

TIA of N.Y., Inc. v Stanley Realty, LLC

2012 NY Slip Op 31187(U)

April 16, 2012

Sup Ct, Nassau County

Docket Number: 9580/11

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
TIA OF NEW YORK INC.,

Plaintiff,

-against-

STANLEY REALTY, LLC and STANLEY AVENUE, LLC,

Defendants.
-----X

MICHELE M. WOODARD
J.S.C.

TRIAL/IAS Part 8

Index No.: 9580/11

Motion Seq. Nos.: 01, 02 & 03

DECISION AND ORDER

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In motion sequence number one, defendant, Stanley Avenue LLC [hereinafter Stanley Avenue], moves for the following relief: an order pursuant to CPLR §3211(a)(1) dismissing the underlying complaint based upon documentary evidence; an order pursuant to CPLR §3211(a)(3) dismissing the within complaint on the basis that the plaintiff lacks the legal capacity to maintain the underlying action; an order pursuant to CPLR §3211(a)(7) dismissing the plaintiff's complaint for failure to state a cause of action; an order pursuant to CPLR §3211(a)(8) dismissing the within action on the basis that this Court has no personal jurisdiction over the defendants; an order granting an award of counsel fees, and; an order pursuant to 22 NYCRR 130-1.1 imposing sanctions upon the plaintiff for frivolous conduct. In the *alternative*, Stanley Avenue moves for an order pursuant to CPLR §§510 and 511, changing the venue from Nassau County to Kings County (Sequence #001).

In motion sequence number two, defendant, Stanley Realty, LLC [hereinafter Stanley Realty], moves for the following relief: an order pursuant to CPLR §3211(a)(1) dismissing the plaintiff's

complaint based upon documentary evidence; an order pursuant to CPLR §3211(a)(2) dismissing the complaint due to defective service of the summons and complaint; an order pursuant to CPLR §3211(a)(3) dismissing the within complaint based upon the plaintiff's lack of legal capacity to prosecute the action; an order pursuant to CPLR §3211(a)(7) and CPLR §3016(b) dismissing the within complaint on the basis that the allegations of fraud are not stated with sufficient particularity; an order dismissing the within complaint on the grounds of waiver and laches, and an order granting an award of counsel fees.

In motion sequence number three, the plaintiff, TIA of New York, Inc. [hereinafter TIA]¹, cross moves pursuant to CPLR §3217(b), discontinuing the underlying action without prejudice.

On January 20, 2006, Stanley Avenue and TIA entered into an agreement whereby Stanley Avenue leased to TIA the premises located at 400 Stanley Avenue in Brooklyn, New York [hereinafter the subject premises](*see* Rachlin Affirmation in Support at ¶7; *see also* Exh. C). The term of the lease covered the period commencing on March 1, 2006 and terminating on February 28, 2011 (*id.*). Subsequently, on May 30 and December 20, 2007 respectively, Stanley Avenue and Stanley Realty, executed a "Ground Lease" and an "Assignment and Assumption of Leases and Rents" in connection to the subject premises (*id.* at ¶8; *see also* Exh. D).

On June 29, 2011, TIA commenced the underlying action which alleges the following: breach of the terms of the lease by both Stanley Avenue and Stanley Realty; fraud, and; unjust enrichment (*id.* at Exh. J). The applications respectively interposed by the moving parties herein thereafter ensued and are determined as set forth hereinafter.

Motion by Stanley Avenue

CPLR §3211(a)(8)

The Court initially addresses that branch of Stanley Avenue's application interposed pursuant to

¹ On or about October 28, 2009, TIA was dissolved by Proclamation (*see* Rachlin Affirmation in Support at Exh. A).

CPLR §3211(a)(8), which seeks dismissal of the complaint based upon this Court's purported lack of personal jurisdiction over the defendant (*see* Rachlin Affirmation in Support at ¶¶25-27). In support of the application, counsel argues that the summons and complaint forwarded to Stanley Avenue by the Secretary of State contained only the first three pages thereof and as such, same was insufficient to appraise the defendant as to TIA's claims (*id.*).

Here, the record reveals that on October 26, 2011, the Secretary of State was served in accordance with §303 of the Limited Liability Company Law (*id.* at Exh. I). The record further indicates that the Secretary of State thereafter forwarded a copy of the summons and complaint to the defendant, which was received thereby on October 26, 2011 (*id.* at ¶25; *see also* Stasco Affidavit at ¶3). While the defendant apparently received a complaint which only included the first three pages, said pages contained 17 out of a total of 22 paragraphs, the contents of which set forth the facts of the underlying action, as well as the substance of those causes of action alleging breach of the lease and fraud (*id.*). Moreover, the record establishes the defendant was able to procure a complete copy of the complaint and timely moved for dismissal thereof on both procedural and substantive grounds. As such, the Court considers unavailing defense counsel's assertion that Stanley Avenue was not sufficiently appraised of the TIA's claims.

Accordingly, that branch of the application seeking dismissal of the within complaint pursuant to CPLR §3211(a)(8), is hereby ***DENIED***.

CPLR §3211(a)(3)

The Court now addresses that branch of Stanley Avenue's application interposed in accordance with CPLR§3211(a)(3), the provisions of which state the following, in pertinent part:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (3) the party asserting the cause of action has no legal capacity to sue."

Business Corporation Law §1005(a)(1) provides that after dissolution "[t]he corporation shall carry on no business except for the purpose of winding up its affairs." Additionally, Business

Corporation Law §1006 (a) states the following: “[a] dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, * * * .”

Accordingly, under the foregoing statutes, TIA had the capacity to commence the underlying action within the circumscribed context of “winding up its affairs” (*id.*; *Tedesco v A.P. Green Industries, Inc.*, 8NY3d 243 [2007]). However, in the instant matter, the record demonstrates at the time the underlying action was commenced on June 29, 2011, TIA was not winding up its affairs but rather remained actively engaged in conducting its business (*id.*). More particularly, while TIA was dissolved as of October 28, 2009, it nonetheless continued to operate its business at the subject premises until September 30, 2011, when it was evicted in accordance with a Non-Payment proceeding commenced in Kings County by Stanley Realty (*id.*).

Therefore, based upon the foregoing, that branch of the instant application, which seeks an order dismissing the underlying complaint on the basis that TIA lacks the capacity to sue, is hereby **GRANTED** (CPLR §3211[a] [3], [7]).

CPLR 3211(a)(1):

Notwithstanding the foregoing determination, this Court finds that even assuming TIA indeed possessed the legal capacity to sue the defendants, the record establishes that dismissal of the underlying complaint would be warranted under CPLR §3211(a)(1). Accordingly, this Court will address Stanley Avenue’s application made thereunder.

CPLR §3211(a)(1) states that “[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.” An application predicated upon this section of law will be granted only upon a showing that the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010] quoting *Scadura v Robillard*, 256 Ad2d 567 [2d Dept 1998]; *Fortis Financial Services, LLC. v Fimat Futures USA*, 290 AD2d 383 [1st

Dept 2002]). As to that which constitutes a document within the purview of the statute, a commercial lease has been held to be a document upon which relief can be predicated (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010], *supra*; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]).

Examining initially the substance of the within complaint, TIA alleges that the subject lease “contain[ed] representations concerning the Premises, including a diagram depicting rental space of approximately 22,650 square feet” and that Stanley Avenue “as landlord, made verbal representations prior to the execution of the Lease concerning the size of the space, indicating that it was at least 22,650 square feet” (*see* Rachlin Affirmation at Exh. J at ¶5). TIA further alleges that the “actual size of the Premises is less than 18,900 square feet” and as a result thereof, Stanley Avenue and Stanley Realty, “breached the Lease causing TIA to pay excessive rent” and causing TIA to sustain damages in the amount of \$150,000 (*id.* at ¶¶8, 11, 12).

As to the cause of action sounding in fraud, TIA alleges, *inter alia*, that the “[d]efendants made false representations regarding the size of the Premises and further provided a diagram in the Lease that contained materially false and misleading information” (*id.* at ¶¶14). TIA additionally alleges that the “[d]efendants’ representations were materially false and misleading, made with intent to defraud Plaintiff” and that by reason thereof TIA has been damaged in the sum “of at least \$150,000 together with interest from January 20, 2006” (*id.* at ¶16).

“[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms” (*W.W.W. Associates v Giancontieri*, 77 NY2d 157 [1990] at 162). Further, “when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, given practical interpretation to the language employed and the parties’ reasonable expectations” (*Del Vecchio v Cohen*, 288 AD2d 426 [2d Dept 2001] at 427 quoting *Slamow v Delcol*, 174 AD2d 725 [2d Dept 1991], *affd* 79 NY2d 1016 [1992]; *AFBT-II, LLC v Country Village on Mooney Pond, Inc.*, 305 AD2d 340 [2d Dept 2003]). Moreover, “[w]here there is a written agreement which purports to express the parties’ entire agreement, extrinsic

evidence that contradicts, varies, or explains the agreement is generally barred by the parole evidence rule”(*Del Vecchio v Cohen*, 288 AD2d 426 [2d Dept 2001], *supra*). Further, “extrinsic and parole evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face”(*W.W.W. Associates v Giancontieri*, 77 NY2d 157 [1990], *supra* at 163 quoting *Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372 [1969] at 379). The determination as to whether or not a written agreement is ambiguous is a question law relegated to the Court (*id.*).

In the matter *sub judice*, the Court has carefully reviewed the terms of the lease, as well as the attendant diagram and upon said review concludes that neither of the aforesaid documents are ambiguous such as to invite the admission of parole evidence (*id.*). Initially, and with respect to the relevant diagram, same contains the following language: “No warranty or representation is made or is to be implied as to the accuracy of the information reflected in this Exhibit. The dimensions are approximate and do not reflect the actual dimensions of the Demised Premises.”² Moreover, section 34.1 of the subject lease clearly provides that “Landlord or Landlord’s agents have made no representations or promises with respect to the Improvements or Demises Premises except as herein set forth.”³

Thus, based upon the unequivocal disclaimer contained on the subject diagram, as well as the resultant inability of TIA to introduce extrinsic evidence, the Court finds that the documentary evidence contained herein conclusively disposes of the plaintiff’s claim as to any purported representations *vis a vis* the size of the subject premises (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010], *supra*). Accordingly, the application interposed by Stanley Avenue for an order dismissing the plaintiff’s complaint pursuant to CPLR§3211(a)(1), is hereby **GRANTED**

Counsel Fees

² see “Agreement of Lease” executed on January 20th, 2006 by and between Stanley Avenue and TIA at Exhibit A.

³ *id.* at p.30.

The Court now addresses that branch of Stanley Avenue's application which seeks an award of counsel fees in accordance with Article 19.1 of the subject lease (*see* Rachlin Affirmation in Support at ¶¶60-62).

"Generally, attorneys' fees and other expenses incurred during an action are considered an incident of litigation and, unless authorized by statute, court rule, or written agreement of the parties, are not recoverable" (*Centennial Contractors Enterprises v East New York Renovation Corp.*, 79 AD3d 690 [2010]; *TAG 380, LLC v ComMet, 380 Inc.*, 10 NY3d 507 [2008]). Here, Article 19.1 of the lease provides the following:

"if Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any Article of this Lease, (a) Landlord may remedy such default for the account of Tenant, immediately and without notice in case of emergency, or in any other case only provided that Tenant shall fail to remedy such default with all reasonable dispatch after Landlord shall have notified Tenant in writing of such default and the applicable grace period for curing such default shall have expired; and (b) **if Landlord makes any expenditures or incurs any obligations for the payment of money in connection with such default** including, but not limited to, reasonable attorneys' fees in instituting, prosecuting or defending any action or proceeding, such sums or obligations incurred, with interest at the Interest Rate, shall be deemed to be additional rent hereunder and shall be paid by Tenant to Landlord upon rendition of a bill to Tenant therefor."
[emphasis added].

In the instant matter, the above language plainly provides for an award of counsel fees incurred in connection to TIA's default under the terms of the lease. However, the substance of the underlying action does not involve a default by TIA under the terms of the lease but rather TIA's assertion that Stanley Avenue was in breach thereof. Accordingly, the application is hereby **DENIED**.

Stanley Realty

The Court now addresses the application interposed by defendant, Stanley Realty. As noted above, Stanley Realty moves for dismissal of the within complaint pursuant to CPLR §3211(a)(1),(2),(3) and (7), as well as for an award of counsel fees pursuant to Article 19 of the subject

lease.

In accordance with the foregoing determinations, those branches of the application predicated upon CPLR §3211(a)(1) and (3) are hereby **GRANTED** and that branch of the application seeking an award of counsel fees is hereby **DENIED**. As to that branch of the application interposed in accordance with CPLR §3211(a)(2), said section provides that a party may move for dismissal of an action based upon the court's lack of jurisdiction as to "the subject matter of the cause of action." Here, there has been no showing that this Court lacks the subject matter jurisdiction to dispose of the legal issues herein raised and accordingly this branch of the application is **DENIED**.

Finally, with respect to that branch of the application interposed in accordance with CPLR §3211(a)(7), counsel for Stanley Realty contends the allegations as to fraud are not plead with sufficient particularity warranting dismissal of the complaint (*see* Vona Affidavit in Support at ¶¶18-20,26,29). Specifically counsel contends that while the plaintiff recites misrepresentations purportedly made by Stanley Avenue "the Complaint does not set forth any fraudulent misrepresentations made by Stanley Realty (*id.* at ¶18).

To properly allege a cause of action sounding in fraud the complaint must set forth the following: the defendants made a material representation; the material representation was false; the defendants knew it was false and made it with the intention of deceiving the plaintiff; the plaintiff believed the representation to be true and justifiably acted in reliance thereon, and; the plaintiff is damaged as a result thereof (*Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43 [1999]). "In order to plead a prima facie case of fraud, a plaintiff must allege each of the elements of fraud with particularity and must support each element with an allegation of fact" (*Fink v Citizens Mortg. Banking Ltd.*, 148 AD2d 578 [2d Dept 1989]; CPLR §3016[b]).

As noted above, TIA predicates the relief demanded in the complaint upon the following factual assertions: that Stanley Avenue made "verbal representations" prior to the execution of the lease as to

the size of the subject premises, and: that the “[d]efendants made false representations regarding the size of the Premises and further provided a diagram in the Lease that contained materially false and misleading information.”

In the instant matter, a review of the complaint indicates that TIA plainly alleges it was Stanley Avenue and *not* Stanley Realty which made verbal representations prior to the lease having been formally executed (*Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43 [1999], *supra*). Further, the allegations of fraud contained in the Second cause of action are set forth in a non-specific manner and refer to the defendants in the collective without delineating which defendant made what misrepresentation (*id.*; *Fink v Citizens Mortg. Banking Ltd.*, 148 AD2d 578 [2d Dept 1989], *supra*). Therefore, that branch of the application, which seeks an order dismissing the underlying complaint pursuant to CPLR §3211(a)(7), is hereby **GRANTED**.

In sum, and based upon the foregoing, it is,

ORDERED, that the application interposed by defendant, Stanley Avenue LLC, is hereby **GRANTED** as to those branches which seek dismissal of the complaint in accordance with CPLR §3211(a)(1),(3) and (7) and **DENIED** as to that branch of the application made pursuant to CPLR §3211(a)(8); it is further

ORDERED, that those branches of the application interposed by Stanley Avenue LLC, for an order granting an award of counsel fees, as well as for the imposition of sanctions, are hereby **DENIED**; and it is further

ORDERED, that the application interposed by Stanley Realty, LLC is hereby **GRANTED** as to those branches of the application seeking dismissal of the complaint in accordance with CPLR §3211(a)(1)(3) and (7) and **DENIED** as to that branch predicated upon CPLR §3211(a)(2); and it is further,

ORDERED, that the branch of the application interposed by Stanley Realty, LLC, for an order granting an award of counsel fees, is hereby **DENIED**; and it is further

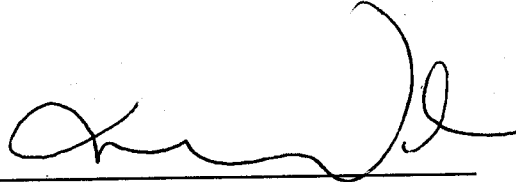
ORDERED, that the cross-motion interposed by TIA seeking an order discontinuing the underlying action without prejudice in accordance with CPLR §3217[b], is hereby **DENIED** as moot.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are *denied*.

DATED: April 16, 2012
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.
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COUNTY CLERK'S OFFICE