Vaneria & Spanos, Esqs. v First Lexington Corp.
2009 NY Slip Op 30011(U)
January 6, 2009
Supreme Court, New York County
Docket Number: 600382/08
Judge: Marilyn Shafer

[* 1]

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

PRESENT: HON. MARILYN SHAFER, JSC PART 8

Index Number : 600382/2008
VANERIA & SPANOS, ESQS.
VS
FIRST LEXINGTON CORPORATION
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 decided pursuant to attached decision

FILED
JAN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/6/09

HON. MARILYN SHAFER, JSC
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 62

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VANERIA & SPANOS, ESQS., Including and Consisting of JOHN SEBASTIAN VANERIA, ESQ. and DIMITRIOS SPANOS, ESQ.,

Plaintiffs,

Index No.: 600328/08

-against-

DECISION AND ORDER

FIRST LEXINGTON CORPORATION, RUDIN MANAGEMENT COMPANY, INC., 20TH FLOOR TENANT, LLC and LOUIS J. SOMOZA,

Defendants.

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SHAFER, J.

FACTUAL BACKGROUND

Plaintiffs were one of several subtenants of defendant 20th Floor Tenant, LLC (20th Floor). 20th Floor rented space in a commercial building owned by defendant First Lexington Corporation (First Lexington), and managed by defendant Rudin Management Company, Inc. (Rudin). Defendant Louis J. Somoza (Somoza) is a Senior Vice-President of Rudin. First Lexington, Rudin and Somoza (together, Moving Defendants) move to dismiss the action against them, pursuant to CPLR 3211 (a) (1) and (7).

20th Floor failed to meet its rental obligations under its prime lease with First Lexington, and, in order to avoid legal process, 20th Floor agreed to terminate the lease and vacate the premises in consideration of First Lexington forgiving the

outstanding rent due and owing.

Plaintiffs allege that 20th Floor notified plaintiffs in December, 2007, that it was terminating its lease with First Lexington, and that, if the premises were vacated, neither First Lexington nor Rudin would commence any proceedings against the sub-tenants.

In January of 2008, the premises were not vacated by the sub-tenants, and, accordingly, First Lexington sent 20th Floor a ten-day notice to cure, which 20th Floor failed to do. Consequently, on January 31, 2008, First Lexington sent 20th Floor a five-day notice of termination. First Lexington also sent courtesy copies of these notices to 20th Floor's sub-tenants.

By early February, 2008, all of the sub-tenants except for plaintiffs had vacated the premises. According to plaintiffs, they notified Rudin that they wished to remain on the premises for an additional period in order to locate other suitable office space. Plaintiffs assert that Rudin and First Lexington agreed to afford plaintiffs a reasonable amount of time to re-locate.

Plaintiffs claim that on February 6, 2008, all telephone and communication lines to their office were disrupted, which, they allege, was directly caused by Moving Defendants' actions. However, the work order submitted with plaintiffs' papers indicate that the work was authorized by 20th Floor, not Moving

Defendants.

On February 7, 2008, plaintiffs obtained a temporary restraining order enjoining defendants from taking any further action to interfere with plaintiffs' possession of the premises. The temporary restraining order was turned into an injunction by this court on February 14, 2008.

On or about February 13, 2008, First Lexington commenced holdover proceedings against 20th Floor, naming in the action plaintiffs and other sub-tenants of 20th Floor as "Undertenants," in order to regain possession of the premises, pursuant to the notice of termination. On March 13, 2008, First Lexington and plaintiffs entered into a stipulation of settlement of the holdover action, whereby plaintiffs agreed to vacate the premises by April 3, 2008, and First Lexington agreed to stay the warrant of eviction that had been ordered by the court in the same action. On April 2, 2008, plaintiffs informed the building manager that they had removed all of their files and belongings from the premises.

Prior thereto, on or about February 25, 2008, plaintiffs had instituted the instant lawsuit, alleging five causes of action: (1), seeking injunctive relief to remain in possession of the premises; (2), breach of the covenant of quiet enjoyment; (3), breach of agreement; (4), negligence and intentional tort; and (5), defamation.

DISCUSSION

CPLR 3211 (a), Motion to dismiss cause of action, states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or ...

(7) the pleading fails to state a cause of action ... .

Under CPLR 3211 (a) (1) a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83 (1994). As stated in *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 (1st Dept 2000),

> "[T]he court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88)."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), the opposing party need only assert facts which "fit within any cognizable legal theory." *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188, 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 (a) (1) is precluded. *Khayyam v Doyle*, 231

AD2d 475 (1st Dept 1996).

Plaintiffs' first cause of action is dismissed as moot. Plaintiff voluntarily vacated the premises pursuant to a stipulation of settlement of the holdover proceeding, and so injunctive relief to permit them to remain in possession is no longer necessary.

Plaintiffs' second, third and fourth causes of action are all based on the argument that, once the prime lease terminated, they became a month-to-month tenant of First Lexington, and were therefore entitled to all legal protections afforded legitimate tenants. However, plaintiffs' argument that they were month-to-month tenants is flawed.

To support their assertions, plaintiffs cite three primary cases, each of which is distinguishable from the instant facts.

Plaintiffs cite *Porthault Co., Inc. v Jeddah Madison Corp.* (43 AD3d 340 [1st Dept 2007]), for the proposition that when a prime tenant voluntarily terminates the paramount lease, the subtenant becomes the month-to-month tenant of the original lessor. However, this is not what the court stated.

In upholding the lower court's grant of summary judgment in favor of the landlord, the *Porthault* court stated that the termination of the prime lease terminated the sub-tenant's rights to the premises. However, because the landlord accepted rent from the sub-tenant, the sub-tenant became, "at best," a month-

to-month tenant, which did not invalidate the termination of the prime lease. In the instant case, First Lexington never requested nor accepted rent from plaintiffs, and plaintiffs state that they paid all of the rent for which they were obligated to 20th Floor.

Plaintiffs contend that the second case, *Golderest Trans., Ltd. v Across Am. Leasing Corp.* (298 AD2d 494 [2d Dept 2002]), holds

> "[a]s a general rule, where a landlord and prime tenant enter into an agreement to voluntarily terminate the paramount lease, the subtenant becomes the immediate tenant of the original lessor, and the interest of the subtenant and terms of the sublease continue as if no termination had occurred [citations omitted]."

Id. at 495.

However, plaintiffs failed to indicate the remainder of the quotation, which goes on to state:

> "Such subtenancy remains because the landlord and tenant may not affect the rights of third parties who are not parties to their separate surrender agreement. However, because a sublease is dependent upon and limited by the terms and conditions of the paramount lease from which it is carved, a subtenancy may be terminated by the expiration of the term of the prime tenant, or a re-entry by the landlord for a condition broken [internal quotation marks and citations omitted]."

Id. at 495-496.

In *Goldcrest*, the court said that, because the paramount lease was terminated by the prime tenant's breach of the covenant to pay rent, the sub-tenant's interest also terminated, and it did not thereby become the tenant of the landlord, facts parallel

to the instant case. However, it is noted that in *Goldcrest*, unlike the instant matter, the sub-tenant did pay rent to the landlord, but the prime lease in *Goldcrest* stated that acceptance of rent from the sub-tenant would not result in the acceptance of the sub-tenant as a tenant.

The third case relied upon by plaintiffs, *JPMorgan Chase Bank, N.A. v Rocar Realty Northeast, Inc.* (47 AD3d 425 [1st Dept 2008]), is likewise unavailing.

In *Rocar*, the court held that

> "[a] subtenant like plaintiff, faced with loss of possession because his sublessor had defaulted under the paramount lease, must nonetheless continue to perform the terms and conditions of its sublease. Indeed, a subtenant has the right to perform covenants of the paramount lease breached by its sublessor in order to protect its possession. Thus, the subtenant may pay the paramount landlord the rent due it from the sublessor. Such payment, if made in good faith and under compulsion, is a defense to an action brought by the sublessor against the subtenant for the same rent [citations omitted]."

Id. at 427.

In the instant case, plaintiffs never paid any rent to the landlord, much less the entire rent due to First Lexington under its prime lease with 20th Floor. Therefore, *Rocar* does not support plaintiffs' position that they became tenants of First Lexington by paying their sub-rent to 20th Floor.

Despite plaintiffs' assertions, the only way that a month-to-month tenancy can be created after the termination of a lease is by the acceptance of rent by the lessor. Real Property Law §

232-c. Since the landlord neither sought nor accepted rent from plaintiffs, no month-to-month tenancy was created, and plaintiffs remained on the premises as a holdover tenant after the lease was terminated by 20th Floor's failure to meet its covenants pursuant to the paramount lease.

Since there was no contractual relationship between plaintiffs and Moving Defendants, the contract being between plaintiffs and 20th Floor, and there was no landlord-tenant relationship between plaintiffs and Moving Defendants, since no month-to-month tenancy was created, plaintiffs cannot maintain an action for breach of quiet enjoyment against Moving Defendants. *See McCarthy v Board of Managers of Bromley* Condominium, 271 AD2d 247 (1st Dept 2000); *Wright v Catcendix Corp.*, 248 AD2d 186 (1st Dept 1998). Further, plaintiffs cannot maintain a cause of action for breach of agreement, because no written contract existed between plaintiffs and Moving Defendants, and the allegations in the complaint are too indefinite and conclusory to meet the requirements of pleading the essential terms of a purported oral agreement. *See Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994).

Plaintiffs' fourth cause of action for negligence and intentional tort is also based on plaintiffs' assertion that they were a lawful tenant, which the preceding analysis indicates that they were not.

Plaintiffs' last cause of action is for defamation, based on statements of Somoza, allegedly to building employees and third persons, that plaintiffs were "unlawful tenants," such statements being made after the notice of termination.

To maintain an action for defamation, plaintiffs must show that Moving Defendants, individually or through authorized agents, made a false statement, published without privilege or authorization to a third party, constituting fault, and that the statement caused either special harm or constituted defamation per se. *Dillon v City of New York*, 261 AD2d 34 (1st Dept 1999). Additionally, pursuant to CPLR 3016 (a), the complaint must specify the particular words used and to whom the statements were made.

The only words specified in the complaint are the words indicating that plaintiffs were "unlawful tenants," said after the paramount lease had terminated, which, as discussed above, was true. Therefore, plaintiffs have failed to meet their burden of pleading a cause of action for defamation.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that First Lexington Corporation's, Rudin Management Company, Inc.'s and Louis J Somoza's motion to dismiss is granted and the complaint is dismissed as against these defendants, with costs and disbursements to these defendants as taxed by the Clerk

of the Court; and it is further

ORDERED that the action is to continue against defendant 20th Floor Tenant, LLC; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 1/6/09

ENTER:

MARILYN SHAFER

Marilyn Shafer, J.S.C.

FILED

JAN 08 2009

COUNTY CLERK'S OFFICE
NEW YORK