

3909 Main St. v Riesenburger Props., LLLP
2016 NY Slip Op 30234(U)
January 21, 2016
Supreme Court, Queens County
Docket Number: 703514/2015
Judge: Thomas D. Raffaele
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA Part 13
Justice

3909 Main Street, x

Plaintiff,

-against-

RIESENBURGER PROPERTIES, LLLP and REGINA C RIESENBURGER,

Defendants.

Index Number 703514 2015

Motion Date August 24, 2015

Motion Seq. No. 1

FILED
JAN 25 2016
COUNTY CLERK
QUEENS COUNTY

The following numbered papers read on this motion by defendant Riesenburger Properties, LLLP (Riesenburger Properties) and Regina C. Riesenburger dismissing the complaint due to a prior action pending in Supreme Court, Queens County, entitled, Riesenburger Properties, LLLP v Pi Associates, L.L.C., et al, under Index No. 709221/2014 (the First Action); pursuant to CPLR 602(a) consolidating this action with the First Action; pursuant to CPLR 3211(a)(7) dismissing the complaint as against defendant Regina C. Riesenburger; and pursuant to CPLR 3211(a)(7) dismissing the complaint in its entirety.

Table with 2 columns: Papers, Numbered. Rows include Notice of Motion - Affidavits - Exhibits (EF 6-16), Answering Affidavits - Exhibits (EF 17-30), Reply Affidavits (EF 33).

Upon the foregoing papers it is ordered that this motion is determined as follows:

This is an action for alleged tortious interference with plaintiff's sublease covering premises known as 39-09/11 Main Street, Flushing, New York, as well as causes of action for breach of the implied covenant of good faith, unjust enrichment and breach of contract. On July 1, 1994, a commercial lease for the subject premises, was entered into between defendant

Riesenburger Properties' predecessor-in-interest, Alkus Riesenburger and The Wiz Distributors of Flushing, Inc. (the Wiz). Thereafter, the Wiz went out of business. On or about April 25, 2003, a lease was entered into between Alkus Riesenburger, as lessor, and Pi Associates, L.L.C., as lessee. The 2003 Lease incorporated the terms of the 1994 Lease, except as modified thereunder by the 2003 Lease. By deed dated August 11, 2003, Alkus Riesenburger conveyed the premises to the defendant Riesenburger Properties. By an Assignment and Assumption of Lease, made as of May 1, 2011, Pi Associates assigned its interest in the 2003 Lease to the plaintiff, 3909 Main Street, LLC. On or about June 17, 2011, plaintiff, as sublessor entered into a sublease with Carat & Co. (Carat). The plaintiff alleges that in accordance with plans that were approved by the defendant Riesenburger Properties, as required under the 2003 Lease, the plaintiff and Carat spent millions of dollars to improve the subject premises.

The plaintiff alleges that the defendant then began to negotiate with Carat the terms of a certain license agreement with Carat's neighbor of the adjoining property, Gerson Properties, LLC. Carat desired to renovate the premises to add a third floor and elevator and the license agreement purported to provide a temporary license to access Gerson's property for such purposes. The plaintiff alleges that in breach of the sublease, the defendant Riesenburger Properties and Carat negotiated the terms of the license agreement. In breach of the sublease contract, Carat provided a copy of the sublease to the defendant. Carat is negotiating and/or intends to negotiate a new tenancy directly with the defendant Riesenburger Properties.

On or about October 7, 2014, the defendant in this action, Riesenburger Properties, then served eight notices to cure upon Pi & Associates. On or about December 1, 2014, the defendant in this action, Riesenburger Properties, purported to serve notices of termination. On or about December 2, 2014, the defendant in this action, Riesenburger Properties, commenced the First Action, alleging that Pi Associates improperly assigned the premises to 3909 Main Street and sublet the premises to Carat.

The Court first turns to the branch of the motion to dismiss for a prior action pending. The relief of dismissal is unwarranted as under these circumstances CPLR 3211(a)(4) does not mandate dismissal. Here, the relief sought in this action and the First Action are not identical and therefore, this action should not be dismissed.

The actions, however, both concern the interpretation and

application of various lease provisions and the legitimacy of the Assignment and Sublease. Therefore, inasmuch as these actions involve common questions of law and fact, the motion to consolidate is granted to the extent that these actions shall be tried jointly in this court (see CPLR 602).

The Court now addresses the motion to dismiss the complaint against the defendant Regina Riesenburger. On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83 [1994]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2d Dept 2004]). Here, the complaint fails to set forth any allegations of personal wrongdoing by Regina Riesenburger. The allegations against Regina Riesenburger all state that she was acting on behalf of and for the economic benefit of the Riesenburger Properties. Therefore, the allegations are insufficient to sustain the individual claims against her.

Finally, the Court turns to the branch of the motion to dismiss all causes of action in the complaint. To state a cause of action for tortious interference with a contract, a plaintiff must allege the following elements: (1) existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procuring of the breach and (4) damages. Here, the plaintiff alleged that Carat and plaintiff are parties to a sublease, that the defendant Riesenburger Properties is aware of the sublease and that the defendant caused Carat to breach the sublease and as a result the plaintiff suffered damages. The plaintiff, thus, adequately alleged each element.

To recover on a cause of action for unjust enrichment, there must be a dispute as to the existence of the contract or the contract does not cover the dispute at issue (see *Clark-Fitzpatrick v Long Island Rail Road Co.*, 70 NY2d 382 [1987]; *Hochman v LaRea*, 14 AD3d 653 [2d Dept 2005]). Here, the plaintiff alleges that the defendant Riesenburger Properties insists that the plaintiff's assignment is unenforceable and thus improvements made by the plaintiff are of no effect under the lease. The plaintiff alleges that the defendant has been unjustly enriched as a result of the improvements. The plaintiff therefore, may proceed on its cause of action for unjust enrichment. Additionally, the plaintiff does not have to elect a remedy and may proceed on both breach of contract and a cause of action for quasi-contract.

The covenant of good faith and fair dealing 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 the agreement (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513 [1999]). Here, the allegations in the complaint that the defendant Riesenburger Properties is seeking to destroy the relationship between plaintiff and its subtenant and to remove the plaintiff from the lease is sufficient to support a cause of action for breach of the covenant of good faith and fair dealing.

Finally, the plaintiff has adequately pled a cause of action for breach of contract. The plaintiff has alleged that the defendant has improperly disclaimed the validity its assignment and sublease and as result the defendant has breached the lease.

Accordingly, the branch of the motion to dismiss the action pursuant to CPLR 3211(a)(4) on the ground of a prior action pending is denied.

The branch of the motion to consolidate is granted to the extent that these actions shall be tried jointly in this court. Each action joined for trial shall have its own index number and separate requests for judicial intervention and notes of issue shall be filed for each action. The titles of the actions to be tried jointly shall be as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
-----X
RIESENBURGER PROPERTIES, LLLP

Plaintiff,

-against-

ACTION NO. 1

INDEX NO. 709221/14

PI ASSOCIATES, L.L.C., JAMES PI,
3909 MAIN STREET, LLC and
CARAT & CO., INC.

Defendant.

-----X
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
-----X

3909 MAIN STREET, LLC

Plaintiff,

ACTION NO. 2

-against-

INDEX NO. 703514/15

RIESENBURGER PROPERTIES, LLLP and
REGINA C. RIESENBURGER

Defendants.

-----x

The defendant Riesenburger Properties, LLLP is directed to serve a copy of this order with notice of entry on all parties and the Clerk of the Supreme Court, Queens County, and a copy of this order shall also be affixed to the notes of issue at the time of filing.

The branch of the motion to dismiss the complaint as against defendant Regina Riesenburger is granted and the complaint is dismissed against that defendant.

The branch of the motion to dismiss the complaint is denied in its entirety.

Dated: *JANUARY 21, 2016*



Thomas D. Raffaele, J.S!C.

FILED
JAN 25 2016
COUNTY CLERK
QUEENS COUNTY