' motion to dismiss plaintiff's complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 27, 2012

A handwritten signature in black ink, appearing to read 'Carol Edmead', written in a cursive style.

J.S.C.

HON. CAROL EDMEAD