

**Cafe Amore of NY Rest. Inc. v IG Second Generation Partners, L.P.**

2013 NY Slip Op 33317(U)

December 19, 2013

Sup Ct, New York County

Docket Number: 653124/2012

Judge: Paul Wooten

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

PRESENT: PAUL WOOTEN J.S.C.

PART 7

*Justice*

**CAFÉ AMORE Of NY RESTAURANT INC.  
and FRANK LA MOTTA,**

INDEX NO. 653124/12

Plaintiffs,

- against -

MOTION SEQ. NO. 001

**IG SECOND GENERATION PARTNERS, L.P.,  
and DEWARS MANAGEMENT CO., INC.,**

Defendants).

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion for Dismissal

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ **█** No(s). \_\_\_\_\_

Answering Affidavits— Exhibits \_\_\_\_\_ **█** No(s). \_\_\_\_\_

Replying Affidavits — Exhibits \_\_\_\_\_ **█** No(s). \_\_\_\_\_

Cross-Motion:  Yes  No

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

In the herein action, Café Amore of New York Restaurant, Inc (Café Amore) and Frank La Motta (La Motta) (collectively, plaintiffs) seek to modify the amount of past due base rent, property taxes, water and sewer charges assessed against plaintiffs on the basis of fraud by IG Second Generation Partners, L.P. and DeWars Managment Co., Inc. (defendants) relating to the lease agreement. This action is related to another action pending before this Court entitled *IG Second Generation Partners, L.P v Franco La Motta a/k/a Francesco La Motta, a/k/a Frank La Mota*, index number 114715/2011 (IG action). In the IG action, IG, the landlord of a building in which Café Amore was a tenant seeks to recover \$641,705.98, plus statutory interest from La Motta, who is the sole officer, director and shareholder of Café Amore of New York Restaurant Inc, on the basis that La Motta signed an individual guaranty for a commercial lease between plaintiff's predecessor in interest and

Café Amore, which Café Amore breached. IG had earlier received a judgement of eviction and monies for past due base rent, property taxes, water and sewer charges against Café Amore in the amount of \$251,410.22 in a summary proceeding in the New York Civil Court (*see IG Second Generation Partners v Café Amore of New York Restaurant Inc.*, L & T Index no. 81109/2009).

Before the Court in this action is a motion by the defendants to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), (7). Defendants maintain that a defense is founded on documentary evidence, the complaint fails to state a cause of action, and is barred by the doctrines of collateral estoppel and res judicata as these claims have already been litigated in the summary proceeding in the Civil Court wherein a judgment was entered against plaintiff Café Amore. Plaintiffs are in opposition to the defendants' motion.

Pursuant to CPLR 3211(a)(1), "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence." On a motion to dismiss pursuant to CPLR 3211, the Court affords the pleadings a "liberal construction" and "accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]).

"On a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1), a dismissal is proper only when the documentary evidence submitted establishes a defense to the asserted claims as a matter of law" (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188, 189 [1st Dept 1999]; *see Leon*, 84 NY2d at 88). The party seeking dismissal has the burden of submitting documentary evidence resolving "all factual issues as a matter of law, and conclusively dispos[ing] of the plaintiff's claim" (*Sullivan v State*, 34 AD3d 443, 445 [2d Dept 2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2d Dept 2000]). In order to prevail on a motion to dismiss based on documentary

evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; see also *Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008] [holding that it was proper for the complaint to be dismissed because the documentary evidence refuted the plaintiff's allegations for breach of contract]).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino*, 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (see *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

The Court finds that this action must be dismissed pursuant to CPLR 3211(a)(5) as the plaintiffs are collaterally estopped from asserting the claims herein.

"It is well established that the doctrine of collateral estoppel bars a litigant from disputing an issue in another proceeding when that issue was decided against the litigant in a proceeding in which he had a 'full and fair opportunity' to contest the matter" (*Feinberg v Boros*, 99 AD3d 219, 226 [1st Dept 2012])."

In deciding whether or not a litigant has had a full and fair opportunity to be heard in the prior

proceeding, the court must evaluate several factors, including but not limited to, the forum of the prior litigation, the extent of the litigation, and the competence of counsel (see *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65 [1969]). The criterion for barring an action, pursuant to the doctrine of collateral estoppel, is not whether the issue was actually litigated, but whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the matter, whether or not he chose to do so (*id.*). Plaintiffs appeared in the Civil Court summary proceeding and had an opportunity to litigate issues regarding breach of contract and any charges due to defendants herein. Moreover, plaintiffs never raised the issue of fraud or mistake and did not appeal the previous judgment (see N.Y. City Civ. Ct. Act § 905 ["The court may consider any defense to a cause of action or claim asserted by any party, whether such defense be denominated or deemed legal or equitable in nature"]; *Rockaway One Co. LLC v Wiggins*, 35 AD3d 36, 37 [2d Dept 2006]; *Dance Showcase II, Inc. v Harvestime Tabernacle, Inc.*, 30 Misc3d 1237[A], 2011 NY Slip Op 50391 [Sup Ct, NY County 2011] ["the Legislature has authorized the Civil Court to hear equitable defenses"]). As such, plaintiffs are bound by the terms of the previous judgment and are collaterally estopped from bringing the herein proceeding.

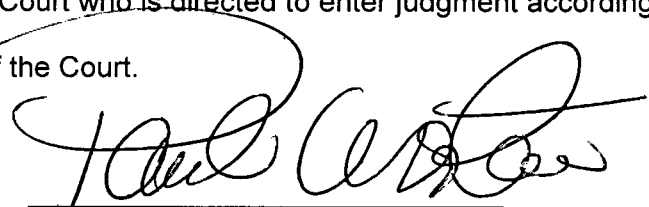
Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR §§ 3211(a)(1)(5) and (7) is granted, and this action is dismissed, with costs and disbursements to the defendants, upon the submission of an appropriate bill of costs; and it is further,

ORDERED that counsel for defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/19/13

  
 PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
 Check if appropriate: :     DO NOT POST     REFERENCE