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| <b>Batan v Ball</b>                                                                                                                                                                                                                                              |
| 2016 NY Slip Op 30062(U)                                                                                                                                                                                                                                         |
| January 13, 2016                                                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 160844/2013                                                                                                                                                                                                                                       |
| Judge: Manuel J. Mendez                                                                                                                                                                                                                                          |
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## SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*PART 13JODI BATAN a/k/a JODI BATAN-DRYERMAN  
a/k/a JODI SEEGULL,

Plaintiff,

-against-

INDEX NO. 160844/13  
MOTION DATE 12-02-15  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_LINDA BALL, CYLA KLEIN and CITI HABITATS,  
NEW YORK REAL ESTATE, INC.,  
Defendants.The following papers, numbered 1 to 15 were read on this motion and cross-motion to/for Summary Judgment:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_ cross motion \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

## PAPERS NUMBERED

1 - 45 - 9, 10 - 1112 - 13, 14 - 15Cross-Motion: ☒ Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion pursuant to CPLR §3212, for summary judgment against defendants, Linda Ball, Cyla Klein, Citi Habitats and New York Real Estate Inc., and pursuant to CPLR §3211 [a],[1], [7] and [b], to dismiss their affirmative defenses, counterclaims and cross-claims, is granted only to the extent that Linda Ball's counter-claim asserted against plaintiff is dismissed. The remainder of the relief sought is denied. Cyla Klein, Citi Habitats and New York Real Estate Inc.'s cross-motion pursuant to CPLR §3212, for summary judgment, is granted. Linda Ball's motion filed under Motion Sequence 005, for summary judgment pursuant to CPLR §3212, seeking to dismiss the complaint in its entirety, and pursuant to CPLR §3211[a],[7] to dismiss the cross-claims and setting this matter down for a hearing to determine reasonable attorney fees, alternatively, to reduce potential damages against Linda Ball, is granted only to the extent that the claims asserted in the Amended Complaint, and all cross-claims asserted against Linda Ball are dismissed, the remainder of the relief sought is denied.

Plaintiff's amended complaint seeks to recover damages for breach of a sublease agreement, costs, and attorney fees, payment of real estate agent fees and tortious interference with the sublease agreement. Plaintiff alleges that Linda Ball entered into a sublease agreement and submitted certified checks, as part of a one year rental of a cooperative apartment #7C, located at 233 East 86<sup>th</sup> Street, New York, N.Y.. Plaintiff alleges that Linda Ball failed to appear for an interview with the cooperative board scheduled on October 15, 2013, wrongfully and wilfully defaulted on the application and cancelled the checks. The Amended Complaint alleges that the checks were cancelled by the defendant on the advice and recommendation of Cyla Klein an employee of Citi Habitats, New York Real Estate Inc. (collectively "Broker Defendants"). Linda Ball asserted a counterclaim pursuant to RPL§234, as prevailing party, for costs and attorney

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

fees. Broker Defendants and Linda Ball have asserted cross-claims against each other for indemnification and contribution.

The parties do not dispute that the defendants withdrew the application and Sublease Agreement dated August 5, 2013, for a term commencing September 1, 2013 through August 31, 2014 (Mot. Exh. C), prior to submission to the cooperative board for approval. Plaintiff accepted the withdrawal and proceeded to have her broker show the apartment to other prospective tenants. Linda Ball, after obtaining a tenant for her Connecticut condominium, by e-mail exchange on August 28, 2013 obtained plaintiff's consent and redelivered the application package with the Sublease Agreement to plaintiff's broker (Mot. Exh. D).

The plaintiff's broker notified the Broker Defendants and Linda Ball by e-mail dated August 30, 2013, that the package could not be immediately submitted to the cooperative board because plaintiff needed to re-issue checks returned after the cancellation and that there would be no review by the board prior to Friday, (September 6, 2013) because of Rosh Hashanah (Mot. Exh. F). Plaintiff's broker also advised the Broker Defendants by e-mail dated August 30, 2013, that the cooperative board would not provide approval prior to, "the 10<sup>th</sup>", and for the defendant, "to make other arrangements for herself." Linda Ball, by e-mail, consented to an extended time period (Mot. Exh. E). The plaintiff's broker had the defendants forward certified checks for \$5,500.00 and \$2,475.00 to establish payment of the first month's rent, the security deposit and for plaintiff's broker fees, as part of the application package. On September 18, 2013, the defendants were advised by the cooperative board that the full package was received on September 12, 2013, commencing a thirty day period to execute a waiver (Mot. Exh. H).

Linda Ball subleased her condominium in Connecticut effective September 27, 2013, and would be homeless after that date. On October 2, 2013, the Broker Defendants advised plaintiff's broker by e-mail that the relevant waiting period for cooperative board approval as stated in the Sublease Agreement had expired, that defendants deemed the Sublease void, and sought return of the certified checks (Mot. Exhs. J & S). On October 2, 2013, plaintiff's broker advised the defendants that the board had thirty days from receipt of the sublease package (September 12, 2013) to approve the application and the time had not yet expired (Mot. Exh. J). On October 3, 2013, the Broker Defendants advised Linda Ball to cancel the certified checks submitted with the sublease application (Mot. Exh. V). Linda Ball cancelled the certified checks and entered into a lease for Apartment 20A, located at 160 East 84<sup>th</sup> Street, New York, N.Y. on October 3, 2013 (Mot. Exh. T). On October 8, 2013, the board notified the Broker Defendants, Linda Ball, and plaintiff's broker that it wanted to schedule an interview with Linda Ball on Tuesday, October 15, 2013 (Mot. Exh. K), she did not appear for the interview. On October 21, 2013, plaintiff's attorney e-mailed a letter to Linda Ball advising that failure to attend the interview constituted willful default of the sublease agreement (Mot. Seq. 005, Exh. S).

Plaintiff's motion pursuant to CPLR §3212, seeks an Order granting summary judgment against, Linda Ball, Citi Habitats and New York Real Estate Inc. (collectively "defendants"). Plaintiff also seeks an Order pursuant to CPLR §3211 [a] [1], [7], dismissing the Linda Ball's counterclaims and pursuant to CPLR §3211 [b], dismissing Linda Ball's affirmative defenses. Pursuant to CPLR §3211 [b], plaintiff seeks to dismiss

the Broker Defendants' answer, affirmative defenses and any cross-claims. Plaintiff voluntarily withdraws the third cause of action asserted in the Amended Complaint, for broker's fees.

The Broker Defendants oppose plaintiff's motion, partially oppose Linda Ball's motion filed under Motion Sequence 005, and cross-move pursuant to CPLR §3212, for summary judgment.

Linda Ball opposes plaintiff's motion and partially opposes the Broker Defendants' cross-motion. Linda Ball under Motion Sequence 005, seeks an order pursuant to CPLR §3212 granting summary judgment, dismissing the complaint in its entirety, setting this matter down for a hearing to determine reasonable attorney fees, alternatively, to reduce potential damages and pursuant to CPLR §3211[a],[7] dismissing the cross-claims for indemnification and contribution.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

A breach of contract cause of action requires an enforceable agreement, performance, breach by a party and damages. All the elements of breach of contract must be plead to avoid dismissal (Noise in the Attic Productions, Inc. v. London Records, 10 A.D. 3d 303, 782 N.Y. S. 2d 1 [1<sup>st</sup> Dept., 2004]).. The determination of whether a writing is ambiguous is a question of law to be resolved through the courts (W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y. 2d 157, 566 N.E. 2d 639, 565 N.Y.S. 2d 440 [1990]). In those instances where the terms of the contract are unambiguous, the contract must be enforced by its terms. The Court, "... may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y. 3d 470, 775 N.Y.S. 2d 765 ,807 N.E. 2d 876 [2004]). A Court that cannot determine what the actual agreement is or whether it has been breached is unable to formulate a remedy. If the terms of the contract are indefinite then the court cannot impose obligations because the parties did not reach a binding agreement (Marlo v. McLaughlin, 288 A.D. 2d 97, 734 N.Y.S. 2d 4 [1<sup>st</sup> Dept. 2001]).

Plaintiff fails to meet her prima facie burden of establishing the breach of contract claim against Linda Ball. The Sublease Agreement was voided when Linda Ball withdrew the initial application with plaintiff's consent. The parties accepted the resubmitted Sublease Agreement as creating a contract, but the e-mail exchange does not state the specific terms, including the new commencement and end date of the sublease. Accepting plaintiff's contention that her husband signed the Sublease Agreement with her consent as a result of her severe Multiple Sclerosis, the breach of contract claim still fails because the amended terms of the Sublease Agreement are too ambiguous. The April 14, 2014, affidavit from plaintiff's bank (Mot. Exh. A) states that the Proprietary Lease referred to in the sublease as the Over-lease, was lost or misplaced, it does not identify

when this occurred. Defendants were not deposed and plaintiff's argument related to their intent are speculative and conclusory. Plaintiff's contention that the number of days was left blank because of the re-application and that there was no objection or request to have a time frame provided by the defendants, is not sufficient to establish the existence of a valid contract. Plaintiff provides no proof in support of her claim that the defendants expected an indefinite time period for cooperative board approval when resubmitting the sublease application, or that they were aware that the cooperative board had thirty days for waiver prior to the board's September 18, 2013 e-mail.

Linda Ball has stated a prima facie basis under Motion Sequence 005, to obtain summary judgment dismissing the claims asserted against her in the amended complaint for breach of contract. She established that the parties did not agree as to the specific terms of the resubmitted Sublease Agreement. Linda Ball also established she was unaware of the thirty day waiver period required by the Proprietary Lease, or the September 18, 2013, and that there was no valid Sublease Agreement.

Linda Ball has not stated a basis to obtain summary judgment on the counterclaim, pursuant to Real Property Law (RPL) §234 for attorney fees and costs as prevailing party. RPL §234 applies when a residential landlord fails, "...to perform any covenant or agreement under the lease.." and there is a provision for the landlord to recover attorney fees and costs. It permits a tenant to recover as prevailing party even if there is no provision in the lease (McKinney's Consolidated Laws of New York Annotated, RPL §234 and March v. 200 West 106<sup>th</sup> St. Corp., 95 A.D. 3d 560, 943 N.Y.S. 2d 525 [1<sup>st</sup> Dept., 2012]). It requires that the parties entered into a valid and enforceable lease agreement. The parties to this action did not enter into a valid sublease agreement. Plaintiff will be granted summary judgment on Linda Ball's counter-claim pursuant to RPL §234.

The elements of a cause of action for tortious interference with a contractual relations is (1) the existence of a valid contract between plaintiff and a third-party, (2) defendant's knowledge of the contract, (3) defendant's intentional inducement of the third party to breach or other wise render performance impossible, and (4) damages (White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y. 3d 422, 867 N.E. 2d 381, 835 N.Y.S. 2d 530 [2007]). Tortious interference with prospective contract rights requires that the plaintiff establish, "...the defendant directly interfered with a third-party and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff" (Posner v. Lewis, 80 A.D. 3d 308, 912 N.Y.S. 2d 53 [1<sup>st</sup> Dept., 2010]). Culpable conduct on the part of the defendant is required, mere persuasion is not enough where the defendant's motivation for the alleged interference is legitimate economic self-interest (Carvel Corp. v. Noonan, 3 N.Y. 3d 182, 818 N.E. 2d 1100, 785 N.Y.S. 2d 359 [2004]).

Plaintiff failed to establish the existence of a valid contract, and cannot support her claims asserted against the Broker Defendants for tortious interference with the sublease. The Broker Defendants have met their prima facie burden of proof to obtain summary judgment against plaintiff on their cross-motion. Plaintiff failed to raise any issues of fact, or meet the burden of proving the Broker Defendant's actions were motivated by malice or something other than legitimate economic self-interest related to obtaining a residence for their client, Linda Ball. Plaintiff has not established that the Broker Defendants' answer and affirmative defenses have no merit, were not properly stated, and

should be dismissed. Plaintiff makes no arguments as to the Broker Defendants' cross-claims and that relief will also be denied.

Accordingly, it is ORDERED that the plaintiff's motion for summary judgment against defendants, Linda Ball, Cyla Klein, Citi Habitats and New York Real Estate Inc., and pursuant to CPLR §3211 [a],[1], [7] and [b], to dismiss their affirmative defenses, counterclaims and cross-claims, is granted, only to the extent that Linda Ball's counter-claim asserted against plaintiff is dismissed, and it is further,

ORDERED, that Linda Ball's counter-claim pursuant to Real Property Law §234 for attorney fees and costs as prevailing party, is severed and dismissed, and it is further,

ORDERED, that the remainder of the relief sought in plaintiff's motion, is denied, and it is further,

ORDERED, that Cyla Klein, Citi Habitats and New York Real Estate Inc.'s cross-motion pursuant to CPLR §3212, for summary judgment, is granted, and it is further,

ORDERED, that the claims asserted in the Amended Complaint, and all cross-claims against Cyla Klein, Citi Habitats and New York Real Estate Inc. Are dismissed, and it is further,

ORDERED, that Linda Ball's motion filed under Motion Sequence 005, for summary judgment pursuant to CPLR §3212, seeking to dismiss the complaint in its entirety, and pursuant to CPLR §3211[a],[7] to dismiss the cross-claims and setting this matter down for a hearing to determine reasonable attorney fees, alternatively, to reduce potential damages against Linda Ball, is granted only to the extent that all claims asserted in the Amended Complaint and cross-claims against Linda Ball are dismissed, and it is further,

ORDERED, that the remainder of the relief sought in Linda Ball's motion filed under Motion Sequence 005, for summary judgment on the counterclaim, seeking an immediate hearing to determine attorney's fees, is denied.

ENTER:

MANUEL J. MENDEZ  
J.S.C.

MANUEL J. MENDEZ,

J.S.C.

Dated: January 13, 2016

Check one:    ☒ FINAL DISPOSITION    ☐ NON-FINAL DISPOSITION  
Check if appropriate:    ☐ DO NOT POST    ☐ REFERENCE