

**Ran v Weiner**

2017 NY Slip Op 32142(U)

October 12, 2017

Supreme Court, New York County

Docket Number: 101762/2016

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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FAYE RAN,

Plaintiff,

-against-

**DECISION/ORDER**

Index No.: 101762/2016

Mot. Seqs. 003 and 004

SAM WEINER and 451 WEST BROADWAY  
COOPERATIVE, INC.,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

**MEMORANDUM DECISION**

This is an action for property damage. In motion sequence 003, defendant Sam Weiner (“Weiner”) now moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the amended complaint (“Complaint”) of plaintiff, Faye Ran (“Plaintiff”). In motion sequence 004, defendant 451 West Broadway Cooperative, Inc. (the “Co-op”), now moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the Complaint. The motions are consolidated for disposition.

*Factual Background*

Plaintiff is a shareholder and tenant residing in the property located at 451 West Broadway, New York, New York (the “property”). Weiner resides in the apartment directly above Plaintiff. The Co-op owns the property. The Complaint alleges that on November 5, 2011, a leak in Weiner’s apartment caused Plaintiff’s ceiling to collapse into her apartment, causing substantial damage to the ceiling, walls, light fixtures, flooring and personal property therein (Compl. ¶¶22, 26). The Complaint further alleges that as a result of the leak, Plaintiff suffered a total monetary loss of \$147,986.72 (*id.*, ¶¶29, 30). Plaintiff’s insurance company reimbursed her

in the amount of \$121,080 (*id.*) Plaintiff further alleges that Weiner denied Plaintiff's requests to reimburse her the balance exceeding her insurance: \$26,906.72 (*id.*, ¶¶30, 31). And Plaintiff alleges that the Co-op has refused to enforce the provisions of the Proprietary Lease and House Rules, which are incorporated by reference into the Proprietary Lease, requiring Weiner to reimburse Plaintiff for the balance of damages caused by the leak (*id.*, ¶¶ 55-57). Plaintiff further alleges that she was an intended third-party beneficiary of the Proprietary Lease, and thus, Weiner assumed a liability and a duty to reimburse Plaintiff for the damage caused by the leak in his apartment (*id.*, ¶46). The Complaint further asserts that pursuant to the Proprietary Lease the Co-op is required to enforce the House Rules requiring Weiner to reimburse Plaintiff for the damages caused by the leak (*id.*, ¶¶55-57).

The Complaint alleges breach of contract against Weiner, seeking monetary damages in the amount of \$26,906.72, with interest (first cause of action), and breach of contract against the Co-op. As a remedy for the latter claim, Plaintiff seeks specific performance: namely, that the Co-op enforce the House Rules by requiring Weiner to reimburse Plaintiff for the balance of damages (second cause of action).

*Motion Sequence 003*

*Weiner's Motion to Dismiss*

In support of his motion to dismiss, Weiner argues that Plaintiff does not have standing to bring her breach of contract claim, since she was not an intended third-party beneficiary of the Proprietary Lease and House Rules. In support of his argument, Weiner submits the Proprietary Lease and House Rules and contends that the provisions contained therein do not clearly confer a direct benefit on Plaintiff. Specifically, Plaintiff was not named as an intended beneficiary in the

Proprietary Lease and that neither the Lease nor House Rules contains a promise to any tenant of the property for indemnification. Moreover, Weiner argues that Plaintiff is an incidental third-party beneficiary.

Weiner additionally argues that Plaintiff's claim against the Co-op for specific performance fails, since Plaintiff has already been reimbursed in part for the damages and the Complaint seeks monetary damages.

*Plaintiff's Opposition*

In opposition, Plaintiff argues that she is an intended third-party beneficiary of the Proprietary Lease. Specifically, Plaintiff argues that Section 11 of the Proprietary Lease and Section 11 of the House Rules entered into by Weiner and the Co-op is intended to benefit Plaintiff and other tenants in instances where a leak in one tenant's apartment causes damage to another tenant's apartment. Plaintiff further argues that despite multiple demands to the Co-op to enforce the House Rules, the Co-op has refused to present the dispute to the Board.

Further, Plaintiff argues that the Proprietary Lease and House Rules do not contain an express provision that explicitly prohibits third-party beneficiaries. Moreover, Plaintiff argues that Weiner's challenge that Plaintiff is not an intended third-party beneficiary raises a question of fact.

In response to Weiner's contention that Plaintiff's claim for specific performance should be denied, Plaintiff argues that the claim seeks only specific performance from the Co-op.

Finally, Plaintiff argues that Weiner's motion should be denied under the law of the case, since the Court addressed identical arguments that Weiner currently makes under the motion to dismiss standard in resolving Plaintiff's motion for leave to amend the complaint (E-file Doc No.

4).

*Weiner's Reply*

In reply, Weiner argues that Plaintiff failed to plead facts that demonstrate that she was clearly intended to be a beneficiary of the Proprietary Lease. Moreover, Weiner argues that no question of fact is raised, since the Proprietary Lease conclusively establishes that Plaintiff is not an intended third-party beneficiary.

As to Plaintiff's argument that Weiner's motion should be denied under the law of the case doctrine, Weiner argues that "the court expressly instructed [Weiner] to file a motion to dismiss following the Plaintiff's Amended Complaint" (Weiner Reply Aff. at ¶12).

Finally, with regard to Plaintiff's claim for specific performance against the Co-op, Weiner argues that Plaintiff's pleadings admit that there is a remedy in law for the alleged damages, and Plaintiff fails to demonstrate that monetary damages are an inadequate remedy.

*Discussion*

Where a motion to dismiss is based on documentary evidence pursuant to CPLR 3211(a)(1), the claim will be dismissed "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 211 [1st Dept 2013]), if so, "a motion for dismissal will fail" (*id.*). On a motion to dismiss made pursuant

to CPLR 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs “the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 104 A.D.3d 401, 403 [1st Dept 2013]).

A party asserting third-party beneficiary rights under a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental (*Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d 364, 807 N.Y.S.2d 353 [1st Dept 2006]). “One is an intended beneficiary if one's right to performance is appropriate to effectuate the intention of the parties' to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance” (*id.*, [internal citations and quotation marks omitted]).

“The parties' intent to benefit the third party must be apparent from the face of the contract” (*LaSalle Nat'l Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 108 [1st Dept 2001] [internal citations omitted]). “Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent” (*id.*, citing *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 45, 485 N.E.2d 208 [1985]; see *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 105 A.D.3d 639, 640 [1st Dept 2013] [dismissing third-party beneficiary claim because, on its face, the contract lacked any clear language evincing an intent to benefit third parties]). An intended beneficiary of a contract may maintain an action as a third party, but an incidental beneficiary may not maintain an action (*Alicea v City of New York*, 145 A.D.2d 315, 317 [1st Dept 1988]). Further, “the

best evidence of [an] intent to bestow a benefit upon a third party is the language of the contract itself" (*243-249 Holding Co., LLC v Infante*, 4 A.D.3d 184, 185 [1st Dept 2004]). Courts have applied this rule in the context of lease agreements (*Girlshop, Inc. v. Abner Properties Co.*, 5 A.D.3d 141, 141, 772 N.Y.S.2d 506 [1st Dept 2004] [dismissing third-party beneficiary claim where there was "no clear indication that the parties to the lease intended to confer upon plaintiff the right to enforce" the relied upon lease provision]).

Here, Plaintiff has failed to plead facts to show that Weiner and the Co-op intended the Proprietary Lease and House Rules to confer a direct benefit to Plaintiff to reimburse her for the property damage caused by the leak. Section 11 of the Proprietary Lease states:

"The Lessor has adopted House Rules which are appended hereto, and the Directors may alter, amend, or repeal such House Rules and adopt new House Rules. This Lease shall be in all respects subject to such House Rules which, when a copy thereof has been furnished to the Lessee, shall be taken to be part hereof, and that Lessee hereby covenants to comply with all such House Rules...B[re]ach of the House Rules shall be a default under this Lease. The Lessor shall not be responsible to the Lessee for the nonobservance or violation of House Rules by any other lessee or person"

(Proprietary Lease, Section 11, Ex. A to Compl.).

Plaintiff also cites to Section 11 of House Rules which provides that, "[d]amage caused by any water leakage is the responsibility of the Lessee in whose floor the leak originated . . . ."

(House Rules, Section 11, Ex. B to Compl.).

Neither the Proprietary Lease, nor House Rules clearly confer rights to Plaintiff or any third-party. Specifically, there is nothing in the plain language of the Proprietary Lease or House Rules indicating that Weiner would be liable to Plaintiff for damages caused by the leak. While Section 11 of the House Rules indicates that damages caused by a water leak is the responsibility

of the lessee whose apartment the leak originated, it does not clearly indicate that a third-party may enforce that provision. Instead, Plaintiff is an incidental beneficiary of the Proprietary Lease and House Rules, since she may derive a benefit from the performance of the contract, but is neither the promisee nor the one to whom performance is to be rendered (*see Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp.*, 291 A.D.2d 40, 58 [1st Dept 2001]). Therefore, Plaintiff lacks standing to bring its breach of contract claim as against Weiner.

Plaintiff's argument that the doctrine of the law of the case precludes Weiner's motion to dismiss pursuant to CPLR 3211 based on a prior order granting Plaintiff's motion for leave to amend the complaint, fails, as the standard to amend a pleading is less exacting than a motion to dismiss pursuant to CPLR 3211 (*see A.L. Eastmond & Sons, Inc. v. Keevily, Spero-Whitelaw, Inc.*, 107 A.D.3d 503, 503 [1st Dept 2013]; *Bodtman v. Living Manor Love, Inc.*, 105 A.D.3d 434 [1st Dept. 2013]). Parenthetically, Plaintiff fails to attach the Court's order or hearing transcript resolving her motion for leave to amend the complaint.

As Plaintiff is not a third-party beneficiary of Weiner's Proprietary Lease with the Co-op, Weiner's motion to dismiss the Complaint as against Weiner, pursuant to CPLR 3211(a)(1) and (7), is granted.

*Motion Sequence 004*

*The Co-Op's Motion to Dismiss*

In support of its motion to dismiss, the Co-op argues that the Proprietary Lease and House Rules demonstrate that it was not responsible for Weiner's alleged violation of the House Rules and had no duty to enforce any alleged violation of the House Rules by Weiner. Specifically, the



Co-op relies on the last line of Section 11 of the Proprietary Lease, which states, “[t]he Lessor shall not be responsible to the Lessee for the nonobservance or violation of House Rules by any other lessee or person.”

Additionally, the Co-op argues that specific performance is not a proper remedy, since Plaintiff seeks monetary damages against Weiner and fails to allege that the Proprietary Lease is unique or special.

#### *Plaintiff's Opposition*

In opposition, Plaintiff argues that her claim against the Co-op is not refuted by the Proprietary Lease, as she is only seeking that the Co-op comply with its contractual obligation to enforce Section 11 of the House Rules against Weiner. Plaintiff further argues that the Co-op's argument that it is not obligated to enforce violations of the House Rules or that it may enforce the rules in an arbitrary and capricious manner would render the contract illusory.

Next, Plaintiff argues that she is an intended third-party beneficiary to the agreement between Weiner and the Co-op.<sup>1</sup> Further, Plaintiff argues that she is entitled to specific performance of the contract since there is no substitute to the Co-op voting to enforce the House Rules. Plaintiff further requests that in the event that her claim for specific performance is dismissed, the court permit her to amend the Complaint to add a claim for declaratory judgment declaring the rights of Plaintiff *vis-a-vis* the Co-op under the Proprietary Lease.

#### *The Co-op's Reply*

In reply, the Co-op argues that Section 11 of the Proprietary Lease demonstrates that the Co-op has no duty to enforce any violation of the House Rules. Next, the Co-op argues that

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<sup>1</sup> Plaintiff's argument in opposition to the Co-op's motion to dismiss on the basis that she is not a third-party beneficiary mirrors her argument against Weiner's motion to dismiss on the same basis.

Plaintiff's purported claim that the Co-op enforced the House Rules arbitrarily and capriciously fails, since Plaintiff failed to allege that the Co-op breached its fiduciary duty and acted in bad faith. Moreover, a claim for breach of fiduciary duty and bad faith is time-barred. Further, the Co-op argues that Plaintiff's claim seeking specific performance fails, since she is seeking specific performance by the Co-op to effectively to obtain money damages from Weiner.

Finally, the Co-op argues that Plaintiff's request that she be permitted to amend the Complaint to seek declaratory judgment should be denied, since Plaintiff's claim that the Co-op's alleged "arbitrary and capricious" enforcement of the House Rules should have been asserted under an article 78 proceeding.

#### *Discussion*

"It is well settled that the elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*Auburn Custom Millwork, Inc. v. Schmidt & Schmidt, Inc.*, 148 A.D.3d 1527, 1529, 50 N.Y.S.3d 635, 637 [1st Dept 2017] [internal citations and quotation marks omitted]).

"In general, specific performance is appropriate when money damages would be inadequate to protect the expectation interest of the injured party (Restatement [Second] of Contracts § 359; *see also Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 415, 754 N.E.2d 184) and when performance will not impose a disproportionate or inequitable burden on the breaching party" (*Cho v. 401-403 57th St. Realty Corp.*, 300 A.D.2d 174, 175 [1st Dept 2002]; *see* Restatement [Second] of Contracts § 364[1] [b]; *Van Wagner Advertising Corp. v. S & M Enterprises*, 67 N.Y.2d 186, 193, 492 N.E.2d 756 [1986]).

At the outset, as to Plaintiff's breach of contract claim against the Co-op, the parties only dispute whether the Co-op breached its agreement with Plaintiff by failing to require Weiner to reimburse Plaintiff for the damages caused by the alleged leak in Weiner's apartment. Even so, Plaintiff's claim of breach is refuted by the Proprietary Lease itself. The last line of the Section 11 of the Proprietary Lease clearly indicates that the Co-op may not be responsible for the violation of the Proprietary Lease and House Rules by other lessees such as Weiner.

Even if Plaintiff's claim for breach of contract were viable, the equitable remedy of specific performance is inappropriate here. Notably, the performance that Plaintiff seeks is one that would force the Co-op to require Weiner to pay Plaintiff damages. Clearly, Plaintiff's application for specific performance is an indirect attempt to recover monetary damages. The remedy of specific performance is not appropriate in such circumstances.

Plaintiff's footnote request that she be permitted leave to amend the Complaint a second time to add a claim for declaratory judgment under CPLR 3001 is denied as it was improperly raised in opposition papers and not in a notice of motion. In any event, while leave to amend a pleading should be "freely given" (CPLR 3025[b]) "as a matter of discretion in the absence of prejudice or surprise" (*Stroock & Stroock & Lavan v. Beltramini*, 157 A.D.2d 590, 591, 550 N.Y.S.2d 337 [1990]; *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959, 471 N.Y.S.2d 55, 459 N.E.2d 164 [1983]), Plaintiff's proposed claim for declaratory judgment is unlikely to be successful on the merits, since, as addressed above, the Co-op is not responsible to Plaintiff for a violation of the Proprietary Lease and House Rules by any other tenant (*see Megaris Furs v. Gimbel Bros.*, 172 A.D.2d 209, 568 N.Y.S.2d 581 [1991]).

As Plaintiff cannot make out a claim for breach of contract, the Co-op's motion to dismiss the Complaint, as against it, pursuant to CPLR 3211(a)(1) and (7), is granted.

**CONCLUSION**

Accordingly, it is hereby,

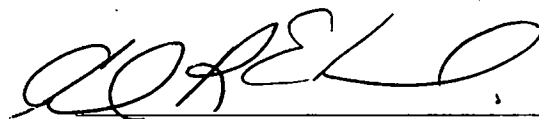
**ORDERED** that the notice of motion of defendant Sam Weiner to dismiss the Complaint is granted in its entirety, and the Complaint and the proceeding are dismissed as against defendant Sam Weiner. It is further

**ORDERED** that the notice of motion of 451 West Broadway Cooperative, Inc., to dismiss the Complaint is granted in its entirety, and the Complaint and the proceeding are dismissed as against defendant 451 West Broadway Cooperative, Inc. It is further

**ORDERED** that defendant Sam Weiner shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 12, 2017



Hon. Carol Robinson Edmead

**HON. CAROL R. EDMead**  
J.S.C.