Budow Sales Corp. v G. Holdings Corp.
2018 NY Slip Op 30493(U)
March 21, 2018
Supreme Court, New York County
Docket Number: 650433/2013
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19

KELLY O'NEILL LEVY *Justice*
JSC

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BUDOW SALES CORP., ALISON BUDOW SALES, INC. A/K/A THE BUDOW GROUP,

Plaintiff,

- v -

G. HOLDINGS CORP., GRANITE COMPANY, MILLENIUM REALTY GROUP LLC, ELI DAHAN, ELI DAHAN D/B/A STUDIO 33, ACREX, INC., USA D/B/A AVELON

Defendant.

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INDEX NO. 650433/2013

MOTION DATE 9/6/2017

MOTION SEQ. NO. 011

DECISION AND ORDER

KELLY O'NEILL LEVY, J.:

This is an action for breach of contract and fraud where a defendant allegedly sub-subleased a space to a plaintiff, who was eventually locked out of the premises.

Plaintiffs Budow Sales Corp., Alison Budow Sales, Inc. a/k/a The Budow Group move, pursuant to CPLR § 3212, for summary judgment in their favor against defendant Eli Dahan (hereinafter, Dahan), individually, and Eli Dahan d/b/a Studio 33 (hereinafter, Studio 33). Dahan opposes and cross-moves, pursuant to CPLR § 3211, to dismiss the complaint based upon documentary evidence and that the complaint fails to state a claim. Dahan also cross-moves, pursuant to CPLR § 3212, for summary judgment in his favor as to liability as set forth in the complaint. Plaintiffs oppose.

BACKGROUND

Years ago, plaintiff Barry Budow, the principal operator of a fashion product marketing enterprise, along with his daughter, Alison Budow, the operator of a fashion industry marketing company with a separate line of designer goods, decided to expand their West Coast operation to New York. At a prior facility, Dahan was a co-tenant with the Budows who did business under the name of "Studio 33." Dahan was looking for space to share as co-tenants for both of their companies and eventually found a space at 214 West 39th Street, Suite 403 (hereinafter, the premises).

In early 2012, Barry Budow, along with his wife and daughter (hereinafter, the Budows), went to see the premises and met with a man named "John," who stated that he was the representative of Acrex, Inc. (hereinafter, Acrex), which held the master lease for the premises [Barry Budow Aff. (ex. S to the Schwartzberg aff.) at ¶ 9-11]. John represented that he was responsible for overseeing and leasing the premises (*id.* at ¶ 13). John explained to the Budows that he was in the process of moving Acrex out of the premises (*id.* at ¶ 12-13). He encouraged the Budows and Dahan to take the space from Acrex (*id.* at ¶ 16). John discussed figures and occupancy details with the Budows and indicated that Dahan had informed him of the Budows' intentions as to the co-tenancy (*id.* at ¶ 16-17). John stated that if the Budows liked the space, they could have it and lease it along with Dahan as co-subtenants (*id.* at ¶ 19).

Plaintiffs allegedly orally agreed to sublease the premises, along with Dahan. John, Dahan, and Mr. Budow made an oral arrangement at the premises on that same day and "shook hands on it" (*id.* at ¶ 23). John specified that a sublease would be forwarded to Dahan and that they were approved by Acrex pursuant to his exclusive authority (*id.* at ¶ 24). John arranged for a written sublease agreement between Acrex and Dahan, dated as of June 26, 2012 (hereinafter,

the sublease agreement) [Sublease Agreement (ex. J to the Schwartzberg aff.)]. The sublease agreement is subject to a master lease agreement between the landlord, 214 West 39th Street LLC, and Acrex. The term of the sublease agreement was from July 25, 2012 (the date of the master landlord's consent to the sublease) to December 30, 2013 (*id.*).

Plaintiffs allege that they were equal co-subtenants with Dahan, but only Dahan's corporation's name, Studio 33 Inc., appears in the sublease agreement, and only representatives of Acrex and Dahan are signatories to the sublease agreement (*id.*). Dahan alleges that, acting on behalf of Studio 33, he entered into an oral arrangement with plaintiffs whereby plaintiffs would pay rent for the use of the premises pursuant to a sub-sublease [Deposition of Eli Dahan (ex. G to the Schwartzberg aff.) at 27-28].

Studio 33 received the following rent checks from plaintiffs: June 30, 2012 ($3,000.00); August 1, 2012 ($1,100.00); September 2, 2012 ($1,000.00); October 3, 2012 ($1,000.00); November 3, 2012 ($1,000.00); December 3, 2012 ($1,000.00) [Checks (ex. H to the Schwartzberg aff.)]. Dahan testified that plaintiffs paid all the rent for use of the premises and that he deposited, endorsed, and utilized the checks for rent [Eli Dahan Deposition (ex. G to the Schwartzberg aff.) at 68, 90]. The monthly account statements maintained by JP Morgan Chase confirm the rental payment deposits [JP Morgan Chase Deposit History (ex. P-1-9 to the Schwartzberg aff.)].

On or about January 10, 2013, Mr. Budow was informed that Dahan had moved out of the premises and that John had arranged for the tenants to be locked out [Barry Budow Aff. (ex. S to the Schwartzberg aff.) at ¶ 50-51]. Mr. Budow later found out that the locks had been changed, entry to the premises was not possible, his belongings inside the premises were missing, and that Dahan was no longer in business as Studio 33 (*id.* at ¶ 52-53).

Pursuant to the July 24, 3013 Order of Justice Anil Singh (hereinafter, the July 2013 Order), the first cause of action in the complaint, seeking declaration that plaintiffs are permitted to remain at the premises, was dismissed; and the fourth and fifth causes of action for business interruption and constructive and actual eviction, respectively were dismissed. The only defendants remaining in this action are Eli Dahan, individually, and Eli Dahan d/b/a Studio 33. John is not a named party in this action. The sole remaining causes of action are for breach of contract and fraud.

DISCUSSION

Plaintiffs move, pursuant to CPLR § 3212, for summary judgment in their favor on the remaining claims. Dahan cross-moves, pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7), to dismiss the complaint, and alternatively, pursuant to CPLR § 3212, for summary judgment in his favor on the remaining claims.

Legal Standards

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

When considering a motion to dismiss made pursuant to CPLR 3211, the court's "task is to determine whether plaintiffs' pleadings state a cause of action." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-152 (2002). The court must construe plaintiffs' pleadings liberally (*see Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]), and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. *See 511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152. The court must accord plaintiffs "the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."

When moving under CPLR § 3211(a)(1), the defendant has the burden of submitting documentary evidence that, on its own, "resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim." *Fortis Fin. Svcs, LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 383 (1st Dep't 2002) (citing to *Scadura v. Robillard*, 256 A.D.2d 567 [2d Dep't 1998]). Dismissal of a complaint on the ground of documentary evidence is warranted where the evidence submitted conclusively establishes a defense as a matter of law. *See 150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004).

CPLR § 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The court must also accept as true all the facts alleged in the complaint and any factual submissions made in opposition to the motion. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). If the court "determine[s] that the plaintiff [is] entitled to relief on any reasonable view of the facts stated, [its] inquiry is complete" and the complaint must be declared legally sufficient. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995).

Arguments

Plaintiffs argue that Dahan, by his words and conduct, entered into a sub-sublease with plaintiffs, thereby waiving any reliance on language prohibiting further subleasing of the premises in the sublease agreement. At no time did Dahan or Studio 33 have a written agreement with any of the plaintiffs, nor did Dahan obtain written consent for a sub-sublease from the landlord or from Acrex.

Dahan argues that he was never involved in any lease or sublease transaction in his own personal and individual capacity, nor did he ever collect or pay rent. Dahan asserts that he acted on behalf of his employer, Studio 33. The sublease agreement is between Acrex and Studio 33, not Dahan individually. Dahan further contends that he is the wrong party named in this action. Dahan also argues that plaintiffs do not plead a cause of action for piercing the corporate veil, and so he could not be held personally or individually liable to plaintiffs. Dahan asserts that the failure of a sub-subtenant to pay rent to a master subtenant does not in itself form the basis for an action for damages; this would only be the case if the failure to pay rent proximately caused an eviction. The court had found in its July 2013 Order that there was no constructive or actual eviction from the premises. Dahan further argues that Acrex, and not Dahan, locked plaintiffs out of the premises. Finally, Dahan contends that plaintiffs have no contract claim against Dahan and that plaintiffs have no claim for damages resulting from an alleged lockout of a space for which it never had a legal tenancy.

Plaintiffs further claim that Dahan previously moved to dismiss, pursuant to CPLR § 3211, based upon documentary evidence and failure to state a cause of action, and pursuant to CPLR § 3212, for summary judgment, which was denied in the July 2013 Order. Plaintiffs assert that the present cross-motion should be denied because same violates CPLR § 3211(e),

which permits only one such motion, as well as the judicial policy barring a party filing more than one motion for summary judgment in the absence of any evidence supporting the same. Plaintiffs also argue that the July 2013 Order found that a question of fact existed as to whether Dahan acted in an individual or corporate capacity regarding his relationship with plaintiffs. Plaintiffs assert that Dahan had dealt with plaintiffs in an individual capacity. Finally, plaintiffs argue that Studio 33 was an inactive corporation as of December 29, 1999, therefore there is no factual basis for the assertion that plaintiffs should have named Studio 33 as a party defendant.

Analysis

CPLR § 3211(e) states in part, "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted." If a previous motion to dismiss is denied by another Justice of the Supreme Court, a defendant's same motion to dismiss the complaint is barred by CPLR § 3211(e). *See Facundo, S.A. v. Pressman*, 233 A.D.2d 117, 117 (1st Dep't 1996). Here, defendant has twice previously moved under CPLR § 3211. In the July 2013 Order and in this court's Order, dated April 11, 2016, the motion was denied. Therefore, defendant's present motion to dismiss is denied.

"The defense of failure to state a cause of action is not lost, however, by failure to include this ground in the motion under 3211 (internal citation omitted). Although it may not be raised in another motion under that section (of which the statute permits only one) it may be later raised in another form (internal citation omitted)." *McLearn v. Cowen & Co.*, 60 N.Y.2d 686, 689 (1983). The single motion rule does not prevent a motion for summary judgment from being made on the same ground which had earlier been advanced in a motion to dismiss. *Tapps of Nassau Supermarkets, Inc. v. Linden Blvd., L.P.*, 269 A.D.2d 306, 307 (1st Dep't 2000). Here,

plaintiffs fail to make a prima facie showing that there is no triable material issue of fact. The remaining causes of action are for breach of contract and fraud. Plaintiffs do not mention or argue the elements of either cause of action with specificity or with citation to relevant case law in their motion papers, affirmations, or replies.

Despite plaintiffs' failure to argue the elements of breach of contract, the court will consider the breach of contract claim. The elements of a breach of contract claim are the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages. *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Here, the alleged oral arrangement between John, plaintiffs, and Dahan manifested itself in a written sublease agreement between Acrex and Studio 33, as well as, at most, an oral license for plaintiffs to use the premises. The July 2013 Order states that an actual, formal instrument naming Budow as a subtenant or co-subtenant is not produced. Plaintiffs have not produced evidence of any such formal, written agreement. There is no other evidence of a co-tenancy between plaintiffs, Dahan, and Acrex, as this notion is contradicted by the sublease agreement which makes no reference to plaintiffs. There is also not enough evidence to establish a sub-subtenancy between plaintiffs and Dahan. The terms of such a tenancy or license are not clear, and if the oral arrangement was for a tenancy of over one year, such an agreement would need to be in writing to comply with the Statute of Frauds. McKinney's General Obligations Law § 5-701(a)(1). The July 2013 Order also states that arguably, the rental rate, based on the amount paid by plaintiffs of Studio 33, is ascertainable, but no other material terms of the sublease, including the term possession, are alleged; it further states that if it is an oral sublease based on the same terms of the written sublease, this would violate the Statute of Frauds, as the sublease's term is longer than one year. The July 2013 Order has not been appealed and remains the law of

the case. *See Martin v.* Cohoes, 37 N.Y.2d 162, 165 (1975). There is no contract between plaintiffs and Dahan and there could be no breach of contract claim. Therefore, the breach of contract claim is dismissed.

Despite plaintiffs' failure to argue the elements of fraud, the court will consider the fraud claim. The elements of a cause of action for fraud are a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009); *New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)." *Eurycleia Partners, LP*, 12 N.Y.3d 553, 559. "General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim (internal citations omitted)." *New York University*, 87 N.Y.2d 308, 318. The July 2013 Order states that the Budow affidavit alleges specific fraudulent misrepresentations allegedly made by John that Budow relied upon to his detriment. The July 2013 Order also states that the representations alleged by plaintiffs are sufficient to meet the particularity standards of CPLR 3016(b), that Mr. Budow was induced into entering the space based on an alleged material misrepresentation by John, that John had the authority on behalf of Acrex to consent to the sublet, and that Budow was a co-subtenant of Dahan. The July 2013 Order was decided while Acrex was still a party defendant to this case. While Dahan introduced plaintiffs to John, this does not establish privity between Dahan and plaintiffs such that Dahan would be responsible for John's alleged material misrepresentations. Plaintiffs' allegation that Dahan entered into an oral agreement with them with no intention to comply with that agreement is not supported by the evidence. Therefore, the claim of fraud is dismissed.

The court considers Dahan's argument that the failure of a sub-subtenant to pay rent to a master subtenant does not in itself form the basis of an action for damages; only in the case where failure to pay rent proximately caused an eviction could that possibly form the basis for damages. The July 2013 Order states that there was no actual or constructive eviction in this case. There is no evidence indicating that plaintiffs were evicted due to non-payment of rent by Dahan or anyone else. Therefore, the court finds no basis for damages under the theory that plaintiffs failed to pay rent to Dahan, or that Dahan failed to pay rent to Acrex or any other landlord.

Plaintiffs concede that they never pled a cause of action based on piercing the corporate veil. The sublease agreement is between Acrex and Studio 33, and it contains Dahan's signature on behalf of Studio 33. All of plaintiffs' rent checks were made out to Studio 33. Therefore, the court finds that Dahan could not individually be held liable for damages resulting from actions he had taken on behalf of his employer, Studio 33.

Thus, Dahan's cross-motion to dismiss is denied, plaintiffs' motion for summary judgment in their favor is denied, and Dahan's cross-motion for summary judgment in his favor is granted.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Defendant Eli Dahan's cross-motion, pursuant to CPLR § 3211, to dismiss the complaint based upon documentary evidence and failure to state a claim is denied; and it is further

ORDERED that Plaintiffs Budow Sales Corp., Alison Budow Sales, Inc. a/k/a The Budow Group's motion, pursuant to CPLR § 3212, for summary judgment in their favor is denied; and it is further

ORDERED that Defendant Eli Dahan's cross-motion, pursuant to CPLR § 3212, for summary judgment in his favor as to liability as set forth in the complaint is granted; and it is further

ORDERED that the complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

3/21/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
KELLY O'NEILL LEVY
JSC

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