

Clearwater Assoc. v Telephone Restaurant, Inc.
2009 NY Slip Op 30373(U)
February 6, 2009
Supreme Court, Nassau County
Docket Number: 132432007
Judge: Leonard B. Austin
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INDEX
NO. 132432007

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 11 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: February 28, 2008
Submission Date: April 24, 2008
Motion Sequence No.: 001/MOT D

CLEARWATER ASSOCIATES,

x

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Law Offices of Steven M. Nachman
675 Third Avenue, 29th Floor
New York, New York 10017

TELEPHONE RESTAURANT, INC., 156-158 SECOND AVENUE, LLC, 8/49 156-158 SECOND AVENUE, LLC, YL 156-158 SECOND AVENUE, LLC, SH 156-158 SECOND AVENUE, LLC, and SECOND VILLAGE PARTNERS, LLC,

Defendants.

x

COUNSEL FOR DEFENDANTS
(Telephone Restaurant Inc.)
Kolodny P.C.
338-A Greenwich Street
New York, New York, 10013

(156-158 Second Avenue, LLC, 8/49 156-158 Second Avenue, LLC, YL 156-158 Second Avenue, LLC, SH 156-158 Second Avenue, LLC, and Second Village Partners, LLC)
Marc E. Elliott, P.C.
The Woolworth Building
233 Broadway- 5th Floor
New York, New York 10279

ORDER

The following papers were read on Defendants' motion to dismiss pursuant to CPLR 3211(a)(1) and (7):

- Notice of Motion to Dismiss, dated Feb. 7, 2008;
- Defendants' Memorandum of Law in Support, dated Feb. 8, 2008;
- Affidavit of James E. Seiler, sworn to Mar. 24, 2008;
- Plaintiff's Memorandum of Law in Opposition, dated Apr. 10, 2008;
- Affirmation of Steven M. Nachman Esq., dated April 18, 2008;
- Affidavit of Rudolf Mosny, sworn to April 10, 2008;
- Defendant's Memorandum of in Opposition, dated April 10, 2008.

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

Defendants, 156-158 Second Avenue, LLC ("156-158 LLC"), 8/49 156-158 Second Avenue, LLC ("8/49 LLC"), YL 156-158 Second Avenue, LLC ("YL LLC"), SH 156-158 Second Avenue, LLC ("SH LLC") and Second Avenue Village Partners, LLC ("Village Partners") (collectively the "Movants"), move to dismiss the amended complaint of Plaintiff, Clearwater Associates ("Clearwater"), as to the Movants and the cross-claim of Defendant, Telephone Restaurant, Inc. ("TRI"), pursuant to CPLR 3211(a)(1) and (7).

BACKGROUND

A. The Parties

Clearwater is the prior owner and landlord of a building located at 149 Second Avenue, New York, New York ("Building"). On April 16, 1985, Clearwater entered into a lease with TRI for the ground floor store and a portion of the basement located within the Building. That lease ("Lease") was amended and/or extended on October 7, 1988, May 31, 1991 and May 1, 2000.

Pursuant to the Lease, TRI was obligated to pay rent as computed by a schedule and to pay water charges, sewer rent and other expenses incurred in connection with the water and sewer system of the Building. The Lease also provided that should TRI fail to pay the rent when it was due, it would be obligated to pay late fees as additional rent. Furthermore, Clearwater could impose interest on all unpaid amounts at a rate of one percent (1%) per month. Finally, TRI would be obligated to reimburse Clearwater

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

for all costs, including counsel fees, in prosecuting any action as a result of any default by the tenant, including rental payments.

On April 22, 2005, Clearwater and 157 J.E.S. LLC entered into a contract ("Contract") with East Village at Second Avenue, LLC to sell the Building in addition to properties located at 24 St. Marks Place, 111 East 7th Street, 215 East 4th Street, 244 East 21st Street, 141, 145, 151, 156, and 157 Second Avenue for a total of \$93,250,000.¹ Section 12.02 of the Contract provides that

If any tenant is in arrears in the payment of rent on the Closing Date, rents received from such tenant after the Closing shall be applied in the following order of priority (c) then to the month preceding the month in which the Closing occurred; (b) then to the month in which the Closing occurred; (a) to any month or months following the month in which the Closing occurred; and (d) then to the period prior to the month preceding the month in which the Closing occurred. If rents or any portion thereof received by Seller or Purchaser after the Closing are payable to the other party by reason of this allocation, the appropriate sum, less a proportionate share of any reasonable attorneys' fees, costs and expenses of collection thereof, shall be promptly paid to the other party, which obligations shall survive the Closing.²

By deed, dated August 19, 2005, Clearwater transferred title to the Building to

¹ According to the Rider to the contract of sale, Clearwater owned all of the properties except 157 Second Avenue, New York, New York, which was owned by 157 J.E.S. LLC.

² The main section of the Contract is a preprinted Blumberg form. The parties altered the pre-printed language concerning the payment of rental arrears following the closing of title by changing the order of the priority of payments owed. The quoted language in this decision reflects how §12.02 appears in the Contract with the alterations.

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

147-49 Second Avenue, LLC, 8/49 147-149 Second Avenue, LLC and SH 147-149 Second Avenue, LLC.³ Pursuant to the contract of sale, Clearwater assigned the Lease to the Building in conjunction with the sale.⁴ At the time, Clearwater transferred title to the Building, Clearwater alleges that TRI owed \$239,641.92 for unpaid base rent, tax rent and water and sewer charges.

Subsequent to this transaction, Clearwater alleges that 8/49 LLC assigned a ten (10%) percent interest in the Building to Village Partners.

B. Prior Litigation

On October 18, 2005, a notice of petition for nonpayment of rent⁵ ("Petition"), was filed against TRI, by 141-149 Second Avenue LLC ("141-149 LLC").⁶ This Petition included a demand for unpaid rent in the amount of \$328,029.24. The Petition alleges that TRI entered into a written rental agreement agreeing to pay rent for space within the Building and that TRI owed rent from January 2005 through October 2005 and related late fees.

³ Despite the fact that title was deeded to parties other than the named Defendants, Movants have not raised an issue in their moving papers with respect to the identity of the current owners of the Building and appear to concede that the Movants are related to the current owners of the Building.

⁴ The contract of sale is between Clearwater, as seller, and East Village at Second Avenue, LLC, as purchaser.

⁵ Civil Court of the City of New York, Index No. 096608/2005

⁶ 141-149 LLC is not named as a Defendant in this action even though it commenced the non-payment proceeding.

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

It is undisputed that TRI's rent owed from January 2005 up until the transfer of title to the Building in August of 2005 was owed to Clearwater.

On December 27, 2005, a stipulation of settlement ("Stipulation") was entered into between 141-149 LLC and TRI in the amount of \$92,000.00. The Stipulation states that the settlement figure reflected \$80,000.00 in rent due and \$12,000.00 in real estate tax escalations due through June 30, 2006. In addition, the settlement extended the expiration of the Lease to April 30, 2010 and modified the monthly rental payments for December 2005 through April 2010 by reducing the amount owed.

C. Present Litigation

Clearwater alleges that it was unaware of the non-payment proceeding and the related settlement between 141-149 LLC and TRI. On February 16, 2007, Clearwater, through its attorney, notified TRI in writing of unpaid back rent in the amount of \$267,936.76. After not receiving the rent from TRI, Clearwater commenced the present action against TRI asserting four causes of action; to wit: (1) breach of contract; (2) account stated; (3) unjust enrichment; and (4) *quantum meruit*.

TRI answered Clearwater's complaint asserting ten affirmative defenses as follows: (1) accord and satisfaction by payment of a just debt to 141-149 LLC; (2) accord and satisfaction by payment to 141-149 LLC which was acting on behalf of Clearwater; (3) accord and satisfaction by payment to 141-149 LLC which was acting as an agent of Clearwater; (4) estoppel by payment to 141-149 LLC which had express or implied authority to commence the suit; (5) accord and satisfaction by payment to 141-

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

149 LLC which was acting for the benefit of Clearwater; (6) estoppel by laches for Clearwater's failure to object to the commencement of the prior litigation; (7) accord and satisfaction by payment to 141-149 LLC which had authority to commence the proceeding; (8) waiver of right to recover; (9) failure to join a necessary party (141-149 LLC); and (10) failure to comply with the terms of the lease.

On November, 9 2007, Clearwater filed an amended complaint. In addition to the original four causes of action against TRI, the amended complaint, which added the Movants as Defendants herein, included two causes of action against them for breach of contract and lack of authority to commence suit or settle any claim on behalf of Clearwater. In the amended complaint, Clearwater alleges that the Movants' act of commencing a suit for non-payment of rent and settling the claim without authority makes them legally responsible for any loss incurred as a result. Moreover, Clearwater alleges that, in the event it is estopped from asserting a claim against TRI for unpaid rent due to the Movants' prior litigation, then the Movants should be liable for all monies due from TRI given their having settled with TRI without Clearwater's authority.

In responding to the amended complaint, TRI interposed a cross-claim against Movants alleging that the Movants represented to TRI that all sums, claimed in the amended complaint to be owed to Clearwater, were due and owing to them and that in reliance upon that representation, TRI paid Movants substantial sums of money. Thus, if any judgment is recovered against TRI, TRI alleges that it should be indemnified by Movants.

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

The Movants filed a motion to dismiss the causes of action brought against them in the amended complaint and the cross-claim pursuant to CPLR 3211(a)(1) and (7) asserting that documentary evidence clearly establishes a defense to the allegations and that Clearwater and TRI have failed to state causes of action on which relief may be granted.

Clearwater opposes the motion on the ground that Movants fail to address both causes of action asserted against them. It also argues that General Obligations Law §5-1501 requires a party to have authority to commence suit on behalf of another and the Movants did not obtain such authority from Clearwater. Moreover, Clearwater argues that the power to collect payments on behalf of another does not encompass the authority to commence suit or settle a claim. In addition, Clearwater claims that the documentary evidence submitted in support of the motion is contradictory and actually supports Clearwater's position that money is owed to it by Movants and that Movants have failed to present any argument in support of their motion pursuant to CPLR 3211(a)(7).

In opposition to the motion, TRI argues that the Movants, in their Petition in the non-payment proceeding and during settlement negotiations, portrayed that the settlement pertained to all monies owed by TRI with respect to its rental of the Building. TRI notes that, of the \$298,583.24 sought in the Petition, only \$29,446.00 was attributed to rent which became due after the Movants obtained title to the Building. The Stipulation entered into with respect to Petition states that, "(u)pon execution of this

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

Stipulation, Respondent [TRI] shall pay to Petitioner the sum of \$92,000 which Petitioner accepts in full satisfaction of all of Petitioner's claim for rent due through December 31, 2005...". (Stipulation ¶3). Thus, TRI argues that Movants are estopped from adopting a position in this lawsuit which is contrary to the position taken in the non-payment proceeding. Since the amount sought in the Petition included sums owed to Clearwater and Movants executed a stipulation stating that the settlement fully satisfied all outstanding rent owed, TRI argues that it has a valid cross-claim against Movants for indemnification for any monies paid to Movants which might be owed to Clearwater based upon the fact that Movants fraudulently induced TRI to enter into the Stipulation.

DISCUSSION

A. Motion to Dismiss Standard

1. CPLR 3211(a)(1)

A motion to dismiss under CPLR 3211(a)(1) should be granted "[w]here documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claims." Baradino v. Ochlan, 2 A.D.3d 556, 557 (2nd Dept. 2003); and Prudential Wykagyl/Rittenberg Realty v. Calabria-Maher, 1 A.D.3d 422 (2nd Dept. 2003). See also, Leon v. Martinez, 84 N.Y.2d 83 (1994).

The question of whether a writing is ambiguous is a question of law for the court to decide. See, Innophos, Inc. v. Rhodia, S.A., 10 N.Y.3d 25, 29 (2008), *citing*

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002). See also, 9394 LLC v. Farris, 10 A.D.3d 708 (2nd Dept. 2004).

2. *CPLR 3211(a)(7)*

The standard of review of a motion to dismiss for failure to state a cause of action is that the allegations in the complaint must be assumed to be true and to “accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” Leon v. Martinez, *supra* at 87. The court must accept the facts alleged in the complaint as true and determine whether those facts set forth a cause of action. Morad v. Morad, 27 A.D.3d 626 (2nd Dept. 2006).

However, “such an assumption must fail where there are conclusory allegations lacking factual support.” Elsky v. KM Ins. Brokers, 139 A.D.2d 691 (2nd Dept. 1988). Bare legal conclusions which are flatly contradicted by evidence are not entitled to the presumption of truth and are not accorded every favorable inference. Hartman v. Morgenstern, 28 A.D.3d 423 (2nd Dept. 2006). In addition, where affidavits have been submitted regarding a motion to dismiss, the court may consider allegations set forth in the affidavits to remedy any deficiencies within the pleading. See, Nonnan v. City of New York, 9 N.Y.3d 825 (2007).

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

B. Clearwater's First Cause of Action against Movants--Breach of Contract

The elements of a cause of action for breach of contract are the existence of a contract between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986). Plaintiff must establish the provisions of the contract the defendant is alleged to have breached. Sud v. Sud, 211 A.D.2d 423 (2nd Dept. 1995); and Atkinson v. Mobil Oil Corp., 205 A.D.2d 719 (2nd Dept. 1994).

With respect to Movants' application to dismiss pursuant to CPLR 3211(a)(1), the Contract provides that Clearwater's right to collect rent which accrued before the closing survived the closing. The Petition establishes that Movants sought rent from January 2005 through October 2005. Clearwater transferred title to the Building in August 2005. Movants settled the non-payment proceeding with TRI in December 2005 and concede that they have made no payment to Clearwater.

In opposition to the motion, Clearwater notes that Movants' own ledger establishes that Movants have not properly accounted for the monies paid to Movants pursuant to the Stipulation. The Stipulation calls for payment of rent for the periods sought in the Petition through December 2005. Nevertheless, Movants allocate a portion of the settlement proceeds to rent in January 2006. In addition, the Stipulation reduced TRI's rent to \$22,000 a month for December 2005. Movants allocate the amount of the previously agreed-upon rent, \$29,246, in their ledger indicating an

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

overpayment of \$7,246 to Movants for that month. The Movants' ledger also shows that \$12,000 of the settlement funds was allocated to taxes due in July 2005 prior to closing; This money was not forwarded to Clearwater.

Consequently, the documentary evidence does not conclusively establish pursuant to CPLR 3211(a)(1) that Clearwater's first cause of action as against Movants must be dismissed since there are questions with respect to the disbursement of the settlement funds.

Clearwater alleges in its amended complaint that, pursuant to the Contract, "Clearwater retained all rights with respect to amounts due and/or accrued under the Lease through the closing date." (Amended Complaint ¶ 39). Moreover, it alleges that Movants had no right to retain funds paid to them which were related to the rent owed prior to the closing date and that Movants have refused to pay over such funds despite demand for payment of same. Clearwater has made out a *prima facie* cause of action for breach of contract. Movants' application pursuant to CPLR 3211(a)(7) must be denied.

C. Clearwater's Second Cause of Action Against Movants--Authority to Commence an Action and Settle on Behalf of Another

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another, that the other shall act on his behalf and subject to his control, and consent by the other so to act." Deep Blue Ventures, Inc. v. Manfra,

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

Tordella & Brookes, Inc., 6 Misc.3d 727, 732 (Sup. Ct. N.Y. Co. 2004), *citing* *Restatement [Second] of Agency* § 1(1). “The principal must in some manner indicate that the agent is to act for him...”. *Restatement [Second] of Agency* § 1(1), Comment (a) on Subsection (1).

Movants move to dismiss the amended complaint on the basis that they commenced suit on behalf of themselves and Clearwater to collect past due rent from TRI and settled that claim and distributed the settlement proceeds in accordance with the terms of the Contract. Consequently, it appears that Movants are arguing that they were acting as Clearwater’s agent when they commenced suit against TRI.

Other than the Contract, Movants have not submitted any written documentation, such as a power of attorney executed pursuant to General Obligations Law §5-1501, evidencing their authority to commence suit on behalf of Clearwater to collect rent arrears from TRI. Even if the Contract authorizes Movants to collect the rent from TRI, it did not authorize them to commence suit to collect such rent. “A power of attorney to receive payment does not confer authority to institute legal proceedings.” 2A N.Y. Jur. 2d Agency §156. “A special agency to receive a payment for the principal does not include an authority to compromise claims.” *Id.* at §158. “A compromise entered into on behalf of a party by an agent who was unauthorized to act for that party is not binding upon either party.” *Id.*

In addition, authority to enter into a suit does not encompass authority to settle a

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

claim. Even an attorney does not have the power to settle a matter on behalf of his or her client unless specifically authorized by the client to do so. Blakney v. Leathers, 56 A.D.3d 404 (2nd Dept. 2008). See also, Hallock v. State of New York, 64 N.Y.2d 224 (1948); and Nash v. Y and T Distributors, 207 A.D.2d 779 (2nd Dept. 1994).

The Petition commenced by Movants to collect rent from TRI clearly included rent owed to Clearwater. The documentary evidence submitted by Movants does not conclusively establish that they had authority to act as Clearwater's agent to commence a suit against TRI to recover the rent owed to Clearwater or that they had authority to settle Clearwater's claim against TRI. Consequently, Movants' motion pursuant to CPLR 3211(a)(1) must be denied.

In addition, Clearwater has made out a *prima facie* cause of action against Movants with respect to its second cause of action. Thus, Movants' motion pursuant to CPLR 3211(a)(7) must be denied.

D. TRI's Cross-Claim against Movants

A *prima facie* cause of action for fraud in the inducement is made when plaintiff alleges that the defendant made a material misrepresentation which was false and known to be false when it was made for the purpose of inducing plaintiff's justifiable reliance causing damage. Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 421 (1996); and Channel Master Corp. v. Aluminum Limited Sale, Inc., 4 N.Y.2d 403, 406-07 (1958).

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

The documentary evidence submitted in connection with Movants' application establishes that, in their Petition, Movants sought rent due to Clearwater by TRI and that the Stipulation of Settlement pertaining to the non-payment proceeding stated that the Movants were settling claims for rent from TRI through December 2005. Consequently, the documentary evidence does not conclusively establish that the cross-claim must be dismissed as a matter of law. Therefore, Movants' motion to dismiss TRI's cross-claim must be dismissed on the CPLR 3211(a)(1) grounds.

With respect to Movants' motion to dismiss pursuant to CPLR 3211(a)(7), TRI alleges that it relied upon the representation by Movants that settlement of the Petition included settlement of the claim now brought by Clearwater in this suit and that TRI's reliance on Movants' representation has caused it damage as it paid substantial sums of money to Movants in reliance on their representations. In support of its argument, TRI submits an affidavit from Rudolf Mosny ("Mosny"), its president, who states the during settlement negotiations pertaining to the non-payment proceeding, he "made it crystal clear that after the payment of the \$92,000 [TRI] would owe nothing for any of the past due rent claimed in the non-payment proceeding and Messrs. Newman and Helegua [principals of Movants] confirmed that this was the case." (Mosny Aff. ¶15). Mosny goes on to further state that TRI would never have entered into the Stipulation to settle the non-payment proceeding, if it would have known that such settlement did not satisfy the sums owed to Clearwater. Consequently, TRI's cross-claim states a cause

CLEARWATER ASSOCIATES v. TELEPHONE RESTAURANT INC. *et al.*
INDEX NO. 13243/07

of action against Movants. Movants' motion to dismiss the cross-claim pursuant to CPLR 3211(a)(7) grounds must be denied.

Accordingly, it is

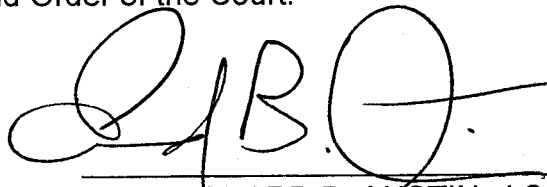
ORDERED, that the motion of Defendants, 156-158 Second Avenue, LLC, 8/49 156-158 Second Avenue, LLC, YL 156-158 Second Avenue, LLC, SH 156-158 Second Avenue, LLC and Second Avenue Village Partners, LLC, to dismiss the amended complaint as against them and the cross-claim asserted by Defendant, Telephone Restaurant, Inc., is **denied**; and it is further;

ORDERED, that Defendants, 156-158 Second Avenue, LLC, 8/49 156-158 Second Avenue, LLC, YL 156-158 Second Avenue, LLC, SH 156-158 Second Avenue, LLC and Second Avenue Village Partners, LLC, are directed to serve an answer to the amended complaint and cross-claim within twenty (20) days after service of a copy of this Order with notice of entry; and it is further,

ORDERED, that counsel for the parties shall appear for a preliminary conference before this Court on March 13, 2009 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, New York
February 6, 2009



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
FEB 13 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE