

Phillips v Continental Advisory Servs., LLC
2010 NY Slip Op 31876(U)
July 13, 2010
Supreme Court, New York County
Docket Number: 114979/2009
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Jacob A. Madew
Justice

PART _____

Index Number : 114979/2009
GREER PHILLIPS
vs.
CONTINENTAL ADVISORY SERVICES
SEQUENCE NUMBER : 001
DISMISS ACTION

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 is decided in accordance with the attached memorandum Decision and Order.

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 13, 2010

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 11

-----X

GREER PHILLIPS,
Plaintiff,

-against-

Index No. 141979/2009

CONTINENTAL ADVISORY SERVICES, LLC, JACOB H.
YAHIAIAN and SYLVA S. YAHIAIAN,
Defendants.

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

Joan A. Madden, J.

Defendants Jacob Yahiaian ("Jacob"), Sylva Yahiaian ("Sylva") and Continental Advisory Services, LLC ("Continental") (together, the "Defendants") move to dismiss the complaint against them. Plaintiff Greer Phillips ("Phillips") opposes the motion, which is granted in part and denied in part for the reasons stated below.

Background

This action arises out of a landlord-tenant relationship between Phillips, as tenant, and Continental, as landlord. Phillips is an attorney and a partner at a law firm. Continental is a limited liability company that manages residential property, which Phillips leased. Continental is wholly owned by Jacob and Sylva.

On or around March 27, 2006, Phillips and Continental entered into a lease (the "lease contract") for a triplex townhouse (the "townhouse"), located at 524 3rd Street, Brooklyn, New York 11215, which Phillips and his family occupied as a residence.¹ The lease contract designated Continental as the owner of the townhouse, and Jacob executed the lease agreement

¹ Phillips leased the entire townhouse building, except for a garden apartment (the "garden apartment"). Park Slope Presbyterian Church (the "Church") leased the garden apartment for a period of time during Phillips' tenancy.

on Continental's behalf. However, the record indicates that Jacob and Sylva were the sole owners of the townhouse, and Continental never owned or had any interest in the townhouse.

The complaint alleges that, on the same day that the parties entered into the lease contract, they also agreed to a lease rider (the "rider") (together with the lease contract, the "lease agreement"). Complaint, ¶16. The rider contains certain provisions that appear to be inconsistent with the lease contract. Phillips maintains that he and Jacob initialed the rider. Phillips submits a copy of the rider, dated March 27, 2006, containing two sets of initials, as evidence. On the other hand, Continental claims that the rider was not signed, and submits a copy of the rider that appears to show only Phillips' initials.

Phillips states in his affidavit that at the time he entered into the lease agreement Jacob represented to him that the Premises was owned by Continental, and that since he believed the townhouse was owned by Continental, he made the checks payable to Continental. In his reply affidavit, Jacob states that he never hid that fact that the townhouse was owned by his family and that the deed identifies his family as the owner of the property, and that Phillips, who is an experienced attorney, knew or should have known who owned the townhouse since it is a matter of public record.

The initial term of the lease was two years, commencing August 20, 2006, and ending August 20, 2008, with a tenant option to renew for a third year on the same terms, which Phillips elected to do. Pursuant to the terms of the rider, Phillips exercised an option to fulfill his rent obligations for each year by paying \$110,000 in cash to Continental on the August 1 preceding each year of the lease term. Rider, ¶1. The lease agreement specified that rent was inclusive of water, electricity, and gas. Pursuant to the terms of the lease agreement, Phillips deposited a

\$30,000 security deposit with Continental. Lease Contract, ¶32. The lease agreement specified that Phillips' security deposit would be placed in an interest-bearing account.

Both the lease contract and the rider contain provisions relating to the condition in which Phillips is to maintain the townhouse during his tenancy, and the condition in which he is to deliver the townhouse at the end of the lease term.

The lease contract specifies that Phillips is obligated to take good care of the townhouse, including fixtures and appurtenances therein, and to make any structural or non-structural repairs resulting from "the carelessness, omission, neglect or improper conduct of [Phillips]...whether or not arising from...[Phillips'] conduct or omission...." Lease Contract, ¶4. The lease contract further specifies that Phillips is required to give Continental prompt notice of any defective condition in the plumbing, heating system or electrical lines, located in the townhouse, and that Continental shall remedy the condition with due diligence, but at Phillips' expense, if the repairs are necessitated by damage attributable to Phillips. Under the terms of the lease contract, Continental is allowed to use Phillips' security deposit to address breaches in Phillips' obligation to maintain the premises in good condition, "accruing" during or after the term of the lease, and that Phillips is required to refill security deposit amount. Lease Contract, ¶32.

The lease contract also provides that, at the end of the term of the lease, Phillips must deliver the "[townhouse], 'broom clean', in good order and condition, ordinary wear and damages which [Phillips] is not required to repair as provided elsewhere in [the] lease excepted...." Lease Contract, ¶22.

The rider specifies that, during the term of the lease, Phillips' liability for repairs to the premises is not to exceed \$500 per quarter, except that, if Continental determines in good faith that repairs above this amount ("other than structural repairs, which shall be for the sole account

of...[Continental]”) are necessary to maintain the premises, then Continental could make these repairs, after providing notice to Phillips, and fund the cost from Phillips’ security deposit, which Phillips would not be required to replenish. Rider, ¶2-3. However, the rider also states that, “[n]otwithstanding any other provision in [the] lease, [the] [t]enant’s aggregate liability under [the] lease shall be limited to (i) payments of annual rent... and (ii) the amount of [the] [t]enant’s security deposit (\$30,000 plus interest).” Rider, ¶4.

When Phillips chose to renew his lease, Continental requested that Phillips pay a greater amount of rent than he was obligated to pay under the terms of the lease agreement. Jacob told Phillips in an e-mail that “the ancillary costs [of renting the townhouse] have really gone up and we’re not even at break even.” Jacob E-mail 2/15/08, 12:18 p.m. Phillips and Continental negotiated the issue of rent for the third year, but they did not come to an agreement, and the terms of the lease agreement remained the same.

The complaint alleges that, in accordance with the terms of the lease agreement, he vacated the townhouse on or about July 27, 2009, and delivered the townhouse to Continental “broom clean” and in good order and condition. Complaint, ¶32. However, Continental contends that Phillips did not deliver the house in the appropriate condition, and, for this reason, Continental did not return Phillips’ security deposit.

Continental asserts that, during his tenancy, Phillips caused a wide array of damages to the townhouse, which necessitated repairs. Jacob Aff., ¶6. Continental asserts that it has received estimates that indicate that it will be compelled to expend over \$30,000 to repair the damages that Phillips caused or allowed to be caused in the townhouse. Jacob Aff., ¶9. The alleged damages include, but are not limited to: cracks in the ceiling, floor damage and missing floor pieces, paint chipping, damaged kitchen cabinets, a leak in the kitchen sink piping,

damaged shades in master bedroom window, holes and cracks in walls, water leak damage around entryway chandelier under bathroom. Continental, Exhibit F.

Continental asserts that, at no point, did Phillips notify Continental of any of these conditions needing repair, and that some of the conditions could have been repaired more cheaply, and the damage less extensive, if Phillips had repaired the conditions or at least notified Continental of them.

On the other hand, in his affidavit, Phillips denies that he caused any of the damages to the townhouse except for damage to one window shade in the master bedroom. Phillips Affidavit, ¶'s 22-25. In particular, Phillips states that he did not cause or contribute to the cracks in the ceiling, paint chipping, and other settling and wear and tear of the house, and there is no evidence that he did. Phillips Aff., ¶24. Phillips also stated that he was not aware of any leak in the second floor bathroom while he was on the premises. *Id.*, ¶25. He further states that, during the lease term, the one repair that he did notify Jacob of, in accordance with the lease, was damage to the ceiling in the third floor bedroom, where a chandelier had partially pulled away from the ceiling molding surrounding it. *Id.*, ¶26. Phillips states that Jacob did not repair the condition until approximately five months after being notified of it. *Id.*

Phillips also states that, between 2007 and 2009, Jacob brought perspective buyers and renters to view the townhouse on at least nine occasions, and never complained of its condition. *Id.*, ¶'s 27, 28. In the complaint, Phillips alleges that during this period, Continental posted photos of the inside of the townhouse on websites, "evidencing the pristine condition in which [Phillips] maintained the [townhouse]." Complaint, ¶31.

Furthermore, Phillips asserts that certain floor areas in the townhouse were deteriorated, with pieces missing, when he and his family moved into the townhouse. Phillips submits an e-mail from Jacob in which Jacob states that he left some scattered rugs in the townhouse "as the house has some settling from the floor." Jacob E-mail, 6/6/06, 8:47.

Phillips commenced this action against the Defendants on or about October 26, 2009. In his complaint, Phillips asserts causes of action against the Defendants for breach of contract, fraud, unjust enrichment, and conversion. With respect to each of these causes of action, Phillips seeks a judgment of at least \$30,000 plus accrued interest, representing the appreciated amount of the security deposit that he put down pursuant to the terms of the lease agreement. Phillips also seeks punitive damages with respect to his cause of action for fraud. Additionally, Phillips asserts a right to recover attorneys fees, under New York Real Property Law Section 234, as a separate cause of action.

The gravamen of Phillips' fraud claims is that the Defendants fraudulently represented that they would return Phillips' security deposit to him at the end of his tenancy when, in fact, they never intended to do so. Complaint, ¶50. Phillips supports his argument that the Defendants never intended to return the security deposit by asserting that this is part of a pattern of behavior which is evidenced by the fact that the Yahiyans failed to return the security deposit to the Church, upon the termination of its tenancy in the garden apartment, for similar unjustifiable reasons. Phillips further asserts that punitive damages are merited as a result of this pattern of fraud.

The Defendants now move for summary judgment dismissing the complaint against them based on documentary evidence, pursuant to CPLR §3211(a)(1), and failure to state a cause of action, pursuant to CPLR §3211(a)(7).

With respect to the causes of action for breach of contract and attorneys fees (together, the “contract claims”), the Defendants argue that Continental has not breached the lease agreement with Phillips because it had common law and contractual rights to retain the security deposit to make repairs to the townhouse resulting from damages caused by Phillips. They assert that they have put forth documentary evidence which establishes that Phillips is responsible for damages to the townhouse which will require them to expend more than \$30,000 to repair. They argue that, based on this evidence and the lease terms, they have established entitlement to dismissal of the case based on documentary evidence.

The Defendants further assert, with respect to the contract claims, that the “alleged” rider which Phillips cites in an attempt to limit his liability to \$500 per quarter was unsigned and that, in any event, it does not contain language which explicitly indicates that it supercedes contrary language in the lease contract.

The Defendants also state that the complaint fails to allege that Phillips made a demand for the return of his security deposit, and, as such, the complaint fails to properly state causes of action for the contract claims.

The Defendants argue that they are entitled to dismissal of the claim against them for fraud on the grounds that Phillips failed to plead facts sufficient to support a claim for fraud or misrepresentation with the specificity required by CPLR §3016(b). The Defendants assert that a claim sounding in fraud that fails to allege facts with sufficient specificity to permit an inference of fraudulent intent is fatally deficient.

With respect to the cause of action for unjust enrichment, the Defendants assert that this claim cannot be sustained because it is undisputed that Phillips and Continental entered into a contract governing Phillips’ leasehold at the townhouse and his security deposit, and a plaintiff

may not recover under a theory of unjust enrichment where the parties have entered into a contract which governs the subject transaction.

The Defendants further argue that Phillips has no viable cause of action against them for conversion because Continental was entitled by law and contract to apply the security deposit towards repairing damage attributable to Phillips and/or his tenancy. Furthermore, the Defendants allege that a cause of action for conversion cannot be maintained based on the same set of facts upon which a breach of contract claim is predicated.

In addition to the above arguments, the Yahiyans each separately assert that the claims against them as individuals should be dismissed because Phillips makes no allegations that implicate their involvement in a personal capacity. Jacob states in his affidavit that Phillips raises his involvement primarily as a managing agent for Continental, which should not give rise to personal liability. The Yahiyans each state that they are not liable for the security deposit merely because they owned the townhouse. Furthermore, the Yahiyans assert that they cannot be held liable for the security deposit based on breach of contract because they were not parties to the contract. The Yahiyans next argue that the cause of action against them based on conversion must be dismissed because Phillips did not plead that they ever received the security deposit.

In opposition, Phillips asserts that he is not responsible for any of the damages asserted against him, except for the damage to the window shade in the master bedroom, since he did not cause or contribute to the other asserted damages. In response to the Defendants' allegations that the rider is ineffective because it was unsigned and contains no language explicitly overriding the lease, Phillips argues that the rider does contain language overriding the lease contract and cites paragraph 4 of the rider, regarding aggregate liability. Phillips also argues that

Jacob ratified the rider by his actions, as Jacob admits in his affidavit that he was aware of and acted in compliance with the rider, and Phillips asserts that the rider was initialed by himself and Jacob, on behalf of Continental.

Phillips also argues that Jacob and Sylva are potentially liable in their personal capacities, Phillips argues that they may be liable for damages relating to the breach of contract claims as he seeks to pierce the corporate veil. He further argues that he has a viable conversion claim since such claim arises out of a claim for fraud in the inducement, rather than breach of contract.

Phillips next asserts that his fraud claim is adequately pleaded based on allegations that Jacob made false representations to induce him to enter into the lease by representing that Continental would return the security deposit at the end of the lease term, and by falsely representing that the townhouse was owned by Continental.

In reply, the Defendants argue, inter alia, that to the extent that the fraud claim relates to the ownership of the townhouse, Phillips cannot show how such a misrepresentation regarding the ownership of the townhouse caused or contributed to damages. The Defendants also contend that Phillips knew that the Yahiyans owned the townhouse and that the reason that Continental is designated "OWNER" in the lease contract is that Continental utilizes a standard form lease that uses the term, "OWNER" to refer to "the party of the first part".

Discussion

On a motion pursuant to CPLR §3211(a)(7), the court is limited to ascertaining whether a pleading states any cause of action and not whether there is any evidentiary support for the complaint. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). The complaint must be liberally construed in a light most favorable to the plaintiff, and all factual allegations must be

accepted as true. Id. At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference,” and dismissal is appropriate pursuant to CPLR §3211(a)(1). Morgenthau & Latham v. Bank of New York Company, Inc., 305 A.D.2d 74, 78 (1st Dep’t 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep’t 1999) aff’d, 94 N.Y.2d 659 (2000). In such cases, the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one.” Id., quoting, Guggenheimer v. Ginzburg, 43 N.Y.2d at 275. However, dismissal based on documentary evidence may only result when the documentary evidence “utterly refutes [a] plaintiff’s allegations, conclusively establishing a defense as a matter of law.” Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

Under this standard, dismissal of the contract claims is not warranted. As a preliminary matter, even assuming arguendo that the rider was legally effective and part of the lease agreement, the provision of the rider generally limiting Phillips’ liability for minor repairs to \$500 per month does not expressly supercede any other language in the lease contract which may be applicable. Rather, the limitation on repairs provision in the rider which does supercede other provisions of the lease only states that Phillips’ aggregate liability cannot exceed payments of the annual amount of rent due and the amount of the security deposit plus interest.

That being said, however, the Defendants’ documentary evidence does not utterly refute Phillips’ allegations such as would be required the dismissal of the contract claims at this juncture. While the Defendants’ documentary evidence tends to show that there was damage in the townhouse, the documentary evidence does not establish that Phillips caused or contributed to the damages in the townhouse, such that Continental is entitled to retain the full amount of

Phillips' security deposit in order to repair the damages, based on the terms of the lease agreement. In fact, there is evidence which suggests that certain damage to the floors in the apartment occurred prior to Phillips' tenancy. Moreover, any failure of the complaint to allege that Phillips demanded the return of the contract deposit is not fatal particularly as the lease does not make such a demand a condition to the return of the security deposit. Thus, the motion to dismiss the contract claims, as against Continental, based on documentary evidence, is denied.

However, the motion to dismiss the contract claims as against the Yahiyans is granted. The record shows that the Yahiyans were not parties to the lease agreement, which was between Phillips and Continental. In addition, although a complaint must be construed liberally and in a light most favorable to the plaintiff on a motion to dismiss, the complaint must allege the material elements of each cause of action asserted, and conduct constituting an abuse of the privilege of doing business in the corporate form is a material element of any cause of action seeking to hold an owner personally liable for the actions of his or her corporation. Morris v. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 142 (1993). In this case, not only does the complaint fail to assert that it seeks to pierce the corporate veil to hold the Yahiyans liable in respect to the contract claims, it fails to allege sufficient facts to even reasonably suggest that Jacob's conduct, much less Sylva's, was an abuse of the corporate form of doing business.

Phillips' cause of action for fraud as against all the Defendants is also dismissed for failure to plead sufficient facts to establish that the Defendants' actions amount to anything more than a breach of contract. The apparent basis of this claim asserted in the complaint, that the Defendants never intended to return the security deposit, is insufficient to demonstrate fraudulent intent. It has been held that a "cause of action for breach of contract cannot be converted into one for fraud by merely alleging that [the] defendant did not intend to fulfill the contract." Non-

Linear Trading Co. v. Braddis Assocs., 243 A.D.2d 107, 118 (1st Dep't 1998). Furthermore, “[a]bsent a present intent to deceive a statement of future intentions, promises or expectations is not actionable on the ground of fraud.” Id. Although Phillips appears to attempt to support his claim by citing the prior dispute that the Defendants had with the Church, the fact that the Defendants had a previous dispute regarding the return of a security deposit is not sufficient to show that the Defendants did not intend to return Phillips’ security deposit from the outset.

Additionally, Phillips cannot support his claim for fraud based on an alleged misrepresentation that Continental, rather than the Yahiyans, owned the townhouse. First, there is nothing in the complaint to suggest that the claim for fraud is based on an alleged misrepresentation as to the ownership of the townhouse. Second, Phillips has not shown that he suffered any damage as the result of such an alleged misrepresentation.

Phillips’ claim for conversion must also be dismissed as against all the Defendants as Phillips asserts that this claim is predicated upon fraud, and Phillips has not set forth a proper cause of action for fraud in his complaint. Furthermore, it is well established that a claim for conversion cannot be predicated upon a mere breach of contract. Traffix, Inc. v. Herold, 269 F.Supp.2d 223 (S.D.N.Y. 2003). Next, as Phillips’ action is based on an express agreement, he cannot assert a claim for unjust enrichment. West End Interiors, Ltd. v. Aim Const. & Contracting Corp., 286 A.D.2d 250, 252 (1st Dep’t 2001).

Finally, the request for punitive damages claims must be denied as it cannot be said that the allegations regarding defendants’ conduct are so egregious or morally reprehensible so as warrant such an award.

In view of the nature of this dispute and the amount at issue, this matter is properly transferred to the Civil Court of the City of New York.

Conclusion

In view of the above, it is


ORDERED that the motion to dismiss is granted to the extent of dismissing the complaint in its entirety against defendants Jacob Yahiyayan and Sylva Yahiyayan; and it is

ORDERED that the motion to dismiss is also granted to the extent of dismissing the third cause of action (fraud), the fourth cause of action (unjust enrichment), the fifth cause of action (conversion), and any request for punitive damages; and it is further

ORDERED that the action shall continue as to the first cause of action (for breach of contract and the second causes of action (for attorneys' fees) as against defendant Continental Advisory Services, LLC; and it is further

ORDERED that this action is transferred to the Civil Court of the City of New York in accordance with the annexed Order.

Dated: July 13, 2010


J.S.C.

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

At an Individual Assignment Part 11 of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse thereof in the County of New York, City, and State of New York, on the 13th of July, 20 10

PRESENT:

HON: JOAN MADDEN
JUSTICE.

PRE-NOTE OF ISSUE

ORDER OF TRANSFER-325(d)

Greer Phillips
vs.
Continental Advisory Services

County Clerk's

Index No. 114979 10/2009

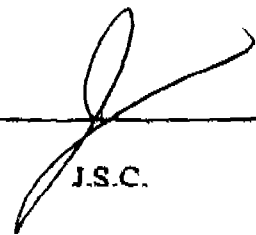
It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Index Number 114979/09 be, and it hereby is, removed from this court and transferred to the Civil Court of the City of New York, County of New York, and it is further

ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

ENTER,



J.S.C.