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

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1046 MADISON AVENUE ASSOCIATES, LLC,

Plaintiff,

-against-

FIMA BERN and ARNOLD BERN,

Defendants.

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Index No.: 154990/2016

**DECISION AND ORDER**

Motion #001

**HON. CAROL R. EDMEAD, J.S.C.:**

DECISION AND ORDER

This is an action to recover damages for fraudulent inducement. Defendants, Fima Bern ("Fima") and his son Arnold Bern ("Arnold") (collectively "Defendants") move pursuant to CPLR §§ 3211(a)(1), (a)(3), (a)(5), and (a)(7) to dismiss the Amended Complaint of plaintiff, 1046 Madison Avenue Associates, LLC ("Plaintiff").

FACTUAL BACKGROUND

According to the complaint, on March 11, 2012, Plaintiff, as landlord, entered into a commercial lease agreement ("Lease") Fima Bern D/B/A Phil's Custom Shoe Repair, as tenant, for the premises known as Store No. 2A in the basement ("Premises") located at 1046 Madison Avenue, New York, NY 10075, to begin on April 1, 2012 and end on May 31, 2019.

In November 2015, Fima and Arnold informed Steven Leader ("Leader"), a representative of Plaintiff, of Fima's poor health and desire to retire from the shoe business, and requested to terminate the Lease prior to its expiration. Fima also advised that he found a new tenant, Lukure Inc. ("Lukure"), to lease the premises for the remainder of the Lease term for the same rental rate set forth in the Lease. Defendants stated that Lukure agreed to pay Fima $90,000.00 as "key money" for permission to assume the remainder of the lease (meaning

"bonus" money for taking over the Premises, over and above the rent and additional rent Lukure also agreed to pay (*Id.* at ¶ 13)). Leader then explained that such arrangement would make Lukure as subtenant, and entitle Plaintiff, under Article 67(H) to the $90,000 as "consideration received by Tenant from any subtenant in excess of the rent and additional rent. . . ." (¶ 14) Defendants then requested that plaintiff permit Fima to keep the $90,000 instead of tendering it to Plaintiff "as a good deed solely because Fima was old and retiring from the business." (¶15).

Notwithstanding Fima's liability under the Lease for the rent and additional rent through the Lease term, plaintiff agreed to forego its right to receive the $90,000 and entered into a Lease Termination Agreement terminating the Lease on January10, 2016 (the "Termination Agreement") on the condition that Fima confirmed in writing that he was retiring from the business (¶¶16, 19, 20).

By subsequent letter dated December 16, 2016, Fima stated:

> My name is Fima Bern. I am leaving my business located on 1046 Madison Ave. I am retiring from this business.
> (*Id.* at ¶ 17; Am. Compl. Ex. B).

The Letter was signed by Fima and Leader, as a witness (*Id.* at ¶ 17). And, Fima allegedly received the key money in December 2015 (*Id.* at ¶ 21).

Thereafter, in May 2016, Plaintiff discovered that Fima was "working as an owner or employee of another entity called Phil's Shoe Repair, located at 1214 Lexington Avenue, New York, NY" (*Id.* at ¶ 23) and this action for fraudulent inducement ensued.

Plaintiff alleges that it only agreed to the Termination Agreement and to waive its right to receive the $90,000 based on Defendants' oral representation and Fima's written representation that Fima was retiring from the shoe business" (*Id.* at 25). Plaintiff agreed to the deal "in order to

perform a good deed for the aging Fima" (*id.*)

*Defendants' Motion*

In support of Defendants' motion to dismiss pursuant to CPLR § 3211(a)(7) and (a)(1), Defendants' argue that Plaintiff's allegation that defendants' representations were false does not meet the requirement that fraud be pleaded with sufficient particularity. There are no facts indicating a fraudulent intent to induce Plaintiff's reliance to its detriment, and no facts indicating how Defendants knew that Fima's representation that he was retiring was false or would induce Plaintiff to terminate the lease early.

Further, Defendants attest that they made no misrepresentations to Plaintiff; Fima's intention was to retire from the business, and he did as Fima is "too old and too tired to run my own store" (Fima Aff. at ¶ 24). "Retirement life is not for everyone, and I needed to be out of the house a few days week. So to keep myself busy, I asked my son if I could help out at one of his stores a few days a week." (*Id.* ¶ 26) Arnold attests that Fima "helps me out in one of my stores a few days a week" (*Arnold Aff.*, ¶ 16). Fima states that he is not an employee or owner of any business.

Moreover, Defendants argue that Plaintiff failed to allege any statements made by Arnold, or that Arnold knew Fima was not retiring. Arnold also denies being present for discussions concerning the Lease and Termination Agreement (¶ 9).

And, Plaintiff failed to demonstrate that it relied on the Fima's statement that he was retiring as the Termination Agreement is silent on any such statement. Furthermore, Plaintiff was not obligated to terminate the Lease based on Fima's retiring.

Finally, as to damages, terminating the lease early did not harm Plaintiff since it received

the same amount of rent pursuant to its agreement with Lukure as it did the Lease.

Defendants argue that the Complaint should be dismissed also pursuant to CPLR § 3211(a)(5) on the grounds of payment and release. First, Defendants posit that pursuant to Article 67[1], Plaintiff would have consented to any assignment to or sublease by Lukure, and thus, Plaintiff would have received rent payments from Lukure, and remained in the same financial position as it is presently. Also, Plaintiff failed to substantiate that it could have collected a higher rent from Lukure. Second, Defendants' argue that the Termination Agreement prohibits Plaintiff from bringing the action. The Termination Agreement states that Fima "and Landlord hereby mutually release each other . . . of and from all claims, demands, actions and causes of every kind and nature whatsoever arising out of the Lease . . ." (¶ 5). Further, the confidentiality clause in the Termination Agreement prohibits Defendant Fima from discussing the terms of the agreement to any third party, entity or individual. (¶ 9)

As to Arnold, Defendants argue that dismissal for lack of standing and capacity to sue is warranted under CPLR § 3211(a)(3) because Arnold lacks any contractual or business relationship with Plaintiff. Arnold simply assisted Fima translate documents needed to terminate the Lease, and there are no allegations of what statement Arnold made to induce Plaintiff to enter the Lease with Lukure.

Finally, Defendants argue that they are entitled to attorney's fees in the amount of $2,400.

*Plaintiff's Opposition*

Plaintiff first argues that Defendants' reliance on paragraph 5 of the Termination

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[1]Defendants inadvertently referred to "Article 76" in their moving papers instead of Article 67 (Def. Reply Aff., at 10).

Agreement to dismiss the Amended Complaint is incorrect. Specifically, in an action where plaintiff sufficiently pleads facts alleging fraudulent inducement, a motion to dismiss should be denied. Plaintiff properly alleged fraud in the inducement, therefore Defendants may not rely on the release. To support its argument, Plaintiff cites to *Gonzalez*, *inter alia*, wherein the appellate court held that dismissal of the cause of action at the pleading stage was premature because plaintiff demonstrated that the release may have been fraudulently obtained (*Gonzalez v. 40 W. Burnside Ave. LLC*, 107 A.D.3d 542, 544, 968 N.Y.S.2d 50 [1st Dept 2013]; *see also Bloss v Va'ad Harabonim of Riverdale*, 203 A.D.2d 36, 37 [1st Dept 1994] ([w]here fraud . . . in the procurement of a release is alleged, a motion to dismiss should be denied")).

Next, Plaintiff argues that Defendants' claim that Plaintiff does not have standing is erroneous, since Plaintiff's claim is based on Arnold's misrepresentation: that Fima was retiring from the business. Furthermore, the caselaw cited by Defendants is distinguishable, as they do not involve a claim for fraud.

Finally, Plaintiff argues that Defendants are not entitled to attorney's fees because neither an agreement nor statute authorizes the Court to grant attorney's fees in this action.

*Defendants' Reply*

First, Defendants' add that the Amended Complaint should be dismissed pursuant to CPLR § 3211(a)(7) because Fima did not intentionally misrepresent his intention to retire. Fima speaks and understands limited English, and therefore the language in the letter "may mean . . . that he is retiring from his specific business at 1046 Madison Avenue" (Def. Reply Aff., at ¶ 7). Defendant argues that it is "farfetched" to assume that Fima misrepresented his intent to retire to Plaintiff, since Fima sought a new tenant and was forthcoming to Plaintiff about the $90,000 key

money (*Id.* at ¶ 23).

Next, Defendants argue that Plaintiff's reliance on Article 67(H) of the Lease is misplaced, since it only address consideration for a sublease, and not assignment.

Further, Defendants argue that the caselaw cited by Plaintiff is distinguishable.

Lastly, with regard to attorney's fees, Defendants simply argue that if "Defendants' Motion to Dismiss is granted there is nothing deterring Plaintiff from filing another frivolous Complaint against them" (Def. Reply Aff., at ¶ 35).

*Discussion*

*CPLR § 3211(a)(7)*

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, *supra; Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David*

*v Hack,* 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 [2000]; *Kliebert v McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 [1st Dept], *lv denied* 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]; *see also Leon v Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150, 730 N.Y.S.2d 48 [1st Dept 2001]).

To sustain a cause of action for fraudulent inducement, plaintiff must allege that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged (*see Perrotti v. Becker, Glynn, Melamed & Muffy LLP*, 82 A.D.3d 495, 918 N.Y.S.2d 423 [1st Dept 2011] *citing Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370 [1996]).

Plaintiff sufficiently alleges facts to state a cause of action for fraudulent inducement against Fima. When accepting the alleged facts as true and affording it the benefit of every possible inference, Plaintiff adequately alleges that, first, Fima made a false representation, in that Fima stated that he was not in good health and planned to retire from the business, both of which were untrue as it was discovered that Fima was working at Arnold's cobbler store. Second, Plaintiff alleges that Fima's misrepresentation was made for the purpose of inducing Plaintiff to enter into the Termination Agreement. Third, Plaintiff allegedly reasonably relied on

Fima's representation that he was retiring from the business when it agreed to enter into the Termination Agreement. Finally, Plaintiff was damaged as a result of Fima's misrepresentation, since it forewent the $90,000 key money it would have received pursuant to Article 67(H) of the Termination Agreement, had Fima retired prior to the termination of the Lease and Plaintiff subleased the Premises to Lukure.

Defendants' arguments that Plaintiff failed to allege facts establishing a cause of action are without merit, since the court must only "determine only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss,* 104 AD3d at 403). Additionally, that Plaintiff voluntary entered into the Termination Agreement is inconsequential for purposes of this motion. Accordingly, Defendants' motion to dismiss Plaintiff's Amended Complaint against Fima pursuant to CPLR 3211(a)(7), is denied.

As to Arnold, Plaintiff failed to allege facts to state a cause of action for fraudulent inducement against him. Plaintiff failed to assert any allegations that Arnold knowingly misrepresented Fima's intent to retire for the purpose of convincing Plaintiff to enter into the Termination Agreement. Notably, Plaintiff's opposition failed to address Arnold's attestation that "all [he] did was translate to my father what documents Leader needed from him" (Arnold Aff. at, 8; *see Id.* at 18). Accordingly, Defendants' motion to dismiss Plaintiff's Amended Complaint against Arnold pursuant to CPLR 3211(a)(7), is granted.

*CPLR § 3211(a)(l)*

Pursuant to CPLR § 3211(a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary

evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Intern.*, 80 A.D.3d 448, 450, 914 N.Y.S.2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 [2002]). "Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*VisionChina Media Inc. v Shareholder Representative VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 A.D.3d 49, 967 N.Y.S.2d 338 [1st Dept 2013]). To be considered "documentary," evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 A.D.3d 78, 898 N.Y.S.2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22)).

To the extent Defendants' rely on the affidavits of Fima and Arnold as a basis for dismissal under CPLR 3211(a)(1), it is noted that affidavits do not constitute "documentary evidence" for purposes of CPLR 3211(a)(1) analysis (*see Regini v Board of Managers of Loft Space Condominium*, 107 AD3d 496, 968 NYS2d 18 [1st Dept 2013]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 924 NYS2d 336 [1st Dept 2011]; *Marin v AI Holdings (USA) Corp.*, 35 Misc 3d 1227(A), 953 NYS2d 550 (Table) [Supreme Court, New York County 2012]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court, Bronx County 2004] (affidavits and depositions cannot be the basis for this motion)).

While the Lease and Termination Agreement are "documentary evidence," they fail to "utterly refute [Plaintiff's] allegations" noted above (*DKR Soundshore*, 80 A.D.3d at 450). Accordingly, Defendants' motion to dismiss the Amended Complaint pursuant to CPLR § 3211(a)(1), is denied.

*CPLR § 3211(a)(3)*

"[C]apacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing. As a general matter, capacity concerns a litigant's power to appear and bring its grievance before the court. Capacity may depend on a litigant's status or . . . on authority to sue or be sued." (*Flintlock Const. Services, LLC v. HPH Services, Inc.*, 2014 WL 6669700 [Sup. Ct. New York Cty. 2014], *citing Silver v. Pataki*, 96 N.Y.2d 532, 537 [2001], *rearg denied*, 96 N.Y.2d 938 [2001] [internal quotation marks and citations omitted]). In contrast, "'standing involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of resolution'" (*People ex rel Spitzer v. Grasso*, 54 A.D.3d 180, 190 n. 4 [2008] [*quoting Matter of Graziano v. County of Albany*, 3 N.Y.3d 475, 479 [2004]).

An allegation that a plaintiff was fraudulently induced into executing an agreement by the misrepresentations of defendants is sufficient to establish standing to assert a fraud claim (*see General Motors Acceptance Corp. v. Kalkstein*, 101 A.D.2d 102, 474 N.Y.S.2d 493 [1st Dept 1984]). Defendants fail to establish that the Complaint does not sufficiently allege Plaintiff's standing or capacity to sue Arnold for fraudulent inducement. That Arnold was not a party to the Lease or had any business relationship with Plaintiff is inconsequential. And, Defendants'

reliance on *Omansky v. Penning* (101 A.D.3d 514, 955 N.Y.S.2d 596 [1st Dept 2012]) and *Concerned Cooper Gramercy Tenants' Ass'n v. N.Y. City Educ. Const. Fund*, 304 A.D.2d 412, 758 N.Y.S.2d 47 [1st Dept 2003]) for the proposition that Plaintiff lacks standing, is misplaced. In *Omansky*, the Court held that plaintiff lacked standing to bring suit arising out of a leasehold he previously assigned to another party. Further, in *Concerned Cooper Gramercy Tenants' Ass'n.*, petitioner lacked standing to bring an Article 78 proceeding to challenge a proposed amendment to a lease because he was not a party to the lease. Accordingly, Defendants' motion to dismiss the Amended Complaint against Arnold pursuant to CPLR § 3211(a)(3), is denied.

*CPLR § 3211(a)(5)*

A "valid release" is a contract governed by contract law, and will support dismissal pursuant to CPLR §3211 (a)(5) of a claim "which is the subject of the release" (*Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276, 929 N.Y.S.2d 3, 952 N.E.2d 995 [2011] ("Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release"); *Cardinal Holdings, Ltd. v. Indotronix Intl. Corp.*, 73 A.D.3d 960, 962, 902 N.Y.S.2d 123 [2d Dept 2010], quoting *Lee v. Boro Realty, LLC*, 39 A.D.3d 715, 716, 832 N.Y.S.2d 453 [2d Dept 2007]). A release must be "fairly and knowingly made" and thus, like any other contract, may be set aside on the basis of fraud or mutual mistake (*Mangini v. McClurg*, 24 N.Y.2d 556, 566, 301 N.Y.S.2d 508, 249 N.E.2d 386 [1969]). Thus, a motion to dismiss on the basis of a release should be denied where fraud or duress in the procurement of the release is alleged (*see Newin Corp. v. Hartford Acc. & Indem. Co.*, 37 N.Y.2d 211, 217, 371 N.Y.S.2d 884, 333 N.E.2d 163 [1975]; *Bloss v. Va'ad Harabonim of Riverdale*,

203 A.D.2d 36, 37, 610 N.Y.S.2d 197 [1st Dept 1994]; *Anger v. Ford Motor Co., Dealer Dev.*, 80 A.D.2d 736, 437 N.Y.S.2d 165) [4d Dept 1981]).

"A motion pursuant to CPLR 3211(a)(5) to dismiss a complaint on the ground of payment may be granted where the documentary evidence establishes the defense of payment as a matter of law" (*Parkoff v. Stavsky*, 109 A.D.3d 646, 647, 970 N.Y.S.2d 817, 819 [2d Dept 2013]).

Defendants' arguement that Plaintiff's Amended Complaint should be dismissed because paragraph 5 of the Termination Agreement releases the parties from actions arising out of the lease fails, given that a cause of action for fraudulent inducement has been properly alleged against Fima. Additionally, Defendants' mere statement that it paid plaintiff, in and of itself, is insufficient to establish payment to Plaintiff. Nor does the Lease orTermination Agreement establish payment to Plaintiff. Accordingly, Defendants' motion to dismiss the Amended Complaint against Fima, based on CPLR 3211(a)(5) is denied.

*Attorney's Fees*

"It is settled that only a prevailing party is ordinarily entitled to attorney's fees and that to be considered a prevailing party, there must be success with respect to the central relief sought' (*25 East 83 Corp. v. 83rd Street Associates*, 213 A.D.2d 269, 624 N.Y.S.2d 125 [1st Dept 1995]). Inasmuch as Defendants' request for attorneys' fees rest on its argument that Plaintiff's complaint fails to state a cause of action and lacks merit, and Defendants did not prevail with respect to the central relief sought because the fraudulent inducement claim against Fima remains, attorneys' fees in Defendants' favor is unwarranted. Moreover, the law in New York precludes the prevailing party from recouping legal fees from the losing party "except where

authorized by statute, agreement or court rule" (*Gotham Partners, L.P. v. High River Ltd. Partnership*, 76 A.D.3d 203, 906 N.Y.S.2d 205 [1st Dept 2010]; *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597, 789 N.Y.S.2d 470 [2004]). Here, Defendants neither cite to an agreement entered into by the parties that address the award of attorney's fees, nor a statute that entitle the award of attorney's fees. Therefore, Defendants' motion for attorney's fees is denied.

CONCLUSION

Based on the forgoing, it is hereby:

ORDERED that the branches of Defendants' motion for an order for dismissing the Amended Complaint pursuant to CPLR § 3211(a)(1), CPLR § 3211(a)(3), and CPLR 3211(a)(5) is denied. It is further

ORDERED that the branch of Defendants' motion for an order for dismissing the Amended Complaint pursuant to CPLR 3211(a)(7) is denied as against Fima Bern and granted as against Arnold, and the Complaint as asserted against Arnold Bern shall be severed and dismissed. It is further

ORDERED that defendant Fima Bern shall serve and file his Answer within 30 days of the date of this order; and it is further

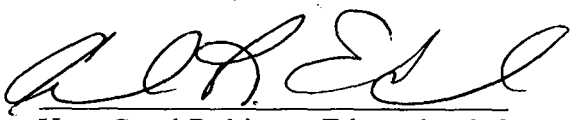
ORDERED that the parties shall appear for a preliminary conference on April 25, 2017, 2:15 p.m.; and it is further

ORDERED that Defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

This constitutes the decision and order of the Court.

Dated: January 20, 2017



Hon. Carol Robinson Edmead, J.S.C.