Gedula 26, LLC v Lightstone Acquisitions III LLC
2016 NY Slip Op 31758(U)
September 15, 2016
Supreme Court, New York County
Docket Number: 653977/2014
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 3

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GEDULA 26, LLC, 485 SHUR LLC, BSD 777-26 MANAGER LLC, and BSD SHEVA MANAGER LLC,

Plaintiffs,

- against -

Index No.: 653977/2014
Mot. Seq. No.: 003
Motion Date: 12/8/2015

LIGHTSTONE ACQUISITIONS III LLC, 485 SEVENTH AVENUE ASSOCIATES LLC, And THE LIGHTSTONE GROUP,

Defendants.

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BRANSTEN, J.:

Plaintiffs Gedula 26, LLC, 485 Shur LLC, BSD 777-26 Manager LLC, and BSD Sheva Manager LLC (collectively, "Sellers") bring the instant suit, stemming from the sale of a building located in midtown Manhattan. Defendants Lightstone Acquisitions III LLC, 485 Seventh Avenue Associates LLC and The Lightstone Group now seek dismissal of the Sellers' complaint pursuant to CPLR 3211(a)(1) and (a)(7). Defendants also seek to be declared the "prevailing party" in this litigation. For the reasons that follow, the Sellers' motion is granted in part and denied in part.

I. Background

This case involves a commercial real estate transaction for a hotel space located at 485 Seventh Avenue. The property is a sixteen-story building, containing offices, retail

space, and a public garage. Plaintiffs are the sellers of the building, and their offices are located inside the property.

The action arises from Defendants-Purchasers' alleged and anticipated defaults of their post-closing obligations under the parties' April 2, 2014 Purchase and Sale Agreement ("PSA"). The sale transaction closed on November 19, 2014 for the full purchase price of $182 million.

A. *Post-Closing Occupancy*

Plaintiffs-Sellers maintain that the Purchasers accepted certain post-closing obligations, such as post-closing occupancy by the Sellers for a period of up to six months, as well as a partnership option for the Sellers. The so-called post-closing occupancy provision is contained in Section 12 of the PSA, which states that the representations and warranties made therein by the Seller are true. *See* Affirmation of Luise A. Barrack Ex. B ("PSA") § 12. The representation and warranty at issue is found in Section 12(iv), which refers to the Rent Roll. *See id.* § 12(iv) & Ex. J. The Rent Roll contains the following language: "will vacate six(6) months from the anniversary of closing. Owner [Seller] will pay a holdover rent in the aggregate of 10K per month, for [Sellers' offices and synagogue]." *See* PSA Ex. J.

Plaintiffs claim that the Purchasers breached the post-closing occupancy agreement by locking the Sellers out of their offices and on-site synagogue on December 17, 2014. Defendants sent a "Default Letter" to Plaintiffs on December 11, 2014, which

contained a "Ten Day Licensee Notice to Quit." The Notice to Quit demanded vacatur of the premises by December 31, 2012, notwithstanding the parties' post occupancy agreement. Plaintiffs purportedly were subjected to humiliation as they were locked out of the in-office synagogue and waited for the police to resolve the situation. However, Plaintiffs do not dispute that Defendants gave them new keys that day.

B. *Partnership Option*

Plaintiffs also claim that Defendants failed to honor the partnership option to which they agreed on November 19, 2014. The partnership option provision is found in Section 38 of the PSA, which states that:

> Following Purchaser's delivery of the Due Diligence Waiver Notice or the Extended Due Diligence Waiver Notice, as applicable, Purchaser and Sellers shall negotiate in good faith for a period not to exceed seventy-five (75) days for Sellers to acquire up to a twenty-five percent (25%) ownership interest in the entity which will acquire title to the Property, on terms and conditions determined in Purchaser's sole discretion.

The option itself allegedly was formally created by separate agreement of the parties on November 19, 2014. *See* Compl. ¶¶ 59-63.

C. *The Instant Action*

Plaintiffs filed the instant action on December 29, 2014, asserting claims for: breach of contract; unlawful eviction; interference with religious worship; attorneys' fees; fraud; punitive damages; and "provisional remedies." Plaintiffs also asserted claims for

declaratory judgment and injunctive relief stemming from violation of the post-closing occupancy agreement; however, both of these claims were withdrawn following the parties' partial settlement. The seven claims listed above remain.

II. **Discussion**

Defendants now seek to dismiss the Complaint in its entirety. On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The Court is not required to accept factual allegations that are

contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

A. *Single Motion Rule*

As a preliminary matter, Plaintiffs contend that the instant motion must be denied, since Defendants previously filed a CPLR 3211 motion. While it is true that Defendants filed an earlier motion, Plaintiffs fail to note that the motion was withdrawn without prejudice, pursuant to a stipulation that was signed by, *inter alia*, Plaintiffs' counsel. *See* NYSCF No. 48 (February 10, 2015 Stipulation). Accordingly, the Court declines to deny the motion pursuant to the "single motion rule."

B. *Breach of Contract Claim*

Plaintiffs' third claim asserts breach of the PSA's the partnership option and post-closing occupancy provision. Since Defendants make no arguments in support of dismissing the post-closing occupancy portion of the claim, this branch of their motion is denied.

Defendants seeks dismissal of the partnership option allegations on the grounds that the section of the PSA on which the claim is premised – Section 38 – did not survive closing. Defendants are correct that Section 38 is not included in the "Closing Surviving Obligations" enumerated in the PSA. *See* Compl. Ex. 1 at ¶ 1(i). However, Defendants' moving papers ignore Plaintiffs' pleading that the parties entered into a separate agreement on November 19, 2014, memorializing the partnership option. This separate agreement forms the basis of Plaintiffs' breach claim. The support for this separate agreement is found in paragraph 80 of the Complaint, as well as paragraphs 19-21.

Defendants' next argue that any purported partnership option agreement fails to satisfy the Statute of Frauds. This argument, however, is advanced for the first time in Defendants' reply papers and therefore cannot be considered. *See, e.g., Alrobaia v. Park Lane Mosholu Corp.*, 74 A.D.3d 403, 404 (1st Dep't 2010) ("The argument . . . was raised for the first time in defendants' reply papers, and should not have been considered by the court in formulating its decision."). Contrary to Defendants' assertion, this argument was not an appropriate response to a new point made in Plaintiffs' opposition papers. Instead, Plaintiffs' contention in their opposition brief regarding the existence of the partnership option mirrors the allegations of the complaint. Accordingly, the statute of frauds arguments cannot be considered, and Defendants' motion to dismiss the breach of contract claim is denied.

C. *Wrongful Eviction Claim*

Plaintiffs' fourth claim for wrongful eviction stems from the Purchasers' December 17, 2014 actions, whereby the Sellers were locked out of their offices and on-site synagogue for a brief period of time. Defendants first argue that this claim should be dismissed because Plaintiffs have not alleged damages. Nonetheless, "[w]rongful eviction is a trespass and, therefore, even without proving actual damages," a plaintiff satisfying the other elements of the claim is "entitled to nominal damages." *See, e.g., Okeke v. Ewool*, 106 A.D.3d 709, 710 (2d Dep't 2013). At a minimum, Plaintiffs have alleged a right to occupancy, and have alleged that right was violated when Defendants denied them access by changing the locks. Therefore, Defendants' arguments as to damages do not suffice to dismiss the claim.

Next, Defendants contend that Plaintiffs were "mere licensees" that could be evicted at any time. This argument ignores the Rent Roll, which was attached as Exhibit J to the parties' PSA. The Rent Roll clearly states that Plaintiffs were to have access to specified areas of the Building for a year and a half after the closing. *See* PSA Ex. J. Defendants not only fail to identify the Rent Roll in their moving papers, they make the factually incorrect statement that "[i]t is undisputed that Plaintiffs had no lease or other written agreement to occupy any space within the Building as a tenant." (Defs.' Moving Br. at 12.) In their reply, Defendants contend for the first time on reply that Plaintiffs "surreptitiously" inserted the tenancy language into the rent roll. This argument, if

anything, raises questions of fact and does not provide a basis for dismissal under CPLR 3211.

Finally, Defendants again argued for the first time on reply that the statute of frauds bars the rent roll. As explained above, the Court cannot consider arguments raised for the first time on reply. *See, e.g., Erdey v. City of N.Y.*, 129 A.D.3d 145, 145 (1st Dep't 2015) (refusing to consider arguments "improperly raised for the first time in [a] reply brief").

Accordingly, the motion to dismiss the fourth cause of action for wrongful eviction is denied in full.

D. *Interference with Religious Worship*

Plaintiffs' fifth claim asserts that Defendants intentionally interfered with Sellers' religious freedom by locking them out of their on-site synagogue. In response, Defendants maintain that this claim must be dismissed because there is no such action available under New York law.

Plaintiffs premise their claim on a putative private right of action derived from New York Penal Law § 240.70, which provides:

> A person is guilty of criminal interference with ... religious worship in the second degree when: . . .(c) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person because such person was or is seeking to exercise the right of religious freedom at a place of religious worship...

Since this statute contains no private right of action, Plaintiffs urge the Court to deem that such a right must be implied. A private right of action will be implied if (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the recognition of such right promotes the legislative purpose which undergirds the statute; and (3) the creation of such right is consistent with the legislative scheme for the statute. *Rhodes v. Herz*, 84 A.D.3d 1, 9 (1st Dep't 2011). Legislative intent is thus the linchpin in any case where a private right of action is to be implied." *Id.*

There can be no reasonable argument that limited liability companies engaged in the management and ownership of commercial real estate, i.e. the Plaintiffs in this action, are members of the class for whose benefit the statute was enacted. Further, there are no indicia whatsoever in the legislative history, *see* New York Bill Jacket, 1999 A.B. 9036, Ch. 635, that a private right of action would be consistent with the legislative intent. Therefore, Defendants' motion to dismiss the fifth cause of action for interference with religious worship is granted in full.

E. *Fraud*

Defendants next contend that the seventh cause of action for fraud should be dismissed as duplicative of the breach of contract claim. The Court agrees.

"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." *First Bank of Ams. v. Motor Car*

Funding, 257 A.D.2d 287, 291 (1st Dep't 1999). However, "[a] fraud-based cause of action may lie ... where the plaintiff pleads a breach of a duty separate from a breach of the contract." *Manas v. VMS Assoc., LLC*, 53 A.D.3d 451, 453 (1st Dep't 2008). In support of this claim, Plaintiffs merely allege breach of the PSA, with the added proviso that Defendants never intended the performance required by the PSA. *See* Compl. ¶ 32. Plaintiffs do not allege and independent breach of duty. Accordingly, the seventh cause of action for fraud is dismissed.

F. *Punitive Damages*

In count eight, Plaintiffs seek punitive damages for their alleged wrongful eviction.[1] Defendants correctly contend that such a claim for damages cannot stand on its own without a substantive underlying cause of action. *See, e.g., Gregor v. Rossi*, 120 A.D.3d 447, 449 (1st Dep't 2014) ("The claims for punitive damages cannot stand in the absence of a substantive underlying cause of action."). Such an underlying cause of action exists here – wrongful eviction. Since no other arguments are raised in favor of dismissal, Defendants' motion is denied.

[1] Plaintiffs also sought punitive damages for the alleged interference with their religious worship. Nevertheless, that claim has been dismissed, *see above*.

G. *Provisional Remedies*

Plaintiffs' ninth claim seeks the imposition of a temporary restraining order or preliminary injunction. In their brief, Plaintiffs concede that such relief is not sought at this juncture. (Pls.' Opp. Br. at 23.) Nonetheless, if Plaintiffs deem that provisional remedies are required later in this litigation, they can move for such relief pursuant to CPLR § 6301. This claim is therefore dismissed from the Complaint.

H. *Defendant The Lightstone Group*

Defendants contend that The Lightstone Group ("TLG") should be dismissed from this action because it was not a signatory to the PSA and does not own the Property. Plaintiffs counter that TLG is affiliated with Defendants – a fact that Defendants concede. Moreover, Plaintiffs point to a memorandum drafted by Defendants' transactional counsel, which states that Plaintiffs "shall have the right to acquire 25% of the equity ownership interest in the Property Owner that is retained by Lightstone Group." *See* Compl. Ex. 3-C. Therefore, the relationship between The Lightstone Group and the transaction, as well as the parties, is an issue that cannot be resolved on this motion.. Accordingly, Defendants' motion to dismiss TLG from the Complaint is denied.

I. *Legal Fees*

Section 17 of the PSA provides that the "prevailing party" in an action brought by either contracting party to enforce the PSA "shall be entitled to recover all reasonable

costs and expenses, including, without limitation, reasonable attorneys' fees and court costs actually incurred…" Since the instant litigation has not been resolved, it is premature to declare a "prevailing party," and Defendants' request that the Court do so is denied.

III. **Conclusion**

Accordingly, it is

ORDERED that Defendants' motion is granted only to the extent that the fifth and seventh causes of action are dismissed, the ninth cause of action is dismissed without prejudice, and the motion is otherwise denied; and it is further

ORDERED that Defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on October 25, 2016 at 10:00 am.

Dated: New York, New York
September 15, 2016

ENTER

Hon. Eileen Bransten, J.S.C.