

Michael Alan Group, Inc. v Rawspace Group, Inc.

2019 NY Slip Op 30055(U)

January 3, 2019

Supreme Court, New York County

Docket Number: 656060/2017

Judge: Barbara Jaffe

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

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

THE MICHAEL ALAN GROUP, INC.

Plaintiff,

- v -

INDEX NO. 656060/2017

MOTION DATE _____

MOTION SEQ. NO. 004

RAWSPACE GROUP, INC.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 17, 18, 19, 20, 21, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 47

were read on this motion to/for dismiss/cross-motion for summary judgment .

Defendant moves pursuant to CPLR 3211(a)(7) for an order dismissing the claim of negligence asserted against it. Plaintiff opposes and cross-moves pursuant to CPLR 3212 for an order granting it summary judgment.

I. COMPLAINT (NYSCEF 19)

On June 5, 2017, plaintiff entered into a contract with defendant for the use of premises located at 63 Greene St. from June 26 through July 23, 2017. (NYSCEF 42). Plaintiff intended to use the space for an event scheduled to be held from July 11 to July 17, 2017. Defendant acted solely as liaison between plaintiff and the owner of the premises.

Upon the execution of the contract, plaintiff received what was allegedly the only key to the premises. On July 5, 2017, upon taking possession of the premises, plaintiff discovered that a construction crew was demolishing the premises, rendering it unusable. Plaintiff complained to

defendant, who replied that a partial reconstruction of the premises would take four days.

Plaintiff assisted with the reconstruction at defendant's request.

The reconstruction produced a space substantially different from its condition at the time of the execution of the contract and plaintiff incurred significant expenses, including resizing vinyl wall coverings, building new door frames, and hiring an outside electrician. In addition, during construction, a video camera that plaintiff had installed in the space was broken by a construction worker. Due to the construction, plaintiff was forced to relocate its training for the event. Moreover, soon before the event, the air-conditioning unit broke, the bathroom leaked, and a "huge bubble" formed from a drip in the ceiling.

During the event, part of the ceiling collapsed, and the ceiling continued to bubble, which defendant unsuccessfully attempted to stop, without professional help, by installing mesh wire zip-tied together. Defendant refused plaintiff's request that it hire a professional to fix it. Defendant assured plaintiff that it would reimburse it for all of the additional expenses incurred, but after the event, refused to do so and failed to return the \$10,000 security deposit.

On September 26, 2017, plaintiff initiated this action advancing causes of action for breach of contract and negligence, and seeking a return of the security deposit and \$26,499.40 in damages.

II. CONTENTIONS

A. Defendant (NYSCEF 17-21)

Defendant asserts that plaintiff's cause of action for negligence must be dismissed given its failure to allege that defendant owed it a duty separate and apart from that set forth in the contract and, as plaintiff's damages are only economic, that its recovery is limited to contractual damages.

B. Plaintiff (NYSCEF 34-38)

Plaintiff contends that it sufficiently alleges that defendant owed it a duty outside of the contract, as evidenced by defendant's noncontractual conduct in permitting a construction crew to demolish the premises and creating dangerous conditions which caused the ceiling to collapse. In addition, plaintiff denies that having suffered only economic damage, there is no remedy for defendant's negligence dehors the contract.

In cross moving for summary judgment, plaintiff references the affidavit of defendant's chief executive officer (CEO) that defendant had submitted in support of its earlier motion to vacate the default judgment (NYSCEF 43), which, plaintiff contends, contains no dispute that defendant breached the contract, claiming rather that the expenses incurred by plaintiff are offset by plaintiff's damage to the premises. Plaintiff also offers the affidavit of its president and CEO who states that the condition of the premises had changed from the time the contract was signed to when plaintiff took possession. (NYSCEF 36). Attached to the exhibit is a photograph of the premises at the time of possession (NYSCEF 37), and bills and invoices representing the expenses allegedly incurred by plaintiff due to defendant's breach (NYSCEF 38).

C. Reply (NYSCEF 41-44)

Defendant reiterates its arguments pertaining to the negligence claim. In opposition to the cross-motion, it asserts that plaintiff does not establish its liability absent any representation in the contract as to the condition of the premises. Consequently, whether the condition shown in the photograph constitutes a breach is unknown. Moreover, even had plaintiff satisfied its burden, there exist questions of fact.

Defendant alleges that the affidavit of plaintiff's CEO is not probative absent any indication that he personally saw the condition of the premises before or after the execution of

the contract, and that plaintiff fails to establish damages because the receipts submitted are insufficiently probative. That “overages are due to construction problems in the venue,” it claims, does not prove that defendant is responsible for those expenses, and other expenses are not evidenced only by plaintiff’s own self-serving invoices to defendant such as that for “Administrative Travel,” an expense not attributable to defendant.

Thus, defendant argues that questions of fact regarding the propriety of the expenses and defendant’s liability preclude an award of summary judgment to plaintiff.

III. ANALYSIS

A. Defendant’s motion to dismiss

A pleading may be dismissed for a failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, “accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, “[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may be properly negated by affidavits and documentary evidence.” (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

As plaintiff’s claim for negligence is duplicative of its breach of contract claim and references no duty dehors the contract, it is not viable.

B. Plaintiff’s motion for summary judgment

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22

NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

Absent any concession by defendant that plaintiff is entitled to damages, and as the documentation on which plaintiff relies is not probative, plaintiff fails to meet its burden of showing an entitlement to a judgment as a matter of law. (*Jacobsen*, 22 NY3d at 833). Moreover, defendant sufficiently demonstrates that discovery may reveal facts and documents disproving that it may be held liable for plaintiff’s alleged damages. (*See Bailey v New York City Transit Auth.*, 270 AD2d 156, 157 [1st Dept 2000] [summary judgment may be denied if opposition shows essential facts may emerge upon further discovery]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion to dismiss the negligence claim is granted; it is further

ORDERED, that plaintiff’s cross-motion for summary judgment is denied; and it is further

ORDERED, that the parties appear for a preliminary conference on March 27, 2019 at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

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1/3/2019

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE