

Anselmo v Corena

2014 NY Slip Op 32185(U)

July 8, 2014

Sup Ct, Queens County

Docket Number: 701171/14

Judge: Augustus C. Agate

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FILED
JUL 11 2014
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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SADIE ANSELMO AND JOHN ASENSIO,

Plaintiffs,

Index No: 1237/14

7/11/14

-against-

Motion
Dated: March 13, 2014

m# 1

RUBEN CORENA,

Defendant.

ORIGINAL

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The following papers numbered 1 to 10 read on this Order to Show Cause by the plaintiffs for an order enjoining the defendants from terminating the lease of the subject premises, from instituting or prosecuting any summary proceeding and other relief; and cross motion by defendant for an order "vacating the injunction", dismissing the action and other relief.

PAPERS
NUMBERED

Order to Show Cause - Affidavits- Exhibits.....	1 - 4
Notice of Cross Motion - Affidavits- Exhibits...	5 - 7
Replying Affirmation.....	8 - 10
Plaintiffs' Memorandum of Law	
Plaintiffs' Reply Memorandum of Law	

Upon the foregoing papers it is ordered that this Order to Show Cause by the plaintiffs and cross motion by the defendant are decided as follows:

Plaintiffs are tenants of the second floor of premises located at 72-46 Cooper Avenue, Glendale, New York. The premises is a two-family dwelling. Defendant is the owner of the subject premises. In October 2012, plaintiffs and defendant signed a lease for the subject premises for a one-year term. Plaintiffs allege that even though the lease was for one year, defendant stated that it was "standard" practice to give a one-year lease at first but assured them that they and their five children could remain in the premises "for years." Plaintiffs maintain that

they moved into the premises in reliance on defendant's representations that they could remain there for years. Plaintiffs state that they never would have signed the initial one-year lease were it not for defendant's representations that they would be able to remain at the premises for years. Plaintiffs also allege that they made substantial improvements to the premises as a result of defendant's promise to reimburse them in full for the improvements. On December 9, 2013, defendant served a 30-day Notice of Termination upon the plaintiffs.

The complaint asserts that defendant has refused to permit the plaintiffs to remain in the premises following the expiration of the one-year term notwithstanding the assurances and representations made by the defendant. The complaint further asserts that defendant has only partially reimbursed the plaintiffs for the improvements made by the plaintiffs to the premises.

Plaintiffs commenced the instant action seeking, *inter alia*, a permanent injunction. On January 27, 2014, this court signed an Order to Show Cause which contained a Temporary Restraining Order enjoining the defendant from, *inter alia*, terminating the lease and occupancy of the plaintiffs for the subject premises pending the hearing and determination of the application. Defendant now opposes the Order to Show Cause.

A preliminary injunction is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers. (*William M. Blake Agency, Inc. v Leon*, 283 AD2d 423, 424 [2d Dept 2001].) The decision to grant a preliminary injunction is a matter ordinarily committed to sound discretion of the court hearing the motion. (*Dixon v Malouf*, 61 AD3d 630, 630 [2d Dept 2009]; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1073 [2d Dept 2008]; *Nelson, L.P. v Jannace*, 248 AD2d 448, 448-449 [2d Dept 1998].) In order to demonstrate entitlement to a preliminary injunction, the movant must establish (1) a probability of success on the merits, (2) the danger of irreparable injury in the absence of injunctive relief, and (3) a balancing of the equities in favor of the movant. (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co. Ltd.*, 53 AD3d 612, 613 [2d Dept 2008].)

In the case at bar, plaintiff has not established a clear right to the relief demanded. Indeed, the residential lease dated October 26, 2012 clearly provides that the term for the premises would end on October 31, 2013. There is nothing to

indicate that the lease would be for any longer than one year. Indeed, plaintiffs' attempt to enforce a lease for a period longer than one year is barred by the Statute of Frauds. (General Obligations Law § 5-703[2]; see *Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 503 [1983].) Thus, there is no likelihood of plaintiff's success on the merits. (see *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 AD3d at 613 [2008].)

The court will now address the cross motion to dismiss the first cause of action for a permanent injunction pursuant to CPLR 3211(a)(1) and (a)(7). On a motion to dismiss a complaint on the ground that there is a defense founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence submitted must "resolve all factual issues as a matter of law and conclusively dispose of the plaintiff's claim." (*Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621, 622 [2d Dept 2006] [quoting *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]; *Dodge v King*, 19 AD3d 359, 360 [2d Dept 2005].) A valid lease qualifies as documentary evidence within the meaning of CPLR 3211(a)(1). (*Midorimatsu, Inc. v Hui Fat Co.*, 99 AD3d 680, 682 [2d Dept 2012].) Here, however, the lease does not conclusively dispose of the plaintiffs' claim that the defendant made assurances to them that they would be able to remain in the premises "for years".

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 682 [2d Dept 2012]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2010]; see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].) "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Sokol v Leader*, 74 AD3d at 1181; see *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus." (*Sokol v Leader*, 74 AD3d at 1181, quoting *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].) In the instant case, accepting the factual allegations of the complaint as true and according the plaintiffs the benefit of every favorable inference, the court finds that plaintiffs have adequately pleaded a cause of action for a permanent injunction based upon the doctrine of promissory estoppel. (see *Rock v Rock*, 100 AD3d 614, 616 [2d Dept 2012].)

To the extent the third cause of action requests punitive damages, that claim is dismissed. The facts submitted herein do not establish that the defendant's alleged conduct was so gross, wanton, or willful, or of such high moral culpability, as to warrant an award of punitive damages. (*Baxter v Javier*, 109 AD3d 493, 495 [2d Dept 2013]; *Stormes v United Water N.Y., Inc.*, 84 AD3d 1351, 1351-1352 [2d Dept 2011].)

The branch of the cross motion for use and occupancy is granted to the extent that defendant is entitled to use and occupancy of the subject premises in the amount of \$1,350.00 per month. Plaintiffs "should not be entitled to continue occupancy of the premises without paying for its use." (*Abright v Shapiro*, 92 AD2d 452, 453 [1st Dept 1983]; see *Corris v 129 Front Co.*, 85 AD2d 176, 180 [1st Dept 1982].) Plaintiffs have not established that they should not be required to pay for use and occupancy during the pendency of this litigation.

Defendant further seeks an order directing the plaintiffs to remove all cameras that they have installed outside the subject premises. In reply, plaintiffs do not deny this claim but merely state that this allegation is "legally meaningless." Thus, plaintiffs shall remove any cameras that they have installed on the defendant's property without the permission of the defendant.

Accordingly, this Order to Show Cause by plaintiffs for a preliminary injunction is denied.

The branch of the cross motion by defendant to vacate the injunction is granted solely to the extent that the Temporary Restraining Order contained in the Order to Show Cause dated January 27, 2014 is vacated and set aside.

The branch of the cross motion by defendant to dismiss the action is granted solely to the extent that the part of the third cause of action which requests punitive damages is dismissed.

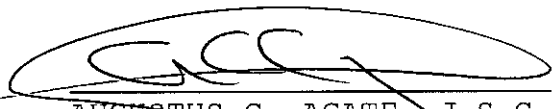
The branch of the cross motion by defendant to direct the plaintiffs to pay use and occupancy is granted solely to the extent that plaintiffs shall pay to the defendant the sum of \$1,350.00 per month for use and occupancy commencing in November 2013 *nunc pro tunc* within 30 days after service of a copy of this order with notice of entry. Plaintiffs are further directed to

make all current and future payments for use and occupancy pending the resolution of this matter.

The branch of the cross motion by defendant to direct plaintiffs to remove all cameras that have been installed outside of the premises is granted to the extent that within 30 days after service of a copy of this order with notice of entry, plaintiffs shall remove any and all cameras they installed on the defendant's property without the permission of the defendant.

The branch of the cross motion for attorneys' fees is denied.

Dated: July 8, 2014


AUGUSTUS C. AGATE, J.S.C.