

Three Egg Studios LLC v FJH Realty Inc
2019 NY Slip Op 30805(U)
March 31, 2019
Supreme Court, Kings County
Docket Number: 501211/2015
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 31st day of March, 2016

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

THREE EGG STUDIOS LLC,
Plaintiff,
- against -
FJH REALTY INC,
Defendant.

Index No.: **501211/15**

Motion Seq. # **2**

SHORT FORM ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion for a default judgment.

	<u>PAPERS NUMBERED</u>
Order to Show Cause, Affirmation and Exhibits	1
Memorandum of Law in Support of Motion	2
Affidavit, Affirmation and Exhibits in Opposition	3
Reply Affirmation of Jacob Ginsburg	4
Reply Affirmation of Barry Hoffman	5

FILED
KINGS COUNTY CLERK
2016 APR 11 AM 8:09

This is an action seeking damages for fraud, loss of business opportunity, tortious interference with contract, and breach of quiet enjoyment. Plaintiff is a former tenant in a building owned by defendant. Defendant moves herein to dismiss the Complaint on the basis that plaintiff lacks capacity to sue pursuant to §206 of the New York Limited Liability Company Law; that plaintiff lacks capacity to sue pursuant to CPLR §3211(a)(3); based upon documentary evidence pursuant to CPLR §3211(a)(1); and for failure to state a cause of action pursuant to CPLR §3211(a)(7). For the following reasons, the motion is GRANTED.

§206 of the Limited Liability Company Law

It is conceded that plaintiff has not complied with §206 of the Limited Liability Company Law (hereinafter "LLC Law") which requires a limited liability company within 120 days of the company's formation to publish its articles of organization or comparable specified information

in two newspapers a specified number of times and file proof of publication with the Department of State. Movant argues that this failure precludes plaintiff from bring the instant action, citing *Barklee Realty Co. LLC v. Pataki*, 309 AD2d 310 (1st Dept 2003). Plaintiff argues that this decision only dealt with the constitutionality of §206 and its publication requirement. Plaintiff cites to a Civil Court New York County decision for the proposition that it is not precluded from commencing an action and can cure its failure to publish. *Acquisition America VI, LLC v. Lamadore*, 784 NYS2d 329, 330-1 (Civ Ct NY Co, 2004). This and the other case cited by plaintiff concern whether the failure to provide proof of publication pursuant to §206 LLC Law is a jurisdictional defect. The courts found that is was not.¹ However, the *Barklee* decision, also in the First Department, quotes the statute itself and states: “If the publication requirement of section 206 is not completed within 120 days of the company’s formation, the limited liability company will be precluded from ‘maintaining any action or special proceeding’ in any New York court, ‘unless and until’ it complies with that requirement” 309 AD2d at 311. The Second Department has recently held that the language of §206 requires that where a plaintiff has failed to comply with the publication requirement, the action must be dismissed, citing *Barklee*. As the Second Department stated, affirming Justice Solomon of Supreme Court, Kings County:

Failure to comply with [the publication requirement] precludes a limited liability company from maintaining any action or special proceeding in New York (*see* Limited Liability Company Law § 206[a]; *Barklee Realty Co. v. Pataki*, 309 A.D.2d at 311, 765 N.Y.S.2d 599). Here, as the defendants correctly contend, since the plaintiff failed to comply with the publication requirements of Limited Liability Company Law § 206, it is precluded from bringing this action (*see* Limited Liability Company Law § 206[a]; *Barklee Realty Co. v. Pataki*, 309 A.D.2d 310, 765 N.Y.S.2d 599).

¹ All cases cited by plaintiff are from the First Department.

Small Step Daycare LLC v. Broadway Bushwick Builders LP, ___AD3d___, 2016 WL 1125575 (2nd Dept 2016).² Accordingly, defendant's motion to dismiss the complaint for failure to comply with LLC Law §206 is granted.

Fraud Cause of Action

Defendant also moves to dismiss the complaint pursuant to CPLR §3211(a)(1) and (7) based upon the "use" clause in the lease. That clause states that the premises is permitted to be used for "commercial use that is not in violation of applicable law, zoning regulation, hazard or liability insurance requirements". The "no representations" clause in the lease provides that

"[t]he Landlord has made no representations or promises in respect to said building or to the demised premises except those contained herein and those, if any, contained in some written communications to the Tenant, signed by the Landlord. This instrument may not be changed, modified, discharged or terminated orally".

Lease at ¶Nineteenth.

Plaintiff's argument in opposition is that it made known to the Landlord that it intended to use the premises as a music studio and the leased premises was set up as a music studio when Tenant took occupancy. Use of the premises as a music studio is apparently a violation of the law which, plaintiff argues, Landlord should have made known to it. Plaintiff's argument is unavailing. The terms of the lease preclude Plaintiff/Tenant from arguing that the alleged oral representations of the Landlord are incorporated into the lease. Unless Tenant has a written statement signed by the Landlord that permits use of the premises as a music studio, which has not been presented to the court or mentioned in the complaint, the "use" clause of the lease coupled with the "no representations" clause of the lease require dismissal of plaintiff's claim for fraud (first cause of

² It should be noted that this case, similar to the case at bar, involves an action for damages for breach of a lease.

action) pursuant to CPLR §3211(a)(1) and (7) based upon documentary evidence (the lease) and failure to state a cause of action .

Condition of the Premises

Plaintiff's claims for lost business opportunity (second cause of action), tortious interference with contract (third cause of action) and breach of quiet enjoyment (fourth cause of action) are all premised on the Landlord permitting conditions to exist in the premises that resulted in Environmental Control Board summonses and Department of Buildings violations to be placed against the building. Paragraph 3 of the lease rider states: "Tenant accepts the premises in 'as is' condition". Those conditions, according to both parties, existed at the time the lease was signed. Accordingly, the terms of the lease preclude Tenant's second, third and fourth causes of action based upon documentary evidence, **CPLR §3211(a)(1)** and a failure to state a cause of action **CPLR §3211(a)(7)**. The court need not reach movant's other arguments.

Based upon the foregoing, the defendant's motion to dismiss the complaint is granted in all respects. IT IS HEREBY ORDERED that the motion is granted and the complaint is dismissed.

This is the decision and Order of the court.

ENTER



LOREN BAILY-SCHIFFMAN
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