

**AARK Hospitality Staten Island BC TK LLC v
Bricktown Pass, LLC**

2018 NY Slip Op 32374(U)

August 27, 2018

Supreme Court, Richmond County

Docket Number: 150718/18

Judge: Jr., Orlando Marrazzo

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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AARK Hospitality Staten Island BC TK LLC and AMOL KOHLI,

DCM Part 21
Present:
Hon. Orlando Marrazzo

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 150718/18
Motion No. 2160-002

BRICKTOWN PASS, LLC,

Defendant.

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BRICKTOWN PASS, LLC,

Index No. LT-050738-18/RI
Consolidated Action

Petitioner/Landlord,

-against-

AARK Hospitality Staten Island BC TK LLC and AMOL KOHLI,

Respondents/Tenants.

Premises:
185 Bricktown Way, Unit D, Staten Island, New York 10309
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The following papers numbered 1 to 3 were marked submitted on the 19th day of June, 2018:

	Papers Numbered
Notice of Motion to Dismiss and for Summary Judgment By Defendant Bricktown Pass, LLC, with Supporting Papers and Exhibits (dated May 11, 2018)	1
Memorandum of Law in Opposition to Defendant's Motion By Plaintiffs AARK Hospitality Staten Island BC TK LLC and Amol Kohli (dated June 12, 2018)	2
Reply Affirmation in Support of Motion By Defendant Bricktown Pass, LLC (dated June 15, 2018)	3

Upon the foregoing papers, the motion to dismiss by Defendant Bricktown Pass, LLC is denied.

This is an action to recover damages for breach of contract.¹ Plaintiffs seek rescission of the lease, rescission of the personal guaranty, as well as reimbursement of construction costs and rental payments.

On March 16, 2016, plaintiffs AARK Hospitality Staten Island BC TK LLC (hereinafter “AARK”) and Amol Kohli entered into a lease for 5,619 square feet of “leasable floor area” of the shopping center known as “Bricktown Center II” located at 185 Bricktown Way, Unit D, Staten Island, New York (*see* Movant’s Exhibit “B”). According to the lease, the Plaintiffs were permitted to use the subject area as a restaurant under the trade name “Tilted Kilt” (*id.*). Plaintiff Amol Kohli executed a personal guaranty on February 22, 2016 (*id.*). The landlord on the lease was defendant Bricktown Pass, LLC (hereinafter “Bricktown”), and the term of the lease was to run for 15 years, with a 15-year renewal option (*id.*).

According to the Verified Complaint, it is alleged that Defendant Bricktown commenced construction of a movie theater, which “caused significant interference with the Tilted Kilt’s business operations at the premises” (*see* Verified Complaint, paras 21-24). Plaintiffs allege the construction interference included “construction noise during hours of operation, construction vehicles’ placement throughout the shopping plaza, reduction in available parking in and about the premises, construction debris about the premises, and an unsafe environment for AARK’s employees and patrons.” As a result

¹ The Verified Complaint also appears to assert an additional cause of action for negligent misrepresentation. The parties herein refer to the claim as Fraud in the Inducement. Nevertheless, the Court will not address whether “the facts as alleged fit within any cognizable legal theory” under CPLR 3211(a)(7), as the Defendant moved to dismiss pursuant to CPLR 3211(a)(1) based upon documentary evidence.

of the construction, it is alleged “the number of patrons to the Tilted Kilt dropped significantly” (*id.* at 25-26). It is alleged that prior to execution of the lease, Bricktown had assured AARK that the subject movie theater would be completed “prior to or contemporaneously with the opening of the Tilted Kilt” (*id.* at 38-39, 44). Plaintiffs allege that the theater is significantly larger than expected, and that the “increased height and width of the movie theater blocks prospective customers’ view of the Tilted Kilt” (*id.* at 38-41). According to Plaintiffs, the scope and timetable for construction of the movie theater were material to AARK’s execution of the Lease (*id.* at 47).

In this regard, Plaintiffs allege Defendant’s breach of Section 5.2 of the Lease entitled, “Changes to Shopping Center and Site Plan”, which provides that “no such changes, rearrangements or other construction shall reduce the number of parking spaces in the parking areas below the number of parking spaces required by the Declaration and the same shall not materially interfere with access to or visibility of the Premises from the applicable portions of the parking areas and other Common Areas or the conduct of [AARK’s] business in the Premises for the Permitted Use” (*id.* at 54; *see also* Movant’s Exhibit “B”, Shopping Center Lease, p 9). Plaintiffs further allege Defendant’s breach of Section 28.11 entitled “Quiet Enjoyment” (*id.* at 59; *see also* Movant’s Exhibit “B”, Shopping Center Lease, p 61).²

MOTION TO DISMISS

Defendant Bricktown currently moves to dismiss the complaint pursuant to CPLR 3211(a)(1) based on documentary evidence. In support, Defendant cites to the same Section 5.2 of the Lease, relied upon by Plaintiffs. Section 5.2 of the Lease provides that Bricktown, as the landlord “reserves the right at any time “to make or permit changes to the Shopping Center including increasing, reducing or changing

² Plaintiff’s allegations supporting their cause of action for breach of the covenant of quiet enjoyment appear to be similar if not identical to the breach of contract claim.

the number, type, size, location, elevation, nature and use of any of the buildings or Common Areas...”
(see Movant’s Exhibit “B”, Shopping Center Lease, p 9).

In opposition, Plaintiffs assert that Defendant’s motion is deficient due to its failure to submit an affidavit of the Defendant, or by any other admissible or competent proof; and that the motion is solely supported by the attorney affirmation by Robert M. Fishler, Esq (see Affirmation of Brendan T. Lantry, Esq., p 1).

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim (see *Sims v. Prom Realty Co, LLC*, 160 AD3d 1006 [2nd Dept 2018]). In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case (see *First Choice Plumbing Corp v. Miller Law Offs, PLLC*, __AD3d__, 2018 NY Slip Op 05825 [2nd Dept 2018]). A valid lease qualifies as documentary evidence within the intendment of CPLR 3211(a)(1) (see *Sunset Café, Inc v. Mett’s Surf & Sports Corp*, 103 AD3d 707, 709 [2nd Dept 2013]). Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence (see *First Choice Plumbing Corp v. Miller Law Offs, PLLC*, __AD3d__, 2018 NY Slip Op 05825 [2nd Dept 2018]).

Accordingly, the motion is denied. Defendant’s submission of an attorney affirmation and the lease in question are insufficient to utterly refute plaintiffs’ factual allegations. Although the lease may constitute documentary evidence for purposes of CPLR 3211(a)(1), Section 5.2 of the Lease fails to

resolve all factual issues as a matter of law or conclusively dispose of plaintiffs' claims. Here, the language contained in the lease fails to conclusively dispose of the allegations plaintiff asserts against defendant. Indeed, both plaintiff and defendant point to the same contractual provision, Section 5.2 of the Lease, to support their divergent positions. Consequently, that portion of Defendant's motion seeking dismissal of Plaintiff's complaint is denied.

MOTION FOR SUMMARY JUDGMENT

Defendant Bricktown had previously commenced an action³ seeking a judgment of rental arrears pursuant to the lease and Amol Kohli's personal guaranty. It is therein alleged that the tenants have defaulted in the payment of rent since August of 2017 (*see* Movant's Exhibit "A"). The two actions were consolidated in an Order dated April 3, 2018 (*see* Movant's Exhibit "F").

Defendant Bricktown now moves for summary judgment on the consolidated action. It is undisputed that Plaintiffs defaulted on their rental payments and that Plaintiffs have surrendered the premises on March 23, 2018 (*see* Movant's Exhibit "D").

As previously stated, Plaintiffs oppose Defendant's motion on the grounds that it is deficient due to the failure to submit an affidavit of the Defendant, or by any other admissible or competent proof; and that the motion is solely supported by the attorney affirmation by Robert M. Fishler, Esq (*see* Affirmation of Brendan T. Lantry, Esq., p 1).

³ *Bricktown Pass, LLC v. AARK Hospitality Staten Island BC TK LLC and Amol Kohli*, Index No. 50738/2018, Civil Court of the City of New York, County of Richmond

The affidavit or affirmation of any attorney, even if he or she has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form, *e.g.*, documents, transcripts. Such an affidavit or affirmation could also be accepted with respect to admissions of party made in the attorney's presence (*see Zuckerman v. New York*, 49 NY2d 557, 563 [1980]). In the present instance, however, Defendant fails to submit evidentiary proof in admissible form.

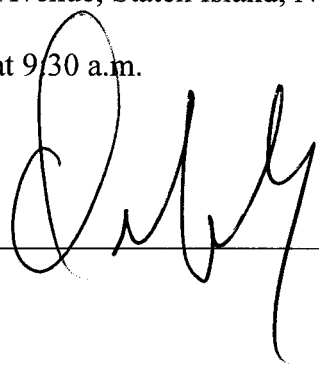
In any event, Plaintiffs should not be permitted to escape or even delay their obligation to pay rent, or to overcome the motion for summary judgment, by raising a feigned issue. On a motion for summary judgment the court must determine whether the factual issue is genuine or unsubstantiated. If the issue claimed to exist is not genuine, but feigned, and there is in truth nothing to be tried summary judgment is properly granted (*compare Southern Assoc, Inc v. United Brands Co*, 67 AD2d 199, 203 [1st Dept 1979]). Here, the Court finds genuine issues of fact exist as to whether Defendant breached certain provisions of the lease agreement.

Accordingly, it is hereby

ORDERED that the motion by Defendant Bricktown Pass, LLC is denied in its entirety; and it is further

ORDERED, that the parties return to DCM Part 21, 26 Central Avenue, Staten Island, NY, Room 430 for a Preliminary Conference on October 9, 2018 at 9:30 a.m.

ENTER,



J.S.C.

Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice

DATED: 8/27/18