

<b>NY Artistic, LLC v Archetype, LLC</b>
2014 NY Slip Op 31806(U)
July 7, 2014
Supreme Court, New York County
Docket Number: 650871/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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NY ARTISTIC, LLC, ANGELO MITILINEOS, LOUIS  
MITILINEOS, ANASTATIOS MITILINEOS, and  
STYLIANOS HATZIMIHALIS,

Index No. 650871/13

Plaintiffs,

-against-

ARCHETYPE, LLC and ALAN BERMAN,

Defendants.

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**JOAN A. MADDEN, J.:**

Defendants Archetype, LLC (“Archetype”) and Alan Berman (“Berman”) move to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), and (7), based on documentary evidence, the New York Statute of Frauds, and for failure to state a cause of action. Plaintiffs oppose the motion, which is granted in part and denied in part for the reasons below.

Background<sup>1</sup>

The individuals listed as plaintiffs are all members of NY Artistic, LLC (“NYA”), which is in the business of construction, renovation, and design of real property in the New York City metropolitan area. The record establishes that on or about December 14, 2007, the NYA members and Berman, the sole owner and manager of Archetype, entered into a five-year lease agreement (“the Lease”) with landlord T&J 2006, LLC (“landlord”) for the first floor and part of the cellar floor of real property located at 552 Columbus Avenue, New York, New York 10024 (the “Property”). Berman is specifically named as a tenant in the lease in his individual capacity. Although Berman did not sign the Lease, it is alleged Berman used the property as office space

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<sup>1</sup>The following facts are based on the allegations in the verified amended complaint and the documentary evidence submitted by the parties.

for Archetype. The verified amended complaint alleges that at or about the same time that the Lease was entered into, the parties entered into a separate agreement (“reimbursement agreement”) whereby NYA would pay the rent on a monthly basis pursuant to the lease and defendants would reimburse NYA for one-half of the amount of the rent payment. Specifically, the complaint alleges that this agreement is “memorialized through written communications including, but not limited to, electronic communications.” Verified Amended Complaint ¶14.

Plaintiffs further allege that at all times during the lease term, NYA timely paid the rent required by the Lease including defendants’ share of the rent and that defendants occupied a majority portion of the property until April 2012, when defendant allegedly abandoned the property without having reimbursed NYA for any rent payments. Plaintiffs now seek to recover defendants’ share of the rent and damages suffered as a result of defendants vacating of the premises prematurely, including moneys expended for renovations made by plaintiffs to avoid a breach of the Lease after the premises allegedly fell into a state of disrepair.

The complaint contains causes of action sounding in breach of contract, unjust enrichment, common-law contribution, and fraudulent inducement. Defendant now moves to dismiss the complaint claiming that plaintiffs’ claims (1) are barred by documentary evidence; (2) may not be maintained because of release; (3) are precluded by the Statute of Frauds; and (3) fail to state a cause of action. Defendants further contend that the complaint fails to state a cause of action with respect to Alan Berman in his individual capacity, as it does not meet the requirements to pierce the corporate veil of defendant Archetype.<sup>2</sup>

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<sup>2</sup>Plaintiffs argue in opposition that defendants’ motion should be denied as defective based on defendants’ failure to attach the amended complaint. However, because the amended complaint was submitted in opposition, the motion will not be denied on this basis.

Breach of Reimbursement Agreement

Defendants argue that the claim for breach of the reimbursement agreement is barred by documentary evidence, the Statute of Frauds, and various releases. With respect to their argument that plaintiff's claims are barred by documentary evidence, defendants first argue that the merger clause in the Lease precludes any agreement made between the parties. The Lease states in pertinent part:

All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between 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, or abandonment is sought.

Lease Agreement, ¶20.

In opposition, plaintiffs contend that the Lease only applies to the terms of the agreement between the landlord and the tenants and it does not control the conduct of the tenants with respect to each other.

A dismissal based on documentary evidence may result “only where ‘it has been shown that a material fact as claimed by the pleader . . . is not a fact at all and . . . no significant dispute exists regarding it.’” Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 76 (1<sup>st</sup> Dep’t 2001) (quoting Guggenheimer v. Ginzburg, 43 N.Y.2d at 275). Further, under New York law, “a lease governs the rights and duties of the landlord of the tenants and of the tenants to the landlord. It does not govern the rights and obligations of the cotenants to each other . . .” Marks v. Macchiarola, 204 A.D.2d 221 (1<sup>st</sup> Dep’t 1994). Thus, as the Lease does not control the rights and duties between the parties here, who are co-tenants, it cannot be said that the reimbursement

agreement under which plaintiffs seek to recover is unenforceable based on the merger clause in the Lease. Moreover, to the extent that defendants argue that other claims are barred by the merger clause, such argument is also without merit.

Defendants next assert that plaintiffs' claims are barred under the doctrine of release since Berman relinquished his security deposit pursuant to a good-faith mutual disposition of all claims. In support of this argument, defendants first rely on a document printed on NYA's letterhead and signed by both plaintiff Louis Mitilineos and Berman. The document was executed after Berman had requested the return of his security deposit from the landlord and reads in relevant part:

I, Alan Berman, owner of Archetype, LLC, withdraw my letter of request dated November 15, 2015, for return of the security deposit for the Premises, in the amount of \$24,000.00. . . . In addition , the entire security deposit . . . is to be forwarded to [Plaintiffs]. . . .In addition, I . . . understand that . . .no lean [sic] or claim can be imposed upon the owners of NY Artistic, LLC . . .

Defendants argue that this letter memorialized certain negotiations between Berman, Louis Mitilineos and Stelianos Hatzymialis whereby plaintiffs purportedly represented that no claim would be made against Berman in exchange for the forfeiture of his security deposit. Defendants also submit a letter from NYA to the landlord dated a few days later on November 19, 2012, which indicates that all members of NYA would be renewing the Lease for another term without Berman and that his name should not be included on the new lease agreement.

Defendants offer yet another letter printed on NYA's letterhead dated December 6, 2012, which states that plaintiffs "do not owe or have any outstanding balances with

Archetype, LLC and / or Alan Berman, the owner of Archetype, LLC.” Defendants also submit a mutual general release dated December 31, 2012, executed between Berman and the landlord.

It is well settled in New York that “a defendant has the initial burden of establishing that it has been released from any claims.” Centro Empresarial Cmpresa S.A. et al. v. America Movil S.A.B. DE C.V., et al., 17 N.Y.3d 269, 276 (2011) (citing Fleming v. Ponziani, 24 N.Y.2d 105, 111.) Moreover, while “stipulations of settlement are favored by the courts and will not be set aside in the absence of fraud or overreaching” (Gallasso v. Gallasso, 35 NY2d 319, 321 (1974); Weissman v. Bondy Schloss, 230 AD2d 465, 467 (1<sup>st</sup> Dep’t 1997), lv dismissed, 91 N.Y.2d 887 (1998)), “a motion pursuant to CPLR 3211(a)(5) to dismiss the complaint must be denied . . . where a court cannot definitively determine whether the scope of a release was intended to cover the allegations in a complaint,” Desiderio v. Geico General Ins. Co., 107 A.D.3d 662, 663 (2<sup>nd</sup> Dep’t 2013).

Here, the documents in the record are insufficient to show that plaintiffs released defendants of any obligation under the reimbursement agreement. First, the November 15, 2012 letter in which Berman agrees to withdraw his request for return of his security deposit and requests that the landlord forward the amount to plaintiffs does not contain any provision releasing Berman (or his company) from any claims that plaintiffs may have against him. Next, the November 19, 2012 letter to the landlord simply states that defendants would not be renewing the lease with the landlord. Moreover, the letter agreement dated December 6, 2012 states that plaintiffs do not owe defendants money, but does not release defendants from any obligation owed to plaintiffs. In addition, the mutual release agreement between landlord and Berman does

not indicate any intent to release Berman of any claims that plaintiffs may have against him. Therefore, defendants have not met their burden of proving that they were released from any claims by plaintiffs and their motion to dismiss the complaint on the basis of release must be denied.

Defendants also contend that the New York Statute of Frauds bars the alleged reimbursement agreement between the parties. The Statute of Frauds requires an agreement “to be in writing and subscribed by the party to be charged therewith . . . if such agreement, promise or undertaking is [b]y its terms not to be performed within one year from the making thereof.” General Obligations Law §5-701(a)(1). Defendants maintain that because the Lease was for a five-year term and the reimbursement agreement was for the term of the Lease, it cannot be performed within a year from its creation and therefore plaintiff is precluded from bringing a claim pursuant to any such agreement.

In opposition, plaintiffs assert that they have pleaded the existence of documentation evidencing the reimbursement agreement and maintain that such alleged documentation is sufficient to satisfy the Statute of Frauds at this stage of litigation. Plaintiffs further argue that since they paid the entire rent due under the lease term, the part performance exception to the Statute of Frauds applies.

The Statute of Frauds provision at issue “is limited to contracts that ‘have absolutely no possibility in fact and law of full performance within one year’” Gural v. Drasner, 114 A.D.3d 25, 26 (1<sup>st</sup> Dep’t 2013) (quoting Cron v. Hargo Fabrics, Inc., 91 N.Y.2d 362, 366 (1998)). Therefore, “[t]he statute does not include an agreement which

is simply not likely to be performed, nor yet one which is simply not expected to be performed within the space of a year. Neither does it include an agreement which, fairly and reasonably interpreted, admits of a valid execution within that time, although it may not be probable that it will be.” Id. (internal citation and quotation omitted).

Under this standard, it cannot be said based on the allegations in the complaint that the reimbursement agreement could not be performed within a year. Specifically, the complaint alleges, “the parties entered into a separate agreement whereby NYA would pay the Rent on a monthly basis pursuant to the Lease and defendants would reimburse NYA for one-half of the amount of each such rent payment.” Verified Complaint ¶13. By its terms as alleged in the complaint, the reimbursement agreement does not establish a specific timeframe for reimbursement and thus admits the possibility of a valid execution within a year. Thus, it is not apparent from the record that the terms of the agreement necessarily come within the purview of the statute.

Moreover, the complaint alleges that there are various writings memorializing the reimbursement agreement that may be sufficient to satisfy the Statute of Frauds. While plaintiffs do not produce any writings to substantiate these allegations, this issue is before the court on a pre-answer motion to dismiss and plaintiffs are not required to support their claim with the “sufficient evidence” prescribed in §5-701(b)(1) at this stage. “The court is not authorized to assess the relative merits of the complaint’s allegations against the defendant’s contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims.” Salles v. Chase Manhattan Bank, 300 A.D.2d 226 (1<sup>st</sup> Dep’t 2002). Rather, “the court’s role in a motion to dismiss is

limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint.” Frank v. Daimler Chrysler Corp., 292 A.D.2d 118, 121 (1<sup>st</sup> Dep’t 2002).

Here, as the complaint alleges the existence of a contract and defendants do not produce any dispositive documentary evidence that an agreement was not reached, plaintiffs’ claim for breach of contract, taken as true, sufficiently states a cause of action notwithstanding the Statute of Frauds.<sup>3</sup>

#### Unjust Enrichment

To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered. Cruz v. McAneney, 31 A.D.3d 54, 59 (2d Dep’t 2006). Under this standard, the complaint sufficiently states a cause of action for unjust enrichment based on allegations that defendants benefited by possessing a majority of the leased premises for the purpose of keeping an office space for nearly five years without paying any rent while plaintiffs continued to timely pay the full rent throughout that period.

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<sup>3</sup>If the reimbursement agreement is in fact, by its terms, not performable within a year and thus subject to the Statute of Frauds, plaintiffs’ part-performance argument is likely unavailing. The part performance doctrine is codified only in §5-703, which pertains to real estate transactions and is notably absent from the provision at issue, §5-701, pertaining to agreements performable within a year. The First Department recently stated that while “[i]t is true that this court has often accepted a part performance exception to General Obligations Law §5-701, . . . we now reject the reasoning of those cases, and hold . . . that the law simply does not provide for or permit a part performance exception for oral contracts other than those to which General Obligations Law §5-703 applies.” Gural v. Drasner, 114 A.D. 3d 25, 31-32 (1<sup>st</sup> Dep’t 2013).

Defendants argue that plaintiffs' claim for unjust enrichment must be dismissed because it is duplicative of their breach of contract claim. For this contention, defendant relies on MJM Advertising, Inc. v. Panasonic Industrial Co., 294 A.D.2d 265 (1<sup>st</sup> Dep't 2002) where the court, citing Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382 (1987), stated, "plaintiff cannot recover for unjust enrichment while simultaneously alleging the existence of an express contract covering the same subject matter."

CPLR 3014 provides in pertinent part, "[c]auses of action or defenses may be stated alternatively or hypothetically." Furthermore, "where there is a bona fide dispute as to the existence of a contract . . . plaintiff . . . will not be required to elect his or her remedies." Am. Tel. & Util Consultants, Inc. v. Beth Isr Med. Ctr. 307 A.D.2d 834 (1<sup>st</sup> Dep't 2003) (citing Joseph Sternberg, Inc. v. Walber 36<sup>th</sup> St. Assocs., 187 A.D.2d 225 (1<sup>st</sup> Dep't 1993)).

As defendants dispute the validity of plaintiffs' alleged contract, plaintiffs may plead both breach of contract and unjust enrichment.<sup>4</sup>

#### Common Law Contribution

The next issue is whether plaintiffs have sufficiently pleaded a cause of action for common law contribution. With respect to the contribution claim, the complaint alleges that by virtue of the parties' status as co-tenants of the property, "[p]laintiffs and [d]efendants were tenants in common and joint obligors under the lease" and that

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<sup>4</sup>While defendants correctly point out that a plaintiff may not use unjust enrichment as a way of evading the Statute of Frauds (Kocourek v. Booz Allen Hamilton Inc., 71 A.D.3d 511 (1<sup>st</sup> Dep't 2010)), dismissal on this ground would be premature since, as indicated above, it cannot be said based on the pleadings that the Statute of Frauds bars the breach of contract claim.

“[d]uring the [t]erm of the Lease, Plaintiffs timely paid the entirety of the rent due under the lease,” which “included Plaintiffs paying Defendants’ pro rata share of the rent during the Lease Term, in the amount of \$127,420.” Verified Amended Complaint ¶¶47-50.

On a motion pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the complaint must be interpreted in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 N.Y.2d 268 (1977); Morone v. Morone, 50 N.Y.2d 481 (1980). Defendants argue that as cotenants of the Lease, they are not joint obligors because the Lease is not “a writing sufficient to impose liability on Defendant Berman.” Defendants contend that the instant case is distinguishable from those that have traditionally invoked the contribution rule as those cases all involved obligations of sureties under written commitments to pay obligations.

Plaintiffs counter that as joint obligors who paid more than their share of their obligation they are entitled to contribution from defendants as joint obligors. See Beltrone v. General Schuyler & Co., 229 A.D.2d 857 (3<sup>rd</sup> Dep’t 1996) (holding that “a joint obligor who pays more than his proportionate share of a common liability is entitled to contribution from the other joint obligors.”); see also Falb v. Frankel, 73 A.D.2d 930 (2d Dep’t 1980) (citing Hard v. Mingle, 206 N.Y. 179, 184 (1912); Empire Trust Co. v. Bartley & Co., 258 A.D. 249 (1<sup>st</sup> Dep’t 1939)). Moreover, Plaintiffs assert that as tenants named together on the Lease, they are presumed to be joint obligors. See Armour v. McDermott, 25 Misc. 3d 139(A) (Sup. Ct. Appellate Term 2009) (holding that tenants named on a lease together are presumed to be joint obligors by virtue of their

status as tenants in common).

Here, as the parties were “under a common burden” as cosigners under the Lease, it appears that the common-law presumption of contribution is fully applicable in the instance case. While there is still an issue as to defendants’ pro rata share considering that there were six cosigners named on the Lease, the claim, which alleges that defendants “failed to pay for *any* portion of the rent during the lease term” (Amended Complaint ¶19) (emphasis added), is sufficient to state a claim for contribution.

#### Fraudulent Inducement

As their sixth and final cause of action, plaintiffs purport to plead a claim for fraud in the inducement. “A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b).” Euryclei Partners, L.P. v. Seward & Kissel, L.P., 12 N.Y.3d 553, 559 (2009). CPLR 3016 (b) requires that claims for fraud set forth “the circumstances constituting the wrong . . . in detail.” Thus, “[a]lthough there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege basic facts to establish the elements of the cause of action.” Id.

Furthermore, to plead a viable cause of action for fraud, it must be alleged that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing justifiable reliance on the alleged misrepresentation or omission by the victim of the fraud, and injury. Lama Holding Company v. Smith Barney Inc., 88 N.Y.2d 413, 421 (1996).

Here, the complaint alleges that “defendants made certain unambiguous promises

to plaintiffs, including, but not limited to, the agreement to pay half of the rent” and that “[u]pon information and belief, defendants knew those promises to be false at the time they were made” and that such promises were made “to induce plaintiffs to enter into the Lease and allow them to remain in the property for many years” and “to induce plaintiffs to pay the rent each month to the landlord” Verified Amended Complaint ¶¶61-64. It is also alleged that “plaintiffs justifiably relied on defendants’ promises and representations.” Id. ¶65.

“A fraud based cause of action is duplicative of a breach of contract claim ‘when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract’” Manas v. VMS Associates, LLC, 53 A.D.3d 451,454 (1<sup>st</sup> Dep’t 2008) (quoting First Bank of Americas v. Motor Car Funding, 257 A.D.2d 287, 291 (1<sup>st</sup> Dep’t 1999)). Otherwise put, “[a] cause of action for fraud does not arise when the only fraud charged relates to a breach of contract.” Id. See also, Linea Nuova, S.A. v. Slowchowsky, 62 A.D.3d 473 (1<sup>st</sup> Dep’t 2009). However, a fraudulent inducement claim may be based on allegations that a defendant made “a misrepresentation of present facts [that] is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty.” First Bank of the Americas, 257 A.D.2d at 291-292.

Here, the alleged misrepresentation that defendant would pay half the rent involves a representation of future intent that arises out of defendants’ common obligation with plaintiffs to pay the landlord pursuant to the Lease, as well as their obligation to pay under the alleged reimbursement agreement between the parties.

Therefore, it cannot be said that the alleged misrepresentations involve an obligation collateral to the Lease or the reimbursement agreement.

Moreover, when, as here, the damages sought in connection with the purported fraud claim are the same as those sought in connection with the breach of contract claim, the fraud claim must be dismissed as duplicative of the breach of contract claim. Manas v. VMS Associates, LLC, 53 A.D.3d at 454 (noting that fraud claim cannot be maintained when plaintiff failed to allege that she sustained any damages that would not be recoverable under the breach of contract claim); See also Orix Credit Alliance, Inc. v. R.E. Hable Co., 256 A.D. 2d 114, 115 (1<sup>st</sup> Dep't 1998).

Here, the fraud claim seeks the same amount of damages as the claim for breach of the reimbursement agreement, that is the unpaid portion of the rent paid by plaintiffs on behalf of defendants plus damages suffered as a result of defendants' alleged abandonment of the premises. Accordingly, the fraudulent inducement claim must be dismissed.

#### Claims Against Berman

Defendants argue that the claims asserted against Berman, individually, should be dismissed because plaintiffs do not allege facts sufficient to "pierce the corporate veil" of his business. However, plaintiffs do not seek to hold Berman liable under a theory of piercing the corporate veil, but rather based on the allegations in the complaint which states that *all* parties entered into the reimbursement agreement. Verified Amended Complaint ¶13. Moreover, that Berman is individually named on the lease suggests that Berman was acting both in his individual capacity and as sole owner of

Archetype in his dealings with NYA. Thus, the complaint is sufficient to state a claim against Berman.

In view of the above, it is

ORDERED that the motion to dismiss is granted to the extent of dismissing the sixth cause of action for fraudulent inducement; and it is further

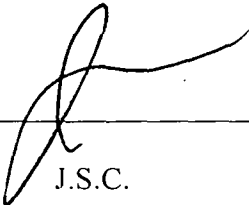
ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendant shall file and serve an answer within 30 days of the date of this decision and order, a copy of which is being mailed by my chambers to counsel for the parties; and it is further

ORDERED that a preliminary conference shall be held in Part 11, room 351, 60 Centre Street, New York, NY on August 21, 2014, at 9:30 a.m.

DATED ~~July 7, 2014~~

*July 7, 2014*



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J.S.C.

**HON. JOAN A. MADDEN**  
**J.S.C.**