Woodhaven Terrace Inc. v Woodhaven Assets Co.
2017 NY Slip Op 32116(U)
August 18, 2017
Supreme Court, Queens County
Docket Number: 9254/13
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART 2

WOODHAVEN TERRACE INC.

Plaintiff,

-against-

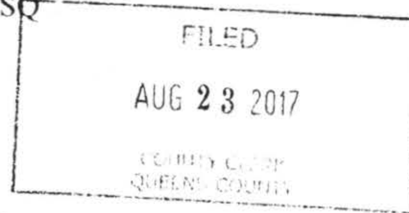
WOODHAVEN ASSETS CO., MADEEP SINGH and SANGITA SINGH PATEL, LAWRENCE J. SILBERMAN, P.C. LAWRENCE J. SILBERMAN, ESQ. MEHRA LAW GROUP, P.C. and RAJA KARAN MEHRA, ESQ.,

Defendants.

Index Number: 9254/13

Motion Date: 3/21/17

Motion Seq. No. 6



The following papers numbered 1 to 38 were read on this motion by defendants, Woodhaven Assets Co. (Assets), Mandeep Singh and Sangita Singh Patel, for, among other things, summary judgment dismissing the Eighth through Fifteenth causes of action in plaintiff's complaint, pursuant to CPLR 3212; the cross motion by defendants, Lawrence J. Silberman, P.C. and Lawrence J. Silberman, Esq. (the Silberman defendants) for, among other things, summary judgment dismissing the action as against them, pursuant to CPLR 3212; and the cross motion of defendants, Mehra Law Group, P.C. and Raja Karan Mehra, Esq. (the Mehra defendants) for summary judgment dismissing the cross claims of codefendants, pursuant to CPLR 3212 and General Obligations Law § 15-208 (b).

	Papers Numbered
Notice of Motion - Affirmation - Affidavit - Exhibits	1-5
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Reply Affirmation - Affidavit - Exhibits	10-13
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Upon the foregoing papers it is ordered that defendants' motion and cross motions are determined as follows:

Defendant, Assets, owns property at 96-01 Jamaica Avenue, Woodhaven, New York. In January 2008, it leased a portion of such property to an entity for the purpose of operating a catering hall, which lease was assigned to plaintiff, Woodhaven Terrace, Inc. (Terrace) in August 2008. In April 2011, Assets commenced a non-payment proceeding against plaintiff, which was resolved by stipulation, setting up a payment schedule. In August 2012, Terrace defaulted in payment pursuant to that stipulation, resulting in a notice of eviction. Plaintiff made application to stop the eviction, which was denied. On appeal, the stay was granted, conditioned upon plaintiff's deposit of a sum certain with the Civil Court, which deposit was made. In December 2012, the Appellate Term granted plaintiff's motion for a stay, conditioned upon Terrace's payment to Assets of all arrears in rent and/or use and occupancy, less the deposited amount, and continued payment for use and occupancy as it became due.

Plaintiff did not have the monies to comply with the Order of the Appellate Term, so entered into negotiations with Assets, which resulted in a second stipulation (Stipulation II), dated January 2013, by which Terrace was to make payments totaling $40,500.00, assign to Assets the right to the Civil Court deposit of $30, 625.00, forfeit its security deposit pursuant to the Lease, and vacate and remove all its scheduled property from the premises on or before February 28, 2013. Terrace timely made the two payments and released the Civil Court deposit to Assets. Assets admits that plaintiff vacated the premises on or before March 1, 2013, but contends that the property was left "a shambles," violating the terms of Stipulation II, and of the Lease, with regard to vacatur of the premises.

In May 2013, Terrace commenced this action against Assets, the owner and landlord; the Silberman defendants, alleged to have been plaintiffs counsel during the eviction proceedings; the Mehra defendants, also alleged to have been plaintiffs counsel during the eviction proceedings; and Singh and Patel, alleged to have "communicated with (Assets) in an effort to take over the property and continue a catering business ... with the intent to interfere with Plaintiff's Lease." Plaintiff included causes of action for wrongful eviction, conversion, breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment and breach of the General Obligations Law § 7-103 (2-a). Terrace alleges, through its principal, Binder Vasudev (Binder), that Binder's signature on Stipulation II was forged; that it (he) was not aware of the terms of Stipulation II; that such terms were not agreeable to it (him); and that attorneys Silberman and Mehra did not properly represent Terrace in these proceedings.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]).

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]).

Defendant, Assets, has moved to dismiss the Eighth Cause of Action for wrongful eviction, alleging that plaintiff's violation of the terms of Stipulation II, by defiling the property upon its moving out, permitted Assets to enter the premises on March 1, 2013, and, therefore, no wrongful eviction took place. In opposition, Terrace claims that Stipulation II was not binding on it, contending that Binder's signature thereon was a forgery, and that plaintiff was not given a notice to vacate prior to Terrace being locked out of the property by the owner/landlord.

Most of plaintiff's opposition herein is based upon the allegation by Binder that his signature on Stipulation II is a forgery, and such instrument is, therefore, not binding upon the parties. However, as in the case at bar, bald averments of forgery, merely stating conclusions of law or of fact, and unsupported by factual assertions, are insufficient to raise an issue of fact necessary to defeat summary judgment (*see Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381 [2004]; *HSBC Bank USA Nat. Ass'n. v Armijos*, 151 AD3d 943 [2017]). Further, Binder has failed to demonstrate "that (his) prelitigation conduct was consistent with a denial of genuineness" of his signature to Stipulation II (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d at 384), based upon the facts that multiple checks, in the amounts as stated in said Stipulation,

were timely paid by Terrace to Assets. Plaintiff's additional contention that Stipulation II was invalid for lack of consideration is without merit, as a guarantee from Binder was, in fact, extant at the time of the drawing of said Stipulation II and, pursuant to its terms, Binder was released from personal liability; that rental arrears were waived; that the amounts of payments were negotiated; and that the time to vacate the premises was extended. Consequently, Binder has "failed to prove to a moral certainty" that his signature was forged (*Kanterakis v Mino's Realty I, LLC*, 151 AD3d 950, 950 [2017]), and failed to raise an issue of fact as to the validity of Stipulation II herein.

Having demonstrated the validity of Stipulation II, which called for Terrace to vacate the premises by February 28, 2013, time being of the essence, the branch of Assets' motion seeking to dismiss the Eighth Cause of Action for wrongful eviction is granted, and such cause of action is dismissed.

Plaintiff's Thirteenth Cause of Action states a violation of General Obligations Law § 7-103 (2-a), resulting from Assets' alleged failure to maintain plaintiff's security deposit in a segregated, interest-bearing account, and in its using said security deposit for its own purposes during the course of the tenancy. Such statute is inapplicable here, as, by its terms, it applies solely to "rental of property containing six or more family dwelling units". Further, the Lease in effect herein, at ¶28 of the Rider, specified that any security deposit "need not be maintained in an interest bearing account." As such, the branch of Assets' motion seeking dismissal of plaintiff's Thirteenth Cause of Action is granted, and such cause of action is dismissed.

Plaintiff admits to basing its Ninth Cause of Action, for conversion, on Assets' commingling of the security deposit. An action to recover damages for conversion cannot be predicated on a mere breach of contract (*see Brown v Kristal Auto Mall Corp.*, 149 AD3d 1025 [2017]), unless it is demonstrated that a defendant "engaged in tortious conduct separate and apart from [any alleged] failure to fulfill its contractual obligations" (*New York Univ. v Cont'l Ins. Co.*, 87 NY2d 308, 316 [1995]. As there was no action for commingling presented herein, there was no act of conversion to pursue as a tort claim (*see Mallory Associates v Barving Realty Co.*, 300 NY 297 [1949]), and the branch of the motion seeking to dismiss the Ninth Cause of Action is granted, and such cause of action is dismissed.

Plaintiff's Tenth Cause of Action, for breach of contract, states only that "Defendant breached the Lease Agreement with Plaintiff ." Plaintiff's opposition to this branch of Assets' motion refers only to a purported question of fact as to the validity of Stipulation II as support for the survival of this cause of action. Plaintiff, having failed to rebut the validity of Stipulation II, renders such opposition moot, and mandates the granting of this branch of defendant's motion, and dismissal of this cause of action.

Plaintiff's Eleventh Cause of Action, stating only that "[d]efendant breached the implied covenant of good faith and fair dealing with every contract by his conduct," asserts nothing more than a duplication of the cause of action for breach of contract, as it fails to allege that defendant "engaged in conduct ... to realize gains from the plaintiff, while depriving the plaintiff of all benefits of the contract", as required for such a cause of action (*Travelsavers Enterprises, Inc. v Analog Analytics, Inc.*, 149 AD3d 1003, 1006 [2017]; *see Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.*, 97 AD3d 781 [2012]). Again, plaintiff's opposition to dismissal rests entirely on the premise that there exists a question of fact as to the validity of Stipulation II, which premise has been determined to be without merit. Consequently, this branch of defendant's motion is granted, and the Eleventh Cause of Action is dismissed.

Plaintiff's Twelfth Cause of Action, alleging unjust enrichment, contemplates a situation in which the defendant has obtained a benefit which in "equity and good conscience" should be paid to the plaintiff (*Corsello v Verizon NY, Inc.*, 18 AD3d 777, 790 [2012] quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 412 [1972]). In other words, such claim exists where there is "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 142 [2009]. In the case at bar, Stipulation II is just such an agreement, barring this claim. Further, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon NY, Inc.*, 18 AD3d at 790). Here, movant has "established [its] prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging unjust enrichment ... since that cause of action was precluded by the existence of a contract between [the parties] covering the same subject matter" (*Ochoa v Montgomery*, 132 AD3d 827, 828 [2015]). In opposition, plaintiff has failed to raise an issue of fact to refute such entitlement, and the branch of the motion seeking to dismiss the Twelfth Cause of Action is granted.

The instant motion also seeks summary judgment dismissing the Fourteenth and Fifteenth Causes of Action against defendant, Singh and Patel. The Fourteenth Cause of Action is for tortious interference with contractual relations, here, plaintiff's lease agreement with Assets. While plaintiff has adequately pleaded such a cause of action against Singh and Patel, movants have failed to eliminate all material issues of fact with regard to the necessary elements of their lack of knowledge of the lease and their lack of intent to procure the breach (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Gutierrez v McGrath Management Services, Inc.*, –AD3d –, 2017 NY Slip Op. 05425 [2d Dept. 2017]; *Tri-Star Lighting Corp. v Goldstein*, 151 AD3d 1102 [2017]). Consequently, this branch of Singh and Patel's motion is denied.

Plaintiff's Fifteenth Cause of Action invokes the Faithless Servant Doctrine (*see Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928 [1977]; *William Floyd Union Free School Dist. v Wright*, 61 AD3d 856 [2009]), claiming that Singh and Patel, as agents of plaintiff, were disloyal to plaintiff in conspiring with Assets to take over the lease to the subject premises while plaintiff was still in possession of such premises. Defendants' papers, in support of summary judgment dismissing this cause of action, demonstrated that Patel was never an employee of plaintiff, so this cause of action as pertaining to her is dismissed. However, movants have left questions outstanding as to whether Singh was employed by plaintiff, and, if so, when negotiations between Singh and Assets took place with regard to the existence of the lease term with plaintiff. Such credibility and factual issues require a denial of this branch of Singh's motion to dismiss the Fifteenth Cause of Action.

Defendant, Assets, also moves for summary judgment, on liability, on its counterclaims, alleging a breach by Terrace of the lease and of the terms of Stipulation II, both arising from the damaged condition alleged to have existed after plaintiff vacated the subject premises. Binder, on behalf of Terrace, denies responsibility for the alleged damage, stating that no such damages were present when he vacated the property. As material questions of fact remain in this regard, Assets has failed to prove entitlement to summary judgment on its counterclaims, and this branch of its motion is denied.

The Mehra defendants cross-move for summary judgment dismissing the cross claims of codefendants, pursuant to CPLR 3212 and General Obligations Law § 15-108 (b). On or about January 12, 2017 plaintiff settled its claims in this action against the Mehra defendants, and released said defendants. G.O.L. 15-108 (b) states, in applicable part, that "[a] release given in good faith by the injured person to one tortfeasor ... relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules." There being no evidence that the release by plaintiff was not given in good faith herein, and codefendants having failed to oppose this branch of the cross motion, summary judgment on this ground is granted, and each codefendant's cross claim seeking contribution from the Mehra defendants is dismissed.

The Mehra defendants' cross motion also seeks dismissal of codefendants' cross claims for indemnification, contending that there is no evidence of any contractual indemnification in this matter, nor should common-law indemnification apply as any liability of Assets, or of the Silberman defendants, would be based upon their own wrongdoing, and not on any vicarious liability, solely by operation of law due to a relationship with an actual wrongdoer (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]; *Bryan v CLK-HP 225 Rabroa, LLC.*, 136 AD3d 955 [2016]). Assets, Singh and Patel contend that their role in re-entering the leased premises "was passive" in nature, as they relied on the terms of Stipulation II, which was forwarded to them by the actively-engaged Mehra defendants, and,

as a result, implied indemnification was warranted. However, as there existed no relationship between Assets and Mehra, no implied indemnification was available to Assets (*see Mas v Two Bridges Assoc.*, 75 NY2d 680 [1990]) , and this branch of the Mehra defendant's cross motion is granted, dismissing Assets' cross claim for indemnification against them.

However, with regard to the indemnification claim brought by the Silberman defendants against the Mehra defendants, there is an issue as to whether any relationship existed between them which would give rise to common-law indemnification. The parties disagree as to the role played by the Mehra defendants on behalf of plaintiff; whether the Mehra defendants and the Silberman defendants acted as "co-counsel" on behalf of plaintiff; whether there existed a de facto retainer/payment agreement between them; and whether each, or either one of them, may have been negligent in the transactions on behalf of plaintiff, culminating in an indemnification possibility herein. As outstanding questions of fact remain on these issues, this branch of the Mehra defendants' cross motion is denied.

The Silberman defendants cross-move for summary judgment dismissing the action against them, pursuant to CPLR 3212, and for sanctions and/or costs. Liberally construing the evidence in a light most favorable to the nonmoving plaintiff (*see Chojnacki v Old Westbury Gardens, Inc.*, – AD3d – , 2017 NY Slip Op. 05706 [2d Dept. 2017]; *D'Esposito v Manetto Hill Auto Service, Inc.*, 150 AD3d 817 [2017]), such evidence, and plaintiff's opposition evidence, demonstrate the presence of unresolved material issues of fact regarding each cause of action against the Silberman defendants, which would deny judgment to said moving defendants (*see Zuckerman v City of New York Transit Auth.*, 49 NY2d 557 [1980]; *Gelstein v City of New York*, – AD3d –, 2017 NY Slip Op. 06064 [2d Dept. 2017]; *Baird v Four Winds Hosp.*, 140 AD3d 810 [2016]). Further, and contrary to the Silberman defendants' contention, the evidence submitted in support of their motion, in the form of the emails allegedly demonstrating plaintiff's knowledge of the terms of Stipulation II, was not "documentary," as it was not of undisputed authenticity, unambiguous and undeniable (*see Anderson v Armento*. 139 AD3d 769 [2016]; *Pasquaretto v Long Island University*, 106 AD3d 794 [2013]; *Kopelowitz & Co., Inc. v. Mann*, 83 AD3d 793 [2011]), and failed to undeniably support movants' claims or utterly refute plaintiff's factual allegations (*see Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Clarke v Laidlaw Tr., Inc.*, 125 AD3d 920 [2015]; *Comprehensive Mental Assessment & Medical Care, P.C. v Gusrae Kaplan Nussbaum, PLLC*, 130 AD3d 670 [2015]). As such, it failed to resolve all factual issues as a matter of law, and conclusively dispose of plaintiff's claim (*see Sciadone v Stepping Stones Associates, L.P.*, 148 AD3d 953 [2017]; *Town of Huntington v Long Island Power Authority*, 130 AD3d 1013 [2015]), and this branch of said cross motion is denied.

The branch of the Silberman defendants' cross motion seeking sanctions and costs, pursuant to 22 NYCRR 130-1.1(c) (1), is denied. While a court, in its discretion, may award

sanctions and costs for frivolous conduct, the party seeking such relief has the burden of proof on this issue, and cross-movants' have failed to demonstrate that plaintiff's claims are devoid of legal and factual merit, and should be considered to be frivolous conduct under that statute (*see West Hempstead Water Dist. v Buckeye Pipeline Co., L.P.*, – AD3d –, 2017 NY Slip Op. 05473 [2d Dept. 2017]; *Stone Mountain Holdings, LLC v Spitzer*, 119 AD3d 548 [2014]).

Accordingly, defendant, Assets' motion for summary judgment dismissing the Eighth through Thirteenth, inclusive, Causes of Action of plaintiff's complaint is granted. Defendant, Singh and Patel's motion for summary judgment dismissing the Fourteenth Cause of Action of said complaint is denied. The branch of said motion seeking summary judgment dismissing the Fifteenth Cause of Action is granted with regard to defendant, Patel, and denied with regard to defendant, Singh. The branch of said motion seeking partial summary judgment for defendant, Assets, on its counterclaims, is denied. The cross motion by the Mehra defendants seeking summary judgment dismissing the cross claim of the codefendants for contribution is granted. The branch of said cross motion seeking dismissal of the cross claim for indemnification is granted as to the cross claims of Assets, and denied as to the cross claims of the Silberman defendants. The cross motion by the Silberman defendants is denied in toto.

Dated: August 18, 2017

J.S.C.