Chelsea Dynasty, LLC v Berg
2013 NY Slip Op 33496(U)
November 25, 2013
Supreme Court, New York County
Docket Number: 113662/11
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN Justice PART 7

CHELSEA DYNASTY, LLC,
Plaintiffs,

-against-

JONATHAN A. BERG and J. BERG PRESS LTD.,
Defendants.

INDEX NO. 113662/11

MOTION SEQ. NO. 005

The following papers were read on this motion by defendants for dismissal pursuant to CPLR 3211(a)(1) and (7).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☒ Yes ☐ No

This is an action brought by Chelsea Dynasty, LLC. (plaintiff or landlord) seeking a Declaratory Judgment establishing (1) validity and enforceability of a prior agreement between landlord and J.Berg Press Ltd (J. Berg Press) and its president Jonathan A. Berg (Berg) (collectively defendants or tenants) and (2) establishing that the Eighteen (18) Month Notice of Cancellation made by plaintiff on defendant was properly served and valid and enforceable in Housing Court. Before this Court is a motion by defendants, pursuant to CPLR 3211(a)(1) and 3211(a)(7), seeking dismissal of the First and Fourth causes of action alleged in plaintiff's Verified Complaint, claiming that the prior agreement between landlord and defendant(s) is not valid and therefore plaintiff is not entitled to damages. Plaintiff has responded in opposition to the motion, and has made a cross-motion for partial summary judgment pursuant to CPLR 3212(e), seeking to establish as a matter of law that the 18 Month Notice of Cancellation/Termination was properly served, valid and enforceable. The parties have completed discovery and Note of Issue has been filed.

BACKGROUND

Plaintiff is the current owner of an apartment located at 222 West 23rd Street, New York NY 10011 (the building). Defendants are tenants of the building in Unit 1028 and the entire roof/roof addition (Subject Premises). On or about June 11, 1997, J. Berg Press entered into an agreement (Prior Agreement) with the previous landlord for the subject premises, upon which it was agreed that access to the Subject Premises would be granted to the landlord for publicity and production requests (*see* Defendant's Notice of Motion, exhibit C). Subsequently, J. Berg Press entered into a Lease Agreement with the previous landlord on or about July 31, 1997 (Lease Agreement) (*see* Defendant's Notice of Motion, exhibit A). Plaintiff alleges that it has repeatedly requested access to the Subject Premises as per the terms of the Prior Agreement and that the defendant(s) continuously refused and denied such access (*see* Verified Complaint, ¶¶ 4-6).

Additionally, plaintiff maintains that on August 4, 2011 in compliance with the Lease Agreement, plaintiff served defendants with an 18 Month Notice of Cancellation/Termination dated August 2, 2011 (*see* Verified Complaint, exhibit E). The defendants reject the validity and proper service of the August 2, 2011 18 Month Notice of Cancellation/Termination.

Subsequently, on December 6, 2011, plaintiff commenced this action by the filing of a Summons and Verified Complaint asserting four causes of action against the defendants, seeking: (1) a declaratory judgment that the June 11, 1997 Agreement is indeed valid and enforceable between the parties herein, in Housing Court (*see* Verified Complaint, ¶14); (2) a declaratory judgment that the August 2, 2011 18 Month Notice of Cancellation/Termination was properly served (*see* Plaintiff's Notice of Cross-Motion, exhibit C); (3) a declaratory judgment that the August 2, 2011 18 Month Notice of Cancellation/Termination is valid and enforceable in Housing Court; (4) damages of no less than ten million dollars ($10,000,000) for the financial and business loss to the plaintiff caused by defendant's denial of access to the Subject

Premises to the plaintiff for publicity and production requests.

Now before the Court is a motion by defendants, pursuant to CPLR 3211(a)(1) and (a)(7), seeking dismissal of the first and fourth causes of action on the basis that the Prior Agreement is superseded by the Lease Agreement, therefore rendering the Prior Agreement null and void, and unenforceable as a matter of law. Plaintiff cross-moves for partial summary judgment, pursuant to CPLR 3212.

STANDARD

CPLR 3211(a) provides that:

> "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 upon documentary evidence;
> [7] The pleading fails to state a cause of action"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature that fits within any cognizable legal theory (*see Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995];

Demas v 325 W. End Ave. Corp., 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "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 Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008] [holding that it was proper for the complaint to be dismissed because the documentary evidence refuted the plaintiff's allegations for breach of contract]).

DISCUSSION

I. DEFENDANT'S MOTION TO DISMISS

On June 11, 1997, prior to signing the Lease Agreement, Berg, in his capacity as president of J. Berg Press signed the Prior Agreement, wherein the parties agreed that the previous landlord would have permission to show or use the Subject Premises for publicity or theatrical purposes at any time during normal business hours (Notice of Motion, exhibit C). Fifty days later, Berg, in his capacity as president of J. Berg Press, signed the Lease Agreement with the prior landlord. The Lease Agreement did not contain the previous language from the Prior Agreement granting the landlord permission to show or use the Subject Premises.

Defendants contend that the First and Fourth causes of action should be dismissed because the documentary evidence refutes the factual allegations contained in the complaint. When interpreting a contract under New York law, it must be construed "according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous [,] the terms are to be taken and understood in their plain, ordinary and proper sense" (*Matter of Covert*, 97 NY2d 68, 76 [2001]). Therefore, "where the contract is clear and unambiguous on its face, the courts must determine the intent of the parties from within the four corners of the instrument" (*Matter of Meccico v Meccico,* 76 NY2d 882, 824 [1990]).

It is well settled that "where the parties have clearly expressed or manifested their

intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement" (*Northville Industries Corp. v Fort Neck Oil Terminals Corp.*, 100 AD2d 865, 867 [2nd Dept 1984]; *see also Citigifts, Inc. v Pechnik,* 112 AD2d 832, 834 [1st Dept 1985]); *see also Continental Stock Transfer & Trust Co. v Sher-Del Transfer & Relocation Services, Inc.*, 298 AD2d 336, 336 [1st Dept 2002]). Seeing as the Lease Agreement before the Court is clear and unambiguous on its face, the Court interprets the contract in its plain and ordinary sense, and does not find that the Prior Agreement was incorporated, or intended to be incorporated, in the Lease Agreement. The Lease Agreement between plaintiff and defendants clearly expresses intent to extinguish the Prior Agreement through the use of a merger clause contained within the lease. Moreover, the Lease Agreement does not incorporate the Prior Agreement by reference.

Under New York law the existence of a merger clause in an agreement precludes the imposition of additional obligations beyond those specifically set forth in the agreement (*see SNS Bank v Citibank,* 7 AD3d 352, 354 [1st Dept 2004]; *see also Torres v D'Alesso*, 80 AD3d 46, 51 [1st Dept 2010] [excluded parol testimony of prior oral agreement between parties due to the parties' delivery of a completely integrated written contract containing a broad merger clause specifying that all agreements were merged into writing]). Moreover, "[A]greements containing [merger] clauses evidence an intent of understanding between parties" (*Schron v Grunstein,* 32 Misc3d 231, 236 [NY Sup 2011]). Specifically, a merger clause establishes the parties' intent that the agreement is to be considered a completely integrated writing (*see Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599-600 [1997]). Here, the Lease Agreement signed by defendant includes a merger clause that states:

> "[t]his instrument contains all the agreements and conditions made between the parties hereto. Any additions thereto, or alternations or changes in this contract, or other agreements hereafter made or conditions created, to be binding, must be in writing and

signed by both parties" (Notice of Motion, exhibit A at p. 4, ¶ Eighteen)

The Lease Agreement clearly contains a merger clause that specifies all agreements and conditions made between the parties are contained in the Lease Agreement, therefore making it a completely integrated writing. Therefore, the terms contained therein supersedes any prior agreement or contracts between the parties entered into previously (*see Cornhusker Farms, Inc. v Hunts Point Cooperative Market*, 2 AD3d 201, 204 [1st Dept 2003] [finding the agreement was an integrated writing and therefore barred any claim based on an alleged agreement that the parties failed to express in the agreement itself or in a signed written amendment]).

Further, the Prior Agreement is not incorporated by reference into the Lease Agreement. For the Prior Agreement to be incorporated, the agreement must be referred to such that it is able to be identified in the referenced document 'beyond all reasonable doubt' (*see Cornhusker Farms, Inc. v Hunts Point Cooperative Market*, 2 AD3d 201, 204 [1st Dept 2003], citing *Shark Info. Serv. Corp. v Crum & Foster Commercial Ins.*, 222 AD2d 251, 252 [1st Dept 1995]). As the Prior Agreement is neither referred to nor described anywhere in the Lease Agreement, it is not incorporated into the Lease Agreement and the terms of the Prior Agreement are therefore null and void.

Plaintiff contends that the Lease Agreement incorporates by reference the Prior Agreement, claiming that both documents must be read together to stand and make sense. Specifically, plaintiff contends that a "side agreement" that references a money payment of $420 contained within the Lease Agreement, is referring to the Prior Agreement, and therefore incorporating the Prior Agreement (Notice of Motion, exhibit A at ¶ 5). Plaintiff has not put forth adequate evidence that shows 'beyond all reasonable doubt' that the "side agreement" mentioned in the Lease Agreement is referring to the Prior Agreement (*see Cornhusker Farms Inc.*, 2 AD3d at 204 [in order to incorporate by reference a prior agreement or document it must be referred to or described in the lease such that it is identifiable 'beyond all reasonable

doubt']). Seeing as the "side agreement" is an agreement regarding a monthly payment of $420 by the tenant, and the Prior Agreement does not contain a money agreement, plaintiff has failed to show beyond all reasonable doubt that the "side agreement" mentioned in the Lease Agreement incorporates the Prior Agreement into the lease.

Plaintiff further proffers that without the Prior Agreement, the Lease Agreement lacks consideration and a description of the premises. The Court finds that the Lease Agreement contains sufficient consideration, as it is based on the defendant's obligation to pay rent on a monthly basis in exchange for the right to live in the premises owned by the landlord (*see Fifty States Mgmt Corp. v Pioneer Auto Parks, Inc.*, 46 NY2d 573 [1979] ["A covenant to pay rent at a specified time...is an essential part of the bargain as it represents the consideration to be received for permitting the tenant to remain in possession of the property of the landlord"]; *see also Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC.*, 8 NY3d 59, 65 [2006]). Moreover, the Lease Agreement's description of the premises under "WITNESSETH" stating the suite number and address is an adequate description of the premises.

Based upon the documentary evidence submitted by defendants, the Court finds that the First and Fourth causes of action stated in the Verified Complaint are dismissed. The Lease Agreement signed later in time supercedes the Prior Agreement as it is not incorporated by reference, and as such renders the Prior Agreement null and void. As plaintiff's First and Fourth causes of action set forth in the Verified Complaint are premised on the enforceability of the Prior Agreement, the First and Fourth causes of action are dismissed.

II. PLAINTIFF'S CROSS-MOTION

Plaintiff's cross-motion for partial summary judgment, pursuant to CLPR 3212(e), seeking to hold the Eighteen (18) Month Notice of Cancellation/Termination dated August 2, 2011 duly and properly served, valid and enforceable in light of the Lease Agreement is denied as premature as it was made before issue was joined (*see* CPLR 3212[a]).

CONCLUSION

For these reasons and upon the forgoing papers, it is,

ORDERED that defendants Jonathan Berg and J.Berg Press, Ltd.'s motion is granted and the First and Fourth Cause of Action set forth in the complaint are dismissed; and it is further,

ORDERED that the cross-motion, brought by plaintiff Chelsea Dynasty for partial summary judgment, pursuant to CPLR 3212, is denied without prejudice as premature; and it is further,

ORDERED that within 30 days of Entry, counsel for defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court

Dated: 11/25/13

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**