

**Mareb 99¢ Plus Enters, Inc. v 101-09 W. 115th St.
Hous. Dev. Fund Corp.**

2016 NY Slip Op 31072(U)

May 25, 2016

Supreme Court, New York County

Docket Number: 162170/15

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
MAREB 99¢ PLUS ENTERPRISES, INC. and
VARIETY CITY INC.,

Plaintiffs,

-against-

101-09 WEST 115th STREET HOUSING
DEVELOPMENT FUND CORPORATION and
HALSTEAD PROPERTY, LLC,

Defendants.

-----X
KATHRYN E. FREED, J.S.C.

DECISION AND ORDER
Index No. 162170/15
Mot. Seq. Nos. 001-003

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION:

MOTION SEQUENCE 001

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-3 (Exs. A-C)
AFFIRMATION IN OPPOSITION	4
REPLY AFFIRMATION	5

MOTION SEQUENCE 003

PAPERS	NUMBERED
ORDER TO SHOW CAUSE AND AFFS. ANNEXED	1-2 (Exs. A-R)
AFFIRMATION IN OPPOSITION	3 (Exs. A-G)
REPLY AFFIRMATION	4 (Exs. A-B)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This order resolves motion sequences 001, 002, and 003.

In this action by plaintiffs Mareb 99¢ Plus Enterprises, Inc. and Variety City Inc. seeking injunctive relief as well as damages for breach of contract and fraud, defendant 101-09 West 115th Street Housing Development Fund Corporation (hereinafter "HDFC") moves (motion sequence 001),

pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action and, in effect, pursuant to CPLR 3211 (a) (5) to dismiss the complaint pursuant to the Statute of Frauds.¹ Plaintiffs move (motion sequence 003), pursuant to CPLR 6301, for a preliminary injunction enjoining defendant from removing plaintiffs from the real property located at 101-09 West 115th Street, ground floor, New York, New York; pursuant to CPLR 2201, for a stay of the action styled *101-09 West 115th Street Housing Development Fund Corporation v Mareb 99¢ Plus Enterprises, Inc.*, currently pending in the Civil Court of the City of New York, County of New York under Index Number 85407/15; and pursuant to CPLR 602, removing and consolidating the Civil Court proceeding with the captioned action.

After oral argument of the motions, as well as a review of the parties' papers and the applicable statutes and case law, **defendant's motion is granted, plaintiffs' motion is denied, and the action is dismissed.**

FACTUAL AND PROCEDURAL BACKGROUND:

In July of 2004, HDFC, as landlord, and Mareb, as tenant, entered into a lease agreement pursuant to which Mareb rented the ground floor store located at 107 Lenox Avenue, New York, New York (hereinafter "the premises"). The lease expired on July 31, 2011, after which time Mareb continued in possession of the premises as a month-to-month tenant.

By correspondence dated May 28, 2015, HDFC advised Mareb that its month-to-month tenancy was to be terminated. However, in lieu of terminating the tenancy, HDFC began negotiating

¹Defendant Halstead Property, LLC moved to dismiss the action (motion sequence 002) but plaintiffs discontinued the action against it by stipulation dated March 22, 2016.

a new lease with Mareb. Pursuant to proposed new lease, the premises were to be renovated and converted from a discount store to a retail variety store. Ex. B to HDFC's Mot. To Dismiss, at p. 1 of 20. The proposed lease was for a 7 year term commencing on August 1, 2015. Id. The principals of Mareb formed a new corporate entity, Variety City, Inc. (hereinafter "Variety"), which was to be the tenant under the lease. Id, at p. 1 of 20. The proposed lease required Variety to pay two months security (\$7,730.90) (Ex. B to HDFC's Mot. To Dismiss, at p. 1 of 20, p. 3 of 20) and to maintain commercial general liability insurance with minimum coverage of \$1 million. (Id., at p. 6 of 20). The proposed lease was sent to Mark Saleh, a principal of Mareb and Variety, on August 10, 2015. Ex. B to HDFC's Mot. To Dismiss.

On or about August 27, 2015, Variety's attorneys returned the unsigned proposed lease to HDFC along with a proposed addendum thereto. Ex. C to HDFC's Mot. To Dismiss. Neither HDFC nor Variety ever executed the proposed lease and HDFC never approved Variety's proposed addendum. Nevertheless, Variety began renovating the premises without either HDFC's approval or any permits required by the New York City Department of Buildings (hereinafter "DOB"). Nor did Variety pay HDFC any security or procure insurance prior to the commencement of its renovations.

On October 7, 2015, Variety's attorneys were notified that the offer to lease was withdrawn due to its failure to execute the lease and because it had commenced renovation of the premises without DOB approval. A termination notice was sent on November 30, 2015 terminating Mareb's tenancy and Variety's occupancy.

On or about November 24, 2015, plaintiffs commenced the captioned action against HDFC, alleging as a first cause of action a claim for breach of contract; alleging as a second cause of action

fraud; and alleging as a third cause of action a claim for temporary and permanent injunctive relief. Ex. A to HDFC's Mot. To Dismiss.

On or about December 14, 2015, Mareb and Variety were served with a holdover petition in the proceeding styled *101-09 West 115th Street Housing Development Fund Corporation v Mareb 99¢ Plus Enterprises, Inc., Variety City Inc. And "John and/or Jane Doe"* (hereinafter "the holdover action"), currently pending in the Civil Court of the City of New York, County of New York under Index Number 85407/15.

HDFC now moves (motion sequence 001), pursuant to CPLR 3211 (a) (7), to dismiss the complaint due to plaintiffs' failure to state a cause of action. Plaintiffs move (motion sequence 003), pursuant to CPLR 6301, for a preliminary injunction enjoining HDFC from evicting them from the premises; pursuant to CPLR 2201, for a stay of the holdover action; and pursuant to CPLR 602, removing and consolidating the holdover action with the captioned action. This Court granted plaintiffs a temporary restraining order staying the holdover action pending the hearing of their motion.

POSITIONS OF THE PARTIES:

HDFC's Motion To Dismiss

In support of its motion to dismiss, HDFC argues that plaintiffs' breach of contract claim is barred by the statute of frauds since the proposed 7 year lease was never executed and could not have been performed within one year. HDFC further argues that plaintiffs' fraud claim must be dismissed since, contrary to Variety's claim, HDFC did not intentionally mislead plaintiffs when it offered to lease them the premises. This, urges HDFC, is evidenced by the proposed lease tendered to Variety,

which it failed to sign. Finally, HDFC argues that plaintiffs are not entitled to an injunction since they cannot demonstrate a likelihood of success on their breach of contract and fraud claims.

In opposition to the motion, plaintiffs initially argue that HDFC's motion must be denied because they alleged each of the elements of a claim for breach of contract. They claim that their breach of contract claim is not subject to dismissal based on the statute of frauds because the renovations they began constituted partial performance unequivocally referable to the proposed lease. Plaintiffs further assert that they have adequately pleaded a claim for fraud by alleging that HDFC promised to allow them to maintain a store at the premises and issue them a new lease for 7 years in exchange for renovating the premises and re-branding the store, that such representations were known to be false when made, and were made with the intention of having plaintiffs close their business; and that plaintiffs detrimentally relied on such representations in closing their prior store and beginning the renovations. Finally, plaintiffs maintain that they are entitled to injunctive relief since they have demonstrated a likelihood of success on the merits, irreparable injury, and a balancing of the equities in their favor.

In its reply affirmation, HDFC reiterates that plaintiffs' claims for breach of contract and fraud are without merit.

Plaintiffs' Motion For Removal, Consolidation, and Stay

Plaintiffs argue that, since the captioned action and the holdover action involve identical facts, the holdover action should be removed to this Court and the actions should be consolidated pursuant to CPLR 602 for the purposes of judicial efficiency and to avoid inconsistent results. They further assert that the actions should be consolidated in this Court because the Civil Court lacks the

jurisdiction to address their partial performance argument. Additionally, they maintain that, given the identical nature of the two actions, the holdover action should be stayed pursuant to CPLR 2201 pending the consolidation of the captioned action and the holdover action to avoid the risk of inconsistent results and the waste of judicial resources on redundant proceedings. Plaintiffs also claim that the holdover action should be stayed based on the likelihood of their success on the merits in the captioned action.

In opposing that branch of plaintiffs' motion seeking consolidation, HDFC argues that the Civil Court may entertain plaintiffs' partial performance argument. They further claim that the breach of contract action is barred by the statute of frauds and that, since the fraud claim arises from the same facts as the contract claim, it must be dismissed as duplicative. In opposing that branch of plaintiffs' motion seeking injunctive relief, HDFC substantially reiterates the arguments it raised in support of its motion to dismiss.

LEGAL CONCLUSIONS:

HDFC's Motion to Dismiss (Motion Sequence 001)

It is well settled that "[o]n a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept the facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 NY2d 83, 87 (1994); *see also 511 W. 232nd Owners Corp. v. Jennifer Realty, Corp.*, 98 N.Y.2d 144 (2002); *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977). Here, even allowing the complaint the most liberal reading possible, it does not state claims for breach of

contract, fraud, or injunctive relief.

Pursuant to CPLR 3211 (a) (5), a claim must be dismissed where it cannot be sustained due to the statute of frauds.² General Obligations Law (hereinafter “GOL”) § 5-703 (1) provides that “[a]n estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.” GOL § 5-703 (2) further provides that “[a] contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.”

Here, plaintiffs claim that HDFC breached an “agreement” to “lease [them the premises] for a period of at least seven (7) years on the condition that a re-branding and renovation of the premises take place . . .” (*emphasis added*). Ex. A to HDFC’s Mot. To Dismiss, at par. 10. Such an agreement would fall squarely within the statute of frauds and require a writing to be enforceable. See GOL § 5-703 (2). Indeed, plaintiffs do not deny that the proposed lease was not signed. Nevertheless, plaintiffs insist that, because of certain partial performance by them which, they claim, was unequivocally referable to the contract, HDFC is estopped from asserting the statute of frauds.

²Although HDFC does not specifically move to dismiss the breach of contract claim pursuant to CPLR 3211 (a) (5), it moves to dismiss it for failure to state a cause of action pursuant to CPLR 3211 (a) (7) and raises the statute of frauds as a ground for dismissal of the same. Thus, this Court may dismiss that claim based on the statute of frauds pursuant to CPLR 3211 (a) (7). See *Goebel v Raeburn*, 289 AD2d 43 (1st Dept 2001).

This argument fails for two reasons. First, plaintiffs concede that “proof of this partial performance” is “not relevant on a CPLR 3211 motion.” Plaintiffs’ Aff. In Opp. To HDFC’s Mot. To Dismiss, at p. 6. Further, in making this assertion, plaintiffs rely on the affidavit of Saleh. Although Saleh claims that plaintiffs performed certain renovations in reliance on HDFC’s representations, he does not explain how or why such work was unequivocally referable to the contract. Ex. B to Plaintiffs’ Aff. In Opp. To HDFC’s Mot. To Dismiss, at par. 13.

Plaintiffs’ fraud claim must also be dismissed. Plaintiffs allege that HDFC falsely and knowingly misrepresented to them that they could lease the premises for at least 7 years if they renovated and re-branded the premises, but that, although they began renovations, HDFC refused to execute the proposed new lease, and that such misrepresentation constituted fraud. Ex. A to HDFC’s Mot. To Dismiss, at pars. 21-27. However, “[m]ere allegations that a party entered into a contract lacking the intent to perform are insufficient to establish a claim of misrepresentation or fraud (see *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]).” *Lucker v Bayside Cemetery*, 114 AD3d 162, 175 (1st Dept 2013); see also *Manas v VMS Assocs, LLC*, 53 AD3d 451 (1st Dept 2008). Thus, this claim must be dismissed as well.

In their complaint, plaintiffs also seek temporary and permanent injunctive relief enjoining HDFC from evicting them from the premises. Ex. A to HDFC’s Mot. To Dismiss, at p. 5. It is well settled that, in order to obtain preliminary injunctive relief or permanent injunctive relief, the moving party must demonstrate 1) a likelihood of success on the merits of the action; 2) the danger of irreparable injury in the absence of preliminary injunctive relief; and 3) a balance of equities in its favor. See *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 (2005); *Ramanadhan v Wing*, 257 AD2d 383, 384 (1st Dept 1999). In applying these factors, the court must “weigh a

variety of factors,” and the matter is committed to the court’s sound discretion. *Doe v Axelrod*, 73 NY2d 748, 750 (1988). One of these potential factors is the movant’s “unclean hands.” *See Board of Higher Education of the City of New York v Marcus*, 63 Misc2d 268, 273 (Sup Ct Kings County 1970).

This Court finds that plaintiffs are not entitled to injunctive relief, as they have failed to establish the likelihood of success of their breach of contract and fraud claims which, as noted above, are dismissed. Additionally, plaintiffs have failed to establish that they will suffer an irreparable injury if injunctive relief is not granted. Plaintiffs allege that they have incurred certain expenses as a result of HDFC’s fraud and breach of contract. Since the said claims are dismissed, they can not recover damages on those causes of action. Even assuming, arguendo, that the claims were not dismissed, an adequate remedy at law exists to compensate plaintiffs for this alleged loss, and thus it is not irreparable. *See Lesron Junior, Inc. v Feinberg*, 13 AD2d 90, 93-94 (1st Dept 1961). To the extent that plaintiffs claim that they are entitled to injunctive relief because there is no adequate remedy at law for the loss of their lease, this argument must fail, since they were month-to-month tenants whose tenancy was subject to termination upon proper notice by HDFC.

Finally, turning to a balancing of the equities, plaintiffs are not entitled to injunctive relief given that they seek the same with unclean hands. As HDFC asserts, Variety did not sign the proposed lease, procure insurance, pay security, or obtain proper DOB permits, but nevertheless began renovations of the premises. HDFC’s Aff. In Supp. Of Mot. To Dismiss, at pars. 12-13. Indeed, Saleh wrote to the Board of Directors of HDFC on September 15, 2015, inter alia, that he apologized for “proceed[ing] with work on the [premises] that should never have been done without following the proper procedures.” Ex. A to HDFC’s Reply Aff. In Supp. Of Mot. To Dismiss. This

led HDFC to withdraw its offer to lease the premises to plaintiffs. *Id.*, at par. 14.

In light of the foregoing, HDFC's motion is granted and the complaint is dismissed in its entirety.

Plaintiffs' Motion For Removal, Consolidation, and Stay (Motion Sequence 003)

Plaintiff's motion is denied in all respects. Since the captioned action is dismissed, the holdover action cannot be removed and consolidated with the same. Similarly, given the dismissal of the captioned action, there is no need for a stay of the holdover action in order to avoid inconsistent results or a waste of judicial resources resulting from redundancy. Finally, plaintiffs' request for preliminary injunctive relief is denied for the reasons stated above.³

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant 101-09 West 115th Street Housing Development Fund Corporation (motion sequence 001) is granted, and the complaint against that defendant is dismissed, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the said defendant; and it is further,

³Although plaintiff's notice of motion seeks a preliminary injunction enjoining HDFC from evicting them from the premises, the issue of the preliminary injunction is not specifically addressed in the papers supporting the motion. In any event, the motion is denied for the same reasons plaintiffs' claim for injunctive relief was dismissed in motion sequence 001.

ORDERED that the motion by defendant Halstead Property, LLC to dismiss the complaint (motion sequence 002) is hereby resolved pursuant to stipulation of discontinuance dated March 22, 2016, and given that the complaint against Halstead Property, LLC is dismissed, the action is thus disposed in its entirety; and it is further,


ORDERED that the motion by plaintiffs Mareb 99¢ Plus Enterprises, Inc. and Variety City Inc. (motion sequence 003) is denied; and it is further,

ORDERED that all stays are vacated; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: May 25, 2016

ENTER:



KATHRYN E. FREED, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**