

Omansky v Penning

2011 NY Slip Op 33949(U)

April 22, 2011

Sup Ct, NY County

Docket Number: 114241/2009E

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Justice

Index Number : 114241/2009

OMANSKY, LAWRENCE

vs.

PENNING, TJEBO

SEQUENCE NUMBER : 002

DISM ACTION/INCONVENIENT FORUM

INDEX NO. 114241/2009E

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

ALL MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

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

Dated: April 22, 2011 _____ *JMF*
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

LAWRENCE A. OMANSKY,
Plaintiff,

Index Number 114241/2009 E
Mot. Seq. No. 002

against

TJEBO PENNING, MICHAEL LATEFI and
160 CHAMBERS STREET OWNERS, INC.,
Defendants.

DECISION AND ORDER

-----X

For the Plaintiff:

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For Defendants Latefi & 160 Chambers:

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For Defendant Penning:

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E-filed papers considered in review of this motion to dismiss:

Papers	Efiling Document No.
Notice of Motion, Affirmation, Exhibits	20 - 22
Interim Order of November 11, 2010	23
Affidavit in Opposition, Exhibits	24
Reply Affirmation	26
Amended Verified Complaint	18

PAUL G. FEINMAN, J.:

Defendant 160 Chambers Street Owners, Inc. moves to dismiss the amended complaint on the basis of (1) documentary evidence, (2) the plaintiff's lack of capacity to sue, and (3) the complaint's failure to state a cause of action as a matter of law (CPLR 3211 [a] [1], [3], [7]), and for costs and expenses of the motion pursuant to CPLR 8303-a and 22 NYCRR § 130-1.1. For the reasons set forth below, the documentary evidence establishes a defense warranting dismissal as a matter of law and this branch of the motion is granted. The branch of the motion seeking sanctions and or costs and expenses is denied.

According to the amended verified complaint, defendant is a New York State cooperative

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corporation and the owner and or landlord of the commercial space in the premises known as 160 Chambers Street, New York, New York (Am. Ver. Compl. ¶ 3). Plaintiff was the tenant of the commercial space, pursuant to a written lease (Am. Ver. Compl. ¶ 4). Plaintiff had previously sublet the commercial space to an entity known as Chambers Wine Merchants, Inc., the sublease of which expired on September 30, 2008 (Am. Ver. Compl. ¶ 6). The sublease contained a five-year option to renew, and Wine Merchants indicated it wanted to exercise the five-year option on the condition that an elevator be installed in the premises during that five-year period (Am. Ver. Compl. ¶¶ 6-7). The complaint alleges that upon inquiry by plaintiff, defendant, along with its directors, co-defendants Penning, Latefi, and or Latefi's wife, represented that an elevator would be installed, but that the commercial space needed to be vacated during installation, and that plaintiff would be compensated for the period of time that the commercial space lay vacant (Am. Ver. Compl. ¶ 8). Relying on these representations, plaintiff did not renew Wine Merchants' lease (Am. Ver. Compl. ¶ 9). Defendants did not install an elevator (Am. Ver. Compl. ¶ 10).

At some point, plaintiff sought a new tenant for the commercial space, and on September 2, 2009, a prospective tenant who had already negotiated the terms of the lease, and was examining the space with plaintiff's real estate broker, heard from co-defendant Penning that plaintiff had been evicted and had no right to lease the space (Am. Ver. Compl. ¶¶ 11-13). This statement was, according to the amended complaint, known by Penning to be false at the time he uttered it (Am. Ver. Compl. ¶ 14). Consequently, plaintiff alleges, the prospective tenant became uneasy about executing the lease, and plaintiff offered, as an inducement to sign, an eight-year indemnity clause providing that plaintiff would indemnify this tenant for all legal fees and damages in the event legal action is taken by "Owner against Tenant to attempt to void this

lease.” (Am. Ver. Compl. ¶¶ 15-16).

The amended verified complaint contains three causes of action. The first sounds in defamation, based on the words of Penning, the agent for defendant 160 Chambers Street Owners, that “Mr. Omansky no longer owns this space, we do, and we are not leasing at this time,” and “because Mr. Omansky was evicted, and no longer had a right to lease this space.” (Am. Ver. Compl. ¶ 19). It contends that plaintiff’s good name and reputation have been damaged, and that he suffered special damages in that he was required to enter into an eight-year indemnity agreement with the subtenant that exposes him to potential significant expenses in excess of \$50,000. The second cause of action alleges that because of the defamatory statements, the prospective tenant did not sign the lease as expected on September 3, 2009, but only on September 23, 2009, after further negotiation, with a commencement date of October 1, 2009, resulting in a loss to plaintiff of \$10,800.00, representing 27 days of rental income (Am. Ver. Compl. ¶¶ 26-30). The third cause of action alleges tortious interference with contract and the business relationship between plaintiff and his tenant (Am. Ver. Compl. ¶¶ 33-34).

The essence of defendant’s motion to dismiss the amended complaint is that documentary evidence established that he is not a proper plaintiff inasmuch as he had assigned the underlying lease at issue in this case, and therefore he lacks the capacity to bring this suit.¹ It points to a copy of a letter dated April 22, 2010, from the attorneys representing an entity called Commerce Court 160 Chambers Street (Commerce Court), which was intended to provide “formal notice” of the status of the commercial space at issue (Doc. 21-4). The letter recites that in June 1983, an

¹Co-defendant Penning submits an affirmation by his attorney in support of this motion, but does not move separately for relief (Doc. 22 [Samman Aff.]).

Agreement of Lease was entered into between 160 Chambers Street Owners, Inc., as landlord and Lawrence A. Omansky, as tenant, that in March 2008, Omansky assigned the lease to “Nicolena’s B and B II, Inc.” (Nicolena B&B) and that in March 2009, Commerce Court succeeded to all rights of Nicolena B & B, in lieu of foreclosure. Attached to this letter notice is a copy of the documents filed in April 2010 with the New York City Department of Finance as to the recording of the transaction, including an Assignment and Assumption of Lease dated August 18, 2009 (Doc. 21-4, pp. 3- 10). This August 18, 2009, assignment shows that on that date, Nicolena B & B, by Omansky as “Sole Shareholder and President,” assigned to Commerce Court “the performance of all of the terms, covenants and conditions of the Lease herein . . . as if Assignee had signed the Lease originally as the lessee named therein.” (Doc. 21-4, pp. 6, 7).²

Defendant argues that based on these documents, plaintiff had assigned the commercial lease “long before” the defamatory statements were made, has as an individual given up his rights to the commercial lease, and cannot show that he personally suffered any special damages so as to establish a claim of defamation (Doc. 21 [Smith Aff. in Supp. ¶ 3]). It also argues that plaintiff, an attorney, should be sanctioned and required to pay the costs of responding to this litigation, because of his initial failure to bring this to the attention of the court (Doc. 21 [Smith Aff. in Supp. ¶ 3]).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court accepts as true the facts as alleged in the four corners of the complaint. The court must also accord the plaintiff the

²The documents do not show any transaction in March 2009, contrary to the letter indicating that the transaction between Nicolena B & B with Commerce Court occurred then rather than in August 2009.

benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001], citing *Tenuto v Lederle Labs.*, 90 NY2d 606, 609-610 [1997]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, when a motion is also premised on CPLR 3211 (a) (1), the court may look at the documentary evidence to determine whether it would, as a matter of law, bar the plaintiff from succeeding.

Here, plaintiff argues that he formed Nicolena B & B as a subchapter S corporation, in order to use the commercial lease as collateral for another loan (Doc. 24 [Omansky Aff. in Opp. ¶ 3]). The March 3, 2008 Assignment and Assumption of Lease shows that he assigned to Nicolena B & B “*all of Assignor’s right, title, and interest as tenant in, to and under the Lease described in . . . the Lease . . .*” and that Nicolena B & B, “for itself, its successors and assigns, hereby accepts and assumes *all of the rights, duties and obligations* of the tenant under the Lease” (Doc. 24, p. 13, emphases added). Plaintiff further contends that as “Omansky d/b/a Nicolena’s B and B II Inc.,” he later assigned the “collateral” but not the “ownership” of the commercial lease, to Commerce Court (Doc. 24 [Omansky Aff. in Opp. ¶ 3]). He suggests that there is no prejudice in allowing him to amend the caption to address this “technicality,” and proffers additional documents to show how the commercial lease was the subject of other transactions (Doc. 24 [Omansky Aff. in Opp. ¶ 9]).

The Assignment of Corrective Mortgage, Assignment of Rents and Security Agreement, dated August 18, 2009 concerns the assignment of certain documents and rights by a Bahamian company called Acqua Wellington Asset Management, Ltd. (Acqua Wellington), to another Bahamian company, Coronation International (Doc. 24, pp. 20 *et seq.*). The assignment included

the transfer of all rights, title and interest of a “corrective mortgage, assignment of rents and security agreement,” also dated August 18, 2009, from Nicolena B & B, in favor of Acqua Wellington. The assignment was “an absolute assignment” (Doc. 24, at p. 21 [Assignment ¶ 3]). In addition, the Forbearance Agreement and Release, also dated August 18, 2009 (Doc. 24, pp. 26 *et seq.*), is drawn up between Coronation International, and three borrowers, one of which is Nicolena B & B, and two guarantors, one of whom is plaintiff Omansky. According to plaintiff, under the terms of the Forbearance Agreement, the “master lease” was placed into escrow with a title company and he was allowed to retain ownership and control of it until February 26, 2010 when, if the loan had not been repaid, the ownership would be transferred to Coronation (Doc. 24 [Omansky Aff. in Opp. ¶ 6]).

There is no reference to Commerce Court in the Forbearance Agreement. Plaintiff explains that in August 2009 when Acqua Wellington assigned its rights, title, and interest in the lease to Coronation, Coronation then formed Commerce Court, to do business under that name (Doc. 24 [Omansky Aff. in Opp. ¶ 5]). Plaintiff offers an affidavit by Richard Wells, described by plaintiff as an “employee” of Acqua Wellington and a Vice President of Commerce Court, in support of this claim (Doc. 24 [Omansky Aff. in Opp. ¶¶ 4, 8]). However, this November 23, 2010 affidavit by Wells (Doc. 24 pp. 7-9), although signed by a notary as required for an affidavit, lacks a notary stamp or a written statement indicating the notary’s name, commission, state, or date of the expiration of the commission, and thus does not provide sufficient assurances that the document can be understood to function as an affidavit.³ Moreover, if the notarization is

³Executive Law § 142-a, allows for the public to rely on the presumption of validity of a notarized document, but not “if the defect was apparent on the face of the certificate of the notary

from out of state, it fails to comport with CPLR 2309 (c) which requires an out-of-state affidavit to be accompanied by a certificate of conformity.

Even if the Wells document were to be considered, it does not sufficiently support plaintiff's claim of clear ownership of the lease as of September 2009. The Wells document discusses the agreement to place the lease title in escrow until February 26, 2010, at which point Nicolena B & B's interest would be conveyed to Commerce Court, but also states unequivocally that in March 2008, Nicolena B & B "mortgaged its interest in and to the Lease to Acqua Wellington" (Doc. 24, p. 7-8 [Omansky Aff. in Opp., Wells Aff. ¶ 3]).⁴

Clearly, plaintiff as an individual is not the proper plaintiff, if any, to bring this action. Even if, as argued by plaintiff, Nicolena B & B was the actual owner of the lease in September 2009, plaintiff Omansky may not pursue the litigation as an individual. However, the documentary evidence appears to show that in September 2009, the lease was owned either by Acqua Wellington or Commerce Court, not by Omansky personally or even by Omansky's solely owned corporation, Nicolena B & B.

The standard in a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7) is whether the facts stated in the complaint are sufficient to support any cognizable legal theory (*Campaign for Fiscal Equity v State of N.Y.*, 86 NY2d 307, 318 [1995]). Here, the true nature of the motion is that the complaint should be dismissed based on documentary evidence extrinsic to the complaint showing that plaintiff was not the leaseholder,

public" (Executive Law § 142-a [3]).

⁴According to Wells, Coronation International is an affiliate of Commerce Court (Doc. 24, p. 8 [Omansky Aff. in Opp., Wells Aff. ¶ 2]).

and therefore could not be defamed by a statement to such effect. In sum, the documentary evidence conclusively establishes that the lease at issue was assigned from plaintiff to an entity other than himself, and the complaint cannot succeed as a matter of law (*see also, Old Clinton Corp. v 502 Old Country Rd. LLC*, 5 AD3d 263, 364 [2d Dept. 2004] [holding that where plaintiff had assigned its lease when it sold the premises, it lacked standing under CPLR 3211 [a] [3] to seek specific performance of a lease provision]). The documentary evidence establishes the truth of the allegedly defamatory statement to the extent it establishes that Omansky individually did not have a right to lease the space. Because the identity of the actual leaseholder is precisely the claim at issue in the purported defamatory statement, it would be entirely improper to allow plaintiff merely to amend the caption to substitute an entirely new plaintiff in response to defendant's motion. The motion to dismiss is therefore granted in its entirety as against all the defendants.

The branch of defendant's motion seeking sanctions and or costs is denied.

ORDERED that the motion to dismiss the complaint based on documentary evidence and capacity to sue pursuant to CPLR 3211(a) (1) and (3), is granted in its entirety; and it is further

ORDERED that the Clerk of Court is directed to enter judgment dismissing the complaint in its entirety, together with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the branch of the motion which seeks sanctions and or costs is denied.

This constitutes the decision and order of the court.

Dated: April 22, 2011
New York, New York



J.S.C.