

**Grocery Leasing Corp. v P&C Merrick Realty Co.,
LLC**

2017 NY Slip Op 33336(U)

December 22, 2017

Supreme Court, Queens County

Docket Number: 707253/2017

Judge: Marguerite A. Grays

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

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GROCERY LEASING CORP., Number 707253/ 2017

Plaintiff(s) Motion
Date August 15, 2017

-against-

Motion Cal. No. 10

P&C MERRICK REALTY CO., LLC.
104-16, LLC and
GOLDEN PROGRESS, INC.

Motion Seq. No. 1

Defendant(s)

_____ x
The following papers numbered 1-9 read on this motion by defendant P&C Merrick Co., LLC (P&C Merrick) pursuant to CPLR §3212 and General Obligations Law § 5-70, to dismiss the complaint insofar as asserted against it, to cancel the notice of pendency, and for an award of attorneys' fees.

FILED
JAN 11 2018
COUNTY CLERK
QUEENS COUNTY

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-8
Reply Affidavits	9

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

Anber Meat & Produce, Inc. (Anber), as tenant, entered into a lease agreement dated September 3, 2003, with defendant P&C Merrick, as owner/lessor, for the premises known as 108-30 Merrick Boulevard a/k/a 108-00 169th Place, Jamaica, New York Pursuant to Article 53¹

¹Article 53 of the lease agreement provides:

Lessee's Right of First Refusal to Purchase Demised Premises: If at any time during the term of this lease agreement lessor shall receive from any third party a bona fide offer to purchase the demised premises at a price and on terms acceptable to lessor, lessor shall give written notice of the price and terms to lessee, and lessee shall have fifteen (15) days thereafter in which to execute a written agreement with

of the lease agreement, Anber was granted a right of first refusal to purchase the demised premises in the event that defendant P&C Merrick offered it for sale.

Plaintiff commenced this action against defendant P&C Merrick for breach of the lease agreement and specific performance of the right of first refusal, and against defendants Golden Progress, Inc. (Golden Progress) and 104-16, LLC for tortious interference with the lease. Plaintiff also seeks monetary, declaratory and injunctive relief. Plaintiff alleges that it is the assignee of Anber's rights as the tenant under the lease agreement pursuant to instruments dated October 13, 2014, and March 24, 2015. Plaintiff also alleges that defendant P&C Merrick advised it, by written notice dated November 21, 2016, of the terms of a prospective sale of the demised premises to defendant Golden Progress, Inc. (Golden Progress), including the purchase price of \$1.9 million, to be paid by a "10% down" payment and the balance to be paid "after thirty days after due diligence," in "all cash," with "no mortgage contingency [clause]." Plaintiff further alleges that defendant P&C Merrick extended it an opportunity to exercise its right of first refusal to purchase the property within 15 days of the notice. In response, plaintiff allegedly requested a copy of the contract of sale. On December 5, 2016, defendant P&C Merrick allegedly provided plaintiff with a copy of an executed contract of sale dated December 2, 2016, naming it as seller, and defendant 104-16, LLC, rather than defendant Golden Progress, as purchaser. The contract provides for a purchase price of \$1.9 million, and sets the closing date as "on or about January 31, 2017." Plaintiff alleges that on or about March 21, 2017, it learned that defendant P&C Merrick had agreed to provide defendant 104-16, LLC with a "closing adjustment," whereby the stated purchase price of \$1,900,000.00 would be reduced to \$1,850,000.00. Plaintiff also alleges that defendant P&C Merrick has failed to extend it an opportunity to exercise its right of first refusal to purchase the property for the purchase price of \$1,850,000.00, and therefore is in breach of the lease. Plaintiff claims that defendants 104-16, LLC and Golden Progress have intentionally interfered with its rights under the lease, and procured defendant P&C Merrick's breach of the Article 53 of the lease.

Defendant P&C Merrick moves to dismiss the complaint insofar as asserted against it. In support of its motion, defendant P&C Merrick offers its counsel's affirmation, a copy of the complaint, an answer by defendants 104-16, LLC and Golden Progress, the contract of sale

lessor for the purchase of the demised premises at that price and on those terms. If lessor shall so notify lessee and lessee shall fail to execute such agreement within the fifteen-day period, lessor shall thereafter be free to sell the property to the third party making the offer on the same terms and conditions set forth in the offer. If the property is not sold to the party making the offer, then lessor shall give lessee the same right to purchase the property on receiving any subsequent offer from any third party that is acceptable to lessor.

' between P&C Merrick and 104-16, LLC , the November 21, 2016 notice, various emails, the lease agreement, the collateral assignment of lease and conditional assumption agreement, a mortgage dated April 19, 2016, given by defendant P&C Merrick and 88-20 88th Street, LLC to Merrick Funding Assocs., a UCC financing statement, an unexecuted lessee's estoppel certificate, and an affidavit of Pedro Pichardo, its managing member, and the affirmation of Gene T. Anton, Esq., the counsel representing defendant P&C Merrick in relation to the sale of the property.

Defendants 104-16, LLC and Golden Progress appear in support of the motion, asserting that the action should be dismissed. Plaintiff opposes the motion. To the extent plaintiff objects to the late submission of the papers submitted by defendants 104-16, LLC and Golden Progress in relation to this motion, the Court, in an exercise of discretion, accepts and considers such papers. There has been no showing of any prejudice by the late submission (*see* CPLR §2214[b]; 2215; *Dinnocenzo v Jordache Enters., Inc.*, 213 AD2d 219 [1995]).

To the extent defendants 104-16, LLC and Golden Progress assert that the complaint should be dismissed insofar as asserted against them, they have failed to cross-move for such relief by a proper notice of cross-motion and supporting papers (*see* CPLR §2215; *J.A. Valenti Elec. Co. v Power Line Constructors*, 123 AD2d 604 [1986]; *Matter of Briger's Estate*, 95 AD2d 887 [1983]). The Court declines to exercise its discretion to entertain their request for affirmative relief in the absence of compliance with CPLR §2215 (*see generally Fried v Jacob Holding, Inc.*, 110 AD3d 56 [2013]).

Defendant P&C Merrick, in its notice of motion, cites CPLR §3212 and the General Obligations Law § 5-701(the statute of frauds), as the statutory bases upon which it moves to dismiss the complaint. A movant may seek summary judgment dismissing the complaint based upon the statute of frauds (*see e.g. Zito v County of Suffolk*, 106 AD3d 814[2013]), but CPLR §3212 requires that issue be joined prior to a party's making a motion for summary judgment (CPLR §3212[a]; *see City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). Defendant P&C Merrick, however, has failed to demonstrate issue has been joined with respect to it, and in any event denominates its motion, as one for dismissal of the complaint, insofar as asserted against it, "in lieu of answer." Thus, to the extent defendant P&C Merrick moves to dismiss the complaint pursuant to CPLR §3212, that branch of the motion is denied as premature (*see City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]).

To the extent defendant P&C Merrick requests in its reply papers, that the court treat its motion as one for summary judgment dismissing the complaint insofar as asserted against it pursuant to CPLR §3211(c), the Court declines to do so.

Although defendant P&C Merrick has not formally and specifically requested relief pursuant to CPLR §3211(a), defendants 104-16, LLC and Golden Progress have not been

prejudiced thereby, because they have been adequately apprised of the relief sought by defendant P&C Merrick, i.e. dismissal of the complaint, and the grounds for it. In the motion papers, defendant P&C Merrick contends that it is not in breach of the lease. Defendant P&C Merrick asserts it extended plaintiff, as the assignee of Anber Meat's rights under the lease, an opportunity to exercise the right of first refusal to purchase the property for the purchase price of \$1,900,000.00, prior to its entering into the contract of sale with defendant 104-16, LLC, and that plaintiff's counsel acknowledged in writing plaintiff's declination to exercise such right. Defendant P&C Merrick also asserts that the contract of sale requires any amendment thereto must be in writing, and it has not agreed in writing to accept a \$50,000.00 reduction in the sales price, and therefore, no triggering event has occurred which activates plaintiff's right of first refusal. Defendant P&C Merrick further asserts that any oral amendment to the contract of sale is violative of the statute of frauds. These assertions, when taken together, amount to a claim by defendant P&C Merrick that the complaint fails to state a cause of action against it, and defenses exist based upon documentary evidence, and the statute of frauds (*see* CPLR §3211[a][1], [5] and [7]).

To the extent defendant P&C Merrick asserts that the complaint should be dismissed against it pursuant to General Obligations Law § 5-701, such section does not apply to "contracts concerning real property" covered by GOL § 5-703 (*see Naldi v Grunberg*, 80 AD3d 1, 7 [2010]). Section 5-703(2) of the GOL provides that a contract 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. Defendant P&C Merrick has failed to move to dismiss the complaint insofar as asserted against it pursuant to General Obligations Law § 5-703(2) (CPLR §3211[a][5]). More importantly, an oral agreement which falls within the statute of frauds is not absolutely invalid, but rather only is voidable, subject to being declared void if and when the statute is interposed as a defense at the proper time and in the proper way by the party sought to be charged (*see Eurofactors Intern., Inc. v Jacobowitz*, 21 AD3d 443, 445 [2005]; *see also Felicie, Inc. v Leibovitz*, 67 AD2d 656 [1979]). Any alleged violation of the statute of frauds regarding the contract of sale would be personal to the parties to such contract and would have no bearing on plaintiff's claims of breach of the lease and specific performance of the lease. Defendant P&C Merrick's claim that an oral amendment to the contract of sale is barred by the statute of frauds does not constitute a defense to plaintiff's claims herein.

To the extent defendant P&C Merrick claims that it has a defense founded upon documentary evidence, a party seeking dismissal on that ground (CPLR §3211[a][1]) has the burden of submitting documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim' " (*Sullivan v State of New York*, 34 AD3d 443, 445 [2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2000]; *see Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, if the evidence submitted in support of the motion is not "documentary," the motion must be denied (CPLR §3211[a][1]; *see Prott v Lewin & Baglio*,

* *LLP*, 150 AD3d 908 [2017]). In this instance, defendant P&C Merrick relies upon Anton's affirmation and Pichardo's affidavit, and the email sent on April 24, 2017 by plaintiff's attorney to Gene T. Anton, Esq., the attorney representing defendant P&C Merrick in relation to the sale, and Stephen Feder, Esq, the attorney representing defendant Golden Progress, to show that defendant P&C Merrick afforded plaintiff the right of first refusal under the lease in connection with the proposed sale of the property from P&C Merrick to 104-16, LLC for the purchase price of \$1.9 million, and plaintiff did not elect to exercise such right. Such evidence does not constitute documentary evidence for purposes of supporting this motion to dismiss the complaint pursuant to CPLR §3211(a)(1). To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2010]). It has been held that letters, emails and affidavits do not meet the requirements for documentary evidence (*see Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2017]; *Attias v Costiera*, 120 AD3d 1281, 1283 [2014]; *Matter of Walker*, 117 AD3d 838, 839 [2014]).

With respect to the assertion that the complaint fails to state a cause of action against defendant P&C Merrick for specific performance, plaintiff has failed to allege that it is ready, willing and able to purchase the property on the terms allegedly offered to defendants Golden Progress and 104-16, LLC, including the stated purchase price of \$1.9 million, with or without a \$50,000.00 "closing adjustment" (*see New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 115 AD3d 829 [2014]; *Wei Hong Hu v Sadiqi*, 83 AD3d 820 [2011]; *Analisa Salon, Ltd. v Elide Properties, LLC*, 46 AD3d 721 [2007]). In addition, although plaintiff alleges in its complaint that "in the last two weeks of May 2017, the landlord confirmed ... that the landlord and 104-16, LLC agreed to reduce the [s]tated [p]urchase [p]rice by \$50,000," it has not alleged that it properly exercised its right of first refusal by giving notice of acceptance of such term and tendering the required deposit (*see 397 West 12th Street Corp. v Zupa*, 34 AD3d 236 [2006]; *see also Yudell Trust I v API Westchester Assocs.*, 227 AD2d 471 [1996]).

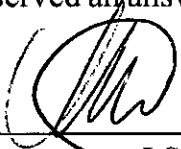
The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (*see El-Nahal v FA Management, Inc.*, 126 AD3d 667, 668 [2015]; *Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc.*, 84 AD3d 122, 127 [2011]). Plaintiff has failed to allege that there are resulting damages from defendant P&C Merrick's alleged failure to provide it with written notice of the offer with the reduced purchase price. Rather, plaintiff alleges in the first cause of action for breach of contract and specific performance that "the landlord breached the lease" and "actively tried to conceal the fact the purchase price was reduced by \$50,000," and it "is entitled to a money judgment in the amount to be determined at trial." These vague and conclusory allegations of damages resulting from the alleged breach of the right of first refusal are insufficient to state a cause of action for breach of contract (*see e.g. Gawrych v Astoria Federal Savings and Loan*, 148 AD3d 681 [2017]; *Smith v Chase Manhattan Bank, USA*, 293 AD2d 598 [2002]), particularly

since plaintiff also alleges that the closing of the sale of the property to either defendant Golden Progress or 104-16, LLC has not occurred.

To the extent the second cause of action for tortious interference of contract is asserted against defendant P&C Merrick, it fails to state a claim. A party to a contract cannot be held liable in tort for allegedly breaching its own contract (see *Mihalakis v Cabrini Medical Center [CMC]*, 151 AD2d 345 [1989]; *Manley v Pandick Press*, 72 AD2d 452, 454 [1980]).

Accordingly, that branch of the motion by defendant P&C Merrick to dismiss the complaint insofar as asserted against it for failure to state a cause of action is granted (CPLR §3211[a][7]). That branch of the motion by defendant P&C Merrick to cancel the notice of pendency is granted. That branch of the motion by defendant P&C Merrick for an award of attorneys' fees pursuant to the lease is denied. Defendant P&C Merrick has not served an answer interposing a counterclaim seeking an award of attorneys' fees.

Dated: **DEC 22 2017**



I.S.C.

FILED
JAN 11 2018
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