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

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FIFTH AVE. CENTER,

Plaintiff,

-against-

DRYLAND PROPERTIES, LLC,

Defendant.

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DRYLAND PROPERTIES, LLC,

Third-party Plaintiff,

-against-

RHINO CO FITNESS LLC, REEBOK INTERNATIONAL LTD., and MANHATTAN MEDICAL DEVELOPMENT LLC,

Third-party Defendants.

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DECISION AND ORDER
Index №.: 652724/15
Motion Seq. Nos. 005

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

In an action arising out of landlord-tenant relationship, defendant Dryland Properties, LLC (Dryland) moves, pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7), for dismissal of the thirteenth, fourteenth, fifteenth, and sixteenth causes of action in plaintiff Fifth Ave. Center's (Fifth Ave.) second amended complaint (NYSCEF doc. No. 146). While Dryland's motion contained branches seeking discovery and discovery penalties against Fifth Ave., the court has already resolved those branches of the motion through discovery orders dated January 29, 2019 (NYSCEF doc No. 190) and February 8, 2019 (NYSCEF doc No. 192). As the branches of the motion relating to discovery are resolved, this decision is limited to Dryland's applications for dismissal.

BACKGROUND

This action involves a lease agreement, executed on October 24, 2011, by Dryland, as landlord, and nonparty Manhattan Medical Development, LLC (Manhattan Medical), as tenant, for a term of 15 years. The lease was modified in November 2012 and it was assigned from Manhattan Medical to Fifth Ave in October 2013. At the time of the assignment, the parties modified the lease again. The lease covers two condominium units, Nos. 11 and 12, as well as a portion of another unit, No. 10, all of which are in the sub-cellar of a building.

Fifth Ave. provides outpatient cancer treatment, oncology and radiology services. Three months after the subject lease was assigned to Fifth Ave., Dryland executed a lease for the cellar to RhinoCo Fitness, LLC (Rhino CrossFit). Part of Rhino CrossFit's fitness regimen includes flinging heavy weights onto the floor. Plaintiff alleges that Rhino CrossFit's use of the cellar -- which is directly above their space in the sub-cellar -- caused illegal noise, vibrations, and related dangerous effects.

Fifth Ave. alleges that it complained to Dryland about the noise and vibrations caused by Rhino CrossFit's use of the cellar space, and that Dryland assured it that the situation would be remedied. On May 24, 2013, Dryland sent Rhino CrossFit a 30-day Notice to Cure, stating: "As a result of the unreasonable noise and vibration caused by continuous and repeated dropping of weights, [Rhino CrossFit has] disturbed the quiet use and enjoyment of other tenants in the building" (NYSCEF doc No. 146, ¶ 33).

Nevertheless, Fifth Avenue alleges that the problem was not abated and on February 23., 2015 and March 2, 2015, Fifth Ave. sent notice by counsel that it could not use the sub-cellar space for its intended medical use and that Dryland had not followed through on its assurances that the situation would be remedied.

On March 23, 2015, Dryland commenced an action in Supreme Court, New York County, against Rhino CrossFit under index No. 152819/15 (the Dryland/Rhino action). The Dryland/Rhino action was before Justice Debra James, and it was settled per stipulation in May 2015 (*see* NYSCEF doc No. 36 under index No. 152819/15).

On May 4, 2015, Fifth Ave. counsel sent Dryland a notice of default, stating that Dryland was in default of the lease due to the noise and vibrations. On July 16, 2015, Fifth Ave. alleges that it sent Dryland a Notice of Termination, returned the keys to the premises, and made a demand for return of the security deposit.

The previous month, April 2015, Dryland brought an eviction proceeding against Fifth Ave. in Civil Court (index No. 62982/15). Plaintiff alleges that proper service was never made on it in the eviction proceeding. On May 19, 2015, the Civil Court entered a judgment of possession on default of Fifth Ave. based on Fifth Ave.'s failure to file an answer, and on May 21, 2015 the Civil Court issued a warrant of eviction. Plaintiff alleges that it was not aware of the eviction proceeding, the warrant of eviction, or the execution of that warrant until after it filed the present action.

The initial complaint, filed on August 5, 2105, alleged causes of action for constructive eviction, nuisance, breach of contract, and for rescission for fraud. Plaintiff sought the return of its security deposit of $320,000 with interest (NYSCEF doc No. 001).

On February 18, 2016, this Court issued an order which, among other things, dismissed plaintiff's cause of action seeking a return of the security deposit (NYSCEF doc No. 76). The First Department reversed the dismissal of this claim, reasoning that:

> "The parties' lease provides that, in the event plaintiff tenant complies with the material terms of the lease, its security deposit will be returned after the date fixed as the end of the lease, i.e., June 12, 2028. Plaintiff alleges that it terminated the

> lease, or was constructively evicted, due to material breaches by defendant landlord, in 2015. To the extent plaintiff is able to show its entitlement to recover the security deposit in these circumstances, it need not wait until the date fixed at the end of the defunct lease to assert the claim, but may recover the security deposit at the time that the claims between the parties are resolved in this action"

(*Fifth Ave. Ctr., LLC v Dryland Props.*, LLC, 149 AD3d 445, 445 [1st Dept 2017]).

In March 2016, Fifth Ave. filed an amended complaint, adding a cause of action for declaratory relief relating that to a Civil Court judgment in 2015 granting Dryland possession of the leased property (NYSCEF doc No. 48). Specifically, plaintiff seeks a declaration that the judgment was effectively an illegal and inoperable eviction because it was not notified of or participate in the Civil Court proceeding.

Finally, on November 13, 2018, Fifth Ave. filed a second amended complaint, which encompasses 16 causes of action. Several of the causes of action are for breach of various sections of the lease: the second (§ 7.2), the third (§§'s 1.2 and 22.1), the fourth (§ 18.6), the sixth (§§ 20.1 and 20.2), the eighth (§§ 6.3 and 7.5), and the twelfth (§ 1.2). Meanwhile, the first cause of action is for nuisance, the fifth is for constructive eviction, the seventh is for overcharge, the ninth is for rescission due to illegality/fraud, the tenth is for breach of the implied covenant of good faith, the eleventh is for the return of the security deposit, the thirteenth is for a declaratory judgment that the judgment of possession entered in the eviction proceeding is a nullity, and the fourteenth is for conversion, while the fifteenth is for breach of fiduciary duty, and the sixteenth cause of action is for breach of GOL § 7-103, which relates to a landlord's responsibilities with respect to a security deposit.

In this motion, Dryland seeks dismissal of the thirteenth, fourteenth, fifteenth and sixteenth causes of action for, respectively, declaratory judgment, conversion, breach of fiduciary duty, and violation of GOL § 7-103.

DISCUSSION

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 a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]). "When determining a motion to dismiss, 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 within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotations and citations omitted]).

However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]). Pursuant to CPLR 3211 (a) (l), a party may move for judgment dismissing one or more causes of action asserted against it on the basis that "a defense is founded upon documentary evidence." A motion to dismiss founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

I. Declaratory Judgment

Plaintiff seeks an order declaring that "the Judgment of Possession entered in the Civil Court is a nullity and of no force or effect because there was at no time jurisdiction obtained over [Fifth Ave.] in Civil Court" (NYSCEF doc No. 146). Fifth Ave. that Dryland did not obtain jurisdiction over it in the eviction proceeding, as it did not make a reasonable application at personal or substituted service before resorting to "nail and mail" (NYSCEF doc No. 187).

Fifth Ave. contends that Dryland's method of service was specially designed to ensure that it would not receive notice of the eviction proceeding against. Specifically, Fifth Ave. argues that Dryland knew that it was not doing business from the leased premises, as the noise, vibrations, and other complications resulting from Rhino Crossfit activities prevented it from doing so. Further, Fifth Ave. contends that Dryland failed to serve it at its place of business, in California, despite sending other correspondence, such as notice of rental charges to that address. Moreover, despite corresponding with Fifth Ave's attorney on other matters, Dryland chose not to serve the attorney. Instead, Dryland chose to nail and mail service to an address that, Fifth Ave. alleges, it knew Fifth Ave. was not present at.

In support of its application to dismiss the thirteenth cause of action, Dryland makes a two-fold argument. In short, it contends that service was proper and that, even if it were not, plaintiff may not, in this court, collaterally attack the determinations of the Civil Court in the eviction proceeding. The latter is the threshold question, as it concerns the justiciability of plaintiff's application.[1]

[1] As to the former argument, Dryland contends that it conformed to the letter of RPAPL 735 (1), which sets out the manner of service for proceedings to recover possession of real property. In relevant part, it provides:

Dryland argues that Fifth Ave. is limited to seeking vacatur of the default judgment pursuant to CPLR 5015 in Civil Court. In support, Dryland cites to collateral estoppel cases such as *Gramatan Home Invs. Corp. v Lopez* (46 NY2d 481 [1979]), where the Court of Appeals noted:

> "Collateral estoppel, together with its related principles, merger and bar, is but a component of the broader doctrine of res judicata which holds that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action."

(*id.* at 485 [internal citations omitted]).

Dryland argues that even though the eviction proceeding was decided on default, rather than the merits, it may still serve as the basis for collateral estoppel. In support, Dryland cites to *Appolino v Delorbe* (24 AD3d 252 [1st Dept 2005]), where the Appellate Court reversed a trial court's decision denying a motion by an insurer's in-house counsel to be relieved as counsel. In a

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1. Service of the notice of petition and petition shall be made by personally delivering them to the respondent; or by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it; or if admittance cannot be obtained and such person found, by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises; and in addition, within one day after such delivering to such suitable person or such affixing or placement, by mailing to the respondent both by registered or certified mail and by regular first class mail ...

(b) if a corporation, joint-stock or other unincorporated association, as follows: at the property sought to be recovered, and if the principal office or principal place of business of such corporation, joint stock or other unincorporated association is not located on the property sought to be recovered, and if the petitioner shall have written information of the principal office or principal place of business within the state, at the last place as to which petitioner has such information, or if the petitioner shall have no such information but shall have written information of any office or place of business within the state, to any such place as to which the petitioner has such information. Allegations as to such information as may affect the mailing address shall be set forth either in the petition, or in a separate affidavit and filed as part of the proof of service.

prior case in Supreme Court, Nassau County, the insurer obtained a default judgment declaring that they had no duty to defend the defendant. The Appellate Division held that "the default judgment could not be attacked collaterally" and noted that no motion to vacate was ever filed.

Dryland argues also that the judgment of possession issuing from the eviction proceeding is not the proper subject of an application for a declaratory judgment. In support, it cites to *Thome v Alexander & Louisa Calder Found* (70 AD3d 88 [1st Dept 2009]), in which the Appellate Division upheld dismissal of an application for a declaratory judgment as to the authenticity of two theatrical stage sets as the work of Alexander Calder. In arriving at this decision, the Court sketched the parameters of justiciable applications for declaratory judgment:

> "Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations. While fact issues certainly may be addressed and resolved in the context of a declaratory action, the point and purpose of the relief is to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact. Consideration of some typical types of declaratory judgments, such as declarations regarding the validity of a foreign divorce, the applicability of an insurance policy to a claim, and the constitutionality of a statute, helps illustrate both the value of declaratory judgments in appropriate circumstances … [T]he declaratory judgment action has been employed as a way to resolve a relatively unique dispute where the plaintiff is unable to find among the traditional kinds of action one that will enable her to bring it to court"

(*id.* at 100).

Dryland argues that Fifth Ave.'s application for a declaratory judgment does not fit within these parameters, as an eviction proceeding is a common dispute that has no trouble finding its way to court.

In opposition, Fifth Ave. argues that it has the choice of whether to challenge the validity of service via a motion to vacate in Civil Court, or here, via the present application for an order

declaring the judgment of possession of nullity. In support, Fifth Ave. reaches back to the nineteenth century for guidance, citing *Kamp v Kamp* (59 NY 212 [1874]). In *Kamp*, the plaintiff obtained an order of alimony against her ex-husband 18 years after another trial court had adjudicated their divorce, which had not provided for any alimony payments. The Court of Appeals held that the court granting the alimony payments lacked jurisdiction. In its reasoning, the Court provided an exception, for jurisdictional defects, to the rule that judgments of courts may not be collaterally challenged:

> The general rule is that a party cannot appeal from one judge to another of co-ordinate jurisdiction, by motion for relief, from an order or judgment against him, but must seek his remedy by appeal to a tribunal having appellate jurisdiction in the premises. But the question has usually arisen in cases where the court making the order has had jurisdiction of the subject-matter and of the person of the party against whom the order or judgment has passed. The reason of the rule, which is simply one of convenience, does not apply when the court is entirely without jurisdiction, and the whole proceeding, including the order or judgment, is *coram non judice* and void. One is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times .... The want of jurisdiction makes the order and judgment of the court, and the record of the action utterly void and unavailable for any purpose, and the want of jurisdiction may always be set up collaterally or otherwise .... [W]hen jurisdiction exists, the decision of the court is conclusive, although erroneous, until reversed, while in the absence of jurisdiction it is a nullity"

(*id.* at 215-217).

Plaintiff, citing to *Royal Zenith Corp v Continental Ins. Co.* (63 NY2d 975, 977 [1984] ["a judgment rendered without jurisdiction is subject to collateral attack"]), notes that the basic concept propounded in Kamp -- that jurisdiction may be challenged collaterally -- has been more recently upheld by the Court of Appeals.

Plaintiff, under *Kamp* and *Royal Zenith*, may collaterally challenge the eviction proceeding in this court, as its allegations as to service go to the question of whether Civil Court ever had jurisdiction over it. While Dryland is correct that default judgment may not be

collaterally attacked, any judgment made without jurisdiction is a nullity and the lack of jurisdiction may be collaterally attacked. Thus, Dryland's reliance on *Appolino* is inapposite, as the issue of jurisdiction was not raised in that case. As to the question of whether a declaratory judgment action was the proper vehicle for bringing a collateral challenge to the eviction proceeding, defendant does not suggest what other cause of action might provide a more apt vehicle for the challenge. Accordingly, the court rejects Dryland's argument that Fifth Ave.'s application for a declaratory judgment is not justiciable.

Moreover, none of Dryland's submissions utterly refute plaintiff's allegations that Dryland failed to make a reasonable application at personal service before resorting to alternative methods of service (*see Eight Assocs. v Hynen*, 102 AD2d 746 [1st Dept 1984]). More broadly, questions remain as to whether Dryland's attempts at service "were reasonably calculated to provide tenant actual notice" of the eviction proceeding (*54 E. 1st St. Owners Corp. v Prune, LLC*, 864 NYS2d 657 [App Term, 1st Dept, 2008]). Thus, as Fifth Ave. states a cause of action for declaratory relief that is not utterly refuted by Dryland's submissions, the branch of Dryland's motion seeking dismissal of the thirteenth cause of action must be denied.

II. Conversion

The fourteenth cause of action, for conversion, alleges that Dryland is liable for transferring the $321,245.79 security deposit to its general operating account on April 13, 2016. Dryland argues that the claim for conversion must be dismissed, as it was entitled to apply the deposit to rental arrears. That is, Dryland argues that it was entitled to the full security deposit after it was granted possession of the apartment in the eviction proceeding. As discussed above, the validity of the judgment in the eviction proceeding is a question that remains in this action.

Thus, it cannot stand as a basis for dismissing the conversion claim. Accordingly, Dryland's application for dismissal of the fourteenth cause of action for conversion is denied.

III. Breach of Fiduciary Duty

The fifteenth cause of seeks damages for breach of a fiduciary trust created by the security deposit. Dryland argues that the security deposit does not "create a fiduciary relationship built on honesty, care, and good faith" (NYSCEF doc 150 at 22). There is no fiduciary relationship formed, Dryland argues, when a landlord holds a security deposit on behalf of a commercial tenant. "The depositing of a security deposit," defendant argues, "does not create a relationship based on unquestioning trust, but ... implicitly built on distrust" (*id.*).

Additionally, Dryland cites to *Pappas v Tzolis* (20 NY3d 228 [2012]), in which the plaintiff was bought out of his real estate holding LLC by one of his partners, before the property was sold at a greater value than his share was worth. The plaintiff then brought an action alleging breach of fiduciary duty, among other things. The Court of Appeals dismissed the complaint, reasoning, as to the breach of fiduciary duty claim, that "Where a principal and fiduciary are sophisticated entities and their relationship is not one of trust, the principal cannot reasonably rely on the fiduciary without making additional inquiry" (20 NY3d 228 [2012]). Applying Dryland to the present facts, Dryland argues that the second amended complaint fails to state what actions Fifth Ave, "a sophisticated entity," took in reliance on Dryland. Moreover, Dryland argues that any such reliance would have been reasonable given the relationship between the parties.

In opposition, Fifth Ave. argues that GOL § 7-103 imposes the obligations of a fiduciary, with respect to the security deposit, on Dryland. GOL § 7-103, which sets out a landlord's obligations in holding a security deposit, does not expressly create a fiduciary relationship.

However, Courts have held that commingling of funds is a fiduciary violation (*see LeRoy v Sayers*, 217 AD2d 63 [1st Dept 1995] [holding that a landlord owes a duty not to commingle, and by breaching that duty, it forfeits the right deposit]), whereas other violations of GOL § 7-103, such as failure to provide to notice or maintain the security deposit in New York are "technical statutory violation[s]" that do not give rise to a statutory violation (*Urban Soccer Inc. v Royal Wine Corp.*, 53 Misc 3d 448, 464 [Sup Ct, NY County, Kornreich, J. 2016], affd 148 AD3d 576 [1st Dept 2017]).

Here, Fifth Ave. has alleged that Dryland commingled funds by transferring the security deposit into its general operating account in April 2106, and defendant has not debunked that allegation through documentary evidence. Thus, plaintiff states a cause of action for breach of fiduciary duty, and the branch of Dryland's motion that seeks dismissal of the fifteenth cause of action must be denied.

IV. GOL § 7-103

In the sixteenth cause of action, Plaintiff seeks a return of the security deposit for various alleged violations GOL § 7-103. As discussed above, technical statutory violations that plaintiff alleges do not give rise to a claim for a return of the deposit. While plaintiff also alleges commingling under this cause of action, these allegations are duplicative of plaintiff's claim for breach of fiduciary duty. As plaintiff fails to state a cause of action under GOL § 7-103, except for the duplicative allegations of commingling, the branch of Dryland's motion seeking dismissal of the sixteenth cause of action is granted.

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion to dismiss granted only to the extent that the sixteenth cause of action in the second amended complaint is dismissed; and it is further

ORDERED that counsel for defendant is to serve a copy of this order, along with notice entry, on plaintiff within 10 days of entry.

Dated: April 12, 2018

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

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