

Analisa Salon Ltd. v Elide Prop. LLC

2011 NY Slip Op 34125(U)

July 22, 2011

Sup Ct, Westchester County

Docket Number: 7582/05

Judge: Orazio R. Bellantoni

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED

JUL 22 2011

TIMOTHY C. IDOM
COUNTY CLERK
COUNTY OF WESTCHESTER

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

FILED & ENTERED
7/23 2011
WESTCHESTER COUNTY
CLERK

ANALISA SALON LTD., d/b/a SUSAN MARLOWE
FIGURE SALON,

Plaintiff,

- against -

ELIDE PROPERTIES, LLC, JACK SEMINARA,
JOHN JAMES ROMEO, CONSTABLE MICHAEL
M. SEMINARA and CONSTABLE KENNETH
R. HERBERT,

Defendants.

SHORT FORM DECISION

Index No. 7582/05
Motion Date: 7/13/11

ANALISA SALON LTD., d/b/a SUSAN MARLOWE
FIGURE SALON,

Plaintiff,

- against -

CONSTABLE MICHAEL M. SEMINARA and
CONSTABLE KENNETH R. HERBERT,

Defendants.

Index No. 19232/05

Defendants Elide Properties, LLC (Elide) and Jack Seminara (Seminara) move for an order, pursuant to CPLR 3212, dismissing the first, second, third and fifth causes of action set forth in plaintiff's amended verified complaint or in the alternative, pursuant to

CPLR §4102, striking the jury demands made by plaintiff. Defendant John James Romeo (Romeo) also moves for an order pursuant to CPLR 3211(a)(1), CPLR 3211(a)(7) and CPLR 3212(b) and (g) dismissing plaintiff's first and fourth causes of action or in the alternative, pursuant to CPLR §4102, striking the jury demands made by plaintiff.

The following papers were read:

Notice of Motion-Affidavit-Affidavit-Exhibits A-Y-Affidavit of Service	1-29
Notice of Motion-Affirmation-Exhibits 1-5-Affirmation of Service	30-37
Affirmation in Opposition-Affidavit-Affidavit-Exhibits A-K	38-51
Affidavits of Service (3)	52-54
Reply Affidavit-Affidavit of Service	55-56
Reply Affirmation-Exhibit 6-Affirmation of Service	57-59

Upon the foregoing papers the motions are decided as follows:

Defendants Elide and Seminara's Motion for Summary Judgment

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movant must set forth a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Plaintiff's first cause of action seeks specific performance of lease agreement which provided for plaintiff's right of first refusal. Specific performance is not an available remedy for breach of contract where, as here, there is an adequate remedy at law, i.e. money damages (*see Alpha Auto Brokers v. Continental Ins. Co.*, 286 AD2d 309 [2nd Dept 2001]). This Court notes that defendants Elide and Seminara were not parties to the subject lease which plaintiff seeks to enforce. Additionally, there has been a finding by the Appellate Division, Second Department, that plaintiff was entitled to summary judgment on its fourth cause of action which seeks damages for breach of lease against defendant Romeo (*see Analisa Salon, Ltd. v. Elide Properties, LLC*, 46 AD3d 721 [2nd Dept 2007]). Accordingly, defendants have established their prima facie entitlement to summary judgment as to plaintiff's first cause of action.

The second and third causes of action are interrelated as plaintiff seeks treble

damages for wrongful eviction. Defendants Elide and Seminara cannot be held liable to plaintiff for purported damages caused to plaintiff since plaintiff was evicted pursuant to a lawful warrant of eviction (*see Campbell v. Maslin*, 59 NY2d 722 [1983]). To the extent that defendants Elide and Seminara have established, prima facie, their entitlement to judgment on plaintiff's second cause of action, they have also established their entitlement to judgment as to the third cause of action for treble damages (*see* RPAPL §853). To the extent that the second cause of action could be construed to allege an action for civil conspiracy, summary judgment is appropriate as it is well settled that New York does not recognize civil conspiracy to commit a tort as an independent action (*see Hebrew Inst. for Deaf & Exceptional Children v. Kahana*, 57 AD3d 734 [2nd Dept 2008]).

Plaintiff's fifth cause of action seeks damages for tortious interference with contract. In order to succeed on a cause of action sounding in tortious interference with an existing contract, the plaintiff must establish: (1) the existence of a valid contract between it and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procurement of the third party's breach of the contract without justification; and (4) damages (*see Pink v. Half Moon Co-Op Apartments*, 68 AD3d 739 [2nd Dept 2009]). The affidavit of Seminara is sufficient to establish defendants' prima facie entitlement to summary judgment as to plaintiff's fifth cause of action. Seminara states that he had knowledge of a lease agreement, which contained a right of first refusal between Romeo and plaintiff, and that neither he nor Elide intended to induce Romeo to breach the lease and it was only after plaintiff allegedly failed to exercise the right of first refusal that Elide acquired title to the premises.

In opposition to Elide and Seminara's motion plaintiff alleges that the motion should be denied as the movants are attempting to re-litigate issues and are barred from doing so pursuant to the law of the case doctrine. Law of the case addresses the potentially preclusive effect of judicial determination made in the course of a single litigation before final judgment (*see People v. Evans*, 94 NY2d 499 [2000]). This Court on November 16, 2005, found defendants' cross-motion to be premature but made no determinations as to the issues raised by the within motion. Counsel also states that "Mr. Wiederker argued orally, on appeal, the very defenses he attempts to reargue now." Upon review of the appellate record, the defendants did not have a motion pending before the Appellate Division, Second Department, when reargument was denied, nor would the mere mention of a potential defense to an appellate court be considered law of the case. Plaintiff further alleges that specific performance claim must stand because it has produced evidence that it was ready, willing and able to purchase the property at the price accepted by Elide and Seminara. As stated above, this allegation fails, as the Appellate Division has found an adequate remedy at law available to plaintiff against Romeo in the form of money damages (*see Analisa Salon, Ltd. v. Elide Properties, LLC*, 46 AD3d 721

[2nd Dept 2007]). To the extent that the decision of the Appellate Term of the 9th and 10th Judicial Districts states that plaintiff was evicted in violation of RPAPL §749(2), failure to give at least 72-hour notice, this finding alone fails to rebut the showing that the moving defendants possessed a valid warrant and that if any damage was caused it was caused by the Marshall's failure to give the requisite notice (*see Funding Assistance Corp. v. Mashreq Bank*, 277 AD2d 127 [1st Dept 2000]). Plaintiff offers no appellate case law which has found that the warrant of eviction was unlawfully issued. The allegations by counsel that defendant Elide took precautions to hide the sale from plaintiff, his statements as to Seminara's actions or inactions, and his allegation that Seminara's general denial or lack of memory creates an issue of fact amounts to nothing more than mere conjecture and speculation which is insufficient to raise an issue of act fact (*see generally Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Fotiatis v. Cambridge Hall Tenants Corp.*, 70 AD3d 631 [2nd Dept 2010]).


Based upon the foregoing defendants' motion to dismiss is granted in its entirety.

Defendant Romeo's Motion to Dismiss and for Summary Judgment

Defendant seeks dismissal of the first and fourth causes of action. As stated above specific performance is not an available remedy for breach of contract where, as here, there is an adequate remedy at law, i.e. money damages (*see Alpha Auto Brokers v. Continental Ins. Co.*, 286 AD2d 309 [2nd Dept 2001]). There has been a finding by the Appellate Division, Second Department that plaintiff was entitled to summary judgment on its fourth cause of action which sought damages for breach of lease against defendant Romeo (*see Analisa Salon, Ltd. v. Elide Properties, LLC*, 46 AD3d 721 [2nd Dept 2007]). As such plaintiff's first cause of action is dismissed as to defendant Romeo, however, plaintiff may recover against defendant Romeo under its fourth cause of action for breach of lease pursuant to *Analisa Salon, Ltd. v. Elide Properties, LLC*, 46 AD3d 721 (2nd Dept 2007).

Based upon the foregoing defendant Romeo's motion is granted to the extent that the first cause of action is dismissed against him. The branch of Romeo's motion which sought to strike the jury demand is deemed moot as the equitable relief sought against him has been dismissed. A copy of this decision and order is forwarded to the Settlement Conference Part.

Dated: July 22, 2011
White Plains, New York


HON. ORAZIO R. BELLANTONI
Justice of the Supreme Court

The Law Office of Marcia E. Kusnetz, PC
Attorneys for Plaintiff
800 Westchester Avenue, Suite 412-S
Rye Brook, New York 10573

Wilson, Elser, Moskowitz, Edelman & Dicker LLP
Attorneys for Defendants Constable Michael M. Seminara and
Constable Kenneth R. Herbert
3 Gannett Drive
White Plains, New York 10604

DelBello Donnellan Weingarten Tartaglia Wise & Wiederkehr, LLP
Attorneys for Defendants Elide Properties, LLC and Jack Seminara
One North Lexington Avenue
White Plains, New York 10601

Nathaniel B. Smith, Esq.
Attorney for Defendant James John Romeo
111 Broadway-13th Floor
New York, New York 10006