

**1471 Second Corp. v NAT of NY Corp.**

2014 NY Slip Op 30870(U)

April 1, 2014

Sup Ct, New York County

Docket Number: 652594/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
1471 SECOND CORP.,

Plaintiff,

Index No. 652594/2013

-against-

**DECISION/ORDER**

NAT OF NY CORP. and NANDO GHORCHIAN  
a/k/a NASSER GHORCHIAN,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u>3</u>
Answering Affidavits to Cross-Motion.....	<u>4</u>
Replying Affidavits.....	<u>5</u>
Exhibits.....	<u>6</u>

Plaintiff commenced the instant action against defendants to recover, among other things, unpaid rents pursuant to a commercial lease and accompanying guaranty. It now moves for an order pursuant to CPLR § 3211 (a)(1)(5) and (7) dismissing defendants' two counterclaims. Defendant Nando Ghorchian a/k/a Nasser Ghorchian ("Ghorchian") cross-moves for an order pursuant to CPLR § 3212 and/or CPLR § 3211(a)(1) and (7) granting him summary judgment and dismissing the action as to him. For the reasons set forth below, plaintiff's motion is granted in part and denied in part and Ghorchian's cross-motion is denied in its entirety.

The relevant facts are as follows. Plaintiff is the owner of the real property located at

1471 Second Avenue in Manhattan (the "Building"). On or about October 12, 2005, plaintiff entered into a lease agreement with defendant NAT of NY Corp. ("NAT") to rent out the ground floor and basement of the Building (the "Lease"). On or about November 23, 2005, to induce plaintiff to enter into the Lease with NAT, Ghorchian allegedly signed and delivered to plaintiff a guaranty (the "Guaranty") wherein he guaranteed "the prompt payment of all rent and additional rent and all other charges, expenses and costs of every kind and nature which are or may be now due or in the future may become due under the terms of the Lease." Thereafter, commencing September 1, 2010, plaintiff alleges that NAT breached its obligations under the Lease by failing to pay base rent and additional rent when it became due. Additionally, plaintiff alleges that in or about September 2012, NAT unilaterally vacated and abandoned the Building.

On or about July 24, 2013, plaintiff commenced the instant action seeking to recover, among other things, the unpaid rents from defendants pursuant to the Lease and accompanying Guaranty. On or about August 21, 2013, defendants answered and asserted two counterclaims against plaintiff. In their first counterclaim, defendants allege that Ghorchian's signature on the Guaranty is a forgery and the Guaranty is fraudulent. The second counterclaim seeks sanctions against plaintiff on the ground that the instant action is frivolous and wholly without merit.

The court first turns to plaintiff's motion to dismiss Ghorchian's counterclaims. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). "[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept 1990). However, "[i]n those circumstances where the legal conclusions

and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference.” *Morgenthau & Latham v. Bank of New York Company, Inc.*, 305 A.D.2d 74, 78 (1<sup>st</sup> Dept 2003) (quoting *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1<sup>st</sup> Dept 1999), *aff’d*, N.Y.2d 659 (2000)). In such cases, “the criterion becomes whether the proponent has a cause of action, not whether he has stated one.” *Id.* (internal quotations removed).

In the present case, as an initial matter, plaintiff’s motion for an order pursuant to CPLR § 3211(a)(5) dismissing Ghorchian’s first counterclaim for forgery on the ground that it is time-barred is denied. It is well settled that forgery is considered a species of fraud and is subject to the same statute of limitations. *See, e.g., Faison v. Lewis*, 106 A.D.3d 1047, 1048 (2<sup>nd</sup> Dept 2013); *Piedra v. Vanover*, 174 A.D. 191 (2<sup>nd</sup> Dept 1992). “[A] fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or ‘could with reasonable diligence have discovered it.’” *Sargiss v. Margrelli*, 12 N.Y.3d 527, 533 (2009) (quoting CPLR § 213(8)); *see also* CPLR § 203 (g). “Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute.” *Id.* (internal quotations and citations omitted). Here, the alleged forgery occurred on November 23, 2005, when the Guaranty was executed. However, Ghorchian asserts in his affidavit that he did not become aware of the alleged forgery until February 13, 2013, when plaintiff’s prior counsel served him with a Notice of Motion for default judgment pursuant to a related housing court proceeding. As defendant Ghorchian asserted his claim for forgery against plaintiff on or about August 21, 2013, well within two years of his discovery of the alleged fraud, i.e. February 13, 2013, and plaintiff has presented no evidence indicating that Ghorchian had

knowledge of the alleged forgery prior to that date, Ghorchian's forgery claim is timely and not barred by the statute of limitations.

Additionally, plaintiff's motion for an order pursuant to CPLR § 3211(a)(1) dismissing Ghorchian's first counterclaim for forgery based on documentary evidence is denied. Pursuant to CPLR § 3211 (a)(1), "[a] party may move for judgment dismissing one or more cause of action asserted against him on the ground that . . . a defense is founded upon documentary evidence." "[A] dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Here, plaintiff presents the Guaranty itself as documentary evidence that Ghorchian's claim of forgery is without merit and should be dismissed. However, the notarized Guaranty is insufficient to conclusively establish that Ghorchian's signature was not forged on the Guaranty as a matter of law. Indeed, the authenticity of the Guaranty is what is in dispute in the instant action and plaintiff has failed to cite to any authority finding that a Guaranty that is notarized constitutes documentary evidence conclusively establishing a defense to a claim of forgery as a matter of law. Thus, the notarized Guaranty cannot serve as a basis to dismiss the claim of forgery at this time. Additionally, to the extent plaintiff relies upon, for the first time in its reply papers, the affidavit of a board certified forensic document examiner, Andre Sulner, to demonstrate that Ghorchian's signature on the Guaranty is genuine, such reliance is without merit on the instant motion. As an initial matter, it is well established that "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415 (1<sup>st</sup> Dept 1992). Additionally, notwithstanding this principle, Mr. Sulner's affidavit is not documentary evidence that conclusively establishes a

defense to Ghorchian's claim of forgery as a matter of law. Instead, Mr. Suolner's affidavit raises an issue of fact as to the authenticity of the signature, which is appropriately addressed on a motion for summary judgment, not a motion to dismiss.

Additionally, plaintiff's motion for an order pursuant to CPLR § 3211(a)(7) dismissing Ghorchian's first counterclaim for forgery on the ground that it fails to state a cause of action is denied. Here, plaintiff contends that Ghorchian's counterclaim for forgery should be dismissed as "[n]o details are provided with respect to the alleged forgery, i.e. date, time, place." However, this contention is without merit as Ghorchian's answer clearly asserts that his forgery claim is based on the Guaranty in the possession of plaintiff guaranteeing the lease on behalf of corporate defendant and sufficiently alleges that said signature on the Guaranty is forged. Thus, Ghorchian's answer sufficiently states a claim sounding in forgery or fraud to withstand a motion to dismiss.

However, plaintiff's motion for an order pursuant to CPLR § 3211(a)(7) dismissing Ghorchian's second counterclaim for sanctions is granted. It is well settled that New York does not recognize a separate cause of action to impose sanctions. *Greco v. Christoffersen*, 70 A.D.3d 769, 771 (2<sup>nd</sup> Dept 2010). Thus, Ghorchian's second counterclaim for sanctions must be dismissed for failure to state a cause of action.

The court now turns to Ghorchian's cross-motion, which this court will treat as a motion for summary judgment. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to

