

Analisa Salon Ltd. v Elide Prop., LLC
2011 NY Slip Op 34124(U)
December 13, 2011
Sup Ct, Westchester County
Docket Number: 7582/05
Judge: J. Emmett Murphy
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**FILED and ENTERED
DECEMBER 13, 2011
WESTCHESTER COUNTY CLERK**

P R E S E N T: HON. J. EMMETT MURPHY
SUPREME COURT JUSTICE

ANALISA SALON LTD., d/b/a SUSAN MARLOWE
FIGURE SALON,

Plaintiff,

- against -

ELIDE PROPERTIES, LLC, JACK SEMINARA,
JOHN JAMES ROMEO, CONSTABLE MICHAEL
M. SEMINARA and CONSTABLE KENNETH
R. HERBERT,

Defendants.

DECISION and ORDER

Index No.: 7582/05

Motion Date: Sept. 15, 2011

FILED
DEC 13 2011
TIMOTHY C. DONI
COUNTY CLERK
COUNTY OF WESTCHE

ANALISA SALON LTD., d/b/a SUSAN MARLOWE
FIGURE SALON,

Plaintiff,

- against -

CONSTABLE MICHAEL M. SEMINARA and
CONSTABLE KENNETH R. HERBERT,

Defendants.

The following papers numbered 1 to 52 have been read on this motion brought by defendants Elide Properties, LLC and Jack Seminara pursuant to CPLR 3212 seeking an order dismissing plaintiff's first, second, third and fifth causes of action as set forth in the amended verified complaint or alternatively pursuant to CPLR 4102 seeking an order striking the plaintiff's jury demands and on this motion brought by defendant John James Romeo pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) and CPLR 3212(b) and CPLR 3212(g) seeking an order dismissing plaintiff's first and fourth causes of action as asserted against him or alternatively pursuant to CPLR 4102 striking plaintiff's jury demands.

Papers

Notices of Motion/Attorney Affirmations/Affidavits;
 Attorney Affirmation/Affidavits in Opposition;
 Reply Affirmation/Affidavit;
 Exhibits;

Numbers

1 - 3, 29 - 30
 36 - 38
 50 - 51
 4 - 28, 31 - 35, 39 - 49, 52

Upon the foregoing papers, it is ORDERED that, for the reasons that follow, that branch of the motion brought by defendants Elide Properties, LLC and Jack Seminara which seeks dismissal of the first, second, third and fifth causes of action as asserted against them in the amended, verified complaint is granted to the limited extent that the second, third and fifth causes of action are dismissed and is otherwise denied; and it is further

ORDERED, that, for the reasons that follow, that branch of the motion brought by defendant John James Romeo which seeks dismissal of the first and fourth cause of action is denied; and it is further

ORDERED that those branches of the movants' respective applications which seek to strike plaintiff's jury demand is granted.

Plaintiff Analisa Salon LTD d/b/a Susan Marlow Figure Salon (hereafter Analisa Salon) commenced these related actions seeking to recover damages for unlawful eviction and breach of the five year, renewable lease agreement it entered into with defendant John James Romeo in 1997 and seeking specific performance of a right of first refusal contained within the lease in the event that the property were offered for sale during the tenancy. The facts as relevant to these motions are as follows:

Analisa Salon entered into a five-year renewable lease with defendant Romeo on February 14, 1997 with respect to 80 Maple Street in the Town of Eastchester. The terms of the lease agreement, inter alia, permitted Analisa Salon the option of renewing the lease for two additional five year terms as well as the right of first refusal option to purchase the subject property in the event that it were offered for sale. In December 1999, Romeo gave notice to Analisa Salon that he had received a third-party offer to purchase the subject property for \$440,000. Although Analisa Salon evidenced its interest in exercising the option by, inter alia, negotiating a purchase price less than the third-party offer, it ultimately chose not to execute a contract for the purchase of the property. In June 2000, defendant Romeo gave Analisa Salon notice that the time to purchase the property had "expired" and, in April 2001, he sold the property to defendant Elide Properties, LLC (hereafter Elide) for \$385,000. Analisa Salon claims not to have been given notice of the Elide offer or the option to exercise the right of first refusal. Lisa Avellino, the president of Analisa Salon testified at her deposition that she learned in May 2001 that Elide was the new owner of the property.

In September 2001, Analisa Salon gave notice to defendant Elide that it intended to exercise its option to renew its lease for the first, additional five-year period. The declaratory action was commenced after Elide responded, inter alia, that the annual rent would increase upon renewal and, in September 2004, this Court (Bellantoni, J.,) issued a judgment declaring that Analisa Salon owed the additional annual rent during the five-year lease renewal period. Elide initiated a summary proceeding for non-payment of rent seeking to evict Analisa Salon which had failed to pay the additional rent. A warrant of eviction was issued by the Justice Court of the Town of Eastchester. Defendants Michael M. Seminara and Kenneth R. Herbert, constables of the Town of Eastchester, (hereafter collectively the constables) executed the warrant without service of the 72-hour notice. Analisa Salon brought an unsuccessful application to vacate the judgment and warrant in the Justice Court of the Town of Eastchester.

Analisa Salon commenced these related actions seeking to recover damages for unlawful eviction and breach of the five-year, renewable lease agreement and seeking specific performance of its right of first refusal. It has claimed that, on the date of the eviction, Elide refused to accept Analisa Salon's check for the amount owed and that defendant Michael Seminara (one of the constables) is the son of defendant Jack Seminara, the principle of Elide and that he had and took a personal interest in evicting Analisa Salon from the subject property. Defendants Elide and Jack Seminara asserted a cross-claim against defendant Hebert (the other constable) for indemnification.

Both of the constables brought successful motions to dismiss the claims and cross-claims as asserted against them on the ground that Analisa Salon's failure to serve the notice of claim required by General Municipal Law § 50-e was fatal to an action. Analisa Salon unsuccessfully cross-moved for partial summary judgment as to liability and maintained that it was entitled to judgment as to liability on the ground that it was not required to serve a notice of claim. This Court, (Bellantoni, J.,) granted the constables' motion to dismiss the complaint and cross claims in the actions as asserted against them and determined that service of a notice of claim was a condition precedent to commencement of an action against them.

Defendant Romeo cross-moved for summary judgment dismissing the claims asserted against him and argued that Analisa Salon waived its right of first refusal by declining to exercise it when it received notice of Romeo's intent to sell the property in April 1998. Analisa Salon opposed the motion and successfully cross-moved for partial summary judgment as to liability and maintained that Romeo was obligated to provide it notice of the offer he had received from Elide Properties, LLC. Romeo opposed Analisa's cross-motion and proffered a letter dated February 2001 from Romeo to Analisa Salon stating that he had received an offer to purchase the subject property from Elide Properties, LLC together with an attorney affirmation in which Romeo's counsel stated that the letter had been sent to Analisa Salon. This Court, (Bellantoni, J.,) denied both of these cross-motions for summary judgment and in so doing, determined that there was a triable issue of fact as to whether the February 2001 letter had been sent to Analisa Salon by Romeo.

On appeal of these motions and cross-motions, the Appellate Division reversed and determined, with respect to the first action as asserted against the constables that they were not entitled to indemnification and therefore that Analisa Salon was not required to serve a notice of claim on the constables prior to commencing its action. Further, as to the cross-motions by Romeo and Analisa Salon, the Appellate Division held that the affirmation of Romeo's counsel did not raise a triable issue of fact as to whether the February 2001 letter had been sent to Analisa Salon that was sufficient to defeat Romeo's summary judgment motion. The Appellate Division also determined that Analisa Salon had not waived its right of first refusal when it declined to exercise it after receiving notice of Romeo's intention to sell the subject property. As to that branch of Analisa Salon's motion which had unsuccessfully sought summary judgment on the first cause of action of the amended, verified complaint as to specific performance, the Appellate Division determined that Analisa Salon had not offered adequate proof to establish, *prima facie*, that it was ready, willing and able to purchase the subject property under the terms that Romeo offered to Elide Property, LLC. However, as to the fourth cause of action, as asserted against Romeo in the first action, which was brought to recover damages for Romeo's breach of the lease agreement, the Appellate Division determined that Analisa Salon was entitled to partial summary judgment as to liability. The action was remitted for an inquest on damages.

The Court is now asked to consider two motions. The first is brought by Elide and defendant Jack Seminara (Seminara) pursuant to CPLR 3212 seeking dismissal of the first, second, third and fifth causes of action set forth in Analisa Salon's amended, verified complaint as asserted against them. The second motion is brought by Romeo pursuant to CPLR 3211(a)(1), CPLR 3211(a)(7), CPLR 3212(b) and CPLR 3212(g) seeking dismissal of the first and fourth causes of action set forth in Analisa Salon's amended, verified complaint, as asserted against him. Alternatively, all of the moving defendants seek an Order pursuant to CPLR 4102 striking Analisa Salon's jury demands.

First Cause of Action

That branch of the defendants' motion which seeks dismissal of Analisa Salon's first cause of action as asserted in the amended, verified complaint which seeks specific performance on the right of first refusal option is denied. The Appellate Division did not hold, as all of the moving defendants insist, that Analisa Salon may not maintain its claim for specific performance on the option. Rather, it determined that Analisa Salon had not established its entitlement to summary judgment because it had not demonstrated, as a matter of law, that it was ready, willing and able to purchase the property under the terms that were offered to Elide (*see Analisa Salon, LTD v. Elide Properties, LLC*, 46 AD3d at 726). Neither is there merit to defendants' argument that specific performance on a right of first refusal is unavailable as a matter of law because monetary damages provide an adequate remedy at law.

“A right of first refusal is a right to receive an offer, and the grantor’s failure or refusal to extend the holder the opportunity to exercise the right constitutes a breach” (*Cipriano v. Glen Cove Lodge # 1458, B.P.O.E.*, 1 NY3d 53, 60 [2003]). In this respect, failure to offer the right of first refusal renders title to the property unmarketable (*see Cipriano v. Glen Cove Lodge # 1458, B.P.O.E.*, 1 NY3d at 61). Notably, it “does not give its holder the power to compel an unwilling owner to sell; it merely requires the owner, when and if [the owner] decides to sell, to offer the property first to the party holding the preemptive right so that [that party] may meet a third-party offer or buy the property at some other price set by a previously stipulated method” (*M & A Motors, Inc. v. Disco Realty, Inc.*, 24 AD3d 519, 520 [2d Dept., 2005]). In addition to establishing prima facie that the option is enforceable, which Analisa Salon has already done, ultimately, Analisa Salon will also be required to show, as to its claim for specific performance, that it was ready, willing and able to purchase the subject property pursuant to its right of first refusal option (*see Cipriano v. Glen Cove Lodge # 1458, B.P.O.E.*, 1 NY3d at 61; *Wei Hong Hu v. Sadiqi*, 83 AD3d 820 [2d Dept., 2011]). This includes a demonstration of plaintiff’s financial ability to close during the relevant time period (*see Island Auto Seat Cover Co., Inc. v. Minunni*, 69 AD3d 570 [2d Dept., 2010]; *Stawski v. Epstein*, 67 AD3d 681 [2d Dept., 1979]). Defendants have not and cannot show, on this record, that Analisa Salon was not ready, willing and able to purchase the subject property. The deposition testimony of Lisa Avellino, president of Analisa Salon, together with the statement of assets would be sufficient to raise a triable issue of fact precluding an award of summary judgment in any event. Accordingly, this branch of the defendants’ respective motions to dismiss is denied.

Second and Third Causes of Action

Analisa Salon’s second cause of action seeks declaratory relief, restoration of its possession of the subject premises and recovery of damages for its wrongful eviction. The third cause of action seeks treble damages. At the outset, the Court notes that there has already been a determination that Analisa Salon was evicted in violation of RPAPL 749(2) on the day that the final judgment was entered and that the Justice Court of the Town of Eastchester failed to afford Analisa Salon with a post-judgment opportunity to satisfy the final judgment (*see Analisa Salon, LTD v. Elide Props., LLC*, 46 AD3d at 722-723; *Elide Properties, LLC v. Analisa Salon, LTD*, 2005-803 WC, [App. Term, 9th & 10th Jud. Dists]; RPAPL 749[2]; RPAPL 751[1]). Notably, Analisa Salon was restored to its tenancy and possession of the subject premises some years ago pursuant to the decision of the Appellate Term, dated June 15, 2005. It is Analisa Salon’s position that Elide is liable for the damages flowing from that wrongful eviction.

As a general matter, a landlord bears no responsibility for the manner in which valid process, duly issued, is executed by an officer. However the officer who executes an irregular, unauthorized or void warrant may, under some circumstances, become the agent of the landlord for the purposes of the imposition liability (*see Mayes v. UVI Holdings, Inc.*, 280 AD2d 153 [1st Dept., 2001]; *Funding Assistance Corp. v. Mashreq Bank, PSC*, 277 AD2d 127 [1st Dept., 2000]; *Ide v. Finn*, 196 App.Div. 304, 314-315 [1st Dept., 1921]). On this record, defendants have established, prima facie, entitlement to judgment as a matter of law on the second and third causes of action for unlawful eviction and for treble damages by demonstrating that plaintiff was evicted pursuant to a lawfully-obtained warrant of eviction.

In rebuttal, plaintiff has failed to raise an issue of fact with respect to the issue of whether the warrant was obtained lawfully. While plaintiff is correct that there has been a determination by the Appellate Division that Analisa Salon correctly interpreted the lease renewal clause and that Elide was not entitled to demand additional rent for taxes and insurance, nor should it have failed to adjust plaintiff's base rent to account for a reduction in property taxes, such does not render the warrant that issued by the Justice Court of the Town of Eastchester invalid after the fact. A determination that the warrant was *obtained* lawfully is not dispositive as to the second and third causes of action however, since it has been indisputably determined that the warrant of eviction was *executed* unlawfully against Analisa Salon.

While plaintiff maintains that because it was evicted by unlawful means, it necessarily follows that dispossession was the product of tortious conduct on the part of Elide or Seminara, the Appellate Division has observed, with respect to the issue of assessment of treble damages, that the imposition of treble damages would be inappropriate "where a tenant is dispossessed by 'unlawful means' which are unintentional or which result from a reversal of a determination in the landlord's favor or from a jurisdictionally defective eviction proceeding" (*Lyke v. Anderson*, 147 AD2d 18, 28 [2d Dept., 1989]). While plaintiff has alleged deliberate, malicious conduct on the part Elide and Seminara, it has failed on this record to raise a triable issue of fact with respect to whether Elide or Seminara improperly directed or caused the warrant of eviction to have been executed without 72-hour notice and thus, as a matter of law, her claim that they share responsibility for the wrongful eviction must fail as speculative and conclusory. Accordingly, so much of the motion for summary judgment which seeks dismissal of the second and third causes of action as asserted in plaintiff's amended, verified complaint as against them is granted.

Fourth Cause of Action

As to that branch of Romeo's motion which seeks dismissal of the fourth cause of action in its amended, verified complaint, the Appellate Division, Second Department determined some years ago that Analisa Salon was entitled to partial summary judgment as to liability on the part of Romeo for his breach of the term of the 1997 which required that he afford Analisa Salon the right of first refusal option to purchase the subject property (*see Analisa Salon, LTD v. Elide Properties, LLC*, 46 AD3d 721 [2d Dept., 2007]). Accordingly, that aspect of Romeo's motion is denied.

Fifth Cause of Action

As to that branch of the motion brought by Elide and Seminara seeking summary judgment dismissing so much of plaintiff's fifth cause of action as asserted against it for tortious interference with a contract, these defendants assert that the record is devoid of facts to demonstrate that they intentionally procured Romeo's breach of the lease, nor can Analisa Salon establish, as a matter of law, that but for the defendants' conduct, Analisa Salon would have purchased the subject property.

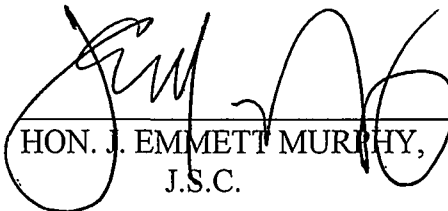
In order to succeed on a cause of action to recover damages for tortious interference with contract, the plaintiff must establish the existence of a valid contract between it and a third party, the defendants' knowledge of that contract, and that the defendants intentionally procured the third party's actual breach of that contract without justification (*see Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 424; *Pink v. Half Moon Coop. Apts., S., Inc.*, 68 AD3d 739 [2d Dept., 2009]; *Beecher v. Feldstein*, 8 AD3d 597, 598 [2d Dept., 2004]). Typically, claims of intentional interference are evidenced by a defendant's inducing or otherwise causing a third person not to perform contractual obligations owed to the plaintiff (*see Guard-Life Corp., v. S. Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]).

Here, defendants Elide and Seminara have made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating that they did not intentionally procure a breach of the right of first refusal option by proffering the affidavit of defendant Seminara, a member of defendant Elide who avers that he believed that Romeo had offered Analisa Salon the opportunity to exercise the right of first refusal option and that Elide only acquired title to the subject property after the time when Seminara thought that Analisa Salon had failed to exercise its option. In opposition Analisa Salon relies primarily upon the deposition of Seminara reflecting statements which, at best, suggests non-actionable negligence, not intentional conduct (*see Alvord & Swift v. Stewart M. Muller Const. Co.*, 46 NY2d 276, 281 [1978]). While there is ample record evidence as to Romeo's breach of the right of first refusal option, plaintiff has failed to raise a triable issue of fact as to the moving defendants' intentional procurement of Romeo's breach. Accordingly, the branch of Elide and Seminara's motion to dismiss the fifth cause of action is granted.

Motion to Strike the Jury Demand

That branch of defendants' respective motions which seeks to strike plaintiff's jury demand is granted. "The prevailing rule is that the deliberate joinder of claims for legal and equitable relief arising out of the same transaction amounts to a waiver of the right to demand a jury trial" (*Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hosp. Ctr.*, 59 AD3d 481 [2d Dept., 2009]; *quoting, Hebranko v. Bioline Labs.*, 149 AD2d 567, 568 [2d Dept., 1989]; *see CPLR 4102[c]; Bryant v. Broadcast Music, Inc.*, – AD3d –, WL 4600629 [2d Dept., Oct. 4, 2011]; *Mirasola v. Gilman*, 104 AD2d 932, 932 [2d Dept., 1984]; *Tanenbaum v. Anchor Sav. Bank*, 95 AD2d 827 [2d Dept., 1983]). "Once the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury" (*Zimmer-Masiello, Inc. v. Zimmer, Inc.*, 164 AD2d 845, 846-847 [1st Dept., 1990]; *see Whipple v. Trail Props.*, 261 AD2d 470 [2d Dept., 1999]; *Mirasola v. Gilman*, 104 AD2d at 932; *Tanenbaum v. Anchor Sav. Bank*, 95 AD2d at 827). However, "[w]here a plaintiff alleges facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint's prayer for relief will not constitute a waiver of the right to a jury trial" (*Hebranko v. Bioline Labs.*, 149 AD2d at 568).

Dated: White Plains, New York
December 13, 2011


HON. J. EMMETT MURPHY,
J.S.C.