

**Rosenbaum v Cornicello Tendler Baumel &
Cornicello**

2014 NY Slip Op 30856(U)

March 31, 2014

Sup Ct, New York County

Docket Number: 103010/2012

Judge: Debra A. James

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 – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES PART 59
Justice

REBECCA ROSENBAUM,
Plaintiff,

- v -

CORNICELLO TENDLER BAUMEL & CORNICELLO,
LLP, HOWARD HUA and ALBIN W. RAUSCH,

Defendants.

Index No.: 103010/2012

Motion Date: 03/22/13

Motion Seq. No.: 001

Motion Cal. No.: _____

FILED

APR 07 2014

The following papers, numbered 1 to 4 were read on this motion to dismiss. COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion of defendants Cornicello, Tandler, Baumel & Cornicello, LLP and Howard Hua (collectively "Cornicello") to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (7) shall be granted.

On this motion to dismiss the complaint pursuant to CPLR 3211(a)(7), the court must "accept as true the facts as alleged in the complaint, and afford plaintiff() every possible favorable inference" Chapman Spira & Carson, LLC v Helix BioPharma, 2014 NY Slip Op 01685 (1st Dept 2014).

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]
More specifically,

On a motion to dismiss pursuant to CPLR 3211, the pleading is afforded a liberal construction (see CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiff() the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1) a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one".
Leon v Martinez, 84 NY2d 83, 87-88 (1994) (citations omitted).

Plaintiff's complaint states in pertinent part:

(3) Plaintiff Rebecca Rosenbaum entered into a stipulated agreement with Albin W. Rauch Jr, who was represented by Howard Hua, of the law firm of Cornicello, Tendler, Baumel & Cornicello. Part of the terms of the agreement were that if Rebecca Rosenbaum hands over her keys to Albin W. Rauch Jr. And vacates the apartment at 21 W. 87th St, #3A, New York, NY 10024 by May 31, 2011, there would be no eviction. Also, all terms of the stipulated agreement and court proceeding were to be confidential. (A copy of the stipulated agreement is attached.) (4) On May 31, 2011, Rebecca Rosenbaum handed over all keys to Albin W. Rauch Jr. and vacated the apartment.

(5) Despite Rebecca Rosenbaum's relinquishment of the keys and vacature, Howard Hua of the law firm of Cornicello, Tendler, Baumel & Cornicello proceeded with an eviction despite his client's request not to do so because Rebecca Rosenbaum had complied with the stipulated agreement. Howard Hua also violated the terms of confidentiality (Eviction attached.)

Also attached to plaintiff's complaint is an affidavit of Albin W. Rauch, Jr., sworn to on May 4, 2012, which states in relevant part "She did not violate our stipulated agreement in any way. I informed my attorney of this. Still, he evicted her despite my objections."

In support of his motion, defendant Cornicello attaches as documentary evidence, the Stipulation of Settlement dated February 16, 2011 ("Stipulation") in Rauch v Rosenbaum, NYC Civil Court, County of New York, L&T Index No. 94236/2010. The Stipulation, which was so-ordered by a judge of the NYC Housing Court (Eisner, J.) states, in pertinent part

1. Respondent consents to the jurisdiction of this court over her person.

2. Final judgment of possession in favor of petitioner, warrant to issue forthwith, but execution stayed through May 31, 2011 as a final date for respondent's vacatur, Respondent acknowledges that time is of the essence.

3. Respondent must surrender all keys and remove all possessions and belongings upon vacatur. Any items left behind are deemed abandoned and may be disposed of by petitioner.

4. Petitioner may pre-serve the notice of eviction no earlier than 5/20/2011

5. Upon respondent's timely compliance and vacatur, petitioner waives all claims to past due use and occupancy and for any use and occupancy forthwith to May 31, 2011.

6. Upon respondent's default petitioner reserves its rights to seek reasonable attorney's fees.

7. Parties agree that any applicable applications for relief must be made before the Hon. Timmie Eisner.

8. Petitioner agrees not to discuss this preceding (sic) or the contents of this agreement with nay person, party, or entity forthwith from the execution of this agreement.

9. This agreement represents the full agreement between the parties. Any and all modifications to this agreement must be done in writing.

"A contract made by an attorney on behalf of a client is generally the act of an agent for a known principal and imposes no personal liability on the attorney in the absence of an express agreement to that effect." New York Jurisprudence, Attorneys, § 161 (Second Edition). Plaintiff does not allege that Cornicello expressly agreed to be personally liable for breach of the Stipulation between she and his client, and therefore no cause of action for breach of the terms of the Stipulation, including the confidentiality provision, is cognizable against Cornicello. Likewise, plaintiff's allegation of retaliation against Cornicello fail to state a cognizable claim. Pearl v 305 East 92nd Street Corp, 156 AD2d 122 (1st Dept 1989).

The court concurs with Cornicello, that even assuming

for the sake of argument that he personally may be cast in damages for breach of contract, plaintiff misapprehends the terms of the Stipulation. Contrary to plaintiff's allegations, the Stipulation does not contain a promise or agreement by defendant Rausch (petitioner therein) that he would never evict plaintiff if she relinquished her keys no later than May 31, 2011. Instead, by the clear terms of the Agreement, defendant Rausch merely promised to delay executing on the warrant until May 31, 2011, and such delay was conditioned upon plaintiff surrendering the keys and removing all of her possessions from the premises by such date. Mayes v UVI Holdings, 280 AD2d 153 (1st Dept 2001) is inapposite because there the original stipulation vacated the judgment and warrant of eviction, and thereafter landlord obtained a final judgment which stayed the issuance of the warrant of eviction for five days. In Mayes, no further warrant was ever obtained. Here, by the Stipulation under which plaintiff sues, she agreed that the warrant would be pre-served no earlier than May 20, 2011. Unlike in Mayes, plaintiff here does not contend that no warrant was pre-served. She alleges instead that defendant Rausch agreed not to execute on the warrant if she surrendered all keys and removed all of her possessions upon her vacatur¹. Her claim of breach is utterly

¹Plaintiff and defendant Rausch both agree that plaintiff left her furniture and personal belongings in the premises after May 31, 2011.

refuted by the unambiguous terms of the Stipulation that only delayed execution and set a date for the issuance of the warrant. That defendant Rausch had similar misapprehension of the terms of the Stipulation did not modify its clear terms. Furthermore, plaintiff alleges that she and defendant Rausch entered into a agreement modifying the Stipulation, but she does not allege that such agreement was filed with the clerk or so-ordered by the court in Rauch v Rosenbaum, NYC Civil Court, County of New York, L&T Index No. 94236/2010, which had continuing jurisdiction over such proceeding. Plaintiff does not submit a copy of such modification, which the Stipulation required to be written and signed by both sides. Nor is there any ground for setting aside the Stipulation, since the misreading of the Stipulation by both the plaintiff and defendant Rausch, if mistakes at all, were not mistakes of facts, but only a misapprehension of the law on the part of the parties. See London Terrace Gardens, LP v City of New York, 101 AD3d 27 (1st Dept 2012).

On January 2, 2013, plaintiff submitted to this court an Amended Complaint, with proof of service on defendants on that date. Pursuant to CPLR 3025(b), plaintiff was required either to obtain an agreement from the defendants to serve and file such an amended pleading or to make a motion seeking an order granting her leave to serve such amended pleading, as the time for defendants to respond to the original Complaint had long expired.

Therefore, as to the moving defendants, such Amended Complaint is a nullity. See Walden v Nowinski, 63 AD2d 586 (1st Dept 1978).

Though Defendant Cornicello has not acquiesced to the service of the Amended Complaint, defendant Rausch has served an Amended Answer to the Amended Complaint and makes no objection such amended pleading, even though it was served without leave of court. Therefore the lawsuit shall continue as to him. Organek v Harris, 90 AD3d 1512, 1513 (1st Dept 2011). However, since the Amended Complaint is a nullity as to defendant Cornicello, the cross claim interposed by defendant Rausch against defendant Cornicello is likewise a nullity, and must be interposed by way of a third party complaint served upon his former attorney.

Accordingly, it is

ORDERED that the motion of defendants Cornicello, Tendler, Baumel & Cornicello, LLP and Howard Hua to dismiss the complaint is granted and the complaint is dismissed against such defendants; and it is further

ORDERED that defendant Rausch shall file a copy of his Amended Answer with the Clerk of the Court; and it is further

ORDERED that the remaining parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, for a preliminary conference on May 20, 2014, 9:30.

Dated: March 31, 2014

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.
J.S.C.

FILED

APR 07 2014

COUNTY CLERK'S OFFICE
NEW YORK