

Dewald v S&P Assoc. of N.Y. LLC
2020 NY Slip Op 31452(U)
May 10, 2020
Supreme Court, New York County
Docket Number: 654981/2019
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15**

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JEROME W. DEWALD,

Plaintiff,

-against-

INDEX NO.: 654981/2019

SEQ. NO.: 001, 002

DECISION AND ORDER

S&P ASSOCIATES OF NEW YORK LLC., and
MILFORD MANAGEMENT CORP.,

Defendants.

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MELISSA A. CRANE, J.S.C.:

Motion sequence 001 and 002 are consolidated for disposition.

On June 5, 2017, plaintiff Jerome Dewald entered into a 13-month lease (“initial lease”) with defendant, S&P Associates of New York, LLC (“S&P”) (Am Compl ¶ 8). S&P is the owner and landlord of 30 Lincoln Plaza, located at 30 West 63rd Street in Manhattan. Milford Management Corp (“Milford”) is the managing agent of the building.

From June 16, 2017 to July 31, 2018, plaintiff rented apartment 8V, a one-bedroom apartment that cost \$4,450 per month. Plaintiff included copies of his 2016 income tax returns and most recent bank statement in the rental application (Am Compl ¶ 9). Plaintiff also submitted a 2017 Tenant Verification Form on June 5, 2017. Defendants approved plaintiff’s application based on his finances, including (i) a history of on-time rent payments; (ii) employment and gross income of \$304,814.00; (iii) strong bank account balances; and (iv) low monthly credit card debt payments of \$25.00 (*see* Tarantino Aff, dated October 18, 2019, ¶ 6). Nearing expiration of the initial lease, defendants presented plaintiff with a renewal lease (“lease

renewal 1”). Plaintiff signed the lease, for a term from August 1, 2018 through July 31, 2019, at a monthly rate of \$4,525.00 (Am Compl ¶ 11).

On March 4, 2019, plaintiff wrote to Kacie Laforest, a Milford administrative assistant, to inquire about moving to a more desirable apartment in the building (Compl ¶ 14). Laforest replied that they permitted relocation on an *ad hoc* basis (Am Compl ¶ 15). During this time, plaintiff’s arrears totaled \$9,150.00 (*see* Tarantino Aff, dated October 18, 2019, ¶ 12). Plaintiff frequently made late rent payments (Am Compl ¶ 16). Despite this, defendants presented plaintiff with a second lease renewal (“Lease Renewal 2”) for the term from August 1, 2019 to August 31, 2020, at a monthly rate of \$4,525.00.

On July 25, 2019, plaintiff approached Clive Spagnoli, a Milford employee, and again asked about switching to a different unit (Am Compl ¶ 21).

On Thurs, July 25, 2019 at 2:56PM, Jerome Dewald

<jeromekjerome@gmail.com> wrote:

Clive, we have decided to renew our lease contingent on your offer of one month free rent and allowing us to change to a different apartment in the complex anytime during the term of the lease. (*see* Tarantino Aff, dated October 18, 2019, ex F).

On Thurs, July 25, 2019 at 3:04PM, Clive Spagnoli

<cspagnoli@milfordmgmt.com> wrote:

It would be a 13 month lease with the first month free. You can upgrade at any point to a Milford Management/Milstein owned apartment. ***As we discussed this morning, you need to be in good standing.*** If you changed on the third month, you would be starting a new, 12 month lease in the new apartment on the 4th month. In other words, whenever you switch, you would start a new 12 month lease. If interested, I will send you a new lease. (*see* Tarantino Aff, dated October 18, 2019, ex F).

Following those emails, on July 31, 2019, plaintiff signed lease renewal 2. On August 15, 2019, plaintiff learned of an available apartment, 6G, in the building. Apartment 6G rented for \$2,995 per month and had a better view than plaintiff’s current apartment (Am Compl ¶ March 4,

2019 25). On August 16, 2019, plaintiff met with Michael Tarantino, another Milford employee. Tarantino told plaintiff that S&P's policy did not allow residents to move into smaller apartments, but he would request an exception for plaintiff (Am Compl ¶ 27). Plaintiff also emailed Tarantino.

On Thurs, August 15, 2019 at 6:59PM, Jerome Dewald <jeromekjerome@gmail.com> wrote:

Hi Michael! I came to see Clive today about changing our current lease on 8V to a new lease on 6G. Then I went to the leasing office at 30H and looked at it. We'd like to proceed. How do we begin the process? (see Tarantino Aff, dated October 18, 2019, ex H).

On Fri, August 16, 2019 at 10:41AM, Michael Tarantino <mtarantino@milfordmgmt.com> wrote:

Mr. Dewald, The landlord will allow you to break the lease on 8V contingent upon you ***applying, being approved, and signing a lease on a new apartment*** (of any size) at 30 Lincoln by end of business 8/19/19. Amy Scardina in the leasing office will contact you shortly to facilitate this. (see Tarantino Aff, dated October 18, 2019, ex H).

Plaintiff then completed a lease application for apartment 6G on August 16, 2019 (Am Compl ¶ 30). In response, defendants requested additional documents from plaintiff, who then submitted a copy of a recent bank statement and his 2018 income tax return (Am Compl ¶ 31, 33, 34). Plaintiff also submitted a 2019 Tenant Verification Form on August 19, 2019. The verification form revealed a change in plaintiff's financial stability, including a low credit score, a bank balance of low five figures, and a credit card balance of \$22,558.00 with minimum monthly payments of \$791.00 (see Tarantino Aff, dated October 18, 2019, ¶ 20). On August 21, 2019, defendants denied plaintiff's application for apartment 6G because of plaintiff's finances. On August 29, 2019, plaintiff filed the complaint in this case, and mailed a copy of the summons

and complaint to defendants (*see* AOS, NYSCEF doc no 5).¹ Plaintiff seeks to recover under a theory of fraudulent inducement, promissory estoppel, breach of oral contract, breach of written contract and specific performance, and unjust enrichment. On September 12, 2019, counsel for defendants consented to e-filing on the NYSCEF system, but did not answer plaintiff's complaint. On October 11, 2019, plaintiff moved for a default judgment. Defendants cross-moved to dismiss plaintiff's complaint on October 18, 2019. On October 31, 2019, plaintiff brought a motion to amend the complaint. On November 8, 2019, defendants opposed plaintiff's motion to amend, and requested that the court apply its motion to dismiss pursuant to CPLR 3211, to the amended complaint. Plaintiff's motion for default (motion sequence 001) is therefore moot because plaintiff brought a motion to amend the complaint. The court now addresses defendants' motion to dismiss plaintiff's amended complaint.

Discussion

Fraud in the Inducement

Plaintiff claims that defendants fraudulently induced him to sign lease renewal 2 by promising that plaintiff could upgrade to another apartment in the building. Had defendants not made this representation, plaintiff claims he would not have signed lease renewal 2 and, instead, would have looked for outside units to rent.

A promise made with no intention of performing sounds in breach of contract, not fraud (*Cronos Group, Ltd. v XComLP, LLC*, 156 Ad3d 54, 56 [1st Dept 2017]). Accordingly, the court dismisses plaintiff's claim for fraud in the inducement.

Promissory Estoppel Claim

¹ Defendants assert that plaintiff improperly served plaintiff under CPLR 311-a. However, defendants responded to plaintiff's default motion, and cross-moved to dismiss the complaint. Defendants also opposed plaintiff's motion to amend. Thus, defendants clearly had notice of the lawsuit.

Plaintiff's claim for promissory estoppel is virtually identical to its claim for fraudulent inducement, which, in turn, duplicates his claim for breach of contract. Accordingly, the court dismisses the promissory estoppel claim as duplicative.

Breach of Oral and Written Contract

To state a claim for breach of contract, plaintiff must allege: (1) that the parties entered into a valid agreement; (2) plaintiff performed; (3) defendant failed to perform; and (4) damages (*RVW Productions Corp v Levin*, 2019 WL 4899056 at *3 [Sup Ct, NY Co 2019]). Here, Clive Spagnoli's July 25, 2019 email may be construed as offer and acceptance, contingent on "good standing." Plaintiff performed when he signed lease renewal 2, paid off his arrears, and completed a lease application for apartment 6G. Defendant denied plaintiff's application, even though Spagnoli stated plaintiff could upgrade to another apartment at any time during the renewed lease period for apartment 8V. Thus, plaintiff's breach of written contract claim survives.

However, under GOL § 5-703, New York's Statute of Frauds requires that any contract concerning a real property interest be in writing. Accordingly, the court dismisses plaintiff's breach of oral contract.

Unjust Enrichment

Plaintiff makes out a claim for unjust enrichment. Plaintiff alleges that defendants benefited from its refusal to let plaintiff rent a smaller unit with a monthly rent 34% less than his current monthly rental amount. Here, plaintiff alleges that the 2019 credit check for apartment 6G showed plaintiff had an average risk with no debt collections, no past due balances, no late payments, no charge off's and no derogatory remarks. Plaintiff's 2018 bank statement and tax return reflected substantially higher amounts than the documents submitted for lease renewal 1,

signed in 2017. Lastly, plaintiff's listed income on its application for apartment 6G still exceeded the required threshold of 50 times the rent for those respective units (Am Compl ¶ 35[a]-[d]). Plaintiff expected to relocate apartments based on Mr. Spagnoli's assurance that he could do so at any time so long as he was in "good standing." Plaintiff met defendants "good standing" requirement. Accordingly, defendants' benefited unjustly when they renewed plaintiff's lease, thus saving time, resources, and money to find a replacement tenant, without fulfilling their promises of an apartment upgrade to plaintiff. As defendants contest the existence of a contract, plaintiff's unjust enrichment claim is a fair alternate pleading at this point.

Accordingly, it is

ORDERED that the court grants defendants' motion to dismiss as to the first, second, and third causes of action, and otherwise denies defendants' motion; and it is further

ORDERED that defendants shall file an answer within 20 days of the e-filing date of this decision; and it is further

ORDERED that there shall be no further motion practice without advance notice to the court; and it is further

ORDERED that the parties are directed to contact the court via email, at mlivings@nycourts.gov to schedule a phone status conference. Please note that the parties shall include all sides on the email, as the court does not accept ex parte communications.

Dated: May 10, 2020

ENTER:


HON. MELISSA A. CRANE, J.S.C.