

**RSB Bedford Assoc., LLC v Ricky's Williamsburg, Inc.**

2010 NY Slip Op 33750(U)

April 12, 2010

Sup Ct, NY County

Docket Number: 602303-2009

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED  
*Justice*

PART 60

**E-E-FILE**

RSB Bedford Associates, LLC.,

INDEX NO. #602303-2009

PLAINTIFF

MOTION DATE #001

- v -

MOTION SEQ. NO. \_\_\_\_\_

Ricky's Williamsburg, Inc., et. al.,

MOTION CAL. NO. \_\_\_\_\_

DEFENDANTS

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached **RECEIVED** memorandum decision.

APR 13 2010

SO ORDERED

MOTION COPY  
NYS SUPREME COURT

Dated: 4/12/2010

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

*[Handwritten signature]*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 60

**E-FILE**

-----X  
RSB BEDFORD ASSOCIATES, LLC,

Plaintiff

-against-

Index No. 602303/2009

RICKY'S WILLIAMSBURG, INC.  
D/B/A RICKY'S NYC and RICKY'S  
HOLDINGS, INC.,

Defendants.

-----X

APPEARANCES:

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Attorneys for the Defendants

**FRIED, J:**

In this breach of contract action, plaintiff, RSB Bedford Associates, LLC (the "Landlord") moves pursuant to CPLR 3212 for partial summary judgment as to the liability of defendants, Ricky's Williamsburg, Inc. d/b/a Ricky's NYS (the "Tenant") and Ricky's Holdings, Inc. ("Holdings") (collectively, the "Defendants"), and for dismissal of counterclaims asserted by the Defendants. The Defendants cross-move pursuant to CPLR 3211(a)(7) to dismiss the complaint.

The complaint alleges that Landlord and Tenant entered into a written lease, dated August 18, 2008 (the "Lease"), for premises located at 191-193 Bedford Avenue in Brooklyn, New York (the "Premise"). According to the complaint, concurrently with execution of the Lease, Landlord and Tenant executed a letter agreement, dated August

12, 2008 (the “Letter Agreement”), which set forth “certain understandings and agreement” that conditioned the parties’ entry into the Lease. (Complaint, ¶ 6 and Exh. B). The Letter Agreement, *inter alia*, provided that the Landlord at the time did not own the property upon which the Premise was located and that Landlord would not enter an agreement to buy the subject property (the “Acquisition Agreement”) unless and until the Lease had been signed. (Complaint, ¶ 7 and Exh. B). Plaintiff signed the Acquisition Agreement on August 27, 2008. (Complaint, ¶ 11). The Lease and the Letter Agreement together constitute the contract between the Landlord and Tenant (the “Contract”). Also on August 18, 2008, Holdings executed a guaranty under which it “unconditionally and irrevocably” guaranteed Tenant’s obligations under the Lease (the “Guaranty”). (Complaint, ¶ 12 and Exh. C).

By letter, dated June 15, 2009, Tenant’s counsel, Gabbard & Kamal LLP by Jason D. Gabbard, Esq., notified Landlord that Tenant will not take possession of the Premise (the “Gabbard Letter”). (Complaint, ¶ 14 and Exh. D). Specifically, the Gabbard Letter unequivocally stated: “I write to formally notify you that Ricky’s will not take possession of the Premises.” (Complaint, ¶ 14 and Exh. D).

Landlord commenced the instant action alleging in the first cause of action that Tenant’s actions constitute an anticipatory repudiation of the contract and breach of contract in the second cause of action. The third cause of action alleges that Holdings is liable for Tenant’s breach pursuant to the Guaranty and the fourth cause of action seeks declaratory judgment. Defendants answered and interposed two counterclaims, breach of contract and fraud, primarily based on the argument that the Letter Agreement is non-

binding on the parties and that the Lease constitutes the entire agreement between the parties. (Answer, ¶ 44–59).

In support of the motion for summary judgment, Landlord argues that the Gabbard Letter evidences Tenant's repudiation and anticipatory breach of the Lease. (Plaintiff's Memo. of Law in Support, pg. 9). As such, Landlord claims, Tenant is liable and Holdings is liable by virtue of the Guaranty. Landlord requests actual and consequential damages as well as attorneys' fees and costs.

Landlord argues that Defendants' breach of contract counterclaim fails because Landlord's alleged breach occurred after the Tenant already anticipatorily breached the Contract, which relieved Landlord of its duty to perform. (Plaintiff's Memo. of Law in Support, pg. 11–12). As to counterclaim for fraud, Landlord argues that Defendants failed to plead the requisite elements of fraud and with particularity required under CPLR 3016(b). (Plaintiff's Memo. of Law in Support, pg. 12–17). Accordingly, Landlord claims that the counterclaims warrant dismissal under CPLR 3211(a)(1) and (a)(7).

Defendants submit papers in opposition to Landlord's motion for partial summary judgment and cross-move to dismiss the complaint. Defendants claim that the Gabbard Letter constituted a mere offer to terminate the obligation between the parties and that subsequently to Lease signing, Landlord has made oral representation to Tenant as to acquisition and delivery of the Premise to Tenant which never materialized because Landlord did not have the capital and the know-how to execute a large commercial real estate transaction. (Kenig Aff. in Support of Cross-Motion to Dismiss/Opp. to Plaintiff's Motion, ¶ 4, 6; Defendants' Memo. of Law in Opp., p. 4).

Under CPLR 3212(b), summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” Furthermore, summary judgment “shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” (CPLR 3212[b]). CPLR 3211(a)(1) provides for dismissal where “a defense is founded on documentary evidence” and CPLR 3211(a)(7) allows for dismissal where the “pleading fails to state a cause of action.”

Anticipatory breach exists where there is either a voluntary affirmative act that renders the obligor unable to perform without breach or a definite, final and unequivocal communication of the intention to forego performance. (*See Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp.*, 301 A.D.2d 70 [1<sup>st</sup> Dept. 2002]; *Rachmani Corp. v. 9 E. 96<sup>th</sup> St. Apt. Corp.*, 211 A.D.2d 262 [1<sup>st</sup> Dept. 1995]; *Coney Island Exhaust, Inc. v. Mobil Oil Corp.*, 304 A.D. 2d 706 [2<sup>nd</sup> Dept. 2003]). Furthermore, an anticipatory breach of a lease exists where, after the execution of the lease but prior to the commencement of its term, a tenant repudiates the lease by informing the landlord that it will not take possession of the underlying premise. (*150/160 Associates v. Mojo-Stumer Architects, Inc., P.C.*, 174 A.D.2d 658, 659 [2<sup>nd</sup> Dept. 1991] [upholding a breach of lease finding where tenant notified the landlord that “it would not be taking possession of the premises as required by the lease.”]).

The Gabbard Letter, in stating that Tenant “will not take possession of the Premise,” evidences a clear intent to breach the Contract. Tenant’s attempted re-characterization of the Gabbard Letter as an “offer” or request for Landlord’s agreement to terminate any and all obligation between the parties is contradicted by the letter’s

language and unpersuasive; it is hard to imagine a more unequivocal statement of intent to breach an agreement than the one present in the Gabbard Letter.

The Guaranty clearly states that Holdings “unconditionally and irrevocably guarantees to Landlord ... the full and complete discharge and performance of each and every other term, covenant, obligation, or warranty contained in the Lease or any other document executed in connection with the Lease by the Tenant.” (Complaint, ¶ 12 and Exh. C). A finding of Tenant’s anticipatory breach of Lease and resulting determination of liability, establishes Holdings’ liability under the Guaranty.

Finally, with regard to attorneys’ fees and costs: the Landlord’s submissions, and a search of the record, fail to demonstrate a basis for finding Tenant liable for reasonable attorneys’ fees and costs; however, the Guaranty demonstrates that Holdings is obligated to pay reasonable attorneys’ fees, costs, and expenses of collection incurred by Landlord in enforcing its rights and remedies under the Lease. (Complaint, Exh. C, pg. 1).

Accordingly, it is ORDERED that the Landlord’s motion for partial summary judgment as to Defendants’ liability is granted; and it is further

ORDERED that the Landlord’s request for attorneys’ fees and costs is granted with respect to Holdings only, and is otherwise denied; and it is further

ORDERED that having granted Landlord’s motion for partial summary judgment, the cause of action for a declaratory judgment is dismissed as moot; and it is further

ORDERED that the issue of the amount of damages, attorneys’ fees and costs is hereby referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by

CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403 or receipt of the determination of the Special Referee of the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Landlord's motion dismissing Defendants' counterclaims is granted; and it is further

ORDERED that the Defendants' cross-motion to dismiss the complaint is denied.

DATE 4/12/2010

  
\_\_\_\_\_  
J.S.C.

**HON. BERNARD J. FRIED**