

**501 Fifth Ave. Co. LLC v Roberts**

2020 NY Slip Op 30150(U)

January 17, 2020

Supreme Court, New York County

Docket Number: 652111/2019

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 46

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501 FIFTH AVENUE COMPANY LLC,

Index No. 652111/2019

Plaintiff

- against -

DECISION AND ORDER

MICHAEL ROBERTS,

Defendant

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APPEARANCES:

For Plaintiff

Howard S. Koh  
Meister Seelig & Fein LLP  
125 Park Avenue, New York, NY 10017

For Defendant

David R. Michaeli  
Hogan Lovells US LLP  
390 Madison Avenue, New York, NY 10017

LUCY BILLINGS, J.S.C.:

Plaintiff sues defendant for breach of contract, promissory estoppel, and unjust enrichment arising from a commercial lease for office space. Defendant moves to dismiss the complaint based on C.P.L.R. § 3211(a)(1) and (7).

I. THE COMPLAINT

The complaint alleges that defendant signed the commercial office lease on or about October 31, 2018, delivering the lease to plaintiff with a check for one month's rent and a check for the security deposit. Plaintiff then countersigned the lease and

deposited both checks. Construction work on the leased office space began shortly afterward, during which the parties communicated about design, selection of materials and finishes, and instructions for defendant to obtain insurance certificates for contractors. Plaintiff claims it incurred expenses of at least \$76,849.96 from the construction work on the leased space. Even though the lease commenced January 1, 2019, defendant neither retrieved the office keys nor entered possession of the premises. More importantly, he made none of the payments required by the lease.

On February 12, 2019, plaintiff served defendant with a written notice of default, pursuant to the lease's provision regarding defaults. This written notice of default stated that defendant failed both to pay rent and to take possession of the premises within 30 days after the lease's commencement date.

On March 7, 2019, plaintiff served defendant with a written notice of cancellation, which terminated the lease as of March 15, 2019. After the lease's termination, plaintiff re-entered and took possession of the office space and filed this action April 10, 2019, claiming damages for breach of contract, promissory estoppel, and unjust enrichment, including attorneys' fees and expenses.

II. DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Defendant moves to dismiss each of plaintiff's three claims pursuant to C.P.L.R. § 3211(a)(1) or (7) on the following principal grounds. First, there was no lease between him and plaintiff and therefore no breach of the lease, because plaintiff failed to deliver an executed lease to him. Second, plaintiff may not use promissory estoppel to enforce an unexecuted agreement and has not alleged the required unconscionable injury to recover based on promissory estoppel. Third, the complaint does not allege that plaintiff was unjustly enriched.

A. Breach of Contract Claim

A motion to dismiss based on documentary evidence pursuant to C.P.L.R. § 3211(a)(1) will succeed only if admissible documentary evidence completely refutes plaintiff's factual allegations, resolving all factual issues as a matter of law. Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 30 N.Y.3d 572, 601 (2017); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Calpo-Rivera v. Siroka, 144 A.D.3d 568, 568 (1st Dep't 2016). For the purposes of determining defendant's motion, plaintiff stipulated that the court may consider the fully executed lease, as both parties rely on Article 37, in a rider to the lease, which provides that:

It is specifically understood and agreed that this lease is offered to the Tenant for signature by the Managing Agent of the building solely in its capacity as such Agent and subject to the Landlord's acceptance and approval, and

that the Tenant has hereunto affixed its signature with the understanding that the said lease shall not in any way bind the Landlord or its Agent until such time as the same has been approved and executed by the Landlord and delivered to the Tenant.

Aff. of David R. Michaeli Ex. A, at 6. Based on this provision, defendant claims the lease is not binding because plaintiff never returned a countersigned lease. Plaintiff, on the other hand, claims the lease became binding on defendant after he executed and delivered it on October 31, 2018.

Because the lease is unambiguous on its face, and neither party claims otherwise, the court enforces the lease's plain meaning without the need for extrinsic evidence to discern the parties' intent. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353, 358-59 (2019); 2138747 Ontario, Inc. v. Samsung C&T Corp., 31 N.Y.3d 372, 381 (2018); Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d 390, 403-404 (2009); Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d 1, 8 (1st Dep't 2012). The fact that sophisticated businesspersons negotiated the lease at arm's length further compels enforcement of the written agreement according to its terms. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d at 359; Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d at 403; Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004). See 2138747 Ontario, Inc. v. Samsung C&T Corp., 31

N.Y.3d at 381; Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d at 7.

Article 37's plain meaning is that the lease binds defendant tenant upon his execution of the lease. Article 37 nowhere tolls the lease's enforcement until plaintiff returns the countersigned lease to defendant. The court may not interpret a contract impliedly to include a requirement that the parties themselves have not included. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d at 359; 2138747 Ontario, Inc. v. Samsung C&T Corp., 31 N.Y.3d at 381; Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d at 475; Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d at 7. See Moon 170 Mercer, Inc. v. Vella, 146 A.D.3d 537, 537 (1st Dep't 2017). Article 37 does not require plaintiff to execute the lease and deliver it to defendant for it to bind him. Article 37 provides only that the lease will not bind plaintiff until plaintiff executes the lease and delivers it to defendant. The court may not distort the unambiguous meaning of the lease to require plaintiff to execute and deliver the lease before it is binding on defendant. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d at 359; 2138747 Ontario, Inc. v. Samsung C&T Corp., 31 N.Y.3d 372, 381 (2018); Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 60 A.D.3d at 66; Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d at 475.

Both parties' conduct further supports the lease's enforceability. Kolchins v. Evolution Mkts., Inc., 31 N.Y.3d 100, 107-108 (2018); Lerner v. Newmark & Co. Real Estate Inc., \_\_\_ A.D.3d \_\_\_, 2019 WL 6482012, at \*2 (1st Dep't Dec. 3 2019); Wooster 76 LLC v. Ghatanfard, 68 A.D.3d 480, 480-81 (1st Dep't 2009); Townhouse Co. v. Williams, 307 A.D.2d 223, 224 (1st Dep't 2003). First, defendant's signature demonstrates a clear and unequivocal acceptance of plaintiff's terms, see Thor Props., LLC v. Willspring Holdings LLC, 118 A.D.3d 505, 507 (1st Dep't 2014), and establishes the parties' agreement at this pleading stage, especially when the facts alleged by plaintiff, set forth below, suggest an intent to be bound. Kolchins v. Evolution Mkts., Inc., 31 N.Y.3d at 107-108; Lerner v. Newmark & Co. Real Estate Inc., \_\_\_ A.D.3d \_\_\_, 2019 WL 6482012, at \*2; Lord v. Marilyn Model Mgt., Inc., 173 A.D.3d 606, 607 (1st Dep't 2019); Kowalchuk v. Stroup, 61 A.D.3d 118, 125 (1st Dep't 2009). For 51 days after defendant executed and delivered the lease, both parties acted as if the lease was binding. Townhouse Co. v. Williams, 307 A.D.2d at 224. Defendant wrote checks for the security deposit and rent which plaintiff deposited. Plaintiff and defendant continuously discussed fixtures and finishes for the leased space and procuring insurance for contractors working on the space. Finally, defendant attempted to cancel the lease. Had he not understood that plaintiff already had conveyed the

interest in the office space to him, he would have had no reason to cancel that interest. See Wooster 76 LLC v. Ghatanfard, 68 A.D.3d at 480-81. This combined conduct estops defendant from claiming the lease was without effect and invalid. Townhouse Co. v. Williams, 307 A.D.2d at 224. See Wooster 76 LLC v. Ghatanfard, 68 A.D.3d at 480-81.

For all the above reasons, defendant's documentary evidence, the lease itself, does not refute its binding effect. Townhouse Co. v. Williams, 307 A.D.2d at 224. See Wooster 76 LLC v. Ghatanfard, 68 A.D.3d at 480-81. Therefore the court denies defendant's motion to dismiss plaintiff's breach of contract claim. C.P.L.R. § 3211(a)(1) and (7).

B. Plaintiff's Remaining Claims

Where, as here, the dispute arises from a written agreement between parties, plaintiff may not maintain either the unjust enrichment or the promissory estoppel claim. As discussed above, there was an enforceable lease between the parties, which precludes recovery based on quasi-contract for the same occurrence as the breach of contract. Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388 (1987); Wald v. Graev, 137 A.D.3d 573, 574 (1st Dep't 2016); Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d at 10; Russo v. Heller, 80 A.D.3d 531, 532 (1st Dep't 2011). Therefore the court grants defendant's motion to dismiss plaintiff's unjust enrichment claim.



The court grants defendant's motion to dismiss plaintiff's promissory estoppel claim for similar reasons. Plaintiff's promissory estoppel claim fails because it does not allege a duty independent of the contract. ID Beauty S.A.S. v. Coty Inc. Headquarters, 164 A.D.3d 1186, 1186 (1st Dep't 2018); Zakrzewski v. Luxoft USA, Inc., 151 A.D.3d 573, 574 (1st Dep't 2017); Susman v. Commerzbank Capital Mkts. Corp., 95 A.D.3d 589, 590 (1st Dep't 2012); CARI, LLC v. 415 Greenwich Fee Owner, LLC, 91 A.D.3d 583, 583 (1st Dep't 2012).

### III. CONCLUSION

For the reasons explained above, the court grants defendant's motion to the extent of dismissing plaintiff's second and third claims for promissory estoppel and unjust enrichment, C.P.L.R. § 3211(a)(7), but otherwise denies defendant's motion. The parties shall appear for a Preliminary Conference February 6, 2020, at 2:15 p.m., in Part 46.

DATED: January 17, 2019



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.