

1267 LRM Corp. v LB Assoc. Inc.

2017 NY Slip Op 33346(U)

June 11, 2017

Supreme Court, Bronx County

Docket Number: Index No. 21150/2015E

Judge: Ben R. Barbato

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 21

-----X
1267 LRM CORPORATION d/b/a
EL-VALLE RESTAURANT AND SPORTS BAR,

Index No.: 21150/2015E

DECISION/ORDER

Plaintiff,

-against-

LB ASSOCIATES INC. and
JEROME TROPICAL INC.,

Defendants.

-----X

HON. BEN R. BARBATO:

Plaintiff commenced this declaratory action to obtain a satisfaction of a debt. Defendant LB Associates, Inc. (hereinafter "LB") seeks dismissal of the complaint as against it under CPLR 3211(a)(1) and (7). Alternatively, LB seeks relief under CPLR 3024(a).

The motion is determined as follows:

Plaintiff alleges that pursuant to a contract agreement, dated November 25, 2012,¹ it purchased a restaurant and sports bar business from LB.² In connection with the purchase, plaintiff alleges it made payments totaling forty-nine thousand (\$49,000.00) dollars to LB pursuant to the terms and conditions of a promissory note and security agreement (collectively, "the Note"). Plaintiff asserts that LB was obligated to issue a UCC-3 termination, a satisfaction of the Note, and a cancellation of the collateral assignment of lease (hereinafter "the Assignment"). According to

¹The verified complaint lists the date of the contract as November 25, 2012, however, the contract itself is dated one year later, November 25, 2013.

²The verified complaint lists defendant Jerome Tropical Inc. (hereinafter "Jerome") as a party defendant for notice purposes only, and seeks no affirmative relief as against it.

plaintiff, LB has not complied with its obligations to do so. Plaintiff further alleges that as a result of LB's failure to issue the satisfaction pieces and cancel the Assignment, plaintiff has been unable to secure a new lease from the landlord for the subject premises, effectively preventing plaintiff from obtaining a liquor license to operate the business. LB alleges that this declaratory judgment action should be dismissed for failure to state a cause of action on the ground that documentary evidence establishes that there was no privity of contract between plaintiff and LB.

“[O]n a CPLR 3211 motion to dismiss, the Court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference” (*Simkin v Blank*, 80 AD3d 401 [1st Dept 2011])[internal citation and quotation marks omitted]; *see Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83 [1994]). The Court's role in determining such a motion is to ascertain whether “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 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). However, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not presumed to be true (*see David v Hack*, 97 AD3d 437 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1995]).

Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the movant submits documentary evidence conclusively establishing defenses to the complaint as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]; *Mill Financial, LLC v Gillett*, 122 AD3d 98 [1st Dept 2014]; *Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436 [1st Dept

2014)). In order to be considered documentary, the evidence must be unambiguous and of undisputed authenticity (see *Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431 [1st Dept 2014], citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21-22; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 [1st Dept 2008]).

LB submits a copy of the verified pleadings, which includes a barely legible copy of the contract between Jerome and plaintiff.” The contract appears to identify Jerome as transferor and plaintiff as transferee, both of which are corporate entities. However, the signatures on the second page of the contract are signed by two individuals identified solely as “seller” and “purchaser” without any clarification as to whether they had the authority to bind the respective corporate defendants or if they were executing the contract on behalf of themselves as individuals.

Plaintiff, in opposition,³ submits an affidavit of merit from Luis Rodriquez, plaintiff's president, and copies of numerous cancelled checks made payable to LB, each in the amount of \$1,100.00.⁴ Rodriguez avers that although the contract of sale for the restaurant and bar was between plaintiff and Jerome, all payments made in connection with the Note were made to LB. Plaintiff contends that it had paid the contract in full, satisfying the condition precedent necessary for the issuance of the UCC-3 Termination, satisfaction of the Note, and cancellation of the Agreement. Notably, LB does not dispute having received the payments or that they were made in connection with the purchase of the business.

³That Jerome and LB are co-defendants in an unrelated action is immaterial to the resolution of this motion.

⁴The checks submitted in opposition exceed the amount plaintiff alleges it paid LB pursuant to the Note.

The evidence submitted herein is insufficient to warrant dismissal of the complaint pursuant to CPLR 3211(a)(1) or (7). Neither party presents a copy of the Note, the Assignment or the UCC-1, thus, the Court cannot conclusively determine that the contract is the sole document that could establish that there was no agreement between the two parties. Additionally, it cannot be said as a matter of law that the complaint fails to set forth a cognizable cause of action (*see African Diaspora Maritime Corp. v Golden Gate Yacht Club*, supra; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, supra).

As to that branch of LB's motion seeking alternative relief pursuant to CPLR 3024(a),⁵ "[t]he criteria for granting a motion for a more definite statement are: (1) the challenged pleading is vague or ambiguous; and (2) that a party cannot reasonably be required to frame a response. Thus, a motion for a more definite statement will be granted, where: one or more of the complaint allegations is so indefinite or uncertain that its precise meaning or application is not reasonably apparent[; or] a pleading is so obscure, uncertain, confused, or unintelligible that a party reasonably cannot draft a response[; or] theories of liability or causes of action are so unclear that the adverse party cannot reasonably be required to frame a response" (6A Carmody-Wait 2A § 37:21[2017]).

Here, LB argues that the complaint is too vague because it fails to allege any fact, transaction or agreement that would give rise to liability on LB's part. When determining a motion for a more definite statement, neither the truth of a plaintiff's factual allegations nor the validity of a defendant's denial and/or defenses are considered (*see e.g. State v Monarch Chemicals, Inc.*, 111 Misc.2d 343 [1981], *aff'd in part*,

⁵The evidence submitted herein by LB establishes that the instant motion is late, having been made 51 days after service was made upon the Secretary of State for LB (*see* CPLR 3024[c]). In an exercise of discretion, the Court shall entertain the request (*see* CPLR 2004).

appeal dismissed in part, 90 AD2d 907 [3d Dept 1982]). CPLR 3024(a) does not require a plaintiff to plead with specificity (cf. CPLR 3016). LB seeks, in effect, amplification of a pleading, relief better addressed by a bill of particulars rather than through a motion for a more definite statement (*see e.g. Cooper v Van Cortlandt Associates*, 54 AD2d 545 [1st Dept 1976]).

For the foregoing reasons, it is hereby ordered that defendant LB's motion seeking dismissal of the complaint is denied in its entirety.

This constitutes the decision and order of the court.

Dated: June 18, 2017


Ben R. Barbato, J.S.C.