East West Bank v Kee Yip Realty LLC
2016 NY Slip Op 30157(U)
January 28, 2016
Supreme Court, New York County
Docket Number: 156698/2015
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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EAST WEST BANK,

Plaintiff,

- v -

KEE YIP REALTY LLC,

Defendant.

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Index No.
156698/2015

DECISION and ORDER

Mot. Seq. #001

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, East West Bank ("Plaintiff" or "East West"), as former tenant, seeks the return of the security deposit in the amount of $189,599.36 (the "Security Deposit") that East West paid pursuant to a lease agreement with Defendant, Kee Yip Realty LLC, as former owner/landlord ("Defendant" or "Kee Yip") for premises located at 27 East Broadway, New York, New York (the "Premises"). East West operated one of its braches out of the Premises until the term of the First Amendment to Agreement of Lease, dated April 29, 2015, expired.

Defendant interposed an answer to Plaintiff's complaint with counterclaims on April 18, 2015.

Plaintiff moves pursuant to CPLR §§ 3016(b), 3211(a)(1), 3211(a)(7) and 3211(b) to dismiss the eleventh affirmative defense/first counterclaim (fraud), seventh counterclaim (attorneys' fees and costs) and eighth counterclaim (unjust enrichment) set forth in Kee Yip's Verified Answer with Counterclaims dated August 19, 2015. Defendant opposes.

CPLR § 3211 provides, in relevant part:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > (1) a defense is founded upon documentary evidence; or
> >
> > (7) the pleading fails to state a cause of action; or

(CPLR §§ 3211[a][1], [7]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]). On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211(a)(1) when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep't 2007] [citation omitted]). When evidentiary material is considered, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

As for Defendant's eleventh affirmative defense/first counterclaim, the elements of fraud are material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*see Pramer S.C.A. v. Abaplus, Intl. Corp.*, 2010 NY Slip Op 4936, *7 [1st Dept. 2010]). CPLR §3016(b) provides that where a cause of action or defense is based on misrepresentation, it must be stated in detail. "General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim." (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 2011 NY Slip Op 5640, *5 [1st Dept. 2011]). Here, in connection with eleventh affirmative defense/first counterclaim for "fraud," Defendant merely alleges in a conclusory manner that Plaintiff "has misrepresented and/or made false representations regarding the Defendant to this Court." Additionally, a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract. (*Metropolitan Transp. Authority v. Triumph Advertising Productions, Inc.*, 116

A.D.2d 526, 527 [1st Dep't 1986]). Accordingly, Defendant fails to state an affirmative defense or counterclaim for fraud.

As for Defendant's seventh counterclaim for "costs an attorneys' fees", each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing the other party shall same. (*A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y. 2d 1, 5 [N.Y. 1986]). As the basis for its requests for attorneys' fees, Defendant relies upon Paragraph 19 of the Lease, which allows the owner to recover fees and expenses when the Tenant defaults under the Lease, and Section 130.1. Plaintiff only seeks to dismiss the portion of Defendant's seventh counterclaim which relates to recovery of attorneys' fees under Section 130.1, the latter. New York does not recognize an independent cause of action for the imposition of fees and sanctions. *360 W. 11th LLC v ACG Credit Co. II, LLC*, 90 A.D.3d 552, 554 [1st Dept. 2011]; *Calabro & Assoc., P.C. v Katz*, 26 Misc. 3d 137(A), 137A [1st Dept. 2010] ("The counterclaim for sanctions under 22 NYCRR 130-1.1 should have been dismissed, since no independent cause of action for such sanctions exists."). "A party may apply for such relief [legal fees] by motion upon the happening of specific conduct... A counterclaim for attorney's fees and sanctions based upon the assertion that the action is frivolous is improper." *Murphy v. Smith*, 4 Misc.3d 1029(A), 1029A (N.Y. Co. 2004) (internal citations omitted). Here, Defendant failed to plead any facts to support Defendant's allegation that Plaintiff's lawsuit is frivolous. Even if Defendant had plead facts to support their Counterclaim, the Counterclaim fails to state a claim. (*See 360 W. 11th LLC*, 90 A.D.3d at 554).

As for Defendant's eighth counterclaim, to prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. (*Id.*). Thus, it is the general rule that, "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). Here, where both parties are relying upon the terms of the Lease and Amendment to Lease with respect to their respective obligations concerning the Premises, Defendant's eighth counterclaim is dismissed.

Wherefore, it is hereby

ORDERED that Plaintiff's motion to dismiss certain counterclaims is granted; and it is further

ORDERED that Defendant's eleventh affirmative defense/first counterclaim and eighth counterclaims, for fraud and unjust enrichment, respectively, are dismissed; and it is further

ORDERED that only the portion of Defendant's seventh counterclaim in which Defendant seeks to recover its attorneys' fees, costs and disbursements based on 22 NYCRR 130-1.1; and it is further

ORDERED the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 28 2016

JAN 28 2016

EILEEN A. RAKOWER, J.S.C.