TDS Leasing, LLC v Tradito

2013 NY Slip Op 34145(U)

February 22, 2013

Supreme Court, Westchester County

Docket Number: 61532/12

Judge: Lester B. Adler

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SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
--X

TDS LEASING, LLC d/b/a
THE 815 YONKERS AVENUE SERIES OF TDS
LEASING and MILTON RAINFORD,

Plaintiffs,

-against-

DECISION & ORDER

EMMANUEL TRADITO, MARIA TRADITO,
and JOHN TRADITO,

Index No.: 61532/12

Defendants.
--X

ADLER, J.

The following papers numbered 1 to 32 were read on defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(3), (5) and (7):

	Papers Numbered
Notice of Motion; Affirmation of Jerry F. Kebrdle, III, Esq.; Affidavit of Emanuel Tradito; Affirmation of Nicholas Leo, Esq.; Exhibits	1-16
Affidavit in Opposition of George Psathas; Exhibit 9	17-26
Affidavit in Opposition of Milton Rainford	27
Memorandum of Law in Opposition	28
Reply Affirmation of Jerry F. Kebrdle, Esq.	29
Reply Affidavit of Emanuel Tradito	30
Reply Affidavit of John Tradito	31
Reply Affidavit of Nicholas Leo, Esq.	32

Plaintiffs commenced this action to recover damages for breach of lease, wrongful eviction and fraudulent transfer in connection with a lease for premises located at 815 Yonkers Avenue in the City of Yonkers, New York (the "Premises"). Defendants now move to dismiss the complaint on the grounds that plaintiff TDS Leasing LLC d/b/a

The 815 Yonkers Avenue Series of TDS Leasing ("TDS Leasing") and plaintiff Milton Rainford ("Rainford") lack standing to sue (see CPLR §3211[a][3]), that the cause of action for wrongful eviction is barred by the applicable statute of limitations (see CPLR §3211[a][5]), and that the complaint fails to state a cause of action under Debtor and Creditor Law §273-a (see CPLR §3211[a][7]).

ALLEGATIONS OF THE COMPLAINT

On or about August 7, 2007, plaintiff TDS Leasing entered into a written commercial lease with defendants Emmanuel Tradito ("E. Tradito") and Maria Tradito ("M. Tradito") for the "Premises (the "Primary Lease"). Thereafter, TDS Leasing entered into a written franchisee store lease with plaintiff Rainford (the "Franchisee Lease"). Plaintiffs took possession of the Premises and began renovations for the purpose of establishing a "Twin Donut" franchise therein.

In the Spring of 2008, defendants E. Tradito and M. Tradito commenced a commercial nonpayment proceeding in the Yonkers City Court. It was alleged in this proceeding that TDS Leasing had failed to make rent payments as provided in the lease. On March 3, 2008, E. Tradito and M. Tradito executed a quitclaim deed whereby title to the Premises was conveyed to defendants M. Tradito and John Tradito ("J. Tradito").

On June 23, 2008, defendants obtained a default judgment of eviction in the Yonkers City Court and a warrant of eviction was issued. At some point in time after June 23, 2008 but before July 17, 2008, defendants directed that the locks to the Premises be changed, thereby disseizing plaintiffs of the Premises and depriving them access thereto. It was also during this time period that defendants re-let the Premises.

On or about July 17, 2008, plaintiff TDS Leasing learned of the eviction proceeding, nonpayment claim and warrant of eviction. In a decision dated November 19, 2010, the Supreme Court Appellate Term, 9th and 10th Judicial Districts, held that defendants' service was defective, the warrant of eviction was vacated and the commercial nonpayment petition was dismissed. The Court further ordered that TDS Leasing be restored to possession of the Premises. Defendant's motion to reargue this decision was denied in a Decision and Order dated July 7, 2011. To date, despite due demands, defendants have failed and/or refused to restore plaintiffs' possession of the Premises.

LEGAL ANALYSIS

I. MOTION PURSUANT TO CPLR §3211(a)(3)

Defendants move to dismiss the first cause of action sounding in breach of contract on the ground that plaintiff TDS Leasing lacks capacity to sue based on its failure to file a certificate as required by General Business Law §130.

Pursuant to CPLR §3211(a)(3), a court may dismiss an action when the party bringing the action lacks the legal capacity to sue. In New York, a limited liability corporation may not conduct or transact business in the state under an assumed name unless it files a certificate with the office of the secretary of state setting forth, among other things, the name or designation under which business is carried on, conducted or transacted (GBL §130[1][b]). In opposition to the motion, TDS Leasing has submitted a certified copy of the certificate of assumed name which was filed with the New York Secretary of State on April 30, 2012.

Defendants further argue that plaintiff Rainford lacks standing to sue on the ground that as a sublessee he has no privity of contract.

Under a sublease, a tenant conveys its right to occupy all or part of the premises to the subtenant for a specified time period which is less than the term reserved in the tenant's lease with its landlord (*New Amsterdam Cas. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 266 N.Y. 254, 260, 194 N.E. 745). Since a sublease is an agreement between a tenant and the subtenant, tenant retains privity of contract with the landlord and remains responsible for all obligations under the lease and, therefore, no privity of contract exists between the subtenant and the landlord-lessor (*Tefft v. Apex Pawnbroking & Jewelry Co.*, 75 A.D.2d 891, 892, 428 N.Y.S.2d 52). In contrast, if the tenant transfers his entire interest in the leased premises, he has made an assignment (*Bostonian Shoe Co. v. Wulwick Assoc.*, 119 A.D.2d 717, 718-719, 501 N.Y.S.2d 393, *appeal dismissed* 69 N.Y.2d 706, 512 N.Y.S.2d 1029, 504 N.E.2d 398). When an assignment occurs, "the assignee becomes directly liable to the original landlord as the transfer creates a privity of estate between the landlord and the transferee of the lease or of a part thereof" (*New Amsterdam Cas. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 266 N.Y. at 259).

The term of the Primary Lease commenced on August 7, 2007 and ran until August 6, 2017. By the terms of the Franchisee Lease, Rainford was required to surrender possession of the Premises to TDS Leasing on August 5, 2017, one day prior to the expiration of the Primary Lease. Since TDS Leasing retained a reversionary interest in the Premises, the Franchisee Lease constitutes a sublease (*Bostonian Shoe*

Co. of N.Y. v. Wulwick Assocs., 119 A.D.2d 717, 719).[1] Accordingly, Rainford lacks privity of contract (*Tefft v. Apex Pawnbroking & Jewelry Co.*, 75 A.D.2d at 892).

In opposition to the motion, plaintiffs have submitted an "Assignment of Claim" dated September 24, 2012, in which TDS Leasing purports to sell, assign, and transfer to Rainford "any and all claims, demands, and cause or causes of action of any kind whatsoever which [TDS Leasing] has or may have against [defendants]." The document further authorizes Rainford, as the assignee, to "prosecute, collect, settle, compromise and grant releases" on any such claims "in his sole discretion." Defendants contend that if this document constitutes a valid assignment, then TDS Leasing is no longer a party in interest (see *James McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 61 N.Y.2d 836, 473 N.Y.S.2d 960, 462 N.E.2d 137). Defendants argue in the alternative that the assignment is not effective in light of the provision in the rider to the Primary Lease which requires written consent by defendants for assignment thereof.

"Under New York Law, contracts are freely assignable absent language which expressly prohibits assignment" (*In re Stralem*, 303 A.D.2d 120, 122, 758 N.Y.S.2d 345 [citations omitted]). An assignment made in contravention of a prohibition clause in a contract is void "if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments" (*Macklowe v. 42nd St. Dev. Corp.*, 170 A.D.2d 388, 389, quoting *Sullivan v. Intl. Fidelity Ins. Co.*, 96 A.D.2d 555, 556, 465 N.Y.S.2d 235 [citations and internal quotations omitted]).

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[1]Indeed, the complaint repeatedly refers to the Franchisee Lease as a "sublease."

Here, paragraph 59 of the rider to the Primary Lease constitutes a covenant not to assign since the language contained therein does not provide that any assignment made without the consent of the defendants would be void or invalid (*Almeida Oil Co., Inc. v. Singer Holding Corp.*, 51 A.D.3d 604, 606, 857 N.Y.S.2d 689, cf. *Cole v. Metropolitan Life Ins. Co.*, 273 A.D.2d 832, 708 N.Y.S.2d 789). Thus, in light of the assignment, plaintiff Rainford has capacity to maintain the instant action and plaintiff TDS Leasing is no longer a party in interest.

II. MOTION PURSUANT TO CPLR §3211(a)(5)

Defendants further move to dismiss the second cause of action sounding in wrongful eviction (see RPAPL §853) on the ground that it is barred by the applicable statute of limitations.

On a motion to dismiss a cause of action as barred by the statute of limitations, "a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired" (*Tsafatinos v. Wilson Elser Moskowitz Edelman & Dicker, LLP*, 75 A.D.3d 546, 903 N.Y.S.2d 907, quoting *Savarese v. Shatz*, 273 A.D.2d 219, 220, 708 N.Y.S.2d 642 [internal quotations omitted]). "Only if the defendant makes such a prima facie showing does the burden then shift to the plaintiff to aver evidentiary facts establishing that the case falls within an exception to the statute of limitations" (*Philip F. v. Roman Catholic Diocese of Las Vegas*, 70 A.D.3d 765, 766, 894 N.Y.S.2d 125, quoting *Savarese v. Shatz*, 273 A.D.2d 219 [internal quotations omitted]), "or that a question of fact exists as to whether an exception applies (*Id.* at 766, citing *Santo B. v. Roman Catholic Archdiocese of N.Y.*, 51 A.D.3d at 957, 861 N.Y.S.2d 674).

"Wrongful eviction claims are governed by the one-year Statute of Limitations applicable to intentional torts" (*Gold v. Schuster*, 264 A.D.2d 547, 549, 694 N.Y.S.2d 646; see also *Gkanios v. D'Ambrosio*, 271 A.D.2d 488, 706 N.Y.S.2d 910; *Jones v. City of New York*, 161 A.D.2d 518, 555 N.Y.S.2d 788; *Kolomensky v. Wiener*, 135 A.D.2d 505, 507, 522 N.Y.S.2d 156), which begins to run "at such time that it is reasonably certain that the tenant has been unequivocally removed with at least the implicit denial of any right to return" (*Gold v. Schuster*, 264 A.D.2d at 549).

Plaintiffs argue that the eviction did not become "unlawful" for statute of limitations purposes until the Supreme Court, Appellate Term deemed it so on appeal. This argument was rejected by the Appellate Division, First Department, which held that the statute of limitations begins to run at the time the actual eviction takes place (*Id.* at 549-550). Here, The Appellate Term previously determined that plaintiff TDS Leasing was evicted on July 17, 2008 (see *Tradito v. 815 Yonkers Ave. Series TDS Leasing, LLC* , 30 Misc. 3d 3, 913 N.Y.S.2d 867). Consequently, the cause of action for wrongful eviction is barred by the applicable statute of limitations (see *Urra v. Friedman*, 231 A.D.2d 710, 648 N.Y.S.2d 41).

III. MOTION PURSUANT TO CPLR §3211(a)(7)

Lastly, defendants move to dismiss the third cause of action alleging a violation of Debtor and Creditor Law §273-a.

On a motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether

the facts as alleged fit within any cognizable legal theory (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Euell v. Incorporated Vil. of Hempstead*, 57 A.D.3d 837; 871 N.Y.S.2d 224; *Well v. Rambam*, 300 A.D.2d 580, 753 N.Y.S.2d 512; *Jacobs v. Macy's East*, 262 A.D.2d 607, 693 N.Y.S.2d 164). Further, a court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Lucia v. Goldman*, 68 A.D.3d 1064, 893 N.Y.S.2d 90; see also *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970).

Where evidentiary material is submitted in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*Cog-Net Bldg. Corp. v. Travelers Indemnity* Co., 86 A.D.3d 585, 586, 927 N.Y.S.2d 669, quoting *Rietschel v. Maimonides Med. Ctr.,* 83 A.D.3d 810, 810, 921 N.Y.S.2d 290; *Peter F. Gaito Architecture v. Simone Dev. Corp.*, 46 A.D.3d 530, 531, 846 N.Y.S.2d 368). "[U]nless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Norment v. Intervaith Ctr. of New* York, 98 A.D.3d 955, 956, 951 N.Y.S.2d 531, citing *Guggenheimer v. Ginzburg,* 43 N.Y.2d at 274-275).

Accepting the facts as alleged in the complaint as true, and according the plaintiffs the benefit of every possible favorable inference, the complaint fails to state a claim pursuant to DCL §273-a. "Pursuant to DCL §273-a, [e]very conveyance made without fair consideration when the person making it is a defendant in an action for

money damages or a judgment in such an action or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment." No action was pending at the time of the conveyances alleged in the complaint, nor does the complaint allege the existence of an unsatisfied judgment, an essential element of a cause of action under this provision (see *Coyle v. Lefkowitz*, 89 A.D.3d 1054, 1056, 934 N.Y.S.2d 216).

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss pursuant to CPLR §3211(a)(3) is GRANTED to the extent that the first cause of action insofar as asserted by plaintiff TDS Leasing is dismissed and in all other respects to DENIED; and it is further

ORDERED, that defendants' motion to dismiss the second cause of action pursuant to CPLR §3211(a)(5) is GRANTED; and it is further

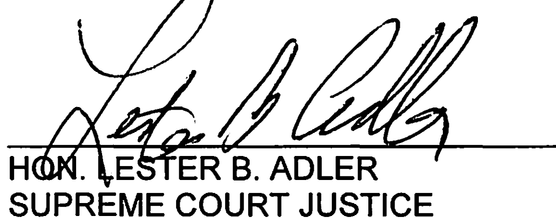
ORDERED, that defendants' motion to dismiss the third cause of action pursuant to CPLR §3211(a)(7) is GRANTED; and it is further

ORDERED, that plaintiffs' application to treat the motion as one for summary judgment pursuant to CPLR §3211(c) is DENIED; and it is further

ORDERED, that the remaining parties appear in the Preliminary Conference Part on March 11, 2013 at 9:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 22, 2013



HON. LESTER B. ADLER
SUPREME COURT JUSTICE