Subway Real Estate Corp v Jahedi
2019 NY Slip Op 31298(U)
May 6, 2019
Supreme Court, New York County
Docket Number: 652369/2017
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** IAS MOTION 33EFM

Justice

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SUBWAY REAL ESTATE CORP.

Plaintiff,

- v -

MANIJEH JAHEDI,

Defendant.

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INDEX NO. 652369/2017

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISMISS DEFENSE.

In this action to recover unpaid rent, defendant Manijeh Jahedi moves pursuant to CPLR 3211(a)(1), (a)(7), (a)(8), and CPLR 3016(b) to dismiss this matter. For its part, plaintiff Subway Real Estate Corp. (SREC) cross-moves pursuant to CPLR 3211(c) to treat the parties' respective motions as motions for summary judgment and, doing so, grant plaintiff summary judgment pursuant to CPLR 3212 on its first cause of action for $40,000.00 in unpaid rent and setting down for a hearing on its second claim for attorneys' fees to determine the amount of fees and costs owed. The decision and order is as follows:

ALLEGATIONS

Starting in May 2008, plaintiff SREC, as tenant, and non-party Mervco Holding LLC (Mervco), as landlord, entered into a lease agreement for a retail store at 1264 St. Nicholas Avenue in the city, county, and state of New York for a lease term of ten years, expiring in June 2018 (NYSCEF #1 – Complaint at ¶6). The lease provided that SREC could sublet to any sublessee doing business as a Subway Sandwich Shop and that the landlord would accept rent directly from the sublessee (*id.* at ¶7). On or about June 26, 2013, defendant Jahedi, as sublessee, entered into possession of the premises pursuant to a written sublease that required defendant to pay rent and additional rent directly to Mervco and observe all the obligations of SREC under its lease with Mervco (*id.* at ¶¶8-11).

Plaintiff alleges that defendant failed to pay the rent and additional rent due under the sublease (*id.* at ¶12). Plaintiff claims that on October 25, 2016 Jahedi closed the restaurant and vacated the premises, without SREC's consent and prior to the expiration of the sublease (*id.* at ¶13). As such, on October 27, 2017, Mervco

commenced nonpayment proceedings against SREC in Civil Court of the City of New York, County of New York, under Index No. L&T 080508/16 (*id.* at ¶14). On January 24, 2017, SREC and Mervco entered into a stipulation of settlement resolving the nonpayment proceedings, wherein SREC agreed to return possession of the premises and pay $40,000.00 to Mervco to settle the damages claims arising from Jahedi's failure to pay the rent under the sublease (*id.* at ¶15). SREC paid Mervco on March 3, 2017 (*id.* at ¶16). SREC made demands upon Jahedi to reimburse it for the $40,000.00, but Jahedi has yet to pay it (*id.* at ¶¶17-18). SREC also alleges that the sublease requires Jahedi to reimburse it for reasonable attorneys' fees and expenses incurred in the nonpayment proceedings and the instant action (*id.* at ¶20).

Defendants, for their part, submit a document entitled "Notice of Surrender", signed on November 1, 2016 by defendant's husband Farshid Jahedi on behalf of defendant (NYSCEF #9 – Notice of Surrender). The surrender notice states that: (1) subtenant quits and surrenders possession of the store and waives all rights, titles, claims, and interests to the sublease and the security deposit; (2) that the store is vacant and that subtenant's rights were not assigned, transferred, or incumbered; (3) that subtenant waives all rights, title, claims and interests to the furniture, leasehold improvements, fixtures, trade fixtures, equipment, machinery, inventory, merchandise, parts and supplies in the store to SREC; and (4) that subtenant acknowledges that SREC's acceptance of surrender of possession does not serve to waive any of the rights, claims, and remedies of SREC and that those claims are expressly reserved (*id.* at ¶¶1-4).

Defendant's husband, Farshid Jahedi, also submits an affidavit of fact on the motion to dismiss (NYSCEF #11 – Affidavit of Farshid Jahedi). Mr. Jahedi claims that towards the end of 2016, the restaurant was falling behind on rent payments and that he "engaged in discussions with the landlord for potential reduction of rent and after many months of negotiations we reached an agreement where the landlord agreed to extend the lease for 60 months starting July 2016 and reduce the rent for one year until we can catch up on the payments" (*id.* at ¶4). Mr. Jahedi claims that he let plaintiff's agent, Bill Taylor, know of the arrangement and that the Jahedis were deciding whether or not to take the deal or sell the business (*id.* at ¶¶4-5). Mr. Jahedi claims that he communicated with Taylor about the situation and that Taylor gave the Jahedis the impression that they could surrender the restaurant to plaintiff and sign paperwork and walk away from the enterprise (*id.* at ¶6). Jahedi claims that they "had the option of selling the restaurant to a buyer or selling the restaurant equipment and machinery and using the proceeds to pay back the landlord for what payment was behind in rent, or as the plaintiff had represented to me surrender the restaurant" (*id.*). Jahedi represents that plaintiff encouraged them to surrender the restaurant and that they could hand over the keys and the equipment and that plaintiff would then takeover negotiations with Mervco (*id.* at ¶7). Jahedi claims that because of plaintiff's representations, they did not sell the restaurant or the equipment because they believed that surrendering the restaurant and equipment would relieve them of any obligations, liabilities, or debts to the plaintiff" (*id.* at ¶8). Defendant attached

communications with Bill Taylor as part of its motion (NYSCEF #12-14 – Correspondence between Jahedi and Taylor).

STANDARD ON MOTION TO DISMISS

Defendant Jahedi moves pursuant to CPLR 3211(a)(1), (7) and (8) to dismiss SREC's complaint pre-answer. In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). "The court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 88). In particular, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.*). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

JAHEDI'S MOTION TO DISMISS

Defendant's motion to dismiss is denied. Defendant effectively makes six arguments: (1) that, based off documentary evidence, plaintiff's argument that Jahedi closed the restaurant without SREC's consent and prior to the expiration of the lease is false and that the evidence shows that plaintiff made an oral representation that defendant's surrender of the restaurant and equipment would relieve defendants of all obligations and liabilities to plaintiff; (2) that this matter should be dismissed on equitable estoppel grounds because of defendant's reliance on plaintiff's alleged misrepresentation regarding Jahedi's ability to walk away from the restaurant to her detriment; (3) that plaintiff has failed to state a claim as plaintiff has failed to provide any contracts or agreements bearing the signatures of the parties or any stipulations or settlements made between plaintiff and Mervco, nor any itemized statements for the alleged debt that was paid to landlord; (4) that plaintiff breached the implied covenant of good faith and fair dealing; (5) that, pursuant to CPLR 3016(b), plaintiff's claims should be dismissed based upon plaintiff's misrepresentation and willful default, breach of trust or undue influence; and (6) that this court lacks personal jurisdiction based on a Connecticut choice of law provision in a franchising agreement and that long-arm jurisdiction does not attach *to plaintiff* (NYSCEF #5 – Def's Memo of Law 6-9).

Defendant's first two arguments are effectively the same: that an oral agreement between plaintiff and defendant bars this lawsuit. Other than defendant's self-serving affidavit of Farshid Jahedi, there is no evidence of any agreement that waived defendant's obligations to plaintiff. Indeed, the Notice of Surrender explicitly states that surrender of possession does not serve to waive any of the rights, claims, and remedies of SREC and that those claims are expressly reserved (NYSCEF #9 at

¶4). Additionally, the correspondence between Farshid Jahedi and Bill Taylor do not indicate any waiver of rights or claims by plaintiff (NYSCEF #12-14). Even if there was an oral agreement, the sublease specifically prohibits oral modification, requiring all amendments to the sublease to be in writing (NYSCEF #24 – Sublease at §14). New York law is very clear that a "written agreement... which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless... [it] is in writing" (NY General Obligations Law §15-301(1)). In other words, "if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls" (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]). There is thus, as a matter of law, no merit to defendant's argument that an alleged oral agreement bars this lawsuit. Likewise, this court does not grant defendant's motion to dismiss on equitable estoppel grounds for the same reason as outlined above – a written contract exists and precludes recovery via quasi-contract theories (*see Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 NY2d 382, 388 [1987] ["The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]). As such, defendants first two arguments for dismissal are rejected.

Defendant's third argument that plaintiff has failed to state a claim as plaintiff has failed to provide any contracts or agreements bearing the signatures of the parties or any stipulations or settlements made between plaintiff and Mervco, nor any itemized statements for the alleged debt that was paid to landlord is also rejected. Plaintiff addresses each of these infirmities in its opposition to the motion with an affidavit of fact and has attached all the relevant documents (NYSCEF #20, 22-29). "In assessing a motion under CPLR 3211(a)(7)... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). As such, plaintiff has not failed to make out a claim as it has provided the relevant support for its claim.

Defendant's fourth argument is rejected as conclusory. Defendant provides no substantive grounds for dismissing plaintiff's complaint based on breach of the implied covenant of good faith and fair dealing. Defendant's argument in its papers is devoid of any substance and cannot, as a matter of law, be a basis for dismissing plaintiff's complaint.

Similarly, defendant's fifth argument that plaintiff's claims should be dismissed pursuant to CPLR 3016(b) fundamentally misunderstands the purposes of CPLR 3016(b). CPLR 3016(b) requires a plaintiff to plead with particularly if it is making a claim for fraud or mistake. CPLR 3016(b) is not a mechanism for defendant to assert a defense of fraud or mistake; it is a mechanism for requiring pleadings to be specific in certain instances. Defendant's citations to *Paterra v Nationwide Mut. Fire Ins. Co.*, 38 AD3d 511 [2d Dept 2007] and *Quinones v Schaap*, 91 AD3d 739 [2d Dept 2012] prove this point and do not stand for the proposition that defendant asserts. As such, defendant's fifth argument for dismissal is rejected.

Defendant's sixth argument that this court lacks personal jurisdiction and that a Connecticut choice of law clause bars this action is rejected. Defendant's counsel appears to fundamentally misunderstand choice of law provisions and the nature of personal jurisdiction. First, the choice of law provision is a component of defendant's franchise agreement with non-party Doctor's Associates Inc. (DAI), the franchisor of Subway Restaurants, and not with SREC (NYSCEF #8 – Franchise Agreement). As such, the choice of law provision is inapplicable to the instant matter as there is no such agreement between the parties to this suit. Second, defendant's cross-default argument is incorrect – breach of the sublease does not constitute default under the franchise agreement and nothing in the franchise agreement or SREC sublease agreement states as much. Third, there is a major distinction between a choice of law provision and a forum selection clause; a choice of law provision would simply require this court to apply another state's laws, it would not deprive this court of jurisdiction as a forum selection clause would. However, there is no forum selection clause to be found and New York is the proper venue for this suit.

Next, defendant's argument that this court lacks personal jurisdiction is similarly misguided. Defendant argues that there is no long-arm jurisdiction here pursuant to CPLR 302(a)(1). CPLR 302(a)(1) states that "a court may exercise personal jurisdiction over any non-domiciliary... who in person or through an agent... transacts any business within the state if the cause of action asserted arises out of that transaction." The "overriding criterion necessary to establish a transaction of business is some act by which the defendant purposefully avails itself of the privilege of conducting activities within New York" (*Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 [2007] [citations omitted]). Defendant oddly misunderstands the long-arm statute and tries to apply it to plaintiff, which is simply incorrect. Personal jurisdiction concerns whether a court may render judgment over the defendant's person, not the plaintiff (*see International Shoe Co. v State of Wash., Office of Unemployment Compensation and Placement*, 326 US 310, 316 [1945]). Furthermore, it is clear that defendant, a New York resident, conducting business in New York, is subject to the jurisdiction of New York courts. Defendant also tries to use the long-arm statute to make her Connecticut choice of law argument into a personal jurisdiction argument. As addressed above, the choice of law provision does not apply here as it occurs in a contract with a non-party and not with SREC. As such, defendant's motion to dismiss must be denied in its entirety.

PLAINTIFF SREC'S MOTION FOR SUMMARY JUDGMENT

SREC's request pursuant to CPLR 3211(c) to treat defendant's CPLR 3211(a) motion to dismiss as a motion for summary judgment is denied. CPLR 3211(c) allows a court after "adequate notice to the parties" to treat a motion to dismiss "as a motion for summary judgment" whether or not the issue has been joined. However, this court has not given notice to the parties that it is entertaining the instant motion to dismiss as one for summary judgment and does not do so in this decision.

Nevertheless, SREC argues that an exception to the notice requirement applies here. The First Department has outlined three exceptions to the notice requirement of CPLR 3212(c): "(1) where the action in question involves no issues of fact but only issues of law which are fully appreciated and argued by both sides; (2) where a request for summary judgment pursuant to CPLR 3211(c) is specifically made by both sides; and (3) where both sides deliberately lay bare their proof and make it clear they are charting a summary judgment course" (*Shah v Shah*, 215 AD2d 287, 289 [1st Dept 1995]). The first and second exceptions do not apply because neither party indicated that this matter "involved a purely legal question rather than any issues of fact" and defendant did not request that the motion to dismiss be treated as a motion for summary judgment (*Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]).

SREC posits that exception three applies, because "both parties have submitted documentary evidence and raised arguments demonstrating that they are deliberately charting a summary judgment course" (NYSCEF #31 – Pl's Memo of Law in Support and Opposition at 2-3). Defendant strenuously argues that the parties have not charted a course for summary judgment (NYSCEF #34 – Def's Reply and Opposition at ¶¶4-5). Defendant's objection to converting its motion to one for summary judgment "is a significant indication that the parties were not charting such a course" (*Wadiak v Pond Management, LLC*, 101 AD3d 474, 475 [1st Dept 2012]). Summary judgment is premature at this juncture as this matter is still pre-answer. As such, plaintiff's motion must be denied.

Accordingly, it is hereby ORDERED that defendant Mainjeh Jahedi's motion to dismiss is denied in its entirety; it is further

ORDERED that plaintiff's cross-motion to convert the motion to dismiss to a motion for summary judgment is denied; it is further

ORDERED that defendant Manijeh Jahedi shall serve an Answer within 20 days after entry of this Order; and it is further

ORDERED that the parties shall appear in Part 33, 71 Thomas St., New York, NY 10013 on June 19, 2019 at 9:30 AM for a preliminary conference.

This constitutes the decision and order of the court.

5/6/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE