

**50 Sutton Place S. Owners, Inc. v Fried**

2016 NY Slip Op 31326(U)

July 14, 2016

Supreme Court, New York County

Docket Number: 151295/15

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**

**PRESENT: DEBRA A. JAMES**  
*Justice*

**PART 59**

50 SUTTON PLACE SOUTH OWNERS, INC.,  
Plaintiff,

Index No.: 151295/15

Motion Date: \_\_\_\_\_

**- v -**

Motion Seq. No.: 01

PAUL M. FRIED, ELIZABETH A. O'BRIEN,  
CAROLANNE FRIED, and ELLIE FRIED,  
Defendants.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1, 2	_____
3, 4	_____
5, 6	_____

**Cross-Motion:**       Yes       No

Upon the foregoing papers,

The court shall grant the defendants' motion to dismiss the complaint in its entirety.

Plaintiff cooperative corporation, by the second cause of action of its complaint, seeks a declaration that defendants Paul Fried and Elizabeth O'Brien, as purchasers of an apartment in the cooperative premises, have breached the proprietary lease by allowing their daughters, co-defendants Carolanne Fried and Ellie Fried to reside in the apartment and by failing to list them as residents on the Purchase Application. By the third cause of

**Check One:**       **FINAL DISPOSITION**       **NON-FINAL DISPOSITION**

**Check if appropriate:**       **DO NOT POST**       **REFERENCE**

**SETTLE/SUBMIT ORDER/JUDG.**

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING**

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action, plaintiff seeks an ejectment of the defendants based upon the alleged expiration of a notice to cure. In the first cause of action, plaintiff seeks damages for fraudulent inducement.

With respect to plaintiff's second and third causes of action, this court on oral argument initially agreed with plaintiff's argument that the cause of action for breach of lease could move forward based upon 445/86 Owners Corp. v Haydon (300 AD2d 87 [1<sup>st</sup> Dept 2002]). However, the court's careful review of the complaint reveals that based on irrefutable documentary evidence in the form of the proprietary lease, plaintiff has failed to allege facts sufficient to state a claim for breach of lease.

In Haydon, the Court in deciding a summary judgment motion considered language in "Paragraph 14" of that proprietary lease similar to that contained in the proprietary lease at issue in this case and stated

Insofar as pertinent, paragraph 14 of the proprietary lease provides that the apartment may not be used for any purpose "other than as a private dwelling for the Lessee and Lessee's wife, their children, grandchildren, parents, grandparents, brothers and sisters and domestic employees." The motion court correctly construed this as permitting occupancy by the listed persons other than the lessee only if the lessee maintains a concurrent occupancy. This meaning is manifested by a grammatical structure that does not differentiate between the lessee's family and domestic employees. Thus, to hold that paragraph 14 permits defendant's mother-in-law to live in the apartment without defendant also living there at the same time would be to permit defendant's domestic employee to live in the apartment without defendant also

living there at the same time--a patently unintended if not absurd result.

Id. at 88. In Haydon, however, the Court there noted that "defendant admits that the apartment is occupied solely by his mother-in-law." Id. (emphasis added).

In this action plaintiff alleges in Paragraph 31 of the complaint that the defendants maintain their residence in New Jersey and in Paragraph 32 continue that the defendants "do not primarily reside in the Apartment" (emphasis added). Paragraph 35 of the complaint states that "[p]laintiff advised Fried and O'Brien that the Adult Daughter Defendants' use and occupancy of the Apartment in Fried and O'Brien's absence was an unauthorized use of the Apartment that violated the terms of their proprietary lease."

Based upon these allegations, the plaintiff asserts in its cause of action for fraud that the defendants misrepresented that "they had no intent to actually contemporaneously reside in the apartment" and in its cause of action for a declaratory judgment that defendants in contravention of their proprietary lease "maintain their residence in New Jersey" while permitting their adult daughters to "occupy the Apartment" in their absence.

Defendants argue in favor of dismissal based upon documentary evidence which they posit demonstrates that there was no misrepresentation and no violation of their proprietary lease.

As concerns the causes of action a declaratory judgment, which in the decretal paragraph of the complaint seeks a declaration as to "breach of lease", the plaintiff does not allege that the defendant proprietary leaseholders do not reside in the apartment. It only alleges that defendants do not "primarily reside in the Apartment." It further alleges that the non-leaseholder daughters occupy the apartment "in the absence" of the defendant proprietary leaseholders. These carefully worded allegations fail to state a violation of Paragraph 14 of the proprietary lease because irrefutably, there is no requirement in that paragraph that occupancy by the proprietary leaseholders must be "contemporaneous" with any other permitted occupants as asserted by the plaintiff. As stated by the Court in Haydon there was a violation in that case because there was no concurrent occupancy. Haydon, supra, 300 AD2d, at 88. Here the plaintiff attempts to confuse and conflate concurrent occupancy, which in Haydon was not present because the leaseholder concededly did not occupy the premises at any time, with what it terms as "contemporaneous" occupancy which would apparently require that the defendant proprietary leaseholders be on the premises anytime their children were home. There is no such restriction in the proprietary lease and unlike Haydon there is no allegation here that the proprietary lessees are not in occupancy.

Furthermore, there is no requirement of "primary residence" in the proprietary lease and thus the importation of that statutory rubric into this wholly private cooperative residential arrangement is inapposite. See Mitchell Gardens No. 1 Co-op. Corp. v Cataldo, 175 Misc 2d 493, 494 (App Term, 2d Dept, 1997) ("use of the rent stabilization definition . . . is improper since cooperatives are excluded from the Rent Stabilization Law of 1969).

Therefore, the court finds that the failure of plaintiff to plead that defendant proprietary leaseholders are not in occupancy of the premises is fatal to its causes of action for breach of lease. Where the parties to the cooperative arrangement have not set forth primary residency as a requirement of the tenancy, there is no authority for this court to impose such a restriction. Thus the plaintiff has failed to set forth allegations that, if true, would constitute a breach of the lease.

To the extent that plaintiff seeks a declaratory judgment, such cause of action is "unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract' or injunctive relief [citations omitted]." Ithilien Realty Corp. v 180 Ludlow Development, LLC, 2016 N.Y. Slip Op. 05077, 2016 WL 3511431 (1<sup>st</sup> Dept 2016). Where an "alternative conventional form[] of remedy

[is] available" in the form of an action for breach of contract, here lease, "resort to a formal action for declaratory judgment is generally unnecessary and should not be encouraged." Bartley v Walentas, 78 AD2d 310, 312 (1<sup>st</sup> Dept 1980). See also Fillmann v Axel, 63 AD2d 876 (1<sup>st</sup> Dept 1978) ("The rule is, of course, well established that 'on a motion to dismiss for failure to state a cause of action, only the question whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him.'" Therefore, to the extent that plaintiff seeks a declaratory judgment, this is not the proper case.

With respect to the fraud claim, the court adheres to its determination on the record that as pled the claim must be dismissed. As stated by the Court in another case in a suit by a cooperative corporation

The essential elements of a cause of action for common-law fraud include the representation of a material existing fact, falsity, scienter, reliance and injury. The central issues presented on this appeal are whether the plaintiffs pleaded that the defendants misrepresented a material fact, or expressed an unactionable opinion or prediction of a future event; and whether defendants intended to induce reliance on what they knew to be a false representation of fact. We have recently held that speculation and expressions of hope for the future do not constitute actionable representations of fact. Moreover, a party does not make an actionable representation of fact when predicting a future event with no knowledge of whether or not the event may occur.

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Albert Apt. Corp. v Corbo Co., 182 AD2d 500, 500-01 (1<sup>st</sup> Dept 1992) (emphasis added, citations omitted).

Plaintiff at bar fails to allege any present fact that defendants misrepresented in their application. There is no allegation in the complaint that at the time the application was submitted defendants' adult daughters were residing with them and thus, any statement that their adult daughters would reside with them in the apartment in the future, as plaintiff asserts defendants should have stated, would have been mere speculation rather than an actionable statement of present intention and therefore its omission is not an actionable misrepresentation.

As the court finds that plaintiff has failed to state either an actionable violation of the proprietary lease by the defendants or sufficiently set forth a cause of action for misrepresentation, the court shall dismiss both causes of action.

Upon the dismissal of this action, and under the attorneys' fees provision contained in Paragraph 28 of the proprietary lease, and Real Property Law 234, the defendants request reciprocal attorneys' fees as the prevailing party.

Under Real Property Law § 234, when a residential lease provides for a landlord's recovery of attorneys' fees resulting from a tenant's failure to perform a lease covenant, a reciprocal covenant is implied requiring the landlord to pay the tenant's attorneys' fees incurred as a result of, inter alia, the tenant's successful defense of an action or summary proceeding commenced by the landlord arising out of the lease (see Graham Ct. Owner's Corp. v. Taylor, 115 A.D.3d 50, 55, ... [1st Dept.2014] ). To support

an award of attorneys' fees, the tenant must be the prevailing party, that is, the result must be substantially favorable to the tenant (see Walentas v. Johnes, 257 A.D.2d 352, 354, ... [1st Dept.1999], lv. dismissed 93 N.Y.2d 958, ... [1999] ).

Here, the terms of the parties' lease plainly triggers the reciprocal covenant mandated by Real Property Law § 234, and the tenant is entitled to recover the attorneys' fees incurred in his successful defense of the holdover proceeding. Contrary to the landlord's assertion, the tenant was the prevailing party regardless of whether the holdover proceeding was formally dismissed, since a tenant is entitled to recover fees "when the ultimate outcome is in his favor, whether or not such outcome is on the merits" [citation omitted].

251 CPW v Pastreich, 124 AD3d 401, 403-404 (1<sup>st</sup> Dept 2015).

The court shall grant the motion to dismiss in its entirety, and defendants are entitled to recover their attorneys fees incurred in this action.

It is therefore

ORDERED that the motion of defendants to dismiss the complaint is GRANTED and the complaint is DISMISSED in its entirety and defendants' request for attorney's fees under Real Property Law §234 is granted; and it is further


ORDERED that the portion of defendants' motion that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees defendants may recover against plaintiff is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry and proof of service thereof, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This is the decision and order of the court.

**Dated:** July 14, 2016

ENTER:

  
**DEBRA A. JAMES** J.S.C.