

22 CPS Owners, LLC v Carter

2009 NY Slip Op 32637(U)

November 6, 2009

Supreme Court, New York County

Docket Number: 109748/009

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PART 35

Index Number : 109748/2009

22 CPS OWNERS LLC

VS.

CARTER, JASON D.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

NOV 12 2009

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by 22 CPS to dismiss the complaint as asserted against it pursuant to CPLR 3211(a)(7) based on plaintiff's failure to state a cause of action is denied as to plaintiff's fourth cause of action for replevin; and it is further

ORDERED that the branch of the motion by 22 CPS to dismiss the complaint as asserted against it pursuant to CPLR 3211(a)(1) based on documentary evidence is denied as to plaintiff's fourth cause of action for replevin; and it is further

ORDERED that the branch of the motion by 22 CPS to dismiss the complaint as asserted against it pursuant to CPLR 3211(a)(7) based on plaintiff's failure to state a cause of action for breach of implied covenant of good faith and fair dealing is granted and the fifth cause of action is dismissed as to 22 CPS; and it is further

ORDERED that the branch of the motion by 22 CPS to dismiss the complaint as asserted against it pursuant to CPLR 3211(a)(1) based on documentary evidence is denied as to plaintiff's fifth cause of action for breach of contract; and it is further

(Page 1 of 2)

Dated: 11/6/09

J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

ORDERED that the branch of 22 CPS's motion attorneys' fees is granted, and assessment of attorneys' fees and costs incurred in connection with 22 CPS's defense of the fifth cause of action shall be held on January 25, 2010 at 10:00 a.m., in Part 35, located at 60 Centre Street, New York, New York, Room 543, before Justice Carol Edmead, and it is further

ORDERED that 22 CPS serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158) within 20 days of entry, file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed. denied; and it is further

ORDERED that the branch of 22 CPS's motion for sanctions is denied; and it is further

ORDERED that 22 CPS serve its Answer within 30 days of entry of this Order; and it is further

ORDERED that the parties appear for a preliminary conference on January 19, 2010, 2:15 p.m.; and it is further


ORDERED that 22 CPS shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

(Page 2 of 2)

FILED
NOV 12 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated 11/6/09

ENTER: 
HON. CAROL EDM EAD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
22 CPS OWNERS, LLC,

Plaintiff,

-against-

Index No.: 109748/09

JASON D. CARTER f/k/a J. DOUGLAS COHEN,
JULIA CARTER, 22 HOUSE, LLC, 22 CPS, LLC,
CARTER MANAGEMENT CORP., and ANDREWS
BUILDING CORP.,

Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant 22 CPS, LLC (“22 CPS”), moves for an order (1) pursuant to CPLR §§ 3211 (a)(1) and (a)(7), dismissing the complaint of plaintiff 22 CPS Owners, LLC (“plaintiff”); (2) pursuant to Article XXV of the governing lease, awarding defendant 22 CPS, LLC its attorneys’ fees in this action; and (3) pursuant to NYCRR 130-1, sanctioning plaintiff for its frivolous conduct

Factual Background

According to the complaint, in December 1977, by a 30-year written lease made by and between plaintiff’s predecessor as lessor and defendant Jason D. Carter f/k/a J. Douglas Cohen (“Jason”) as lessee (the “Master Lease”), Jason became the lessee of the building located at 22 Central Park South, New York, New York (the “Building”).¹ In September 1996, defendant Jason assigned the Master Lease to a company he owns and manages, defendant 22 House, LLC (“22 House”). In March 2004, 22 House assigned the Master Lease to 22 CPS, LLC (“22 CPS”),

¹ The Building is a seven-story mixed-use building, containing approximately 23 residential apartments on the second through seventh floors, and commercial retail space on the first floor.

another company Jason owns and controls. Plaintiff purchased the Building in April 2006, thereby succeeding to the lessor's interest under the Master Lease. As such, plaintiff became the lessor and 22 CPS was the ground lessee of the Building pursuant to the "Master Lease."² Thereafter, the term of the Master Lease expired on April 3, 2008.

Plaintiff alleges that Jason and defendant Julia Carter ("Julia") reside in the 7th Floor apartment (the "Penthouse") in the Building, and claim that their occupancy of the Penthouse under a purported "Penthouse Lease" is a tenancy subject to rent stabilization. Under the Penthouse Lease, defendant Jason, or an entity owned and controlled by him, purported to lease the Penthouse to him.³ Plaintiff also alleges that Jason and his successors were responsible for all of the management and day-to-day business operations of the Building, and thus should have maintained regular and customary business records (the "Books and Records"), including leases and lease renewals, rent rolls and documents filed with federal and local agencies, and other documents relating to the occupants of the Building. However, despite plaintiff's requests, and in violation of the implied covenant of good faith and fair dealing inherent in the Master Lease, Jason refuses to turn over the Books and Records of the Buildings which makes it extremely

² See affidavit of Diane Hunt, the Property Manager at Andrews Building Corp. ("Andrews"), a defendant in this action and the former managing agent of the subject premises.

³ Plaintiff claims that a person or entity cannot lease real property to itself. Upon the making of the Penthouse Lease, Jason's purported interest in the Penthouse Lease merged with his interest in the Penthouse under the Master Lease and the Penthouse Lease is a nullity. Therefore, upon the expiration of the term of the Master Lease, Jason and Julia right to occupy the Penthouse ceased pursuant to the Rent Stabilization Law or Code, or otherwise. Further, when the owner or lessor of a residential unit subject to rent stabilization occupies said unit, the unit ceases to be subject to rent stabilization. Nor have Jason and Julia paid any rent or use and occupancy since April 2006. Thus, plaintiff seeks a declaration that, *inter alia*, neither defendant Jason nor Julia is a rent-stabilized tenant of the Penthouse (first cause of action), upon the expiration of the Building's entitlement to tax benefits, the residential apartments ceased to be subject to rent stabilization (second cause of action), and the Penthouse ceased to be subject to rent stabilization when Jason took possession of same (third cause of action).

difficult or impossible for plaintiff to properly operate and manage the Building.

Therefore, plaintiff seeks a declaration that, *inter alia*, plaintiff is entitled to immediate possession of the Books and Records which defendants must deliver to plaintiff pursuant to CPLR Art. 71 (fourth cause of action for "Recovery of Chattel") and for defendant's violation of the implied covenant of good faith and fair dealing contained in the Master Lease (fifth cause of action).

Motion by 22 CPS

22 CPS argues that plaintiff's claims against it should be dismissed. The only issue to be placed before the court regarding plaintiff's fourth cause of action to recover "chattel" under CPLR Art.71 is which party has the possessory right to the chattels. Here, the Books and Records were not wrongfully taken and were not wrongfully detained. The Books and Records are the property solely of 22 CPS and plaintiff has no possessory rights therein. As to possession, plaintiff fails to allege the basis of its alleged "entitlement" or for that matter, the basis of such "urgent need" although "urgent need" does not give rise to legal right. The only allegations in the Complaint relating to 22 CPS relate to 22 CPS's interest in the Building pursuant to the Master Lease. 22 CPS timely surrendered possession of the Building, no longer has any interest in the Ground Lease or the Building or any uncollected rents, and complied with all of its obligations and undertakings under its "Ground Lease"; the Complaint does not allege otherwise. Also, the Ground Lease not only does not provide plaintiff with any rights relating to 22 CPS's Books and Records, but in fact, precludes plaintiff under section 28.01 from claiming any such right as to 22 CPS's Books and Records and limits plaintiff's rights and remedies from and after the expiration of the term of the Ground Lease. Nor does plaintiff have any claim for

breach of contract, because the Ground Lease does not impose upon 22 CPS any obligation after the Ground Lease expires. Accordingly, as plaintiff's rights and remedies as to 22 CPS arise solely out of and are subject to the terms and conditions of the Ground Lease, plaintiff has no basis in law or fact to make any possessory claim as to 22 CPS's Books and Records. Further, although 22 CPS in fact is a new York limited liability company and was the ground lessee of the Building, co-defendant Jason never owned or controlled 22 CPS relating to 22 CPS's operation of the Building during the term of the Ground Lease.

As to the second requisite showing of demand, plaintiff fails to allege that 22 CPS refused a demand for its books and records. Nor can plaintiff make any such allegation, because plaintiff "had unfettered access to all rent rolls, leases, DHCR reports, and other books and records relating to the Building" and 22 CPS's managing agent "has provided Plaintiff with copies of all books and records relating to the Building."⁴ Accordingly, the fourth cause of action for replevin must be dismissed as against 22 CPS.

It is also argued that the fifth cause of action for breach of contract must be dismissed as duplicative of the fourth cause of action. Further, the court should not, under the guise of

⁴ According to the affidavit of Diane Hunt, Andrews was defendant 22 CPS's managing agent of the Building while 22 CPS was the ground lessee. Andrews maintained all books and records relating to the operation and management of the Building, including all leases, tenant lists, rent rolls, and DHCR reports. At the time 22 CPS's lease terminated in April 2008, all records pertinent to the management of the building, including all paid invoices, all bank statements, any tax filings, all leases, copies of DHCR filings and all tenant correspondence was forwarded to 22 CPS. Thereafter, from April 2008 through April 2009, the Building's owners, plaintiff, continued to retain Andrews as the managing agent of the Building for a period of one year. As such, plaintiff had unfettered access to all rent rolls, leases, DHCR reports, and other books and records relating to the Building. Upon termination of Andrews' management contract in April of 2009, plaintiff's representatives came to Andrews' office and picked up all records in the possession of Andrews relating to the building, including all paid invoices, all bank statements, any tax filings, all leases, copies of DHCR filings and all tenant correspondence. Andrews provided plaintiff with copies of all books and records relating to the Building that are or were in Andrews' possession, custody or control. Hunt is unaware of any book or record relating to the Building that has not been provided to plaintiff.

contract interpretation, imply a term which the parties themselves failed to insert or otherwise rewrite the contract. And, an essential element of a claim for breach of the implied covenant of good faith is that the acts or omissions complained of frustrate the basic purpose of the agreement and deprive plaintiff of its rights to its benefits, and here, the Complaint fails to allege any facts relating to the purpose of the Ground Lease or the deprivation of plaintiff's benefits thereunder. Nor does any portion of the Ground Lease entitle plaintiff to the delivery of 22 CPS's Books and Records, but expressly releases 22 CPS from any such obligation. Thus, the fifth cause of action must be dismissed as against 22 CPS.

Furthermore, to the extent that plaintiff styles its claims as arising under the Ground Lease, and upon the Court granting the instant motion, 22 CPS is entitled to an award of its reasonable attorneys' fees and court costs based on the attorneys' fees provision therein.

In addition, sanctions should be imposed upon plaintiff for its frivolous conduct. Plaintiff's claims and allegations are wholly "without merit in law" and the Complaint "asserts material factual statements that are false." Further, as set forth in the accompanying Hunt Affidavit, plaintiff commenced a litigation against 22 CPS to recover Books and Records that are already in plaintiff's possession.

Plaintiff's Opposition

Plaintiff's claims against 22 CPS are simple, non-monetary, and based upon principles of fairness and common sense. After the Master Lease expired and 22 CPS had no further interest in the Building, 22 CPS refused and failed to turn its Books and Records over to plaintiff. 22 CPS does not submit an affidavit either denying that its has the Books and Records, or stating that it has already turned the Books and Records over to plaintiff, or given plaintiff access to

them. Indeed, 22 CPS's moving papers contain no affidavit from 22 CPS at all. Rather, 22 CPS bases its motion solely on the affidavit of Diane Hunt and she is not a property manager for 22 CPS 22, but for Andrews. While 22 CPS was the lessee under the Master Lease, Andrews was the managing agent of the Building, and maintained the Books and Records. Since plaintiff is to be given the benefit of every favorable inference, plaintiff's allegations that 22 CPS failed and refused to turn the Books and Records in its possession over to plaintiff must be deemed true. Upon the expiration of the Master Lease in April 2008, Andrews turned over all the Books and Records to 22 CPS and from April 2008 through April 2009, plaintiff continued to retain Andrews as the managing agent of the Building. Significantly, the only piece of relevant information that can be drawn from this affidavit is that 22 CPS has possession and control of the Books and Records. Since Andrews forwarded the Books and Records to 22 CPS in April 2008, it is impossible for Andrews to have given plaintiff access to the Books and Records from April 2008 through 2009. Andrews could not have given plaintiff access to the Books and Records from April 2008 through April 2009, when Andrews had already relinquished control over these documents to 22 CPS prior to this time. Even assuming that Andrews gave plaintiff an opportunity to review the Books and Records it had in its possession (which plaintiff vehemently denies), such conduct is entirely irrelevant to 22 CPS's obligation to turn over the Books and Records it might have related to the Building. Thus, 22 CPS's motion to dismiss the complaint should be denied, because 22 CPS has not shown that it turned the Books and Records over to plaintiff or even that plaintiff otherwise had access to the Books and Records. Notably, even had 22 CPS produced documentary evidence that it had turned over the Books and Records to plaintiff (which it has not), this still would not warrant dismissing the complaint against 22 CPS

since, as set forth previously, on a motion to dismiss a complaint, all the factual allegations of the complaint must be deemed true, with the plaintiff being given the benefit of every favorable inference. Further, as shown in the affidavit of Victoria Robles, neither Andrews, 22 CPS, nor any other defendant has, after due demand, turned over the Books and Records to plaintiff.⁵

Additionally, 22 CPS has entirely misinterpreted and/or misrepresented Paragraph 28.01 of the Ground Lease, which provides that should the tenant under the Master Lease default or breach any of the terms thereof, then, as the landlord's sole remedy, it may go after the tenant's interest in the lease (as well as rents, etc.). This provision is entirely irrelevant to 22 CPS's obligation to turn over the Books and Records. 22 CPS's failure to turn over the Books and Records is not a breach of the Master Lease; this obligation arose after the Master Lease expired. Additionally, 22 CPS's obligation to turn over the Books and Records to plaintiff is not a potential source of "liability," nor are the Books and Records an "asset" of 22 CPS. Plaintiff seeks no money damages from 22 CPS. It seeks only the turnover of the Books and Records.

Further, 22 CPS's application for attorneys' fees and sanctions should be denied. Even if the attorneys' fees provision of the Master Lease applies to plaintiff's causes of action against 22 CPS (which it does not), 22 CPS is not entitled to any attorneys' fees, since its motion to dismiss

⁵ Victoria Robles, the Assistant General Counsel of El Ad US Holding, Inc., the holding company of plaintiff attests that she attempted to obtain the regular and customary business records which plaintiff and its predecessors maintained or should have maintained with respect to their management of the Building. The series of e-mails between Robles and Hunt of defendant Andrews, in which, in response to a request that Hunt send copies of the Books and Records, Hunt informed Robles that she was unauthorized to release certain portions of the Books and Records to me. In the e-mail dated May 1, 2008, Robles asked Hunt for copies of the leases for the (sub)tenants of the Building. By e-mail dated May 5, 2008, Hunt sent Robles a copy of an e-mail she received from Joshua Kurtz (who was, upon information and belief, defendant Jason D. Carter's attorney), advising that she was "not authorized to release any documentation to ElAd in connection with the subtenants." And by e-mail dated May 6, 2008, referring to her e-mail of the previous day, Hunt stated: "I was just forwarding the line item that indicated that I could not release requested documents." Neither Andrews, 22 CPS, nor any other defendant has, after due demand, turned over the Books and Records to plaintiff.

the complaint should be denied. 22 CPS's application for sanctions under NYCRR Sec. 130-1.1 should likewise be denied. As shown above, 22 CPS seeks to dismiss the complaint with no factual basis whatsoever, and no support from the Master Lease or any other document. As a consequence, it is 22 CPS, not plaintiff, which has engaged in sanctionable conduct, particularly since NYCRR Sec. 130-1.1 (c) specifically provides that "[f]rivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section." However, plaintiff declines to request that the Court impose sanctions upon 22 CPS as litigation over sanctions will only cause delay, in an action where plaintiff requires expeditious relief.

22 CPS's Reply

Plaintiff fails to mention, much less rebut, the ample legal authority relied upon by 22 CPS demonstrating that plaintiff has no right to 22 CPS's own Books and Records and fails to identify any legal authority that supports its claim to 22 CPS's own property. Plaintiff likewise fails to identify any provision of the Ground Lease, the only agreement between plaintiff and 22 CPS, that would entitle plaintiff to the relief that it seeks. Plaintiff's argument that its claims are "based upon principles of fairness and common sense" is a tacit admission that its claims are not supported by existing law or a good faith argument for the extension or modification of existing law and, as such, are frivolous.

Plaintiff also fails to rebut the showing that plaintiff should be sanctioned for asserting claims that are entirely frivolous with no basis. 22 CPS's moving papers also demonstrated that plaintiff's claims are sanctionable because they could not possibly have been brought in good faith. Specifically, the property manager of both 22 CPS's and plaintiff's managing agent, Andrews, stated that, upon plaintiff's termination of Andrews as managing agent for the

Building, plaintiff took possession of the Books and Records relating to the Building.

Accordingly, plaintiff has commenced an entirely frivolous action against 22 CPS for Books and Records to which plaintiff has no legal or equitable claim and that, in any event, have already been provided to plaintiff.

22 CPS points out that Hunt's affidavit was proffered in support only of 22 CPS's motion for attorneys' fees, and plaintiff failed to identify any legal authority that prevents the Court from considering documentary and testimonial evidence in assessing such a motion for attorneys' fees. Also, plaintiff failed to identify any legal authority to support the proposition that a party's agent may not submit an affidavit, particularly where, as here, that agent is the custodian in the ordinary course of business of the very books and records at issue. Furthermore, an examination of the entire email exchange reveals that Andrews actually was directed by 22 CPS's counsel not to release documents "at this time" because counsel "would like to review any document prior to its release." The presentation of the edited version of this email distorts its meaning to the point of misrepresentation. Finally, plaintiff does not sufficiently deny that it has received the books and records.

Discussion

Dismissal under CPLR 3211(a)(1) and (a)(7)

As against 22 CPS, the Complaint asserts claims for replevin and breach of contract in order to obtain possession of 22 CPS's own business Books and Records.

Pursuant to CPLR 3211 (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense

to the asserted claims as a matter of law,” dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]). The test on a CPLR 3211 (a)(1) motion is whether the documentary evidence submitted “conclusively establishes a defense to the asserted claims as a matter of law” (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] citing *Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

In determining a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the Court’s role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Mfg. Co., v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and 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 into any cognizable legal theory” (*Norman v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). “In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint’s allegations against the defendant’s contrary assertions or to determine whether or not plaintiff has

produced evidence to support his claims” (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

On a motion to dismiss for failure to state a cause of action, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence” the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*” (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant/respondent, “[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they “establish conclusively that [petitioner] has no [claim or] cause of action” (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Fourth Cause of Action for Replevin

As the fourth cause of action, Article 71 of the CPLR creates a cause of action to “try the right to possession of a chattel” CPLR § 7101 (McKinney 1963). “Replevin, a procedure in the

nature of a provisional remedy, is ancillary to an action for recovery of a chattel (*Honeywell Info. Sys., Inc. v Demographic Sys. Inc.*, 396 F Supp 273 [1975] citing Practice Commentary, CPLR § 7101 (McKinney 1963), *Sears Roebuck & Co. v Austin*, 60 Misc 2d 908, 304 NYS2d 131 [NY Co Civil Ct 1969], CPLR § 7102 (McKinney 1963)). In an action under § 7101, as in an action for replevin, the issue is strictly whether plaintiff or defendant has the superior possessory right (*Honeywell Info. Sys., Inc.* citing Practice Commentary, CPLR § 7101 (McKinney 1963) citing *Hofferman v Simmons*, 290 NY 449 [1943]; *Batsidis v Batsidis*, 9 AD3d 342, 778 NYS2d 913 [2d Dept 2004]). Plaintiff must plead that “[it] has an immediate and superior right to possession of the [chattel]” (*Volt Delta Resources LLC v Soleo Commun. Inc.*, 11 Misc 3d 1071 816 NYS2d 702 [Sup Ct New York County 2006] citing *Dubied Mach. Co. v Vermont Knitting Co., Inc.*, 739 F Supp 867, 872 [SDNY 1990]). Further, a complaint must allege that demand was made for possession of the chattel and refused prior to commencement of action (*see Heating & Plumbing Finance Corp. v Kuhn*, 151 Misc 510, 271 NYS 152 [1933]).

In the Complaint, plaintiff alleges from paragraphs 1 through 47, the existence of a “Master Lease” between Jason and plaintiff’s predecessor, Jason’s assignment of this Lease to various entities, and how the residential apartments in the Building, including the Penthouse, are no longer subject to the Rent Stabilization Law. In paragraphs 48-58 pertaining to the fourth cause of action, plaintiff alleges that Jason or one of the entities he owns, possesses the Books and Records due to their management of the Building under the “Master Lease,” that plaintiff is entitled to the Books and Records in order to currently manage the Building, and that 22 CPS’s “right, if any, to the Books and Records, is inferior to plaintiff’s right, and that “Jason and his successors, and said defendants’ agents, have refused to turn over to plaintiff the Books and

Records, *despite plaintiff's demand.*" 22 CPS's denial of 22 CPS's superior right, and assertion that copies of all pertinent documentation were delivered to plaintiff, are insufficient to establish relief under CPLR 3211(a)(7). In this regard, the affidavit of Hunt is insufficient to establish that plaintiff was provided with the Books and Records generated prior to April 2008, which were given to 22 CPS, where plaintiff insists that 22 CPS refused to turn over such Books and Records (*see e.g., Sullivan & Cromwell LLP v Charney*, 15 Misc 3d 1128, 841 NYS2d 222 [Sup Ct 2007] [defendant is not entitled to dismissal of the replevin claim for failure to state a cause of action on the weight of his attorney's affidavit which stated that he has returned all the confidential documents at issue]). Therefore, contrary to 22 CPS's contention, plaintiff's Complaint states, though scantily, that plaintiff has a right to the Books and Records, that its right to the Books and Records are superior to that of 22 CPS's, and that 22 CPS refused plaintiff's demand for the Books and Records.

Further, 22 CPS failed to establish that the documentary evidence established its defense as a matter of law pursuant to CPLR 3211(a)(1). Where a written agreement unambiguously contradicts the allegations of a breach of contract cause of action, the contract itself constitutes documentary evidence warranting dismissal of the complaint, pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the plaintiff (*Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202, 831 NYS2d 362 [Sup Ct New York County 2006] *citing 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]).

Contrary to 22 CPS's contention, documentary evidence does not establish 22 CPS's defense to the fourth cause of action pursuant to CPLR 3211(a)(1). 22 CPS's reliance upon the Master Lease is misguided.

Section 28.01 of the Master Lease provides that:

. . . the maximum exposure and liability of the Tenant, and its successors or permitted assigns, with respect to any claims of Landlord *as a result of any default or breach of any of the terms, covenants, agreements, provisions, conditions and limitations of this lease* on Tenant's part to be kept, observed or performed, is limited to the interest and/or title of Tenant in this lease and the Premises, the uncollected rents and income therefrom, and, if applicable, insurance proceeds or condemnation proceeds; and no other assets of Tenant, or its successors or permitted assigns, shall be subject to judgment, decree, execution, attachment, sequestration or other legal remedy.

(Emphasis added).

As such, any claim or judgment of any court against 22 CPS in favor of plaintiff as a result of any default or breach of the Master Lease occurring after the date on which the permanent loan is funded shall be wholly satisfied by plaintiff's resorting only to the interest and/or title of 22 CPS in the Master Lease and the Building. However, according to the plain meaning of its terms, section 28.01 pertains to remedies available to the Owner *as result of the Tenant's (or 22 CPS's) breach of the lease*, and the fourth cause of action for replevin is not premised upon any breach of the Master Lease by 22 CPS.

Further, to the extent 22 CPS relies upon the affidavit of Hunt, such affidavit is not "documentary evidence" for purposes of dismissal under CPLR 3211(a)(1) (*see Williamson, Picket, Gross v Hirschfeld*, 92 AD2d 289, 290 [1st Dept 1983] [stating that affidavits do not qualify as "documentary evidence" for purposes of this rule]; *Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988] [rejecting use of reply affidavit to support a motion to dismiss based on documentary evidence]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court Bronx County 2004]). In any event, Hunt's affidavit asserts that from April 2008 through April 2009, plaintiff continued to retain Andrews as the

managing agent of the Building for a period of one year, and therefore, had “unfettered access to all rent rolls, leases, DI-ICR reports, and other books and records relating to the Building.” When Andrews’ contract with plaintiff ended in April of 2009, plaintiff “came to Andrews’ office and picked up all records in the possession of Andrews relating to the building, including all paid invoices, all bank statements, any tax filings, all leases, copies of DI-ICR filings and all tenant correspondence.” Thus, based on her affidavit, plaintiff was provided “with copies of all books and records relating to the Building that are or were in Andrews’ possession, custody or control.” However, nothing in Hunt’s affidavit indicates that 22 CPS, in turn, provided plaintiff with the Books and Records once 22 CPS received them from Andrews. Therefore, neither Master Lease nor Hunt’s affidavit establish 22 CPS’s defense as a matter of law pursuant to CPLR 3211(a)(1).

Based on the above, the branch of the motion to dismiss the fourth cause of action based on for failure to state a cause of action and documentary evidence is denied.

Fifth Cause of Action

The fifth cause of action for breach of implied covenant of good faith inherent in the Master Lease cannot be sustained. Although not duplicative of plaintiff’s replevin action, the breach of implied covenant of good faith is insufficiently stated.

In every contract there is “an implied obligation by each party to deal fairly with the other and to eschew actions which would deprive the other party of the fruits of the agreement” (*Miller v Almouist*, 241 AD2d 181, 185, 671 NYS2d 746, 749 [1st Dept 1998]). “[T]he essential elements of a claim for breach of the implied covenant of good faith and fair dealing ... [are] arbitrary or unreasonable conduct which has the effect of preventing the other party to the

contract from receiving the fruits of the contract” (*JFK Family Ltd. Partnership v Millbrae Natural Gas Dev. JFK Family Ltd. Partnership v Millbrae Natural Gas Dev. Fund 2005, L.P.*, 21 Misc 3d 1102, 873 NYS2d 234 [Sup Ct Westchester County 2008]).

Here, there is no allegation of any facts that 22 CPS acted in bad faith to deny CPS 22 of the benefit of its bargain under the Master Lease. Plaintiff alleges, in addition to the aforementioned allegations, that the Master Lease contains an implied covenant of good faith and fair dealing, and that Jason and his successors have breached this implied covenant by failing and refusing to turn over the Books and Records to plaintiff. Since the Complaint entirely fails to allege any facts as to how 22 CPS deprived plaintiff a benefit under the Master Lease, or that 22 CPS’s actions were arbitrary or unreasonable conduct which has the effect of preventing plaintiff from receiving the fruits of the Master Lease, plaintiff failed to state a claim for breach of implied covenant of good faith and fair dealing.

The Court notes that the fact that the Master Lease does not expressly permit plaintiff a right to the Books and Records does not constitute a complete defense to plaintiff’s breach of implied covenant of good faith claim. New York courts have held that “a party may be in breach of an implied duty of good faith and fair dealing, even if it is not in breach of its express contractual obligations, when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denied or to deprive the other party of the fruit of its bargain” (*Gross v Empire Healthchoice Assur., Inc.*, 16 Misc 3d 1112, 847 NYS2d 896 [Sup Ct New York County 2007] citing *Dalton v. Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). However, since plaintiff failed to state a claim for breach of implied covenant of good faith, such claim is dismissed.

Attorneys' Fees

Article XXV, §25.01 of the Ground Lease contains an attorneys' fees provision that provides as follows:

In the event that an action is commenced by either party hereto to enforce any rights or obligation hereunder, the prevailing party shall be entitled to reasonable attorneys' fees and court costs.

Plaintiff has commenced an action against 22 CPS for breach of the implied covenant of good faith and fair dealing under the Master Lease, and this Court has dismissed such claim, rendering 22 CPS the prevailing party on this issue. Thus, having prevailed against plaintiff's claim of implied rights under the Master Lease, 22 CPS is entitled to attorneys' fees solely as they pertain to 22 CPS's defense of such claim.

Sanctions for Frivolous Conduct

Part 130 of the Uniform Rules of the Chief Administrator (22 NYCRR 130-1.1 *et seq.*), permits the court to impose sanctions, including reasonable attorney's fees, for conduct if it is found to be "frivolous," *i.e.*, if (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (130-1.1[c]; *Solow v Bethlehem Steel Corp.*, 204 AD2d 227, 612 NYS2d 402 [1st Dept 1994]).

Given the plaintiff states a claim for replevin, at this juncture, it cannot be said that the Complaint is frivolous. Therefore, the branch of 22 CPS's motion for sanctions is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by 22 CPS to dismiss the complaint as asserted against it pursuant to CPLR 3211(a)(7) based on plaintiff's failure to state a cause of action is denied as to plaintiff's fourth cause of action for replevin; and it is further

ORDERED that the branch of the motion by 22 CPS to dismiss the complaint as asserted against it pursuant to CPLR 3211(a)(1) based on documentary evidence is denied as to plaintiff's fourth cause of action for replevin; and it is further

ORDERED that the branch of the motion by 22 CPS to dismiss the complaint as asserted against it pursuant to CPLR 3211(a)(7) based on plaintiff's failure to state a cause of action for breach of implied covenant of good faith and fair dealing is granted and the fifth cause of action is dismissed as to 22 CPS; and it is further

ORDERED that the branch of the motion by 22 CPS to dismiss the complaint as asserted against it pursuant to CPLR 3211(a)(1) based on documentary evidence is denied as to plaintiff's fifth cause of action for breach of contract; and it is further

ORDERED that the branch of 22 CPS's motion attorneys' fees is granted, and assessment of attorneys' fees and costs incurred in connection with 22 CPS's defense of the fifth cause of action shall be held on January 25, 2010 at 10:00 a.m., in Part 35, located at 60 Centre Street, New York, New York, Room 543, before Justice Carol Edmead, and it is further

ORDERED that 22 CPS serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158) within 20 days of entry, file of a note of issue and a

statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

denied; and it is further

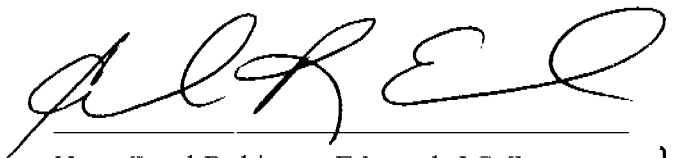
ORDERED that the branch of 22 CPS's motion for sanctions is denied; and it is further

ORDERED that 22 CPS serve its Answer within 30 days of entry of this Order; and it is further

ORDERED that the parties appear for a preliminary conference on January 19, 2010, 2:15 p.m.; and it is further

ORDERED that 22 CPS shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: November 6, 2009



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMED

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