

Astra Pac. Outdoor, LLC v Jergil Mfg. Corp.
2017 NY Slip Op 30497(U)
March 15, 2017
Supreme Court, New York County
Docket Number: 655599/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND
J.S.C Justice

PART 35

Astra Pacific

-v-

Jergil Mfg. Corp.

INDEX NO. 655599/16

MOTION DATE 3/9/17

MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

In this action for breach of a certain lease, defendants Jergil Mfg. Corp. (the "Former Landlord"), 516 Eighth Avenue Borrower LLC (the "Current Landlord") and Walter & Samuels Inc. ("WS") (collectively, "defendants") move to dismiss the complaint of the plaintiff Astra Pacific Outdoor, LLC ("plaintiff") pursuant to CPLR 3211(a)(4) and (7), or in the alternative, for a stay of this action pending resolution on the merits of plaintiff's affirmative defenses in an underlying holdover proceeding.

Factual Background

On October 28, 2008, the Former Landlord entered into a 15-year lease agreement (the "Sign Lease") with plaintiff, pursuant to which plaintiff leased the west facing facade of the building located at 516 Eighth Avenue, New York, New York (the "Wall") in order to erect and operate an outdoor advertising sign. The Sign Lease provides that plaintiff will not assign its rights therein "without Landlord's prior written approval, which shall not be unreasonably withheld." (¶ 15.)

In 2015, plaintiff entered into a letter of intent to sell substantially all of its assets to AllOver Media LLC ("AllOver Media"), including plaintiff's interest in the Sign Lease, and the related asset purchase agreement required plaintiff to assign the Sign Lease by a date certain. (Complaint ¶¶10-11). In March 2016, prior to closing, plaintiff sought approval from the Former

1 The Factual Background is taken from the moving papers and the complaint.

Dated: , J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

Landlord of the proposed assignment, which was withheld, allegedly because the Current Landlord, who was in contract to purchase the building, would not allow the Former Landlord to consent to the assignment (Id. ¶¶ 17, 20).

Thereafter, the Current Landlord became the owner of the building, and issued a Five-Day Notice of Default to plaintiff, alleging various defaults under the Sign Lease, such as failing to obtain proper permits for signage. This was followed by a three-day termination notice. Thereafter, in May 2016, the Current Landlord commenced a holdover action in the Housing Part of the New York City Civil Court against plaintiff for rent arrears and to recover possession of the Wall.² In response, the plaintiff alleged six affirmative defenses, of which only two remain upon the Current Landlord's motion to dismiss: the fifth affirmative defense of unclean hands and sixth affirmative defense alleging that the Current and Former Landlord breached the Sign Lease by unreasonably withholding consent of the assignment. WS, as agents for the Current Landlord also advised plaintiff that the Current Landlord might allow the Former Landlord to consent to the assignment if plaintiff agreed to an early termination of the Sign Lease.

While the holdover action was pending, plaintiff commenced this action against both Landlords for breach of contract and tortious interference with contract against the Current Landlord and its agent WS based on the Former and Current Landlord's refusal to consent to plaintiff's proposed assignment of its Sign Lease. Plaintiff alleges that as a result of defendants' refusal to consent to the assignment, AllOver Media is withholding \$650,000 of the sales proceeds from plaintiff until it receives the assignment. (Id. ¶ 15.) Thus, plaintiff seeks \$650,000, plus interest and attorney's fees against defendants.

In support of their motion, defendants argue that dismissal under CPLR 3211(a)(4) is warranted because there is already a pending action in the Housing Part of the New York City Civil Court between the same parties and concerning common questions of law and fact. Also, until the Housing Court action is resolved, this action is premature as plaintiff cannot show that it suffered any damages as a result of defendants' alleged misconduct. In the alternative, this action should be stayed as there are common issues of law and fact, and to avoid a waste of judicial resources and create the risk of inconsistent determinations. Further, plaintiff fails to state a claim against WS because it was at all times an agent for a disclosed principal and there are no allegations of any independent basis of wrongdoing. A trial in the holdover action is scheduled for March 27, 2017.

In opposition, plaintiff argues that it is barred from seeking monetary relief or asserting counterclaims in the holdover action. Also, in the holdover action, the Current Landlord acknowledged that plaintiff did not assign its rights without Current Landlord's consent, and as such, plaintiff is withdrawing its affirmative defense of breach of the Sign Lease. And, since the Former Landlord and WS are not parties in the holdover action, and have nothing to do with the Former Landlord's breach of the Sign Lease when it was the landlord, the holdover action cannot afford the plaintiff any relief as to Former Landlord and WS's misconduct. Plaintiff's affirmative defense in the holdover action (which is pending withdrawal) does not concern most

² The Current Landlord alleges that plaintiff breached the parties' lease in failing to remove an exterior sign on the façade of the building prior to May 2, 2016, pursuant to a Three-Day Notice of Termination and Five-Day Notice of Default.

of the claims herein and could not afford plaintiff monetary relief. Also, WS is liable for its active and affirmative conduct in advising the Former Landlord to refuse to consent to the assignment.

In reply, defendants argue plaintiff's primary defense in the holdover action is the same claim it asserts in the complaint here, and there is no agreement between the parties to allow plaintiff to withdraw its sixth affirmative defense. Plaintiff fails to address, and thereby concedes, that it only might suffer damages in the future if it cannot satisfy its obligations under the asset agreement, and thus, plaintiff has no damages. There need not be complete identity of the parties in order for the Court to grant dismissal pursuant to CPLR 3211(a)(4) as substantial identity is sufficient. The Housing Court is the preferred forum for landlord tenant disputes.

Discussion

CPLR 3211(a)(4) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires” (*Walsh v. Goldman Sachs*, 185 A.D.2d 748, 586 N.Y.S.2d 608 [1st Dept 1992]).

“Although it is within a court's discretion whether or not to grant dismissal on this basis (*Whitney v. Whitney*, 57 N.Y.2d 731, 454 N.Y.S.2d 977, 440 N.E.2d 1324), relief is still dependent on there being an identity of parties and of the cause(s) of action for which dismissal is being requested” (*Morgulas v. J. Yudell Realty, Inc.*, 161 A.D.2d 211, 554 N.Y.S.2d 597 [1st Dept 1990]).

The identity of the parties are not substantially similar to invoke CPLR 3211(a)(4) Defendants' reliance on *Corino v. 448-450 West 19 Realty LLC* (2015 NY Slip Op 32241(U), 2015 N.Y. Misc. LEXIS 4307, *8 n.3 [Sup. Ct., New York County 2015]) is misplaced. In *Corino*, the Court held that the Housing Court's determination as to whether the subject apartment and the building “are or are not rent stabilized,” “would essentially have the same effect as the declaration sought by plaintiff” in the second action brought in Supreme Court. Therefore, “the relief sought in the second action is thus available in the first action” (*8). Here, the defense of another action pending pursuant to CPLR 3211(a)(4) will not succeed where the relief sought in the second action is not available in the first action (*Corino citing Walsh v Goldman Sachs & Co., supra.*)

Also, in *Corino*, the party in the Supreme Court action was found united in interest with its principal in the Housing Court action and thus, was of substantially similar identity for purposes of invoking CPLR 3211(a)(4). However here, the Former Landlord in this Supreme Court action is not an agent of the Current Landlord in the Housing Court action.

The Court also notes defendants failed to sufficiently establish an identity of issues in both actions. In the holdover action, the Current Landlord sought a judgment for “rental arrears,” to which plaintiff's alleges, as an affirmative defense, that the Current Landlord unreasonably withheld consent to the assignment. Plaintiff's alleged rental arrears may, arguably, entitle the Current Landlord to withhold consent (*see e.g. NNA Restaurant Management LLC v. Eshaghian*, 29 A.D.3d 384, 815 N.Y.S.2d 499 [1st Dept 2006] *citing Sayed v. Rapp*, 10 A.D.3d 717, 782 N.Y.S.2d 278 [2d Dept 2004] (finding that it was not unreasonable for the landlord to withhold its consent to the proposed assignment “on the ground that the tenant failed to pay the amounts

due for rent and additional rent”). However, there is no indication that the rent allegedly due and owing to the Current Landlord has any bearing on plaintiff’s instant claim against the Former Landlord herein.

And, that both proceedings involve a claim that defendants improperly withholding consent to the Assignment does not render the actions or parties substantially similar for purposes of CPLR 3211(a)(4). Defendants failed to establish that the Housing Court has authority to determine, in an action in which neither the Former Landlord nor WS are parties, whether *all* defendants herein acted reasonably in withholding their consent to the assignment.

Defendants’ remaining arguments lack sufficient merit to warrant dismissal.

And, defendants failed to demonstrate a sufficient basis to stay this action.

Thus, the Housing Court determination will not afford plaintiff full and complete relief of all of its claims herein.

As such, dismissal pursuant to CPLR 3211(a)(4) unwarranted.³

As against WS, in determining a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the Court’s role is deciding “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs “the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, *supra*; *Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not” presumed to be true or accorded every favorable inference (*David v. Hack*, 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]; *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 [2000]; *Kliebert v. McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 [1st Dept], *lv denied* 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 [1996]).

“An agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his or her personal liability for, or to, that of the principal” (*Performance Comercial Importadora E Exportadora Ltda v. Sewa Intern. Fashions Pvt. Ltd.*, 79 A.D.3d 673, 915 N.Y.S.2d 44 [1st Dept 2010] *citing Savoy Record Co. v. Cardinal Export Corp.*, 15 N.Y.2d 1, 4, 254 N.Y.S.2d 521, 203 N.E.2d 206 [1964]).

Here, plaintiff alleges:

Subsequently, Plaintiff . . . was further advised by Walter & Samuels,

³ Defendants’ additional claim that plaintiff’s action is premature in that it has not suffered damages is insufficient to warrant dismissal. Although it is alleged that AllOver Media is withholding \$650,000 of the sales proceeds in escrow until plaintiff is able to obtain the assignment of the Sign Lease, it is uncontested that the asset agreement is dated March 9, 2016, from which plaintiff had 12 months to obtain the assignment, the Sign Lease has not been assigned, and the allegation that plaintiff suffered such amount in losses must be accepted as true.

agents for [Current Landlord] 516 Eighth LLC, that 516 Eighth LLC might allow defendant Jergil to consent to the Assignment if plaintiff APO agree to an early termination of its rights and interest as Tenant in the Sign Agreement.

Defendants 516 Eighth LLCs and Walter & Samuels' baseless demand and pre-condition of early divestment by APO of its rights and interests as Tenant in the Sign Agreement was unreasonable, unlawful and unconscionable.

Defendants 516 Eighth LLC and Walter & Samuels tortiously interfered with plaintiff APO's rights under the Sign Agreement, and but for such interference, plaintiff APO's request to defendant Jergil for approval for the Assignment would have been approved under the Sign Agreement. (Complaint, ¶¶ 21-23.)

Such allegations, which acknowledge that WS acted in its capacity as agent for the Current Landlord with plaintiff's knowledge, fail to state a claim against WS for tortious interference with contract.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants motion to dismiss the complaint of the plaintiff pursuant to CPLR 3211(a)(4), or in the alternative, for a stay of this action pending resolution on the merits of plaintiff's affirmative defenses in an underlying holdover proceeding, is denied; and it is further

ORDERED that the branch of defendants motion to dismiss the complaint of the plaintiff pursuant to CPLR 3211(a)(7) as asserted against Walter & Samuels Inc. is granted, and the action against Walter & Samuels Inc. is severed and dismissed; and it is further

ORDERED that the Clerk may enter judgment as to Walter & Samuels Inc. accordingly; and it is further

ORDERED that the remaining parties shall appear in Part 35 on Mary 30, 2017, 2:15 p.m.; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

DATED:

3/15/2017

[Handwritten Signature]

HON. CAROL R. EDMOND J.S.C.

J.S.C.

- 1. CHECK ONE :
- 2. CHECK AS APPROPRIATE :
- 3. CHECK IF APPROPRIATE :

DO NOT POST

CASE DISPOSED

MOTION IS: GRANTED DENIED

SETTLE ORDER

FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

REFERENCE