

**Galpern v Air Chefs, L.L.C.**

2015 NY Slip Op 31601(U)

August 21, 2015

Supreme Court, New York County

Docket Number: 650347/2015

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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ROBERT GALPERN,

Plaintiff,

-against-

Index No. 650347/2015

**DECISION/ORDER**

AIR CHEFS, L.L.C. a/k/a AIR CHEF, INC., RAKESH  
K. AGGARWAL and SHEELI AGGARWAL,

Defendants.

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**HON. CYNTHIA KERN, J.S.C.**

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :** \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff has commenced the instant action against defendants seeking to collect unpaid rent pursuant to a commercial lease and accompany guaranty. Defendants now move for an Order (1) pursuant to CPLR § 3211(a)(3) dismissing the complaint in its entirety on the ground that plaintiff lacks standing/legal capacity to sue; (2) pursuant to CPLR § 3211(a)(7) dismissing the complaint as against defendant Sheeli Aggarwal (“Sheeli”) for failure to state a claim against her; and (3) pursuant to CPLR § 3024(a) directing plaintiff to amend the complaint to provide a more definite statement. Plaintiff cross-moves for an Order pursuant to CPLR § 3025(b) granting him leave to serve an amended complaint. For the reasons set forth below, plaintiff’s cross-motion is granted in part and defendants’ motion is also granted only in part.

The relevant facts are as follows. In this action, Robert Galpern (“Galpern”) seeks

damages based on the alleged breach by defendant Air Chefs, L.L.C. a/k/a Air Chef, Inc. (“Air Chefs”) of two commercial leases for the premises located at 102 Washington Place, New York, New York (the “Premises”). Specifically, at issue in this action are two separate leases entered into in 2004 and 2007. According to the 2004 lease, the corporate lessor of the Premises was African and Hispanic American Realty of N.Y, LLC (“African & Hispanic”). According to the 2007 lease, the corporate lessor of the Premises was 215 African & Hispanic American Realty of New York, LLC. (“215 African”). According to the complaint, Air Chefs defaulted in its obligations under the leases in failing to pay rent, water charges and property taxes totaling \$400,316.92. Additionally, the complaint alleges that defendant Rakesh K. Aggarwal (“Rakesh”) executed a written guaranty in connection with these leases and, as such, is liable for the damages sought in this action. This action is also brought against Rakesh’s wife Sheeli based on the allegation that she assisted Rakesh in the transfer of assets to avoid creditors.

This is not the first action that has been commenced to collect the rents herein at issue. Galpern previously filed an action against the defendants herein on behalf of an entity known as “Net Leased, Real Properties, Operating Partnership” (“Net Leased”) as successor in interest of 215 African (the “Prior Action”). The Prior Action was ultimately dismissed due to Net Leased’s failure to appear by counsel.

On the present motion, defendants seek to dismiss plaintiff’s action in its entirety on the ground that plaintiff lacks standing/legal capacity to sue as he was not a party to either the 2004 or 2007 lease. Additionally, defendants seek to dismiss this action as against Sheeli for failure to state a cause of action. In response, plaintiff cross-moves for an order granting him leave to serve an amended complaint which he alleges further clarifies his right to bring this action and

asserts an additional claim against defendants for unjust enrichment. Annexed to the amended complaint is an “Amended Transfer of Claim Agreement” dated June 10, 2015. The Amended Transfer of Claim agreement is between, *inter alia*, 215 African, Net Leased and Galpern.

The court first turns to plaintiff’s cross-motion for leave to amend his complaint. Pursuant to CPLR § 3025(b), “[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit.” *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1<sup>st</sup> Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations “but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” *Id.*

In the present case, as an initial matter, plaintiff’s motion for leave to amend his complaint to assert an additional claim against defendants for unjust enrichment is denied as such amendment is patently devoid of merit. It is well established that “the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter.” *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 23 (2005); *see also Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382 (1987). Here, it is undisputed that Air Chefs occupied the Premises pursuant to two valid leases. Thus, as there was a valid contract governing the payment of rent and additional rent, which is the subject matter of this action, plaintiff cannot now assert a claim in quasi contract against defendants.

However, plaintiff’s motion for leave to amend his complaint to assert additional allegations to further clarify his right to bring this action is granted as it is not patently devoid of

merit or palpably insufficient. Attached to the amended complaint is the “Amended Transfer of Claim Agreement” wherein the deed holder to the Premises, 215 African and Net Leased assign to Galpern any and all claims they may have arising out of the 2004 and 2007 lease agreements, “including, but not limited to, any action for the non payment of rent by Air Chefs, LLC, and/or the enforcement of personal guarantees executed along with the [2004 and 2007 lease agreements] with full right to start and maintain an action thereon in any court of competent jurisdiction.” As the 2007 lease was entered into with 215 African, thereby making 215 African the entity with the right to collect rents thereunder, this Amended Transfer of Claim Agreement is sufficient to establish that Galpern now has the right to bring this action against defendants to collect the unpaid rents under the 2007 lease and is clearly not patently devoid of merit. Thus, plaintiff should be granted leave to amend his complaint to include the Amended Transfer of Claim Agreement and all allegations relating thereto.

The court now turns to defendants’ motion to dismiss. As an initial matter, defendants’ motion to dismiss plaintiff’s claims relating to the 2007 lease on the ground that plaintiff lacks standing/legal capacity to sue is denied as the amended complaint sufficiently alleges that plaintiff assumed all rights to bring claims arising under the 2007 lease pursuant to the Amended Transfer of Claim Agreement, which is signed by 215 African who was a party to the 2007 lease.

However, defendants’ motion to dismiss plaintiff’s claims relating to the 2004 lease on the ground that plaintiff lacks standing/legal capacity to sue is granted as neither the complaint nor the amended complaint allege facts demonstrating a proper assignment of claims under the 2004 lease to plaintiff Galpern. The 2004 lease was executed on behalf of the corporate entity African & Hispanic. Thus, only African & Hispanic has any right to bring claim against Air

Chefs or Rakesh, as the alleged guarantor of the 2004 lease, for unpaid rents under the 2004 lease. However, the Amended Transfer of Claim Agreement annexed to plaintiff's amended complaint identifies only three assignors, none of which are African & Hispanic. Thus, plaintiff fails to allege facts establishing that he has standing to bring any claims against defendants for unpaid rents under the 2004 lease. To the extent Galpern contends that the 2004 lease should have stated that 215 African was the lessor and that the identification of African & Hispanic as the lessor was simply a typo, such contention is without merit as plaintiff puts forth no evidence to support this self-serving and conclusory assertion. Thus, any claim asserted by plaintiff against defendants arising out of the 2004 lease must be dismissed for lack of standing/legal capacity to sue.

Additionally, defendants' motion to dismiss this action as against defendant Sheeli is granted on the ground that neither the complaint nor amended complaint states a cause of action against Sheeli. Plaintiff has commenced this action against Sheeli based on the sole allegation that "upon information and belief, Rakesh K. Aggarwal transferred all assets to his wife, Sheeli Aggarwal, in an effort avoid collections by his creditors." This conclusory allegation is insufficient to state a claim against Sheeli as plaintiff does not even attempt to identify what claim he is specifically asserting against Sheeli.

Finally, defendants' motion for an order directing plaintiff to serve an amended complaint providing a more definite statement is granted to the extent that plaintiff is directed to file an amended complaint in accordance with this order.

Accordingly, based on the foregoing, both motions are granted in part and denied in part and it is hereby

