50 Carmine Rest. Assoc. LLC v Elias
2015 NY Slip Op 32292(U)
December 4, 2015
Supreme Court, New York County
Docket Number: 653290/2014
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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50 CARMINE RESTAURANT ASSOCIATES LLC,

Plaintiff,

-against-

AL ELIAS, DEAN JANKELOWITZ, JANKMAN LLC, MAXWELL-KATES, INC.

Defendants.

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DECISION/ORDER

Index No. 653290/2014
Motion Seq. 001, 002

HON. SALIANN SCARPULLA, J.:

In this action, plaintiff 50 Carmine Restaurant Associates, LLC (50 Carmine) seeks damages and injunctive relief arising from the failure to sell its rights in a restaurant it owned and operated in commercial space located at 50 Carmine Street, New York, New York 10014 (Premises). According to the complaint, 50 Carmine offered to sell its rights in the Premises to defendant Jankman LLC and its managing member, defendant Dean Jankelowitz (together, Jankman Defendants). The Jankman Defendants allegedly accepted 50 Carmine's offer to purchase its rights in the Premises. Thereafter, the Jankman Defendants allegedly discovered that 50 Carmine was suffering severe financial difficulties, and defendants Maxwell-Kates, Inc. (Maxwell-Kates), managing agent for the Premises, and defendant Al Elias (Elias), Maxwell-Kates' senior vice president, offered to lease the Premises to the Jankman Defendants directly.

The four-count complaint asserts causes of action for tortious interference with contract, breach of contract, fraud, and tortious interference with prospective economic

advantage. The Jankman Defendants now move (in motion sequence number 001) to dismiss the complaint for failure to state a cause of action, and based upon the statute of frauds and documentary evidence. Elias and Maxwell-Kates move (in motion sequence number 002) to dismiss the complaint for failure to state a cause of action and based upon documentary evidence. Motion sequence numbers 001 and 002 are consolidated for disposition.

Discussion

A. Breach of Contract (Second Cause of Action)

50 Carmine's second cause of action for breach of contract is asserted against the Jankman Defendants only. This claim is based upon allegations that 50 Carmine and the Jankman Defendants "entered into a binding Agreement to Agree," or, alternatively, that the parties entered into a "binding Contract of Sale" based upon emails between May 23 and July 28, 2014. According to the complaint, "[b]y July 28, 2014, all essential terms to the contract of sale were agreed upon via the correspondence set forth in Exhibit C and Exhibit D (the 'Contract of Sale')."

The elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

Here, the purported "Agreement to Agree" is annexed as an exhibit to the complaint. Nonparty SKH Realty, purportedly acting as agent for the Jankman Defendants, sent this document, dated May 23, 2014, to the attention of Rick and Jesse

Camac at 50 Carmine. By its own terms, this document contained "[p]roposed terms" for "the lease/purchase of the Premises." It expressly stated that it "is in no way intended to obligate any party contractually and no such obligation shall arise unless/until a mutually satisfactory purchase agreement and or lease agreement is executed by all parties." Thus, on its face, the "Agreement to Agree" is not "binding," as alleged in the complaint. Under New York law, it is well-settled that a mere agreement to agree is unenforceable. *Dragon Head LLC v. Elkman*, 118 A.D.3d 424, 425 (1st Dep't 2014).

50 Carmine further annexes emails that allegedly evidence a "binding Contract of Sale" to the complaint. On May 23, 2014, SKH Realty sent the following email to 50 Carmine:

> "Dean has accepted your last proposal of; [sic]
> - $337,500 all cash
> - $17,500 per month
> - 6 weeks rent abatement
>
> The attached term sheet reflects the points above.
>
> Next Steps:
>
> - your green light for Dean to send notice to CB on Tuesday
> - in-person meeting with LL
> - Dean providing full financials
>
> Strategy with Ned - Definitely don't want to lose him as a back-up! Think it might be best to say that the LL has requested to see financials and concept info / bios prior to arranging an in-person meeting. This will buy us some time.
>
> Thoughts?"

On May 24, 2014, 50 Carmine sent an email to Elias, stating: "I have reached terms with a group you will be pleased to do business with." The email referred to rent

terms and lease duration, but stated that Elias "will, of course, negotiate all the other terms necessary . . . ." As of June 19, 2014, 50 Carmine admitted that it was "awaiting final comments from his [Dean Jankelowitz's] lawyer." In an email dated June 26, 2014, 50 Carmine informed Elias that "we cannot control negotiations on your side with Dean. When do you expect the lease to be signed/agreed to?" On June 30, 2014, 50 Carmine sent a further email to Elias, stating: "[s]till working on getting this deal done. Assuming it doesn't get done in the next few days (this is a short week), I'd like to request pushing out the final payment a month, if necessary, with us paying additional rent, for the additional time."

Also attached to the complaint is an email dated July 28, 2014, from 50 Carmine's attorney to the Jankman Defendants' attorney, Donald Bernstein.[1] Counsel for 50 Carmine attached to the email an "Indemnification Agreement," a "Bulk Sales Notice," an "Escrow Agreement," a "Bill of Sale," and an "LLC Resolution," requesting that these documents be reviewed and the parties notified of any "requested changes." This email indicated that a "Surrender Agreement" would be prepared in the future, and summarized

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[1] **Error! Main Document Only.** 50 Carmine argues that Donald Bernstein is "an individual whose relationship to the parties is unclear and unstated in the Defendant's motion papers." However, the Jankman Defendants' opening brief represents that Donald Bernstein is their attorney. Moreover, the complaint itself alleges that the Jankman Defendants "and/or their agents engaged in ongoing email conversations regarding Plaintiff's sale of the Premises to [the Jankman Defendants]. Exhibit C, in turn, is an email communication between 50 Carmine's attorney and Donald Bernstein. Thus, 50 Carmine's argument is refuted by its own pleading and the documentary evidence attached thereto.

"closing checks" that would be needed. 50 Carmine also attaches to the complaint copies of tax lien documents for 50 Carmine, issued by the Internal Revenue Service.

Nothing contained in these emails supports 50 Carmine's assertion that the parties entered into a binding Contract of Sale. The May 23, 2014 email merely transmits, as an attachment, the "term sheet" that forms the basis of 50 Carmine's unenforceable "Agreement to Agree." In substance, this transmittal email merely refers to, and reiterates, the same "[p]roposed terms" that were contained in the term sheet. Moreover, the May 23, 2014 email expressly refers to "Next Steps," states that a "back-up" was still being considered for the transaction, and expresses the need to "buy . . . some time" (id., exhibit C), further evidencing the preliminary nature of the parties' negotiations and that they had not agreed upon all material terms. Thus, the May 23, 2014 email does not constitute a binding contract. *Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 N.Y.2d 475, 482 (1989) ("[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract"); *Argent Acquisitions, LLC v. First Church of Religious Science*, 118 A.D.3d 441, 443 (1st Dep't 2014) (where "'material term[s are] left for future negotiations,'" the purported agreement is "'unenforceable'"). Nothing contained in the tax lien documents shows the existence of an agreement between the parties. Nor were any of the purported agreements signed by the parties. Significantly, the emails themselves make clear that numerous "material term[s were] left for future negotiations," rendering the purported agreement "unenforceable." *Argent Acquisitions, LLC*, 118 A.D.3d at 443 (internal quotation marks and citation omitted); *Cobble Hill*

Nursing Home, 74 N.Y.2d at 482. Accordingly, the second cause of action for breach of contract is dismissed.

B. Tortious Interference with Contract (First Cause of Action)

The first cause of action for tortious interference with contract is asserted against Elias and Maxwell-Kates only. This cause of action is based upon allegations of Elias and Maxwell-Kates' improper interference with the purported agreement between 50 Carmine and the Jankman Defendants. Tortious interference with contract requires, among other things, "the existence of a valid contract between the plaintiff and a third party." *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996). For the reasons discussed above, there was no valid contract between the parties. Therefore, the first cause of action for tortious interference with contract is dismissed.

C. Fraud (Third Cause of Action)

The third cause of action for fraud is asserted against all defendants. "The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury.'" *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995). Conclusory allegations of fraud are insufficient to support a fraud claim. Id. at 319. Rather, where the cause of action is based upon fraud, "the circumstances constituting the wrong shall be stated in detail." CPLR § 3016(b).

The fraud claim here is based upon defendants' alleged "statements to Plaintiff regarding the potential for a sale of the Premises." The "Defendants [allegedly] told Plaintiff on multiple occasions that they were negotiating in good faith with the Plaintiff

to reach a deal allowing Plaintiff to sell the Premises to [the Jankman Defendants]." According to the complaint, defendants made these statements "with the intent of inducing Plaintiff to introduce Elias and Maxwell-Kates to a suitable tenant, at which point Elias and Maxwell-Kates intended to bypass Plaintiff and negotiate directly with the proposed tenant." The complaint alleges that, once 50 Carmine introduced the Jankman Defendants to Elias and Maxwell-Kates, "Defendants began making knowingly fraudulent statements to Plaintiff regarding the status of the deal between Plaintiff and [the Jankman Defendants]."

As a preliminary matter, the fraud claim is based upon allegations that "statements" were made, without identifying the statements, who made them, or any other detail that would inform defendants of the misrepresentations upon which the fraud claim is based. The only misrepresentation that is even arguably stated with sufficient particularity is the allegation that defendants were negotiating in good faith, but this allegation fails to identify who made the statement or when it was made. In short, the fraud claim "only contains general allegations as to the alleged misrepresentations and virtually no information as to when and by whom these representations were made." *Ferro Fabricators, Inc. v. 1807-1811 Park Ave. Dev. Corp.*, 127 A.D.3d 479, 480 (1st Dep't 2015). Accordingly, the fraud claim is "dismissed for failure to plead with requisite particularity pursuant to CPLR 3016 (b)." Id. at 479.

Even assuming that the fraud claim was stated with sufficient particularity, it is dismissed for the independent reason that it fails to state a cause of action. Defendants allegedly represented that they would negotiate 50 Carmine's sale of the Premises to the

Jankman Defendants in good faith while, in reality, defendants never intended to perform in good faith; rather, they "intended to bypass Plaintiff and negotiate directly with the proposed tenants." Implicit in these allegations is 50 Carmine's assertion that defendants negotiated with 50 Carmine while not intending to perform under any agreement reached among the parties. When I heard argument on these motions, 50 Carmine's counsel conceded that the "improper means" employed by defendants was that they continued negotiations while never intending to enter into an agreement with 50 Carmine. *See e.g.*, 5/12/15 tr at 20. To the extent that the fraud claim is based upon allegations that "defendant[s] entered into a contract while lacking the intent to perform it," those allegations "are insufficient to support the claim." *New York Univ.*, 87 N.Y.2d at 318; *First Bank of Ams. v. Motor Car Funding*, 257 A.D.2d 287, 291 (1st Dep't 1999) ("[a] fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract"); *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988).

Moreover, "unless otherwise mandated by law," the right to enter into a contract "is no right at all if it is not accompanied by freedom not to contract." *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 N.Y.2d 105, 109 (1981). 50 Carmine fails to identify any law or fact that prevented defendants from ceasing negotiations with 50 Carmine and dealing among themselves and the owner of the Premises directly. For this additional reason, the fraud claim is dismissed.

D. Tortious Interference with Prospective Economic Advantage

(Fourth Cause of Action)

The fourth cause of action for tortious interference with prospective economic advantage is asserted against Elias and Maxwell-Kates only. This cause of action is based upon Elias and Maxwell-Kates' alleged interference with the negotiations between 50 Carmine and the Jankman Defendants.

"A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship." *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 108 (1st Dep't 2009).

Here, the complaint alleges that Elias and Maxwell-Kates "negotiated a higher rent rate" with the Jankman Defendants "in exchange for informing them of [50 Carmine's] imminent eviction and/or for delaying all negotiations with [50 Carmine] regarding Elias's approval of the sale and/or for allowing no further extensions of the lease by [50 Carmine] and/or for evicting . . . 50 Carmine." Complaint, ¶ 24. At oral argument on these motions, 50 Carmine's counsel conceded that Elias and Maxwell-Kates:

> "continued and extended negotiations to keep – to bring in someone that my client brought to the table, to keep them at arm's length so they can continue negotiations behind the back of my client. With no interest, they got themselves a better deal . . . by basically removing my client . . . they were able to allow a better deal, maybe higher rent . . . ."

5/12/15 tr at 21. Here, 50 Carmine "has not alleged any facts suggesting that defendants violated the law or undertook actions with the sole purpose of harming [it]; indeed, by

plaintiff's own theory of the case, defendants acted with the intent of benefitting themselves" financially by negotiating a higher rent rate and allowing Elias and Maxwell-Kates to strike a better deal with the Jankman Defendants. *Thome*, 70 A.D.3d at 108; *see also Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004) (tortious interference claim dismissed where the plaintiff's "motive in interfering with the [defendants'] relationships with their customers was normal economic self-interest"). Therefore, the claim for tortious interference with prospective economic advantage is dismissed.

In accordance with the foregoing, it is hereby

ORDERED that defendants Dean Jankelowitz and Jankman LLC's motion to dismiss the complaint (motion seq. no. 001) is granted; and it is further

ORDERED that defendants Al Elias and Maxwell-Kates, Inc.'s motion to dismiss the complaint (motion seq. no. 002) is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of all defendants.

This constitutes the decision and order of the Court.

DATE : 12/4/2015

SALIANN SCARPULLA, JSC