

**9th St. Restaurant LLC v Pen Quin Tenants Corp.**

2011 NY Slip Op 3371 (U)

March 11, 2011

New York County Supreme Court

Docket Number:

Judge: Eileen Bransten

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

PRESENT:

PART 3

Index Number : 103235/2010  
 9TH ST RESTAURANT LLC  
 vs  
 PENQUIN TENANTS CORP  
 Sequence Number : 001  
 DISM ACTION/ INCONVENIENT FORUM

INDEX NO. 103235/10  
 MOTION DATE 12/10/10  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

\_\_\_\_\_ IS DECIDED  
 IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3-11-11

Eden Rand  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

[\* 2]  
SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 3

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9TH ST. RESTAURANT LLC,

Plaintiff,

-against-

PENQUIN TENANTS CORP.,

Defendant.

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Index No. 103235/10  
Motion Date: 12/10/10  
Motion Seq. No.: 001

**BRANSTEN, J.:**

In this action for fraudulent representation, defendant Penquin Tenants Corp. (Penquin) moves, pursuant to CPLR 3211 (a) (1), (5), and (7), to dismiss the complaint of plaintiff 9th St. Restaurant LLC ("Restaurant").

**BACKGROUND**

Penquin is the board of shareholders of a cooperative which owns three attached buildings located at 19-21-23 9th Street, New York, New York (the "Building"). The Building has a large basement space (the "Premises") which was once used as a restaurant. Restaurant is a corporate entity that was formed for the purpose of opening a restaurant.

Non-party Sheppard Ellenberg ("Ellenberg") was the original owner of the Building, which he sold to Penquin in 1979. Penquin and Ellenberg then entered into a lease (the "Master Lease"), pursuant to which Ellenberg has been renting the Premises from Penquin.

In March 2007, Restaurant learned that the Premises were available for rent and arranged with Ellenberg to see the Premises. Restaurant's representative had a brief walk

through and noted the existence of leaks. Restaurant allegedly did not notice, nor was informed of, the existence of mold behind the walls at the Premises. Ellenberg allegedly assured Restaurant that Penquin, under the Master Lease, was obligated to repair damage caused by the leaks. In April 2007, Restaurant and Ellenberg entered into a 10-year lease (the "Sublease") for the Premises. The Sublease incorporated by reference the terms of the Master Lease.

The same month, Restaurant and Ellenberg met with Penquin's representatives and raised the issue of leaks at the Premises. Penquin allegedly acknowledged the issue and promised to address it promptly. In reliance, allegedly, on Penquin's promise, Restaurant prepared plans and designs for the restaurant, secured bids from various contractors, arranged for publicity in anticipation of a restaurant opening in the fall of 2007, and engaged the services of a well-known chef. On multiple occasions, Penquin allegedly repeated its promise to fix the leaks.

At some point, Restaurant discovered the existence of mold at the Premises, informed Penquin of its discovery and requested that the mold be removed. Penquin allegedly agreed to do so. In August 2007, Penquin hired a mold testing company. That company tested the mold and provided a written report, allegedly stating that the leaks caused the mold and that the mold was toxic. The mold testing company's report recommended that leaks be stopped and mold removed. Penquin, however, allegedly did not address these problems, and, as a result, in January 2008, Restaurant terminated the Sublease.

Arbitration

In April 2008, Restaurant, and two of its partners, non-parties William Gilroy and Jason Kosmas (together, “AAA Claimants”), commenced an arbitration proceeding before the American Arbitration Association (“AAA”), arbitration no. 13 115 Y 01033 08, against Penguin, Ellenberg, and non-party Ellenberg Asset Management, Ellenberg’s company (“AAA Proceedings”). AAA Claimants alleged (1) that Ellenberg failed to inform them of the existence of the leaks and the mold, (2) that he assured them that Penguin would perform any necessary repairs, and (3) that the AAA Claimants relied on his representations, entered into the Sublease, and incurred expenses in anticipation of opening the restaurant (*see* 07/20/10 Lessem Aff., Ex. B, Supplement to Demand for Arbitration). AAA Claimants also alleged that after they and Ellenberg advised Penguin of the mold problem, Penguin did not conduct necessary repairs (*see id.* at 10).

AAA Claimants and Ellenberg allegedly entered into a rider to the Sublease, providing that if the mold was not removed by November 30, 2007, each party had an option to terminate the Sublease. In early December 2007, Ellenberg allegedly promised AAA Claimants that if Penguin failed to correct the mold problem within 10 days, he would hire a remediation company himself (*id.* at 12). Ellenberg, however, failed to do so. As a result, in January 2008, AAA Claimants terminated the Sublease. On these facts, AAA Claimants sought an award of monetary damages.

Penquin then, pursuant to CPLR Article 75, filed a petition with the New York County Supreme Court, index number 107451/08, naming the AAA Claimants as respondents, seeking an order staying the AAA Proceedings. Penquin argued that it and the AAA Claimants had not agreed to arbitrate their disputes with respect to the rental of the Premises. By order dated June 10, 2008 and entered June 11, 2008, the court (Edmead, J.) granted Penquin's petition (*see* 07/20/10 Lessem Aff., Ex. D).

As a result of Justice Edmead's order, the AAA Proceedings continued as against only Ellenberg and Ellenberg Asset Management. The AAA proceedings culminated in an August 19, 2009, arbitration award in favor of the AAA Claimants for \$300,051.34 (the "Arbitration Award"). The Arbitration Award represented the AAA Claimants' (1) claim for rent deposit, security, and letter of credit (\$225,500.00), (2) architect and expediter fees (\$37,127.00) and (3) interest through the date of the award (\$37,424.34) (*see id.*, Ex. F, Arbitration Award). In September and October 2009, Ellenberg and Ellenberg Asset Management paid the Arbitration Award, plus a portion of arbitration costs, to the AAA Claimants in full (*see id.*, Ex. G).

#### This Action

Restaurant here alleges two causes of action against Penquin: (1) breach of the Master Lease, to which Restaurant allegedly was a third-party beneficiary (Complaint, ¶¶ 25-30); and (2) sounding in fraudulent representation that it would address the problems of leakage and mold, on which Restaurant relied to its detriment (*id.*, ¶¶ 31-38).

Penquin now moves, pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7), to dismiss the complaint.

### DISCUSSION

A motion to dismiss, pursuant to CPLR 3211 (a) (1), “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), the court “assumes the truth of the complaint’s material allegations and whatever can be reasonably inferred therefrom. [Citation omitted.] The motion should be denied if ‘from [the pleading’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law’” (*McGill v Parker*, 179 AD2d 98, 105 [1st Dept 1992] quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

CPLR 3211 (a) (5) provides that “the cause of action may not be maintained because of arbitration and award, [or] collateral estoppel ... .”

#### Collateral Estoppel

Penquin argues that Restaurant is precluded by the Arbitration Award from contending that its damages exceed the amount of such award.

“The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior

action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *see also Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334, 334 [1st Dept 2006]). “What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding. Of course, the issue must have been material to the first action or proceeding and essential to the decision rendered therein” (*Ryan*, 62 NY2d at 500).

The controlling issue here is whether the damages addressed at the AAA Proceedings are identical to the issue of damages in this action. After Penquin’s petition to stay arbitration was granted, the AAA Proceedings continued as against Ellenberg and Ellenberg Asset Management. The claim presented was that Ellenberg and Ellenberg Asset Management breached the Sublease by leasing the Premises knowing that it had leaks and mold.

The Arbitration Award awarded damages representing Restaurant’s expenses of rent payment as well as architect’s fees (*see 07/20/10 Lessem Aff., Ex. F, Arbitration Award*). The Arbitration Award denied Restaurant’s claims for the following categories: “[b]uilding expenses”; “[i]nvestor equity in new venture”; “[i]nterest on loans”; “[n]et profits year 1”; and “[n]et profits year 2” (*id.*).

The Arbitration Award did not explain the grounds for denial of those claims. The record on this motion also does not reveal whether the arbitrator’s denial stemmed from the

fact that evidence produced at the AAA Proceedings did not support all of Restaurant's claims for damages, or whether the denial was due to Ellenberg's defense that it was Penquin's obligation under the terms of the Master Lease to fix the leaks and remove the mold (*see e.g.* 09/21/10 Arden Aff., Ex. B, Shepard Ellenberg Tr., at 1767-1770). An attorney for Penquin testified at the AAA Proceedings that, in February 2007, Penquin learned about the existence of the leaks, that it was unable to undertake any repairs until its mortgage would be refinanced and that repair work on the Premises commenced only in the summer of 2008 (*id.* Herbert L. Cohen Tr., 2696-2698, 2783-2786).

In this action, Restaurant alleges that Penquin (1) breached the Master Lease to which Restaurant was a third-party beneficiary and (2) fraudulently represented to Restaurant that it would do necessary repairs when it had no intention of doing so. In reliance, Restaurant allegedly hired a chef, bought restaurant equipment and launched a public relations campaign (*see* Complaint, ¶¶ 14, 34, 36). Later, Restaurant also hired a company to conduct mold testing (*see id.*, ¶ 17). Aside from aforementioned claims for damages that were denied at arbitration, the damages alleged in this action were not considered as part of the AAA Proceedings (*see* 07/20/10 Lessem Aff., Ex. F, Arbitration Award).

Accordingly, in this action, Restaurant is proceeding against a party, Penquin, that was not a party to the AAA Proceedings, and Restaurant's second cause of action here, sounding in fraud, is a different cause of action from breach of contract, which it pursued against

Ellenberg at arbitration. Given the existence of a different cause of action as against a party that was not a party to the AAA Proceedings, as well as the fact that the Arbitration Award does not explain the grounds for denial of certain categories of damages, the court cannot conclude that the issue of damages, as a factual or legal issue, in this action is identical to the issue of damages that was litigated at arbitration (*see Ryan*, 62 NY2d at 500).

The case of *Velazquez v Water Taxi* (66 AD2d 691 [1st Dept 1978], *affd* 49 NY2d 762 [1980]), which Penquin cites in support of its position, is distinguishable from the fact pattern here. There, a plaintiff chose to proceed at arbitration against the same parties that were also named as defendants in a simultaneous legal action, for injuries sustained in a car accident (*id.* at 692). The plaintiff received an arbitration award in her favor and reduced it to judgment. The *Velazquez* Court held that the plaintiff was collaterally estopped from prosecuting the legal action against the same parties for the injuries stemming from the same accident (*id.*).

Here, although originally a party to the AAA Proceedings, Penquin obtained the court order staying arbitration as against it. Accordingly, although the arbitrator received evidence about Penquin's alleged obligation under the Master Lease to fix the leaks, the arbitration proceedings continued only against Ellenberg and his company. Unlike in *Velasquez*, the court cannot conclude that Restaurant had a full and fair opportunity at arbitration to litigate the issue of its damages to the extent that they were allegedly caused by Penquin. Therefore, collateral estoppel does not bar Restaurant from prosecuting this action.

### Election of Remedies

Penquin further argues that Ellenberg's full payment of the Arbitration Award to Restaurant bars Restaurant from maintaining this action under the doctrine of election of remedies. "It is well settled that the satisfaction of a judgment rendered against one tortfeasor discharges all joint tortfeasors from liability to the plaintiff" (*Blanco v J&B Assoc.*, 177 AD2d 370, 371 [1st Dept 1991] [quotation marks, citation, and brackets omitted]). However, where two concurrent causes of action exist against different parties, prior litigation of a cause of action against one party does not preclude pursuit of another cause of action against a different party in a subsequent action (*see DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 271 [1st Dept 1994]).

Here, as previously discussed, the AAA Proceeding pertained to Ellenberg's breach of the Sublease. This action pertains to Penquin's alleged fraudulent representation that it would fix the leaks and remove the mold when it allegedly knew when it made the representation that it had no intention of doing so. Additionally, there is no possibility of a double recovery. The Arbitration Award awarded damages only with respect to rent payments and architect's fees, whereas here Restaurant seeks compensation for different, aforementioned categories of damages (*see id.*). Accordingly, the doctrine of election of remedies does not apply here, and, consequently, Penquin's motion is denied.

CONCLUSION


For the foregoing reasons, it is hereby

ORDERED that the motion of defendant Penquin Tenants Corp. to dismiss the complaint is denied; and it is further

ORDERED that defendant Penquin Tenants Corp. is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: New York, New York  
March 11, 2011

ENTER

  
Hon. Eileen Bransten, J.S.C.