

AKS Mgt. LLC v Ribeiro
2013 NY Slip Op 33212(U)
January 18, 2013
Sup Ct, Queens County
Docket Number: 9263/12
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

AKS MANAGEMENT LLC,

Plaintiff,

-against-

GISELE RIBEIRO and "JOHN DOE" and/or
"JANE DOE",

Defendants.

Index No. 9263/12

Motion
Date December 11, 2012

Motion
Cal. No. 1

Motion
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Upon the foregoing papers it is ordered that this motion by defendant, Gisele Ribiero ("Ribiero") pursuant to CPLR 3211(a) dismissing the Complaint of plaintiff, AKS Management LLC, is hereby denied.

Plaintiff commenced this action alleging, a first cause of action for a declaratory judgment that the lifetime-lease between plaintiff and defendant Ribiero is a nullity, a second cause of action for a judgment of possession and ejection of all defendants, and a third cause of action for monetary damages for use and occupancy. Defendant Ribiero now moves to dismiss the complaint as against her for failure to state a cause of action against her and for lack of standing by plaintiff, and plaintiff cross moves for summary judgment pursuant to CPLR 3212 declaring defendant Ribiero's lease null and void, and granting plaintiff a judgment of possession and damages for defendant's use and occupancy.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v.

Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

That branch of defendant's motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendant Ribiero for failure to state a cause of action is decided as follows:

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; Leon v. Martinez, 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc., 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East, Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk, 187 AD2d 560 [2d Dept

1992])).

Applying these principles in this case, the court decides as follows:

At the outset, the Court notes that moving defendant moves to dismiss plaintiff's Complaint, but fails to attach a copy of the Complaint to her moving papers. As such, the motion is denied for this reason alone. However, as the plaintiff has attached a copy of the Complaint to its cross motion, the Court relies upon same.

Moving defendant asserts that plaintiff's Complaint fails to state a cause of action for fraud in the inducement. The record reflects that no cause of action is grounded in fraud in the inducement and moving defendant has failed to state which parts of the Complaint allege fraud in the inducement.

Moving defendant asserts that plaintiff's Complaint fails to state a cause of action for mutual mistake of fact. The record reflects that no cause of action is grounded in mutual mistake of fact and moving defendant has failed to state which parts of the Complaint allege mutual mistake of fact.

Moving defendant asserts that plaintiff's Complaint fails to state a cause of action for ejectment, however, movant has failed to establish a prima facie case of what the elements for a cause of action in ejectment are and how they have not been pled in the Complaint.

Moving defendant asserts that plaintiff's Complaint fails to state a cause of action for damages because plaintiff has no standing to assert money damages from defendant. This Court finds that plaintiff does have standing in that plaintiff alleges that it is the owner of the premises, that plaintiff is landlord to moving defendant, that there is a contract of sale, and plaintiff was a party to the Rider to the Contract of Sale. The Court notes that while plaintiff denominates its third cause of action as one for money damages, it is in essence, a cause of action for use and occupancy.

Additionally, that branch of moving defendant's motion seeking to dismiss the plaintiff's Complaint as against her pursuant to CPLR 3211(a)(3), because plaintiff lacks standing to obtain relief against her based upon her alleged acts towards another non-party is hereby denied because moving defendant has failed to establish a prima facie case in support of the relief requested.

Furthermore, moving defendant has improperly sought to reach

the merits of the Complaint on this mere CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra).

Plaintiff's cross motion for summary judgment pursuant to CPLR 3212 declaring defendant Ribiero's lease null and void, and granting plaintiff a judgment of possession and damages for defendant's use and occupancy is hereby denied as plaintiff has failed to establish a prima facie case in support of its claims. While plaintiff alleges that moving defendant engaged in criminal conduct which conduct should serve to void its lease, plaintiff has failed to allege any specific facts which support such criminal conduct.

Accordingly, the motion and cross motion are denied.

This constitutes the decision and order of the Court.

Dated: January 18, 2013

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Howard G. Lane, J.S.C.