

**Cynthia Broan, Inc. v Avidov Holding Corp.**

2008 NY Slip Op 33186(U)

November 25, 2008

Supreme Court, New York County

Docket Number: 107179/08

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 107179/2008  
**CYNTHIA BROAN INC.**  
 vs.  
**AVIDOV HOLDING CORP.**  
 SEQUENCE NUMBER : 002  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

UNDECIDED

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
 NOV 28 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 11/21/08

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**WALTER B. TOLUB** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 15

----- X

CYNTHIA BROAN, INC. d/b/a CYNTHIA  
BROAN GALLERY,

Plaintiff,

INDEX NO.  
107179/08

-against-

AVIDOV HOLDING CORP.,

Defendant.

----- X

**FILED**  
JAN 14 2009  
CLERK OF COURT  
NEW YORK COUNTY

**WALTER B. TOLUB, J.:**

Defendant moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint on the ground that plaintiff's action is barred by the Statute of Frauds.

Plaintiff cross-moves for an order continuing the stay of defendant's summary non-payment proceeding entitled *Avidov Holding Corp. v Cynthia Broan Inc.* (Index No. 068011/08) pending in the Civil Court, New York County (the "summary proceeding").

In this action plaintiff's president and sole shareholder, Cynthia Broan ("plaintiff"), is seeking, *inter alia*, to recover damages for defendant's alleged breach of an oral agreement to purchase her leasehold interest in commercial space located at 548 West 29<sup>th</sup> Street in Manhattan (the "premises"). The following is plaintiff's version of the facts.

Plaintiff leased the entire premises from defendant pursuant to a 10-year lease which expires on October 31, 2014 and invested over \$700,000 to convert the premises into an upscale art gallery. In the summer of 2007 a potential purchaser (the "Purchaser") of the premises made

the following representations to her “(on behalf of himself and defendant)”: she would be paid \$750,000 if she surrendered the premises; she could cease paying rent until the buy-out occurred; and, she would be permitted to keep her fixtures after she vacated the premises (*see* Plaintiff’s Affidavit, ¶ 11). In reliance on the “parties” representations plaintiff ceased paying rent as of August 2007, stopped marketing the premises for exhibitions, and began shutting down the art gallery. Defendant, in turn, stopped billing plaintiff for rent in August 2007. Thereafter, the Purchaser advised plaintiff that the buy-out of her leasehold interest would be delayed because defendant’s two principals were involved in a business dispute. Notwithstanding repeated assurances that plaintiff did not have to pay rent, defendant commenced the summary proceeding against her seeking rent and additional rent from August 2007 in the approximate sum of \$91,000.

The complaint herein (Defendant’s Ex. A) asserts five causes of action: breach of contract (the alleged oral agreement to purchase plaintiff’s leasehold interest); permanent injunction (enjoining the prosecution of the summary proceeding); declaratory judgment (declaring that the commencement and prosecution of the summary proceeding was and is improper); promissory estoppel (declaring that defendant is estopped from prosecuting the summary proceeding) and fraud (defendant’s alleged misrepresentation that plaintiff could cease paying rent and that her leasehold interest would be purchased for \$750,000).

Defendant moves for summary judgment contending that plaintiff’s action is barred by the Statute of Frauds because defendant’s alleged agreement to purchase plaintiff’s leasehold interest is not in writing and because plaintiff fails to qualify for any exception to the Statute such as equitable estoppel. In his supporting affidavit (Defendant’s Ex. D) defendant’s president, Dov

Pravkewitz ("Pravkewitz"), states that he planned to build residential units above plaintiff's art gallery which would not interfere with her leasehold and that neither he nor his co-principal ever told plaintiff that she could stop paying rent or that defendant wanted to purchase her leasehold interest. Pravkewitz then points to e-mails (attached to his affidavit) which support his position that he did not tell plaintiff to stop paying rent and contain an acknowledgment by plaintiff that she owes past due rent along with her request for a pay-out plan. In his supporting affidavit (Defendant's Second Ex. A) defendant's co-principal, Avraham Gottlib ("Gottlib"), states that neither he nor Pravkewitz ever told plaintiff that she did not have to pay rent and that they never discussed purchasing her leasehold interest.

The proponent of a motion for summary judgment must establish a defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the proponent meets this burden, the opponent must then produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact, mere conclusions or unsubstantiated assertions are insufficient (*id.*).

Defendant established its right to summary judgment dismissing the complaint as a matter of law. The Statute of Frauds provides, in pertinent part, that a contract for the sale of real property or an interest therein is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged (*see* General Obligations Law § 5-703[2]). Defendant's principals contend that there was never an agreement with plaintiff to purchase her leasehold interest and that there is no signed writing indicating the parties entered into such an agreement. Plaintiff's failure to refute the contention by producing an appropriate written

instrument<sup>1</sup> warrants a dismissal of the first cause of action for breach of contract.

Plaintiff's reliance on the doctrine of partial performance (*see* General Obligations Law 5-703[4]) is misplaced. The doctrine is "based upon the equitable principle that it would be a fraud to allow one party, insisting on the Statute [of Frauds], to escape performance after permitting the other party, acting in reliance, to substantially perform" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group plc*, 93 NY2d 229, 237 [1999]). The partial performance must be "unequivocally referable" to the oral agreement (*id.*, at 235 ). Plaintiff's primary "performance" was her failure to pay rent. That failure may have been caused by a number of things such as a lack of funds and, in any event, was not unequivocally referable to defendant's alleged agreement to purchase plaintiff's interest in the premises. If plaintiff's failure to pay rent was considered partial performance, any lessee who defaulted in his rent obligation could claim, as plaintiff does herein, that the failure to pay rent was based upon the reliance of the lessor's oral promise to forgive rent payments and buy a leasehold interest. Furthermore, the fact that defendant commenced the summary proceeding for non-payment of rent, and the attached e-mails to the Pravkewitz affidavit, belie plaintiff's "unsubstantiated allegations or assertions" (*Zuckerman v City of New York, supra*, 49 NY2d at 562) concerning the failure to pay rent, the alleged closing of her art gallery (which could have been done for any number of reasons), and defendant's purported offer to purchase her leasehold interest.

Plaintiff's second and third causes of action, for injunctive and declaratory relief

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<sup>1</sup> Plaintiff's contention that discovery might uncover a written agreement to purchase plaintiff's leasehold interest does not withstand scrutiny. If the writing existed then plaintiff, as a necessary party thereto, would have a copy or undoubtedly know of the writing's existence.

respectively, pertain to the summary proceeding in Civil Court. By decision and order dated May 27, 2008 this court stayed the summary proceeding "pending the resolution of the dissolution proceeding [between Gottlib and Pravkewitz] ... in this court" (*see* Defendant's Ex. C). The dissolution proceeding has now been resolved (*see* stipulation of discontinuance, Defendant's Ex. D). As a result, plaintiff's second and third causes of action are dismissed as academic. Plaintiff's fourth cause of action, which is based on the doctrine of promissory estoppel, also pertains to the summary proceeding and is dismissed as academic.

Plaintiff's fifth cause of action for fraud alleges that defendant falsely represented that it would pay plaintiff \$750,000 for the leasehold interest and waive the rent obligations in consideration of plaintiff's closing down the business and prematurely terminating the lease, and that plaintiff justifiably relied on defendant's representation which defendant knew to be false when made (*see* Defendant's Ex. A, ¶¶ 56-60). These allegations properly state a cause of action for fraudulent representation (*see Channel Master Corporation v Aluminium Limited Sales, Inc.*, 4 NY2d 403, 406-407 [1958]). However, both Pravkewitz and Gottlib have stated under oath that they never represented that plaintiff did not have to pay rent, that they never discussed purchasing her leasehold interest and never told her that she should cease doing business (*see* Pravkewitz affidavit, ¶ 4; Gottlib affidavit, ¶ 3). Pravkewitz and Gottlib's statements are not refuted by plaintiff who states in her opposing affidavit that the Purchaser made the subject representations (*see* plaintiff's affidavit in opposition, ¶ 11). Plaintiff offers no support for her parenthetical assertion that the Purchaser was acting on behalf of defendant, who was the owner and potential seller of the premises, or for her implicit assumption that the Purchaser's representations were binding on the defendant. Additionally, plaintiff offers no reason for her

failure to join the Purchaser as a defendant herein. As noted above, unsupported conclusions or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York, supra*, 49 NY2d 557, 562). Plaintiff's fifth cause of action for fraudulent representation is therefore dismissed.

Accordingly, it is hereby

ORDERED that defendant's motion for an order granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that plaintiff's cross-motion for an order continuing the stay of the summary proceeding in Civil Court is denied and the stay is hereby vacated; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: ~~Nov~~ 25, 2008

  
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WALTER B. TOLUB, J.S.C.

**FILED**  
NOV 20 2008  
COUNTY CLERK'S OFFICE  
NEW YORK