

Wah Win Group Corp. v 979 Second Ave. LLC
2019 NY Slip Op 30084(U)
January 10, 2019
Supreme Court, New York County
Docket Number: 155492/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 155492/2017

WAH WIN GROUP CORPORATION,
Plaintiff,

MOTION SEQ. NO. 001

- v -

979 SECOND AVENUE LLC and ELIAS TSINIAS,
Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to DISMISS

Upon the foregoing documents, it is ordered that the motion is **granted**.

Defendants 979 Second Avenue LLC (“979 LLC”) and Elias Tsinias (“Tsinias”) move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint of plaintiff Wah Win Group Corporation (“WWG Corporation”) in its entirety. After oral argument, and after a review of the parties’ papers and the relevant statutes and case law, it is ordered that the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

On March 1, 2011, plaintiff WWG Corporation entered into a lease with defendant 979 LLC for the storefront and a portion of the basement of a building located at 979 Second Avenue in Manhattan (“the premises”). (Doc. 16 at 4.) The term of the lease commenced on April 1, 2011, and is set to expire on March 31, 2021. (Doc. 17 at 2.) The lease was signed by defendant Tsinias in his capacity as the principal owner and manager of 979 LLC. (Docs. 16 at 4; 17 at 10.) Plaintiff

entered into the lease with the intention of opening and operating a Chinese restaurant at the premises. (Doc. 16 at 5.)

Plaintiff commenced the instant action against 979 LLC and Tsinias on June 16, 2017, by filing a summons with notice, which represented that the nature of the action included enforcement of the lease's terms and the recovery of lost profits. (*Id.* at 2–3.) Plaintiff thereafter filed a complaint against defendants on August 1, 2017. (*Id.* at 4–8.) The complaint avers that 979 LLC breached a lease provision that required it to give plaintiff the right of first refusal if 979 LLC received a bona fide offer from a third-party to purchase the building, and that 979 LLC received such an offer when it decided to put the building on the market in 2012. (*Id.* at 5–6.)

Four causes of action are set forth in the complaint. The first cause of action is for specific performance and demands that 979 LLC sell the building to plaintiff at its 2012 value. (*Id.*) The second cause of action seeks compensation for the alleged loss of profits from plaintiff's inability to open a Chinese restaurant at the premises. (*Id.* at 6–7.) To support this claim, plaintiff asserts that electric company Con Edison shut off the gas in the building in 2011 due to a gas leak and that the building still does not receive the amount of gas needed to operate a restaurant. (*Id.*) The third cause of action seeks an abatement of rent following a water leak that occurred in June of 2016, and demands that 979 LLC repair any damages to the property that resulted from the leak. (*Id.* at 7.) Plaintiff's final cause of action claims entitlement to treble damages for defendants' purportedly unlawful collection of rent. (*Id.* at 7–8.)

In lieu of filing an answer, defendants now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint in its entirety. (*See* Docs. 14; 15 at 2.)

LEGAL CONCLUSIONS:

On a CPLR 3211 motion to dismiss a complaint, “the pleading is to be afforded a liberal construction.” (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].) Nonetheless, CPLR 3211 (a)(1) provides for dismissal should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. (*See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see also Leon*, 84 NY2d at 88.) Therefore, if the complaint’s “allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference” (*Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261–62 [1st Dept 2004].)

Unlike CPLR 3211(a)(1), which allows defendants to challenge a plaintiff’s complaint using the documentary evidence, CPLR 3211(a)(7) “test[s] the *facial* sufficiency of the pleading in two different ways.” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014] (emphasis added).) First, “the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law.” (*Id.*) Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*Id.*)

CPLR 3013 further states that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”

a. Whether the Complaint Should Be Dismissed as Against Defendant 979 LLC.

This Court determines that plaintiff’s first cause of action, demanding that 979 LLC sell

the building to plaintiff at its 2012 value, must be dismissed. Although paragraph 72 of the lease does grant plaintiff “a right of first refusal to acquire the property in the event [979 LLC] has received a bona fide offer to sell the property” (Doc. 17 at 26), our courts have held that “the right of first refusal . . . is contingent upon the existence of a valid, outstanding contract to a third party [buyer].” (*See Lin Broadcasting Corp. v Metromedia, Inc.*, 139 AD2d 124, 135 [1st Dept 1988].)

Here, plaintiff WWG Corporation alleges in its complaint that defendants decided to put the building on the market in 2012 for \$4 million (Doc. 16 at 4–5), that they did so without notifying plaintiff of this decision (*id.* at 5), and that, upon “information and belief,” 979 LLC indeed received such a bona fide offer for the building (*id.*). Plaintiff’s papers include an “Offering Memorandum” for the sale of the premises. (Doc. 24 at 4.) Importantly, however, the complaint does not assert—and nothing in the parties’ papers indicates—that defendants ever reached an agreement with a third-party buyer to sell the property.¹ (*See Benjamin v Madison Med. Bldg. Condominium Bd. of Mgrs.*, 66 AD3d 510, 511 [1st Dept 2009] (“If there is no such contract, then there is nothing to accept or refuse.”).) Plaintiff’s first cause of action must therefore be dismissed for failure to plead a necessary, material allegation pursuant to CPLR 3211(a)(7).

Plaintiff’s second cause of action seeks compensation for the alleged loss of profits due to the inability to open and operate a Chinese restaurant at the premises. (Doc. 16 at 6–7.) In particular, plaintiff blames 979 LLC’s continued failure to deliver a sufficient amount of gas to the building over the last five years due to the gas leak that occurred in 2011. (*Id.*) According to

¹ Plaintiff’s papers include an “Exclusive Right to Sell Agreement” (Doc. 24) that appears to be between 979 LLC and an entity described therein as Eastern Consolidated. The document is blurry and therefore is difficult to read, but this Court does acknowledge that paragraph 2 of the agreement states: “Eastern Consolidated undertakes to pursue a satisfactory purchaser for the Property.” (*Id.* at 1.) Document 24, however, only reflects that Eastern Consolidated was to find a third-party buyer for the premises, and does not provide proof of a contract with such a buyer.

plaintiff, paragraphs 4 and 9 of the lease obligated 979 LLC to repair the building's gas lines and to apportion the rent from the date of the gas leak, respectively: (*Id.*)

This Court finds that 979 LLC may not be held liable on plaintiff's second cause of action. Paragraph 4 requires 979 LLC to maintain the "public portions" of the premises (Doc. 17 at 3), and it puts the burden on plaintiff to make "all non-structural repairs" at plaintiff's "sole cost and expense." (*Id.*) It does not, however, require 979 LLC to "make any necessary repairs to allow for the gas to be provided" to the building as plaintiff suggests. (Doc. 16 at 6.) In fact, paragraph 20 of the lease states that 979 LLC, in entering into the lease agreement, was not making any representations as "to the physical condition of the building" (Doc. 17 at 6) and that plaintiff was to take the building "as is" (*id.*). And paragraph 9, which obligates 979 LLC to apportion rent subsequent to a fire or any other casualty that destroys or renders the property unusable, specifically provides that "each party shall look first to any insurance in its favor before making any claim against the other party" (*Id.* at 4.) Plaintiff's second cause of action must therefore be dismissed pursuant to CPLR 3211 (a)(1) because the documentary evidence, i.e., the lease, establishes a defense to the claim.

979 LLC is also entitled to dismissal of plaintiff's third cause of action, which seeks an abatement of rent following a water leak that occurred in June of 2016 and demands that 979 LLC repair any damages to the property that resulted from the leak. (Doc. 16 at 7.) Similar to its second cause of action, plaintiff again relies on paragraphs 4 and 9 of the lease in an attempt to hold 979 LLC liable. (*Id.*) For the reasons mentioned above, this Court likewise finds that the third cause of action in the complaint should be dismissed based upon the documentary evidence.

Last, with respect to the fourth cause of action, plaintiff seeks treble damages in the amount of \$3.24 million for 979 LLC's "wrongful collection of rent." (Doc. 16 at 8.) Plaintiffs are entitled

to treble damages when they have been “disseized, ejected, or put out of real property in a forcible or unlawful manner” (*Hood v. Koziej*, 140 AD3d 563, 564–65 [1st Dept 2016].) Nowhere in the complaint does plaintiff allege it has been ejected or forced out of the premises (Doc. 16 at 7–8), and therefore the fourth cause of action must be dismissed pursuant to CPLR 3211(a)(7) for failure to plead a material allegation necessary to sustain the claim.

b. Whether the Complaint Should Be Dismissed as Against Defendant Tsiniias.

If defendant Tsiniias is to be held liable on any of plaintiff’s four claims, it must be because he held himself out as personally liable during the transactions between 979 LLC and WWG Corporation. (See *Ciavarella v Zagaglia*, 132 AD3d 608, 608–09 [1st Dept 2015] (“[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.”).) There is no evidence in the record before this Court that defendant Tsiniias subjected himself to personal liability. Although his signature appears on the lease, the lease makes it clear that he was signing on behalf of 979 LLC as its “Managing Member Landlord.” (Doc. 17 at 10.) The complaint must therefore be dismissed as against Tsiniias.

In accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants 979 Second Avenue LLC and Elias Tsiniias to dismiss the complaint is granted and that the complaint of plaintiff Wah Win Group Corporation is dismissed in its entirety; and it is further

ORDERED that defendants' counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 30 days after the entry of this order onto NYSCEF; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of this Court.

1/10/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

REFERENCE

CHECK IF APPROPRIATE: