

D'Jesus Rest. Corp. v 1133 Boston Rd. LLC
2018 NY Slip Op 30973(U)
May 23, 2018
Civil Court of the City of New York, Bronx County
Docket Number: TS 300003-18/BX
Judge: Sabrina B. Kraus
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 242

D'JESUS RESTAURANT CORP.,

X

Plaintiff,

HON. SABRINA B. KRAUS

-against-

DECISION AFTER TRIAL
Index No.: TS 300003-18/BX

1133 BOSTON ROAD LLC and

Defendant,

X

BACKGROUND

This action was commenced by **D'JESUS RESTAURANT CORP** (Plaintiff) against **1133 BOSTON ROAD LLC** (Defendant) seeking damages based on tortious interference with contract, fraud and misrepresentation, and assault. The claims arise out of a commercial landlord tenant relationship between the parties.

PROCEDURAL HISTORY

The summons and complaint were filed on June 3, 2013. The action was commenced in Supreme Court, Bronx County under Index Number 21990/2013E.

Plaintiff filed an amended complaint naming 1133 Boston Associates LLC (LLC) and Rental Management Associates (RMA) as additional defendants on August 8, 2013.

Proof of service as to RMA was filed on August 28, 2013. On September 16, 2013, Plaintiff filed a notice of discontinuance as to RMA.

Proof of service as to LLC was filed on September 6, 2013, and as to Defendant proof of service was filed September 18, 2013.

Defendant appeared by counsel, on or about December 19, 2013, and filed an answer on April 29, 2014, asserting failure to state a cause of action, and asserting a counterclaim for legal fees and sanctions.

The preliminary conference order is dated May 28, 2014, and a compliance order is dated December 7, 2015.

A note of issue and jury demand were filed on February 10, 2017.

On March 14, 2017, Defendant moved for an order vacating the note of issue, and related relief based on alleged outstanding discovery. The motion was withdrawn by Defendant on June 9, 2017.

On January 11, 2018, Supreme Court (Gonzalez, J) issued an order transferring the action to Civil Court, pursuant to CPLR § 325(d). The action initially appeared on the Part 21 calendar on March 13, 2018, and was adjourned by the parties to May 23, 2018 for trial. On May 23, 2018, the parties agreed to waive trial by jury and the action was assigned to this Court for trial, which commenced and concluded on that same date. Plaintiff presented two witnesses and Defendant presented one witness.

At the conclusion of the trial the court reserved decision.

FINDINGS OF FACT

At the commencement of the trial, both parties confirmed on the record that a trial by jury was waived and that the action was discontinued as to all parties except Defendant.

Defendant is the landlord and owner of the “third Store on the left” at 1133 Boston Road, Bronx, New York 10459 (Subject Premises). Defendant had leased the Subject Premises to

Maria F. Mena pursuant to a lease dated October 1, 2007, which ran for an initial term through and including September 30, 2012 (Exhibit A).

On or about August 11, 2011, Plaintiff and Defendant and Victor Manuel Lopez Mena executed a document labeled Assignment and Assumption of Lease (Exhibit B). Victor was the son of Maria Mena, the tenant of record, and presumably recognized by the parties as having authority to execute the documents on her behalf. The document provided for an extension of the lease between Defendant and Mena through September 30, 2016, and for assignment of said lease from Mena to Plaintiff.

Plaintiff and Mena also executed a Agreement for the Sale of Business dated August 20, 2011, providing for sale of the business for \$30,000.00, which was to be paid upon execution of the document.

Plaintiff took occupancy of the Subject Premises. Maria Rosario (MR) executed the documents on behalf of Plaintiff. MR had no prior experience as a business owner or in the restaurant business and worked a day job even after purchase of the restaurant. MR's mother worked in the restaurant with a chef and one other employee. MR would go to the restaurant after her day job.

MR had trouble making timely payments on rent and additional rent that came due under the lease, and decided shortly after her tenancy commenced that she wished to sell the business. MR asked David Sedgh (DS) the owner, if he would consent to a sale and he stated he would cooperate as long as the arrears were paid.

On or about August 26, 2012, MR signed an agreement for the sale of the restaurant with Bernardo Aquino-Sala (Bernardo). The agreement (Exhibit 2) provided for a down payment of

\$5000, which was to be held in escrow until the closing, which was scheduled to take place on October 15, 2012, at which time the balance of the purchase price of \$25,000 would be due and payable by cash or certified check.

Upon execution of the agreement, rather than holding the \$5000 in escrow as provided in her agreement with Bernardo, MR took the money and paid it to Defendant to be applied towards her arrears. Again, MR and DS discussed the sale of the business by MR, which DS stated he would consent to upon payment of arrears and which he noted would require execution of a formal assignment and assumption of lease.

Prior to any closing pursuant to her agreement with Bernardo, MR put Bernardo in occupancy and he began to operate his business there. MR did so without having any written consent from Defendant or any executed assignment and assumption of lease. DS discovered this when he was passing by the Subject Premises and observed Bernardo in occupancy. DS went into the Subject Premises and spoke with one of Bernardo's employees to let them know that Bernardo had no right to be there without an executed assignment and assumption of lease and that arrears had to be addressed before DS would sign such a document.

Bernardo subsequently backed out of his agreement to purchase the restaurant from MR and vacated the Subject Premises returning the keys to MR. While MR took back possession from Bernardo she never attempted to resume running a business in the Subject Premises. MR sold some of the fixtures from the Subject Premises.

In October 2012, Defendant commenced a summary nonpayment proceeding against Defendant under Index Number 901707-2012. Both parties were represented by counsel and

entered into a stipulation on March 3, 2013 (Ex F) pursuant to which, Plaintiff surrendered possession of the Subject Premises and the proceeding was discontinued without prejudice.

During closing arguments, Plaintiff withdrew the third cause of action for assault and battery.

DISCUSSION

“In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury [*Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996)].”

Plaintiff failed to make out a *prima facie* case of fraud. The only misrepresentation alleged by Plaintiff was that MR challenged the validity of some charges on the tenant ledger (Ex 1) showing arrears due. However, Plaintiff acknowledges that she was in arrears at the time she put Bernardo into possession, thus there was no misrepresentation regarding the fact that Plaintiff was in arrears, nor were the other elements of the cause of action established.

Based on the foregoing the cause of action for fraud and misrepresentation is dismissed.

Plaintiff's remaining cause of action is for tortious interference of contract.

“Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom (*Id* at 424).”

First of all Plaintiff presented no contract between plaintiff and a third party. The only contract presented was entered between MR and Bernardo. Even were the court to assume that the contract was entered by MR on behalf of Plaintiff, Plaintiff still failed to establish a cause of action on this claim.

Defendant did not act to intentionally procure Bernardo's breach of contract. Rather Plaintiff had wrongfully put Bernardo into possession, without Defendant's knowledge and prior to obtaining Defendant's written consent as required by paragraph 25 of the rider to the lease. Plaintiff failed to offer any evidence as to why Bernardo breached his contract. Plaintiff admitted she had also breached the contract with Bernardo, by using the down payment to pay arrears instead of holding it in escrow as required. Plaintiff failed to call Bernardo as a witness at trial. Plaintiff argued in closing that court could surmise that Bernardo pulled out of the purchase after his employees were advised that Plaintiff was in arrears and an assignment and assumption of lease would not be signed off on by Defendant until the arrears were paid. Even if this were the reason, and there is no evidence of this on the record, it would not constitute tortious interference, because DS was justified in informing Bernardo's employees that they had no right to possession before an assignment was executed and that DS would not execute an assignment until the arrears were paid.

Based on the foregoing, the first cause of action for tortious interference with contract is also dismissed.

Defendant offered no evidence on its counterclaim for attorneys' fees and sanctions. Based on the foregoing, the counterclaim is also dismissed.

This constitutes the decision and order of the Court.

Dated: Bronx, New York
May 23, 2018

Sabrina B. Kraus, JCC

TO: GEORGE D. PETERS, ESQ
Attorney for Plaintiff
2510 Valentine Avenue - 3rd Floor
Bronx, New York 10458
347.751.0157

ZISHOLTZ & ZISHOLTZ, LLP
Attorney for Defendant
By: STUART ZISHOLTZ, ESQ
170 Old Country Road, Suite 300
Mineola, New York 11501
516.741.2200