

Midorimatsu, Inc. v Hui Fat Co.

2011 NY Slip Op 33274(U)

November 22, 2011

Supreme Court, Queens County

Docket Number: 16053/11

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

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MIDORIMATSU, INC.,
Plaintiff,

Index No.: 16053/11
Motion Date: 11/16/11
Motion Cal. No.: 29

-against-

HUI FAT COMPANY, QUEST GYM, INC.,
RICHARD A. GASALBERTI, M.D., SPORTS
MEDICINE & REHABILITATION, P.C.,
and NEW AGE IMAGING,
Defendants.

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The following papers numbered 1 to 12 read on this motion by defendant **HUI FAT COMPANY** (“Hui Fat”) for an order pursuant to CPLR Rules 3211(a)(1) and 3211(a)(7) and CPLR Section 3016(b) dismissing plaintiff’s causes of action against Hui Fat for failure to state a claim and failure to plead with sufficient particularity and because the allegations of the causes of action are contradicted by documentary evidence.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
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Reply Memorandum of Law.....	11-12

Upon the foregoing papers it is ordered that this motion by defendant **HUI FAT COMPANY** (“Hui Fat”) for an order pursuant to CPLR Rules 3211(a)(1) and 3211(a)(7) and CPLR Section 3016(b) dismissing plaintiff’s causes of action against Hui Fat for failure to state a claim and failure to plead with sufficient particularity and because the allegations of the causes of action are contradicted by documentary evidence is granted for the following reasons:

According to the pertinent sections of the complaint, plaintiff has been the restaurant tenant of the premises at 110-12 and 110-14 Queens Boulevard in continuous occupancy as a Japanese/Chinese restaurant since about October 2005. Defendant Hui Fat is the owner landlord of the store premises at 110-12 and 110-14 Queens Boulevard where the plaintiff has been a tenant since about October 2005. The three other defendants also are tenants of the

building owned by defendant Hui Fat but not occupants of the premises which defendant Hui Fat leased to plaintiff. As of October 1, 2005, plaintiff as tenant and defendant Hui Fat as owner landlord entered into a written lease for the premises located at 110-12 and 110-14 Queens Boulevard, Forest Hills, New York. The lease consists of a printed six page Real Estate Board of New York, Inc. "Standard Form of Store Lease" plus a thirteen page "typed" Rider containing numbered paragraphs 40 through 107 and a one page Supplemental Rider. Plaintiff was to pay rent in the amount of \$10,400.00 monthly during the first year with an increase of \$200.00 per month for every subsequent year of the lease. Plaintiff was to use and occupy the premises as a Japanese/Chinese, hibachi and sushi restaurant. Prior to entering the Lease, Hui Fat represented and plaintiff believed that the premises could accommodate up to 150 persons, the basis of which was used to compute the terms of the Lease. However, prior to entering the Lease, "Hui Fat had actual or constructive knowledge that the premises could not legally be used as a restaurant because the premises had capacity for over 75(sic)patrons and did not have the required Public Assembly Permit." It was not in the contemplation of either party that plaintiff be required to pay for or make changes required to legally accommodate over 75 patrons.

After signing the lease, Plaintiff operated the restaurant with a seating capacity of 148 patrons. On September 20, 2006, plaintiff received a violation order for operating the restaurant with seating for more than 75 patrons. Plaintiff reduced the seating capacity and thereafter had work done to the premises and applied for a Public Assembly Permit for over 75 patrons. On October 22, 2007, and October 9, 2008, plaintiff was again warned and charged, respectively, that it was in violation for operating without a Public Assembly Permit. In March 2009, plaintiff contracted with another company to obtain the Permit and was told it needed the cooperation of Hui Fat. Hui Fat did not respond to plaintiff's request for help on this issue, however, during July 2009, Hui Fat agreed to accept \$7,000.00 for the monthly rent charged "because of the harm Midorimatsu was suffering as a result of the reduced actual capacity of the restaurant." Thereafter, plaintiff received two more violations for operating without a Public Assembly Permit.

On or about March 17, 2011, landlord Hui Fat sent a demand letter to plaintiff stating that there were substantial unpaid rent and real estate taxes for twenty months. In response, plaintiff contacted Hui Fat, through their respective attorneys, and advised Hui Fat's attorneys of the repeated violations caused by Hui Fat's failure to perform structural repairs and alterations and failure to provide plaintiff with an updated Certificate of Occupancy. Counsel also discussed the previously agreed upon lower rental payments.

On or about July 7, 2011, plaintiff tenant filed an Order to Show Cause seeking a "Yellowstone" Injunction against defendant landlord Hui Fat. This application was denied by the Hon. Denis J. Butler by oral decision on July 8, 2011. Subsequently, plaintiff brought the

instant action which sets forth two causes of action: The first cause of action is for the breach of implied covenant to engage in structural repairs and alterations in compliance with regulations. In this cause of action, plaintiff alleges that, "[t]here is no explicit covenant in the lease regarding which party will pay for structural repairs and alterations" however, "Hui Fat represented and Midorimatsu believed that the Premises were in compliance with all rules and regulations necessary in order to accommodate up to 150 patrons at any time" Plaintiff claims this breach has caused it to pay violations and to incur legal fees. Plaintiff's second cause of action is for fraudulent misrepresentation and alleges that Hui Fat misrepresented the following to plaintiff tenant: (i) that it was permissible for plaintiff tenant to operate on the premises; (ii) that the premises are in compliance with all NYC regulations; and (iii) that it was permissible for plaintiff tenant to operate a restaurant with a seating capacity of up to 150 individuals on the Premises.

Defendant Hui Fat now seeks to dismiss the complaint as against it on the grounds that a defense is founded upon documentary evidence, the complaint fails to state a cause of action, and is not to be pleaded with sufficient particularity. Plaintiff opposes this branch of motion.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . ." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . ." (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

Here, plaintiff's submissions in support of its motion include the complaint, the Lease, the Rider, the Supplemental Rider, the March 17, 2011 letter regarding rent and tax arrears, the March 24, 2011 email response to the demand letter by plaintiff's counsel, Hui Fat counsel's response to the March 24 response, and the complaint. Hui Fat claims this evidence establishes that Hui Fat had no obligation to make any of the alleged changes to the premises and made no fraudulent misrepresentations regarding the premises.

Pursuant to paragraph 20 and 48 of the lease, plaintiff tenant accepted the premises "As Is" with no obligation placed upon defendant landlord Hui Fat. Additionally, pursuant to paragraph 6, 81, 82, 83 and 84 of the lease, it is the plaintiff restaurant tenant's sole responsibility to ensure that the premises are in compliance with government regulations. Moreover, paragraph 48 of the lease provides that the Tenant "inspected the premises, is familiar with them and accepts the premises 'As Is' in their present state and condition latent or patent, without any representations or warranties by the Owner." Furthermore, paragraph 20 provides that "Neither Owner nor Owner's agent have made any representations or promises

with respect to the physical condition of the building . . . or any other matter or thing affecting or related to the demised premises."

Hui Fat also claims that there is nothing in the lease about any public assembly permit or plaintiff tenant's intention of seeking one. As such, plaintiff was solely responsible for securing a public assembly permit or any other permit or permits necessary for the operation of its business. Hui Fat points to paragraph 81 of the Lease, which provides that "Tenant, at Tenant's own cost and expense shall procure any and all permits or licenses required for the premises and shall comply with all governmental and departmental rules and regulations." Plaintiff tenant's having not secured a public assembly permit (or any other related or similar permit), and to nevertheless have repeatedly operated its restaurant in the absence of such a permit, is its own fault, not the fault or responsibility of the defendant landlord Hui Fat. Hui Fat also points to paragraph 74 of the Lease, captioned "Exits and Means of Egress:" states the following:

Owner makes no representation as to the adequacy or number of exits or means of egress. Tenant is to adequately and properly maintain all exits and means of egress in accordance with all municipal codes and regulations including Fire Department rules and regulations. If the number and/or types of exits and/or means of egress are inadequate in function, operation or number, Tenant, at its own cost and expense, shall be responsible for increasing or repairing or bringing matters to code and in compliance, even if compliance requires the adding of one or more exits. Finally, Hui Fat argues that plaintiff's claims are also refuted by the fact that it has been and still is in possession of the premises and continues to operate the premises as the restaurant contemplated by the parties in the October 2005 lease.

Regarding the second cause of action, the alleged misrepresentations made to plaintiff regarding the capacity of the premises, Hui Fat claims the terms of the lease are clear and unambiguous as to plaintiff taking the premises "As Is" and there being no representations regarding the premises save for those in the Lease. Specifically, paragraph 20, entitled "No Representations by Owner" provides as follows:

Neither Owner nor Owner's agent have made any representations or promises with respect to the physical condition of the building, the land upon which it is erected or the demised premises, the rents, leases, expenses of operation, or any other matter or thing affecting or related to the demised premises, except as herein expressly set forth, and no rights, easements or licenses are acquired by Tenant by implication or otherwise, except as expressly set forth in the provisions of this lease. Tenant has inspected the building and the demised premises and is thoroughly acquainted with their condition, and agrees to take the same "as-is", and acknowledges that the taking of possession of the demised premises by Tenant shall be conclusive evidence

that the said premises and the building of which the same form a part were in good and satisfactory condition at the time such possession was so taken, except as to latent defects. All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between Owner and Tenant, and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

Hui Fat also points out that for the past almost six years, plaintiff continuously has utilized the premises as a restaurant. Further, as stated in the complaint, it was the plaintiff that contracted with both an engineering company and a "Construction Expert" to obtain its public assembly permit. Significantly, the complaint details a host of failings on the part of those entities, all retained by the plaintiff to obtain its public assembly permit. There is no mention of Hui Fat being at fault for the failure to obtain the public assembly permit.

In opposition to this branch of the motion to dismiss, plaintiff points to the New York City Administrative Code sections that require Public Assembly Permits for premises being used by more than 75 persons. Plaintiff also claims that the Lease is not clear on the issue of which party shall pay for structural repairs and therefore the parol evidence rule does not preclude extrinsic evidence on this issue. In this regard, plaintiff has submitted affidavits from Xiao Min Hou, plaintiff's President, and Solomon Hsu, plaintiff's General Manager. These affidavits indicate Mr. Fat, Hui Fat's principal owner, was advised that plaintiff's planned on renting the place operate a restaurant and would have to make renovations. He was also told plaintiff intended to create a restaurant for more than one hundred patrons, as the prior tenant had. Mr. Fat indicated to them "since the old one has that many seats, your new restaurant will definitely have that many seats after renovation." Plaintiff claims that without this representation about the capacity of the restaurant, they would not have signed the Lease.

The Court finds that Hui Fat's submissions constitute documentary evidence and establish, as a matter of law, that the Lease provisions make it clear that plaintiff took the premises "As Is". The lease also is clear that Hui Fat was under no obligation to make any changes to the premises regarding the increase in legal occupancy and plaintiff obtaining a Public Assembly Permit for over 75 persons. Any representations made prior to the signing of the lease were specifically merged into the lease documents, thereby rendering any alleged representations by Mr. Fat to be of no consequence. Home Sales Realty, Inc. v. Unity Bank, 40 A.D.3d 1035 (2d Dep't 2007.) Moreover, plaintiff was represented by counsel and is a relatively sophisticated entity that could easily have verified the allowable occupancy of the

premises. Thus plaintiff cannot claim to have reasonably relied upon these alleged fraudulent representations. *See, Valassis v Weimer*, 304 AD2d 448 (1st Dept 2003.) In any event, the alleged representations by Mr. Fat do not indicate he implied in any manner that the premises could legally be used as a restaurant for more than 75 persons.

The Court finds that plaintiff has failed to show any evidence that sufficiently refutes Hui Fat's evidence and consequently plaintiff has failed to prevent a finding that resolves all issues in Hui Fat's favor. Contrary to its claim, there is no ambiguity in the Lease Agreements regarding Hui Fat having no obligation to make structural repairs and alterations in compliance with regulations. As such, plaintiff cannot rely upon the parol evidence offered to contradict, vary, or explain the Lease Agreements. *Gill v Bowne Global Solutions, Inc.*, 8 AD3d 339 (2d Dept 2004.) In any event, were this Court to consider this Parol Evidence, it would not find such capable of supporting plaintiff's claims. Accordingly, the branch of Hui Fat's motion seeking to dismiss the complaint as against it based upon CPLR 3211(a)(1) is granted. Based upon this finding, the Court shall not address the branches of the motion pursuant to CPLR 3211(a)(7) and CPLR Section 3016(b), as they have been rendered academic.

Dated: November 22, 2011

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ORIN R. KITZES, J.S.C.