

34 Main St. LLC v Palmer
2022 NY Slip Op 33811(U)
October 11, 2022
Supreme Court, Rockland County
Docket Number: Index No. 032324/2022
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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34 MAIN STREET LLC; JAY THREE ASSOCIATES;
ELI EICHLER; JOSEPH SHOER; USHER PANTIERER;
JERALD B. FRIEDMAN ESTATE,

Plaintiffs,

-against-

SCOTT PALMER; OSHA-WASH, INC.;
PALMER CARPENTRY,

Defendants.
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Sherri L. Eisenpress, A.J.S.C.

DECISION & ORDER

Index No.: 032324/2022

(Motion # 1 and #2)

The following papers, NYSCEF documents numbered 8-16, and 18-22, were considered in connection with (i) Defendants' Notice of Motion for an Order pursuant to CPLR 3211 dismissing this action and for such other and further relief as this Court may deem just and proper (Motion #1); and (ii) the Notice of Cross Motion of Plaintiffs to strike an affidavit submitted by Defendant Scott Palmer and to amend the caption (Motion #2).¹

Upon the foregoing papers, the Court now rules as follows:

Factual Allegations

Plaintiffs commenced this action against defendants to recover unpaid rent in the amount of \$28,070 under an alleged commercial lease relating to certain real property located at 34 Main Street, Haverstraw, New York (hereinafter "the property"). The complaint alleges that Plaintiff Joseph Shoer, Plaintiff Usher Pantierer and a nonparty, Jerry Friedman, formed a partnership, which is Plaintiff Jay Three Associates. In 1993, Jay Three Associates purchased and obtained title to the subject property.

¹ Although Plaintiffs purportedly cross-move to strike the "answer" of Defendant Scott Palmer, the attorney's affirmation in support of the cross motion apparently references an affidavit of Palmer submitted by Defendants in support of their motion to dismiss as an "answer" filed by Palmer. Moreover, none of the defendants filed an answer in this case.

In 1999, Plaintiff 34 Main Street LLC was formed to "operate as the landlord of" the property. Authority to act on behalf of Jay Three Associates and to manage the property was assigned to Plaintiff Eli Eichler. In 1999, 34 Main Street LLC leased the property to Matthew Murtagh, who established Defendant Osha-Wash, Inc. in 1993. Murtagh operated the company's laundromat business on the property. At some point, Murtagh "gave 100% of" Osha-Wash, Inc. to Defendant Scott Palmer (hereinafter "Palmer") and gave Palmer "full control of operations at the laundromat." Palmer thereafter operated the laundromat business and "paid rent with checks made out to" 34 Main Street LLC. Some of the checks used by Palmer to pay rent "were from" Defendant Palmer Carpentry. However, a search of the New York State Department of State record did not reveal any business registered as "Palmer Carpentry." Murtagh passed away in 2011.

The complaint alleges that "an oral Landlord-Tenant relationship was formed directly between 34 Main Street LLC and Scott Palmer when Matthew Murtagh passed away and Scott Palmer continued to pay the rent." In February 2020, Palmer ceased the operation of the laundromat business. Palmer, however, did not vacate the premises until October 2020. The complaint further alleges that, in September 2020, 34 Main Street, LLC commenced a nonpayment summary proceeding against Palmer and Osha-Wash, Inc. seeking possession of the property and rent arrears in the sum of \$25,770. Palmer and Osha-Wash, Inc. moved to dismiss the proceeding on the grounds that 34 Main Street, LLC did not have standing to sue and that Palmer should not be held personally liable for the unpaid rent. In February 2021, the proceeding was dismissed on the ground that 34 Main Street, LLC was not the owner of the property but the owner's managing agent, and therefore, lacked standing to bring the summary proceeding. Specifically, the decision of dismissal states that RPAPL § 721 provides a list of persons who can commence a summary proceeding and managing agents are not on that list.

The complaint at issue alleges five causes of action sounding in breach of contract, fraud, unjust enrichment, prima facie tort and attorney's fees. Under the first cause of action for breach of contract, the complaint alleges that "[t]here was an agreement between Plaintiffs and Defendants to lease the property in exchange for monthly rent payments" and that Defendants breached the lease by failing to pay rent totaling \$28,070.

Under the second cause of action for fraud, the complaint alleges that Defendants promised to pay "rent and back rent" to Plaintiffs even though Defendants had no intention of continuing to pay rent, and that Plaintiffs relied upon Defendants' misrepresentations allowing them to remain on the property. As a remedy for this alleged fraud, Plaintiffs seek the same measure of damages as they demand on their breach of contract claim.

Under the third cause of action for unjust enrichment, the complaint alleges that Defendants benefitted substantially from using the property during the period when Defendants were in default on rent payments, and that Plaintiffs incurred expenses for maintaining the property during that period.

Under the fourth cause of action for prima facie tort, the complaint alleges that, although Defendants ceased the operation of the laundromat business as of February 2020, they did not surrender the premises until October 2020; that Defendants were obligated to surrender the premises upon ceasing the operation of their business on the property; that, during the period from February 2020 to October 2020, Plaintiffs were not able to lease the property to another tenant and incurred expenses in maintaining the property; and that Defendants remained on the property during that period to "negotiate the financial responsibility of the back rent" or to retaliate against Plaintiffs for collecting rent from Defendants.

Under the fifth cause of action, Plaintiffs are seeking to recover attorney's fees rendered in connection with the nonpayment summary proceeding.

In addition, the complaint alleges that personal liability should be imposed against Palmer under a theory of piercing the corporate veil of Osha-Wash, Inc. In this regard, the complaint alleges that the principal executive office address of Osha-Wash, Inc., as registered with the New York State Department of State, is Palmer's residential home address. Palmer, as the sole owner and officer of Osha-Wash, Inc., commingled funds with the company and "abused Osha-Wash, Inc. by taking out all the funds without leaving anything for the business to survive."

The Parties' Contentions

In support of their motion to dismiss, Defendants first contend that 34 Main Street, LLC, Jay Three Associates, Eli Eichler and Jerald B. Friedman Estate all lack standing or the capacity to sue (see CPLR 3211 [a] [3]). Specifically, Defendants argue that 34 Main Street, LLC is not an owner of the property but a managing agent and, thus, 34 Main Street, LLC does not have standing to sue Defendants. Defendants argue that the decision of dismissal rendered in the summary proceeding should be binding on the parties in this case. Defendants allege that the property has been owned by Usher Pantierer, Joseph Shoer and Jerry Friedman doing business as Jay Three Associates since August 1993. To this end, Defendants submitted a deed to the property, which is illegible. Defendants further argue that Eli Eichler similarly lacks standing because Eichler is also a managing agent and not an owner of the property. Eichler never entered into any lease agreement with any of the defendants here entitling Eichler to recover the rent. Jay Three Associates lacks standing to sue because Plaintiffs failed to allege that Jay Three Associates is a "recognized corporate legal entity established under the laws of any particular State." Jerald B. Friedman Estate lacks standing because an estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her representative capacity.

Defendants next contend that Palmer is not responsible for the alleged unpaid rent and that all the claims against Palmer should be dismissed. Palmer avers, in his affidavit

submitted in support of the motion to dismiss, that he has never been a tenant at the premises and never signed any lease agreement, "in any capacity," to rent the property; and that there was no written lease agreement concerning the property. Palmer avers that he never personally guaranteed the payment of rent. Palmer asserts that he is "a shareholder of Osha-Wash, Inc." and that the company occupied the premises on a month-to-month basis operating a laundromat business until February 2020. Murtagh, who founded Osha-Wash, Inc. more than 20 years ago, is Palmer's father-in-law. Palmer avers that Palmer Carpentry is an assumed name for a New York State corporation, Scott Palmer, Inc., of which he is a shareholder. With respect to Plaintiffs' allegation that personal liability should be imposed against Palmer under a theory of piercing the corporate veil of Osha-Wash, Inc., Palmer avers that (1) Plaintiffs do not and cannot allege that Osha-Wash, Inc. is a mere alter ego of Palmer and used to defraud creditors or other third parties; (2) there is no allegation that Osha-Wash, Inc. is not a bona fide entity or that Palmer has used the corporate form to avoid debts; and (3) he never misused or abused Osha-Wash, Inc.'s corporate form in order to default Plaintiffs or any other party. Defendants argue that the payments made by Palmer towards the rent does not indicate any intention of Palmer to assume full responsibility for the payment of rent.

Defendants further contend that Plaintiffs fail to state a cause of action for prima facie tort or fraud. With respect to the latter, Defendants argue that Plaintiffs fail to allege a material misrepresentation of a fact, made with knowledge of its falsity and with an intent to induce reliance thereupon. Allegations of a misrepresentation of an intention to perform under a contract are insufficient to sustain a cause of action for fraud. Lastly, as to the cause of action for attorney's fees, Defendants contend that, since the nonpayment proceeding was dismissed, any demand for associated counsel fees is meritless.

In opposition to Defendants' motion and in support of their cross motion, Plaintiffs contend that Palmer's affidavit contains incorrect statements. Specifically, Plaintiffs

argue that Palmer's statement in his affidavit that he is "a" shareholder of Osha-Wash, Inc. incorrectly indicates that there are other shareholders and that Palmer is not the sole shareholder of Osha-Wash, Inc. Plaintiffs contend that the decision of dismissal rendered in the nonpayment summary proceeding is not binding on the parties as to the issue of whether 34 Main Street LLC has standing to sue here because this case involves different issues from the summary proceeding. However, Plaintiffs concede that Jerald B. Friedman Estate lacks standing and, therefore, move to amend the caption to substitute "Moshe Friedman as Executor of Jerald B. Friedman Estate" for "Jerald B. Friedman Estate" as a defendant. Plaintiffs assert that the executor of Jerald B. Friedman Estate is Moshe Friedman. Plaintiffs argue that, contrary to Defendants' contention, the remaining plaintiffs all have standing to sue. Plaintiffs further argue, among other things, that, although there was no written lease agreement concerning the property, the oral lease agreement is nonetheless enforceable because it falls under the part-performance exception to the statute of frauds. Palmer and Palmer Carpentry made "many payments" towards the rent for the premises, which indicated to Plaintiffs that Palmer and Palmer Carpentry would continue to make rent payments even in the absence of any written lease agreement. Palmer and Palmer Carpentry should be held jointly and severally liable for the unpaid rent.

In reply to Plaintiffs' opposition to Defendants' motion to dismiss and in opposition to Plaintiffs' cross motion, Defendants argue, among other things, that Plaintiffs failed to provide proof that Moshe Friedman was formally appointed as the executor of Jerald B. Friedman Estate by a Surrogate's Court and that this Court should require Plaintiffs to provide such proof. Contrary to Plaintiffs' assertion, Palmer's affidavit does not contain any incorrect statements.

In response to Defendants' opposition to Plaintiffs' cross motion, Plaintiffs contend, among other things, that Defendants "do not seriously oppose changing the name from Jerald B. Friedman Estate to 'Moshe Friedman as Executor of Jerald B. Friedman Estate'"

and that Defendants' request for proof regarding the appointment of Moshe Friedman as the executor of Jerald B. Friedman Estate is improperly raised at this early stage of the case.

Legal Analysis

Turning first to Defendants' motion to dismiss, Defendants' motion papers reference three separate subdivisions of CPLR 3211: (a) (1) (documentary evidence), (a) (3) (legal capacity to sue), and (a) (7) (failure to state a cause of action). "A motion to dismiss pursuant to CPLR 3211 (a) (1) based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law" (Law Offs. of Harry J. Binder & Charles E. Binder, P.C. v Fraga, 207 AD3d 455, 456 [2022]; see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v Martinez, 84 NY2d 83, 88 [1994]).

"While CPLR 3211 (a) (3) speaks to the plaintiff's lack of 'capacity' as a basis for dismissing complaints, decisional authorities have addressed a party's lack of standing as within the scope of the same statutory subdivision" (Wilmington Sav. Fund Socy., FSB v Matamoro, 200 AD3d 79, 89 [2021]; see Katz v Hampton Hills Assoc. Gen. Partnership, 186 AD3d 688, 691 [2020]; Wells Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239, 242 [2007]). "Where a CPLR 3211 (a) (3) motion is based upon an alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" (Wilmington Sav. Fund Socy., FSB v Matamoro, 200 AD3d at 89-90; see Katz v Hampton Hills Assoc. Gen. Partnership, 186 AD3d at 691; New York Community Bank v McClendon, 138 AD3d 805, 806 [2016]).

"The presentation of prima facie evidence is a concept more frequently associated with motions for summary judgment under CPLR 3212, but is also applied to CPLR 3211 (a) motions where the basis for dismissal is standing" (Wilmington Sav. Fund Socy., FSB v Matamoro, 200 AD3d at 90). "The burden is not on the plaintiff to affirmatively establish its standing for the dismissal motion to be denied" (id.; see Deutsche Bank Natl.

Trust Co. v Benson, 179 AD3d 767, 768 [2020]; Deutsche Bank Trust Co. Ams. v Vitellas, 131 AD3d 52, 59-60 [2015]). "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (Golden Jubilee Realty, LLC v Castro, 196 AD3d 680, 682 [2021]; see Katz v Hampton Hills Assoc. Gen. Partnership, 186 AD3d at 691; U.S. Bank N.A. v Trulli, 179 AD3d 740, 742 [2020]).

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), 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'" (Phoenix Life Ins. Co. v Town of Oyster Bay, 186 AD3d 763, 765 [2020], quoting Leon v Martinez, 84 NY2d at 87-88; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; see Bay Ridge Lodge 758, Free & Accepted Masons v Grand Lodge of Free & Accepted Masons of the State of N.Y., 202 AD3d 1035, 1036 [2022]).

Here, Defendants failed to meet their burden of establishing, prima facie, that 34 Main Street LLC and Eli Eichler lack standing to sue as a matter of law (see CPLR 3211 [a] [3]). Specifically, Defendants failed to demonstrate, prima facie, that 34 Main Street LLC and Eli Eichler have no legal stake in the outcome of this case or that they did not suffer any cognizable injuries as a result of Defendants' actions (see Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 772 [1991] [holding that, in order to establish standing, a party must establish "an injury in fact—an actual legal stake in the matter being adjudicated"]).

Contrary to Defendants' contention, the decision rendered in the nonpayment summary proceeding that 34 Main Street LLC as a managing agent has no statutory authority under RPAPL 721 to commence a summary proceeding is not binding on the parties here, as this case involves a different issue regarding the traditional common-law standing of 34 Main

Street LLC in a plenary action (see generally Ryan v. New York Tel. Co., 62 NY2d 494, 500 [1984] ["The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. . . . What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding."]).

To the extent that Defendants challenge Jay Three Associates' legal capacity to pursue this action, Defendants' contention lacks merit since Jay Three Associates is alleged to be a partnership and, thus, may sue in the partnership name (see 82 NY Jur 2d, Parties § 9). However, Defendants correctly contend, and Plaintiffs concede, that Jerald B. Friedman Estate lacks legal capacity to sue, because "[a]n estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her representative capacity" (Grosso v Estate of Gershenson, 33 AD3d 587 [2006]).

As to the part of Defendants' motion seeking dismissal of the five causes of action pursuant to CPLR 3211 (a) (7), this Court finds that the complaint failed to state causes of action for fraud, prima facie tort and attorney's fees. To establish fraud, a plaintiff must show "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (Joseph v Fensterman, 204 AD3d 766, 768 [2022]; see Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]). "A cause of action to recover damages for fraud will not lie where the only fraud claimed arises from the breach of a contract" (East Coast Intl. Tire Group, Inc. v New York Tire Factory, Inc., 185 AD3d 662, 663 [2020]; see Gorman v Fowkes, 97 AD3d 726, 727 [2012]; Selinger Enters., Inc. v Cassuto, 50 AD3d 766, 768 [2008]). "General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a claim to recover damages for fraud" (Gould v Decolator, 121 AD3d 845, 848 [2014]; see New York Univ. v Continental Ins. Co., 87 NY2d 308, 318 [1995]; Pugni v

Giannini, 163 AD3d 1018, 1020 [2018]). Here, the allegations of the complaint were insufficient to establish a cause of action for fraud, as they amounted to nothing more than general allegations that Defendants entered into a lease agreement with the intent not to perform (see Gould v Decolator, 121 AD3d at 848). Therefore, the cause of action for fraud is dismissed.

In order to establish a cause of action for prima facie tort, a plaintiff must show "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (Freihofer v Hearst Corp., 65 NY2d 135, 142-143 [1985]; see Curiano v Suozzi, 63 NY2d 113, 117 [1984]). To adequately plead a claim of prima facie tort, the complaint "must plead the defendant's malicious intent or disinterested malevolence as the sole motive for the challenged conduct" (Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc., 153 AD3d 768, 772 [2017]). Here, inasmuch as the complaint failed to allege that Defendants' conduct at issue was motivated solely by malice or disinterested malevolence, it was insufficient to state a cause of action sounding in prima facie tort (see Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc., 153 AD3d 768, 772 [2017]; Goldman v Citicore I, LLC, 149 AD3d 1042, 1045 [2017]). As such, the cause of action sounding in prima facie tort is dismissed.

As for the cause of action seeking to recover the attorney's fees Plaintiffs allegedly incurred in connection with the nonpayment summary proceeding, the general rule is that there is no cause of action for an attorney's fee absent a statutory or contractual basis for such an award (see Chapel v Mitchell, 84 NY2d 345 [1994]; Matter of A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1, 5 [1986]). The complaint here failed to allege any such statutory or contractual basis for Plaintiffs to recover counsel fees and failed to allege any applicable exceptions to that general rule. Accordingly, the claim for attorney's fees is dismissed.

However, assuming the facts alleged in the complaint to be true and according Plaintiffs the benefit of every possible favorable inferences, this Court concludes that Plaintiffs set forth a cognizable cause of action against defendants to recover damages for breach of contract by alleging all of the essential elements: (1) the existence of oral agreements to rent the property, (2) Plaintiffs' performance under the agreements, (3) Defendants' breach of their obligations under the agreements to pay the rent, and (4) damages resulting from that breach (see Nassau Operating Co., LLC v DeSimone, 206 AD3d 920, 926 [2022]; Hausen v North Fork Radiology, P.C., 171 AD3d 888, 892 [2019]). Inasmuch as there are allegations in the complaint indicating that one of the oral agreements was entered between Palmer and 34 Main Street LLC, Palmer is a proper party to this action. To the extent that Defendants also move to dismiss this breach of contract cause of action pursuant to CPLR 3211 (a) (5) based on the statute of frauds, the statute of frauds (see General Obligations Law § 5-703) does not render the alleged oral agreements void. The oral agreements, as alleged in the complaint, did not contemplate any specific lease term and thereby created an at-will tenancy, which is not barred by the statute of frauds (see Sawicka v Schwimmer, 187 AD3d 957, 959 [2020]).

The complaint, construed liberally, also sufficiently states a cause of action for unjust enrichment by alleging that Defendants were unjustly enriched, at Plaintiffs' expense, by occupying the property without paying rent and that it would be against equity and good conscience to permit Defendants to retain what is sought to be recovered, namely, the unpaid rent (see Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011]).

The part of Plaintiffs' cross motion seeking to strike Palmer's affidavit on the ground that the affidavit contains untruthful statements is denied since this Court does not find the challenged statements to be false. However, at this juncture, this Court finds it proper to grant the part of Plaintiffs' cross motion seeking to amend the caption to substitute

"Moshe Friedman as Executor of Jerald B. Friedman Estate" for "Jerald B. Friedman Estate" as a defendant (see CPLR 305 [c]).

Accordingly, it is hereby

ORDERED that Defendants' Notice of Motion (Motion #1) is GRANTED in part and DENIED in part; and it is further

ORDERED that Plaintiffs' Notice of Cross Motion (Motion #2) is GRANTED in part and DENIED in part; and it is further

ORDERED that the caption shall be deemed amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
34 MAIN STREET LLC; JAY THREE ASSOCIATES;
ELI EICHLER; JOSEPH SHOER; USHER PANTIERER;
MOSHE FRIEDMAN AS EXECUTOR OF
JERALD B. FRIEDMAN ESTATE,

Plaintiffs,

-against-

SCOTT PALMER; OSHA-WASH, INC.;
PALMER CARPENTRY,

Defendants.

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and it is further

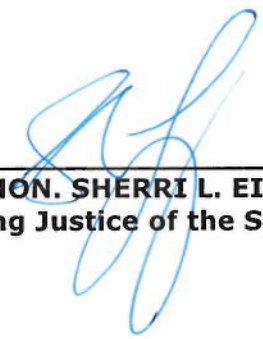
ORDERED that Plaintiffs are permitted to file the proposed Amended Complaint through the NYSCEF system, which shall be deemed timely filed, and shall do so within ten (10) days of the date of this Decision and Order — the Amended Complaint is deemed served upon counsel for Defendants at the moment it is uploaded to the NYSCEF system; and it is further

ORDERED that Defendants have twenty (20) days from the date the Amended Complaint is filed to file an Answer; and it is further

ORDERED that the parties are directed to appear for a Preliminary Conference on NOVEMBER 10, 2022 at 9:40 a.m. via Microsoft Teams. Link to be provided the day prior.

The foregoing constitutes the Decision and Order of this Court on Motion #1 and # 2.

Dated: New City, New York
October 11, 2022



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO: All counsel via NYSCEF