

854 Carnegie Real Estate Corp. v Siricharoen

2015 NY Slip Op 30052(U)

January 15, 2015

Supreme Court, New York County

Docket Number: 159574/2013

Judge: Eileen A. Rakower

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

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854 CARNEGIE REAL ESTATE CORP.,

Plaintiff,

- v -

Index No.
159574/2013

**DECISION
and ORDER**

Mot. Seq. 001, 004

PENKAE SIRICHAROEN and SANFORD LEVINE,

Defendants.

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

This is an action for fraud, declaratory judgment, rescission, permanent injunction, unjust enrichment, conversion, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, breach of employment, negligence, and ejectment. This action is based on an allegedly unauthorized "sweetheart" lease agreement (the "Agreement") and renewal lease (the "Renewal Lease") between plaintiff 854 Carnegie Real Estate Corp. ("Plaintiff" or "Carnegie Real Estate"), as landlord, and defendant Penkae Siricharoen ("Siricharoen"), as tenant, for the premises located at 854 7th Avenue, Apt. 6, New York, New York, 10019 (the "Premises"). In connection with the Agreement, Plaintiff executed a Renewal Lease allowing Siricharoen to renew at that same rate for a period of fifteen years. Plaintiff claims that the Lease Renewal and Agreement were executed without proper authority, through defendant Sanford Levine ("Levine") (and together with Siricharoen, collectively, "Defendants").

Siricharoen now moves (Mot. Seq. #001) for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's complaint on the basis of documentary evidence and failure to state a cause of action.

Levine now moves (Mot. Seq. #004) for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's complaint on the basis of documentary evidence and failure to state a cause of action.

Plaintiff consents to the dismissal of Plaintiff's fifth cause of action, for conversion as against Defendants. Plaintiff opposes Defendants' motions in all other respects.

Oral Argument was heard on Defendants' motions.

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:

(1) a defense is founded upon documentary evidence; or

(7) the pleading fails to state a cause of action.

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). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). 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 Dep't, 2003] [internal citations omitted]; CPLR § 3211[a][7]).

In a claim for fraudulent misrepresentation, a plaintiff must allege: (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; and, (5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 [2011]). CPLR § 3016 requires particularity in the pleading of a fraud cause of action. (CPLR § 3016[b]). "[A]n omission does not constitute fraud unless there is a fiduciary relationship between the parties". (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 42 [1st Dep't 2012] [internal citation omitted]).

Plaintiff's complaint alleges that, prior to the Agreement, Siricharoen was the rent-stabilized tenant of record at Premises, pursuant to a lease agreement that was due to expire on June 30, 2011. Plaintiff's complaint alleges that Plaintiff "had the right to receive a legal rent increase upon the expiration of Siricharoen's lease in June 2011", and that, "in February 2011, Levine offered an improper renewal lease to grant Siricharoen the benefit of artificially depressed rent solely as a way of providing a gift to Siricharoen with whom he was having a romantic relationship." Plaintiff's complaint alleges that Siricharoen executed the Agreement and Renewal Lease on February 14, 2011. Plaintiff's complaint further alleges:

The terms of the Renewal Lease do not reflect the maximum legal rent stabilized rent that can be charged at the subject premises. [Levine] improperly and without Plaintiffs [sic] knowledge, consent or authority granted to Sirichareon a preferential rent to the detriment of Plaintiff and in violation of the public policy of the Rent Stabilization Law and Codes.

Plaintiff's complaint further asserts:

Defendants purported to enter into the Renewal Lease and Agreement, and [Levine] represented, on behalf of Plaintiff and only for the benefit of Siricharoen, that Siricharoen was entitled to a preferential rent for a period of fifteen (15) years in violation of the terms of the Rent Stabilization Code and Laws. Further, Defendants represented that the terms of the lease were negotiated in good faith and furthered a legitimate business purpose of Plaintiff without ever disclosing their extramarital affair to Plaintiff or its owner.

Plaintiff's complaint alleges that, "Plaintiff relied upon the foregoing misrepresentations of Defendants", and that, "As a direct result of the misrepresentations of [Levine], Plaintiff will potentially be deprived of legal rent stabilized guidelines increases and the concomitant increase in income from rent for the subject premises for years. Additionally, Plaintiff will be deprived of increased value to the building".

Even accepting Plaintiff's allegations as true, Defendants' purported representation that "the terms of the lease were negotiated in good faith and furthered a legitimate business purpose of Plaintiff without ever disclosing their extramarital affair to Plaintiff or its owner" does not plead a misrepresentation of material fact with the requisite particularity to sustain a cause of action for fraud. Plaintiff's complaint does not allege which of the defendants made the subject representation; nor does Plaintiff's complaint plead when or to whom the purported representation was made. In addition, Plaintiff's complaint fails to plead that Plaintiff was induced to enter into the Renewal Lease and Agreement in reliance on Defendants' claimed misrepresentation. Plaintiff's complaint does not allege that Plaintiff lacked access to information concerning the existence of the Renewal Lease and Agreement, the amount of rent to be charged for the Premises, or the maximum legal rent stabilization amount available for the same. Indeed, Siricharoen's documentary submissions¹ indicate not only that Siricharoen has been the rent-stabilized tenant of record at the Premises since 1996, but also that Siricharoen continuously paid—and Plaintiff presumably accepted—rent at a rate less than the maximum "legal regulated rent" available for the Premises during that time.

Furthermore, Plaintiff's complaint contains no allegation that Levine, in his purported capacity as Plaintiff's employee, lacked actual or apparent authority to act on Plaintiff's behalf with respect to Plaintiff's residential leases generally. Plaintiff's complaint does not allege any corporate charter provision, bylaw, or other procedural mechanism requiring Levine to obtain Plaintiff's prior authorization or approval in order to lease the Premises on Plaintiff's behalf, or to renew a residential lease agreement between Plaintiff and an existing tenant. In this way, the four corners of Plaintiff's complaint do not plead with particularity any allegations of fact from which to infer when, where, or to whom any purported affirmative misrepresentation or material omission of fact was made. Moreover, insofar as the four corners of Plaintiff's complaint do not plead a fiduciary relationship between Plaintiff and Siricharoen, Siricharoen's alleged nondisclosure "cannot constitute" a fraud as against Plaintiff. (*Cobalt Partners, L.P. v. GSC Capital Corp.*, 97 A.D.3d 35, 42 [1st Dep't 2012]). Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of

¹ Specifically, Siricharoen submits a series of renewal leases affording Siricharoen a preferential rental rate for the Premises. Siricharoen further submits a copy of the New York State Department of Housing and Community Renewal ("DHCR") registration information for the Premises. The DHCR registration indicates that the amount of "actual rent paid" was less than the amount of "legal regulated rent" for the Premises, during the years 2002, 2003, 2005, 2006, 2007, 2009, 2010, 2011, 2012, and 2013. The DHCR registration lists Siricharoen as the tenant of record during these years, and indicates "preferential rent" since 2007. The report indicates registration "not found for subject premises" for the years 1998, 1999, and 2008.

Plaintiff's complaint do not plead with the requisite particularity a cause of action for fraud.

As for Plaintiff's second cause of action, for declaratory judgment and rescission as against Siricharoen, a claim for reformation or rescission of a written agreement generally must be grounded upon either mutual mistake or fraudulently induced unilateral mistake. (*Goldberg v. Manufacturers Life Ins. Co.*, 242 A.D.2d 175, 179 [1st Dep't 1998]). In a case of fraudulently induced unilateral mistake, the parties have reached an agreement and, "unknown to one party but known to the other (who has misled the first), the subsequent writing does not properly express that agreement." (*Chimart Associates v. Paul*, 66 N.Y.2d 570, 573 [1986]). Thus, a claim for rescission or reformation of a written agreement based on unilateral mistake cannot stand absent legally sufficient allegations of fraud. (*Greater N. Y. Mut. Ins. Co. v. United States Underwriters Ins. Co.*, 36 A.D.3d 441, 443 [1st Dep't 2007]). The essential elements of a claim for fraud are misrepresentation of a material fact, falsity, scienter and deception. (*Id.*). As discussed above, the four corners of Plaintiff's complaint do not set forth legally sufficient allegations of fraud as against Siricharoen. The insufficient pleading of Plaintiff's fraud cause of action "necessarily dooms the rescission cause of action as well since, in this instance, it is predicated upon the viable assertion of [that claim]". (*Gall v. Summit, Rovins & Feldesman*, 222 A.D.2d 225, 226 [1st Dep't 1995]). Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's claim for a declaratory judgment rescinding the Agreement fails.

As for Plaintiff's third cause of action, for permanent injunction, "although it is permissible to plead a cause of action for a permanent injunction . . . permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted." (*Weinreb v. 37 Apts. Corp.*, 97 A.D.3d 54, 59 [1st Dep't 2012] [citations omitted]). Here, Plaintiff's cause of action for permanent injunction depends on Plaintiff's cause of action for rescission of the Agreement. Plaintiff's complaint asserts: "Plaintiff is entitled to a permanent injunctive relief against Siricharoen, enjoining and restraining Siricharoen from relying on the Agreement and enjoying her wrongfully obtained benefits to the detriment of Plaintiff. Plaintiff is also entitled to the equitable relief of rescission of the Agreement." Insofar as the four corners of Plaintiff's complaint, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, do not support Plaintiff's cause of action for rescission, Plaintiff's cause of action for permanent injunction likewise fails.

As for Plaintiff's fourth cause of action, for unjust enrichment as against Siricharoen, to prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]). "[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). However, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies." (*Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 438-39 [1st Dep't 2012]; *Loheac v. Children's Corner Learning Ctr.*, 51 A.D. 3d 476, 476 [1st Dep't 2008]).

Plaintiff's complaint alleges: "To the extent Siricharoen has, through an illicit arrangement with [Levine], received the benefit of residing in the subject premises owned by Plaintiff under the terms of the wrongfully secured Renewal Lease and Agreement at a preferential rental rate, Siricharoen has been unjustly enriched at Plaintiffs expense." Plaintiff's complaint further alleges that, "[t]he circumstance of Siricharoen's enrichment, and its long-term effect, is such that it would be unjust, in equity and in good conscience, to permit Siricharoen to retain the benefits under the Agreement." Plaintiff's complaint alleges that, as a result, "Plaintiff is entitled to recover the value of the benefit conferred upon Siricharoen, as measured by the maximum legal regulated rental amount of the subject premises set against the payments rendered by Siricharoen under the alleged terms of the Renewal Lease and Agreement from February 14, 2011 to the present date." Even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's complaint pleads a written agreement between Plaintiff and Siricharoen governing the terms of Siricharoen's rental rate. Accordingly, Plaintiff's claim for unjust enrichment is not viable because express contracts govern the subject matter of Plaintiff's dispute.

As for Plaintiff's sixth cause of action, for breach of the covenant of good faith and fair dealing as against Siricharoen, "[i]mplied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." (*Jaffe v. Paramount Communs.*, 222 A.D.2d 17, 22-23 [1st Dep't 1996]). The implied obligation "is in aid and furtherance of other terms of the

agreement of the parties”, and “an obligation that would be inconsistent with other terms of the contractual relationship cannot be implied.” (*Sheth v. New York Life Ins. Co.*, 273 A.D.2d 72, 73 [1st Dep’t 2000]). The duty of good faith and fair dealing does not extend beyond the contract’s “fair intent and meaning,” and cannot be expanded “in order to obviate objections which might have been foreseen and guarded against.” (*Mark Patterson, Inc. v. Bowie*, 237 A.D.2d 184, 186 [1st Dep’t 1997] [citation omitted]).

Here, Plaintiff’s complaint alleges a contract between Siricharoen, as tenant, and Plaintiff, as landlord, to lease the Premises at a preferential rate and a right of renewal. Plaintiff’s complaint asserts, “Siricharoen has, by capitalizing upon her extramarital affair with [Levine], breached her obligations to act in good faith in connection with the Agreement, and to deal fairly with Plaintiff, with those obligations being implied in law”. Here, even accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint do not allege any facts that would demonstrate that Siricharoen deprived her landlord of any rights it had under the Agreement. Plaintiff’s complaint does not allege that Plaintiff lacked notice of the rental rate under the Renewal Lease and Agreement, that Siricharoen failed to pay the contractually agreed upon amount when due, or that Siricharoen interfered with her landlord’s right to receive such payments in the contractually agreed upon amount. Accordingly, even accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint do not plead a cause of action for breach of the covenant of good faith and fair dealing as against Siricharoen.

As for Plaintiff’s seventh cause of action, for breach of fiduciary duty as against Levine, the elements of a cause of action for breach of fiduciary duty include (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 90 AD3d 683, 935 NYS2d 304 [2d Dep’t 2011]). A fiduciary relationship “exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 [2005] quoting Restatement [Second] of Torts § 874, Comment *a*). Such a relationship, “necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions.” (*Id.*) In addition, “it is axiomatic that an employee is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.” (*CBS Corp. v. Dumsday*, 268 A.D.2d 350, 353 [1st Dep’t 2000]; *Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc.*, 100 A.D.2d

81, 88 [1st Dep't 1984]). The duty of loyalty implied in the relationship between an employee and his employer stems from the rule that a person who acts as agent for another "shall not in the same matter act for himself." (*Alexander & Alexander v. Fritzen*, 147 A.D.2d 241, 246 [1st Dep't 1989]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity. (CPLR 3016[b]).

Plaintiff's complaint alleges that Levine was Plaintiff's "employee" at the time of the Renewal Lease and Agreement, and that, "[d]uring the course of [Levine's] employment with Plaintiff, [Levine] had the duty and obligation to act in the best business interests of Plaintiff." Plaintiff's complaint alleges, "In February, 2011, [Levine] offered an improper renewal lease to grant Siricharoen the benefit of artificially depressed rent solely as a way of providing a gift to Siricharoen with whom he was having a romantic relationship", and that, "On February 14, 2011, [Levine] caused Plaintiff to execute the Agreement." Plaintiff's complaint further asserts:

[Levine] improperly entered into the renewal lease on behalf of Plaintiff and did so with artificially low rent terms to Siricharoen, on the pretense that the rent terms were a preferential rent. The only basis [Levine] had to give a preferential rent to Siricharoen, in violation of his fiduciary duty to Plaintiff, was because of [Levine's] extramarital affair and romantic relationship with Siricharoen.

Plaintiff's complaint alleges that Levine "failed to attempt to maximize the corporate asset by taking advantage of substantial lawful rent increases in apartments which experienced vacancies", and that, "[Levine's] wrongful actions constituted a breach of the fiduciary duties which he owed to Plaintiff and caused Plaintiff to suffer substantial damages."

Accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's complaint adequately pleads an agency relationship between Levine, as employee, and Plaintiff, as employer, whereby Levine had an affirmative duty to act in his employer's best interests. (*Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc.*, 100 A.D.2d 81, 89 [1st Dep't 1984]). The four corners of Plaintiff's complaint are sufficient to allege that Levine failed to exercise the utmost good faith and loyalty in the performance of his duties to Plaintiff by allegedly "fail[ing] to attempt to maximize the corporate asset", and by purportedly causing Plaintiff to execute the Renewal Lease and Agreement

“solely” as a way of “providing a gift” of “artificially depressed rent” to Siricharoen. Accordingly, accepting Plaintiffs’ allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint adequately plead a claim for breach of Levine’s fiduciary duty of loyalty to Plaintiff.

As for Plaintiff’s eighth cause of action, for breach of employment as against Levine, Plaintiff’s complaint alleges, “As an employee of Plaintiff, [Levine] owed Plaintiff various duties and obligations, including fiduciary duties and the duty of loyalty.” Plaintiff’s complaint alleges, “[Levine] breached the terms of his employment by Plaintiff”, “acted outside the scope of his employment by Plaintiff”, “acted outside the scope of the authority granted by Plaintiff”, and “acted against the interest of his employer Plaintiff.” To the extent that Plaintiff’s eighth cause of action seeks to recover for Levine’s alleged failure to exercise the utmost good faith and loyalty in the performance of his duties to Plaintiff, Plaintiff’s eighth cause of action is duplicative of Plaintiff’s seventh cause of action, for breach of fiduciary duty. Insofar as the four corners of Plaintiff’s complaint do not plead an employment contract between Plaintiff and Levine, or identify the “terms” or “scope” of employment, even accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint do not adequately allege a cause of action for breach of employment. Accordingly, Plaintiff’s eighth cause of action fails.

As for Plaintiff’s ninth cause of action, for negligence as against Levine, to establish negligence, a plaintiff must demonstrate: (1) that a duty of care was owed by the defendant to the plaintiff; (2) breach of the duty; (3) proximate cause; and, (4) damages. (*Alvino v. Lin*, 300 A.D.2d 421 [2002]). In the absence of a duty, there can be no breach and no liability. (*Ruiz v. Griffin*, 71 A.D.3d 1112 [2010]). Here, Plaintiff’s complaint alleges that Levine owed Plaintiff an obligation “to perform certain duties and services as a residential building manager of the Subject Premises.” Plaintiff’s complaint alleges, in a conclusory fashion, that Levine “was obligated to exercise that degree of diligence, judgment, care and skill ordinarily used by persons of common capacity engaged in the same profession, as a residential building manager.” Plaintiff’s complaint asserts, “[Levine] was negligent in the performance of the services and duties he performed on behalf of Plaintiff”, and that, “as the direct result of [Levine’s] negligence, Plaintiff has suffered substantial damages.” Plaintiff’s conclusory allegations are insufficient to plead a cause of action for negligence. Furthermore, Plaintiffs’ negligence cause of action is duplicative of Plaintiff’s breach of fiduciary duty and breach of employment claims. Accordingly, Plaintiff’s negligence cause of action fails.

Finally, with respect to Plaintiff's tenth cause of action, for ejectment as against Siricharoen, "in an action for ejectment, now properly called an action to recover the possession of real property, damages may be recovered for withholding of such property, including rents and profits or the value of the use and occupancy of the property." (RPAPL 601; *1537 Associates v. Temlex Industries, Inc.*, 128 A.D.2d 384, 385 [1st Dep't 1987]). In addition, a landlord may recover possession of real property from a lessee when the lessee has breached a condition contained in the lease. Here, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint fail to plead facts sufficient to support any inference that Siricharoen is not properly in possession of the Premises pursuant to the Agreement. Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint are insufficient to support Plaintiff's cause of action for ejectment.

Wherefore, it is hereby

ORDERED that defendant Penkae Siricharoen's motion is granted (Mot. Seq. #001) and Plaintiff's complaint is dismissed as against defendant Penkae Siricharoen and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Sanford Levine's motion is granted (Mot. Seq. #004) only to the extent that Plaintiff's first, second, third, fourth, fifth, sixth, eighth, ninth, and tenth causes of action are dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's seventh cause of action, for breach of fiduciary duty as against defendant Sanford Levine only, is severed and shall proceed.

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

DATED: January 15 2015



EILEEN A. RAKOWER, J.S.C.

HON. EILEEN A. RAKOWER