

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

2020 NY Slip Op 33001(U)

September 11, 2020

Supreme Court, New York County

Docket Number: 651920/2020

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**

<p>PRESENT: <u>HON. ARLENE P. BLUTH</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>40 BROAD ASSOCIATES NO. 3 LLC</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>40 BROAD COMMERCIAL LLC,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART <u>IAS MOTION 14</u></p> <p>INDEX NO. <u>651920/2020</u></p> <p>MOTION DATE <u>09/10/2020</u></p> <p>MOTION SEQ. NO. <u>001</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

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 claims that plaintiff started a case in landlord-tenant court but later discontinued that proceeding and brought the instant action.

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 an April 2020 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 without objection by defendant. Plaintiff points out that by January 10, 2018 more than \$160,000 in arrears had accumulated. It contends it sent a five-day rent demand in late January 2018 before later commencing a summary non-payment proceeding in February 2018. 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 that there is no evidence that defendant ever agreed to pay an “agreed” amount.

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 well before the April 2020 objection cited by defendant (*see* NYSCEF Doc. No. 25). In reply, the affidavit of Mr. Zamir (managing member of defendant) disputes that the invoices submitted don’t show the breakdown or enough details about what is owed nor is there evidence these invoices were sent prior to the commencement of this action (NYSCEF Doc. No. 29, ¶¶ 6-7). But Mr. Zamir does not provide any evidence that he contested any invoices as the arrears allegedly began to accrue prior to January 2018; 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 one in April 2020. But that email is dated long after plaintiff instituted a summary non-payment proceeding in 2018. In other words, plaintiff claims defendant stopped making payments prior to 2018 and defendant only points to an objection in 2020—that states a cause of action for account stated.


It may be that discovery reveals that there was a dispute over the amount owed or that defendant never received the invoices in question, 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 14, 2020.

9/11/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

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

APPLICATION:

CHECK IF APPROPRIATE: