

<b>Seoul Garden Bowery Inc. v Ng</b>
2020 NY Slip Op 31842(U)
June 8, 2020
Supreme Court, New York County
Docket Number: 653635/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

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SEOUL GARDEN BOWERY INC,  
Plaintiff,

- v -

WILSON NG and TIEN YICK CO., INC.  
Defendants.

INDEX NO. 653635/2018  
MOTION DATE 11/08/2018  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21

were read on this motion to/for DISMISS.

ORDER

Upon the foregoing documents, it is

ORDERED that the defendants' motion to dismiss the complaint is GRANTED ONLY AS TO the second through sixth causes of action and is otherwise DENIED; and it is further

ORDERED that defendants shall serve an answer to the complaint within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference by court approved video platform or, if possible, "in person" appearance, 60 Centre Street, Room 331, New York, New York, on July 14, 2020, 9:30 AM.

DECISION

The court shall grant in part defendants' motion to dismiss the complaint.

Plaintiff alleges that it entered into a lease for commercial space from defendant owners based upon representations from the defendants that the defendants would assist plaintiffs in obtaining a certificate of occupancy for the premises that would allow plaintiff to operate a restaurant. Plaintiff's first cause of action seeks rescission of the lease and a declaration that the lease is void along with a return of the security deposit. The second cause of action seeks damages for breach of contract and the third cause of action is for breach of the covenant of good faith and fair dealing. The fourth cause of action is for unjust enrichment and the fifth cause of action asserts fraudulent inducement. The sixth cause of action asserts that defendants violated the Administrative Code of the City of NY provision against harassment of commercial tenants.

The complaint states that the plaintiff was aware that the leasehold premises did not have a certificate of occupancy although a fast-food restaurant had previously operated out of the premises. The complaint alleges that plaintiff relied on assurances from the defendants that defendants would assist in obtaining a proper certificate. Paragraph 2.01 of the Lease

states that "The Tenant shall use and occupy the Premises as a restaurant (not 'fast food similar McDonalds, Burger King etc.')

and for no other purposes. . . . Any use of the Premises in violation of this Article 2 shall be deemed to be a breach of a substantial obligation this Lease." Paragraph 19 of the Lease states that "Except as may be specifically set forth in this Lease, neither the Landlord nor its agents have made any representations with respect to the Building, . . . This Lease constitutes the complete and exclusive agreement between the parties and supersedes all prior written and oral statements, including any prior representations, statements, conditions or warranties." Paragraph 24.06 of the lease states that the tenant is taking the premises "as is" and that "Landlord shall have no obligation to perform any work at the Premises. All agreements and representations of the parties are merged into this Lease."

Defendants now move to dismiss the complaint on the grounds that they have carried out all of their obligations under the lease and that the terms of the lease supersede any alleged representations. In support of their position the defendants cite Casilia v Webster LLC )140 AD3d 530 [1st Dept 2016]] wherein the Court on similar facts stated that

"Plaintiff Casilia's alleged inability to use the leased premises as a catering hall due to the certificate of occupancy does not relieve her of

the obligation to pay rent for the period of time during which she occupied the premises. The lease did not require defendant landlord to obtain a certificate of occupancy that would permit plaintiff's intended use of the premises, and there is no evidence that defendant fraudulently induced plaintiff to execute the lease or made a specific representation that her intended use would comply with the certificate of occupancy."

Id. (citations omitted).

The court agrees with defendants that principles outlined in Casilia renders plaintiff's second through fifth causes of action unsupportable. Plaintiff concedes that it was aware of the lack of certificate of occupancy thus rendering its fraudulent inducement claim unsupportable as there is no misrepresentation alleged by defendants in connection with the lease. The lease also contains an express merger clause rendering reliance upon any oral representations not actionable. Further, the complaint fails to set forth any obligation under the terms of the lease that was breached. With respect to the sixth cause of action for harassment, there are no facts alleged to support the violation of the statute.

However, as to the first cause action, the court agrees with plaintiff that it is not subject to dismissal because of the terms of the lease. The lease expressly limits the plaintiff's use of the premises to the operation of the restaurant. To the extent that it is alleged that such use is not permitted, the plaintiff has made out a valid claim of the



impossibility of contractual performance. As cited by the plaintiff, "Because there are issues of fact as to whether plaintiff's cause of action for rescission of the lease can be proved on the grounds of impossibility, fraud or misrepresentation, and also whether the lease should be terminated based on frustration of purpose, defendants' motion for summary judgment dismissing the amended complaint should not have been granted." Jack Kelly Partners LLC v Zegelstein, 140 AD3d 79, 82 (1<sup>st</sup> Dept 2016). On the facts alleged here, plaintiff has sufficiently pled a cause of action for rescission based upon impossibility of performance, as allegedly the leasehold use restriction prevent its performance. Therefore, such claim survives defendants' motion.

<u>6/8/2020</u> DATE					<u><i>Debra A. James</i></u> DEBRA A. JAMES, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE