

**40 Broad Assoc. No. 3 LLC v 40 Broad Commercial
LLC**

2020 NY Slip Op 33000(U)

September 10, 2020

Supreme Court, New York County

Docket Number: 651757/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

40 BROAD ASSOCIATES NO. 3 LLC

Plaintiff,

- v -

40 BROAD COMMERCIAL LLC,

Defendant.

-----X

INDEX NO. 651757/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for DISMISS

Defendant's motion to dismiss the first and third causes of action is granted in part and denied in part.

Background

This action arises out of a lease between defendant and plaintiff. Defendant (the tenant), agreed to a ten-year lease with plaintiff in March 2011. Defendant admits that it vacated and allegedly surrendered the premises in July 2019. It claims that plaintiff started a case in landlord-tenant court for rent, additional rent and other charges related to the lease. Defendant contends that on the day of trial, plaintiff discontinued that proceeding and brought the instant action six months later.

Defendant argues that plaintiff's first claim for a declaratory judgment must be dismissed because it is duplicative of the second claim for breach of contract. It also claims that the third cause of action for account stated is deficient because the parties failed to agree on a specific

amount due, the account was not accepted as correct and defendant never agreed to pay any specific sum. It argues that the only invoice referenced by plaintiff in this cause of action is a December 2019 statement and that defendant disputed it.

In opposition, plaintiff agrees to withdraw its first cause of action without prejudice. With respect to the third cause of action, plaintiff alleges that there were years of invoices mailed to defendant and defendant did not timely object. Plaintiff insists that defendant's arrears have been memorialized in monthly invoices and have now increased to over \$2 million. It argues that this cause of action was properly pled as plaintiff alleges there was an account with defendant and defendant failed to object within a reasonable time.

In reply, defendant contends that plaintiff has not demonstrated that there is a valid account stated cause of action. It argues that plaintiff only offers vague and conclusory allegations and criticizes plaintiff's "self-serving billing practices" regarding purported partial payments.

Discussion

As an initial matter, the first cause of action is dismissed because plaintiff did not offer opposition; its offer to withdraw it without prejudice is not sufficient in opposition to a motion to dismiss.

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

“In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]).

“An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time” (*Bartning v Bartning*, 16 AD3d 249, 250, 791 NYS2d 541 [1st Dept 2005]).

Here, the Court denies the branch of defendant’s motion to dismiss the third cause of action. Even if plaintiff had failed to plead this cause of action in its complaint, it attached in opposition invoices from 2017 through 2019 (NYSCEF Doc. No. 27). In reply, the affidavit of Mr. Zamir (managing member of defendant) claims that these “invoices are deficient and do not establish an account stated and the so-called mailing labels do not establish delivery of any particular invoice or invoices” (NYSCEF Doc. No. 49, ¶ 6). But Mr. Zamir does not provide any evidence that he contested any of these invoices; claiming that the invoices are deficient is not a basis to grant a motion to dismiss.

The fact is that on a motion to dismiss the Court must ascertain whether plaintiff has stated a cognizable cause of action in its pleading and affidavit in opposition. At this early stage of the litigation, the Court cannot conclude that plaintiff has failed to state a cause of action for account stated. It pointed to invoices allegedly sent to a tenant (defendant) and defendant failed to cite any objections except for a December 2019 email (NYSCEF Doc. No. 15). But that email is dated long after defendant admits it had surrendered the premises in July 2019. And it does not negate plaintiff’s allegations because, according to plaintiff, the arrears began to accrue in January 2017. In other words, plaintiff claims defendant stopped making payments during 2017

and defendant only points to an objection in December 2019—that states a cause of action for account stated.

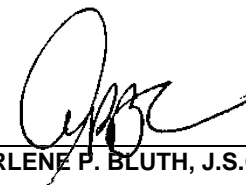
It may be that discovery reveals that there was a dispute over the amount owed, but on these papers the Court is unable to dismiss the cause of action for account stated.

Accordingly, it is hereby

ORDERED that the motion by defendant to dismiss is granted to the extent it sought the dismissal of plaintiff’s first cause of action and denied to the extent it sought dismissal of the third cause of action.

Remote Conference: December 9, 2020.

9/10/2020
DATE


ARLENE P. BLUTH, J.S.C.

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