Yung Hua Tsang v Berley
2014 NY Slip Op 31721(U)
July 2, 2014
Suprememe Court, New York County
Docket Number: 650433/2014
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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YUNG HUA TSANG AND
MANHATTAN HOLDING USA LTD,

Plaintiffs,

- v -

DAVID I. BERLEY AND 500 EIGHTH AVENUE
LIMITED LIABILITY COMPANY,

Defendants.

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Index No.
650433/2014

DECISION and ORDER

Mot. Seq. 1

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs, Yung Hua Tsang ("Tsang"), and Manhattan Holding USA Ltd. ("MHU"), filed the summons and complaint, on or about February 8, 2014, against defendants, David I. Berley ("Berley") and 500 Eighth Avenue Limited Liability Company ("500 Eighth Avenue LLC"). Tsang is alleged to be the vice president of MHU. Berley is alleged to be the Chairman of Walter & Samuels, Inc., the management company of 500 Eighth Avenue LLC that manages the building located at 500 Eighth Avenue, New York, NY ("10065").

The Complaint alleges that on or around February 27, 2013, Plaintiffs signed a lease agreement with 500 Eighth Avenue to lease Suites 800-801 at 500 Eighth Avenue, New York, NY ("the Premises"). The Complaint alleges that the at the time the Lease was executed, the Premises were vacant, and that Defendants "were aware of Plaintiffs' intentions to operate a school in the leased Premises and that Plaintiffs intended to perform extensive renovation work." Plaintiffs allege that, as per the Lease, Defendants were "to apply to amend the Certificate of Occupancy for the 8th floor so as to permit the operation of a school in the Premises leased by Plaintiffs, and that if the amended certificate was not obtained

by August 31, 2013, the Plaintiffs could vacate the Premises and receive a payment of $10,000, or could continue to occupy the Premises for a use permitted by the Certificate of Occupancy in effect."

The Complaint alleges that although "Defendants expressly warranted that the application for amendment of the Certificate of Occupancy would be submitted immediately after the lease was signed," "Defendants did not immediately apply for the amended Certificate of Occupancy as agreed upon at the time the Lease was signed." Plaintiffs allege that Defendants did not apply for the Certificate of Occupancy until July 26, 2013, which was disapproved by the City on August 7, 2013, and which Plaintiffs were not advised of until September 3, 2013. Plaintiffs allege that "[t]he delay in obtaining the Certificate of Occupancy amendment has caused tremendous damage to Plaintiffs due to the inability to operate its school" and "the Premises cannot be used for any other purposes other than for school use since all the renovation work completed was to equip the space for such use."

The Complaint further alleges, "Immediately after signing the Lease, Plaintiffs arranged for renovation work to begin on the Premises. Plaintiffs hired the necessary contractor and workers to commence renovation work that was necessary to meet the requirements of governmental agencies for operating a school, including the Department of Buildings and Department of Education."

The Complaint alleges two causes of action against Defendants. The first is for unjust enrichment, based on "Defendants' intentional delay in submitting and obtained the relevant amended Certificate of Occupancy" and the allegations that "Defendants will be greatly and unjustly enriched by all the work and investment Plaintiffs could have put into the Premises to prepare it to operate as a school," including "a newly renovated office space, fully equipped with new furniture and other furnishings."

The second cause of action is for misrepresentation based on allegations that "Defendants made assurances and guarantees of their ability to obtain an amended Certificate of Occupancy for school use on the 8th floor," "Plaintiffs relied on the Defendants [sic] assurances" and "relied on the information provided on Defendants' website," and that "[t]he information provided on the Defendants'

website misled the Plaintiffs by supplementing Defendants' assurances of its ability to obtain an amended Certificate of Occupancy for the lease [sic] Premises."

Defendants move, pursuant to CPLR 3211(a)(1), (3), (4), (5), and (7), to dismiss the Verified Complaint. Plaintiffs oppose.

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> (1) a defense is founded upon documentary evidence; or
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> (3) the party asserting the cause of action has not legal capacity to sue; or
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> (4) there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
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> (5) the cause of action may not be maintained because of..., res judicata ....; or
>
> (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8

NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

"A guarantee is a contract separate from and independent of the underlying contracts." *YL W. 87th St., LLC v. Arbor Realty Sr., Inc.*, 2010 WL 2150616, [Sup. Ct., Nassau County 2010]. "The principal debtor is not a party to the guarantee nor is the guarantor a party to the underlying contract." (*Id.*). "The specific purpose of a guarantor is to give the beneficiary recourse separate from any action against the principal debtor, and it is not unusual for the beneficiary of a guarantee to sue the guarantor alone." (*Id.*). A guarantor may not take upon himself the election of remedies which rightfully belong to his principal." (*Id.*)

Here, Tsang is alleged to be the vice president of MHU, who signed the Lease on behalf of MHU. Tsang also signed a Guaranty of the Lease obligations individually. "A guarantor may not take upon himself the election of remedies which rightfully belong to his principal." *YL W. 87th St..*, 2010 WL 2150616. As such, Tsang does not have independent standing to raise claims under the Lease, which belong to MHU, and has not otherwise identified individual harm. Therefore, the claims asserted by Tsang individually must be dismissed.

As for the allegations that Defendants have been "unjustly enriched" by the renovations made by MHU, the Lease expressly provides that any improvements or renovations made by MHU are being made at MHU's expense. Specifically, paragraph 3 of the Lease, and paragraph 44 of the Rider, provide:

> Tenant Alterations: 3. . . . Subject to the prior written consent of the Owner, and to the provisions of this article, Tenant, at Tenant's expense, may make alterations, installations, additions or improvements which are non-structural and which do not affect utility services or plumbing and electrical lines. . . .Tenant shall, before making any alterations, additions, installations or improvements, at its own expense, obtain all permits, approvals and certificates required by any governmental or quasi-governmental bodies ... All fixtures and all paneling, partitions, railings and like installments, installed in the premises at any time, either by Tenant or by Owner on

Tenant's behalf, shall, upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises unless Owner, by notice to Tenant no later than twenty days prior to the date fixed as the termination of this lease, elects to relinquish Owner's right thereto and to have them removed by Tenant, in which event the same shall be removed from the premises by Tenant prior to the expiration of the lease, at Tenant's expense. Nothing in this Article shall be construed to give Owner title to or prevent Tenant's removal of trade fixtures, moveable office furniture and equipment, but upon removal of any such from the premises or upon renewal of other installations as may be required by Owner, Tenant shall immediately and at its expense, repair and restore the premises to the condition existing prior to installation and repair any damage to the demised premises or the building due to such removal. All property permitted or required to be removed, by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned and may, at the election of the Owner, either be retained as Owner's property or may be removed from the premises by Owner, at Tenant's expense.

44. TENANT'S WORK: The provisions of this Article 44 shall pertain to all work to be done in, at or upon the Demised Premises throughout the term of this Lease, whether such work is (i) to be done in order to prepare the Demised Premises for Tenant's opening for business; or (ii) to make additional improvements, at any time thereafter, . . .

(a) Prior to Tenant's commencing any work, at or upon the Demised Premises (both prior to and subsequent to the Lease Commencement Date), Tenant shall submit to Landlord for Landlord's written approval, which approval shall not be unreasonably withheld or delayed, professional drawings, or professional prepared plans and specifications (herein collectively referred to as "Tenant's Plan") for or in connection with the improvements and installations to be made by Tenant (herein collectively referred to as "Tenant's Work"), which shall include Tenant's Initial Work, as hereinafter defined . . . Tenant's Plain for Tenant's Work shall be fully detailed, shall show

> complete dimensions, shall not require any changes in the structure of the building and shall not be in violation of any laws, orders, rules or regulations of any governmental department or bureau having jurisdiction over the Demised Premises. Subject to the foregoing and the terms of this Lease, Tenant may, at its own cost and expense, install two (2) entrance doors to the Demised Premises. Notwithstanding the foregoing, if Tenant's Work consists solely of installing dry-wall partitions, no plans shall be required.
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> * * *
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> (i) All work done by Tenant shall, in addition to the provisions of this Article 44, be subject to the provisions of Article 3 hereof unless otherwise specifically provided for elsewhere herein.

As for Plaintiffs' allegations that they relied upon Defendants' "assurances and guarantees of their ability to obtain an amended Certificate of Occupancy for school use on the 8th floor," and relied on information on Defendants' website which indicated "that the building had Certificates of Occupancy in place for schools," paragraph 21 of the Lease and paragraph 52 of the Rider provide:

> No Representations by Owner: 21. Neither Owner nor Owner's agents have made any representations or promises with respect to the physical condition of the building, the land upon which it is erected or the demised premises, the rents, the leases, expenses of operation or any other matter or thing affecting or related to the premises . . . All understandings and agreements heretofore made between the parties hereto are merged into in this contract, which alone fully and completely expresses the agreement between the Owner and Tenant and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge of abandonment is sought.
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> 52. "AS IS" CONDITION: Tenant agrees that it has inspected the Demised Premises and by doing so shall accept same in its present "as

is" condition, including, but not limited to, its acknowledging that it is not relying upon any verbal or written statements, representations, real estate brokers' "set-ups" or flyers pertaining to the layout or size of the Demised Premises. Landlord agrees that the Demised Premises shall be delivered to Tenant in a vacant and broom clean condition.

Accordingly, these provisions of the Lease and Rider flatly contradict the legal conclusions and factual allegations of the Complaint.

Wherefore, it is hereby,

ORDERED that Defendants' motion to dismiss is granted and the Complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 7/2/14

EILEEN A. RAKOWER, J.S.C.