

Avikzer v Ricky's E. Hampton, Inc.

2021 NY Slip Op 32642(U)

December 13, 2021

Supreme Court, New York County

Docket Number: Index No. 650115/2021

Judge: Erika M. Edwards

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS

PART 11

Justice

-----X

DEVORA AVIKZER,

Plaintiff,

- v -

RICKY'S EAST HAMPTON, INC. and TODD KENIG,

Defendants.

-----X

INDEX NO. 650115/2021

MOTION DATE 02/10/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and oral argument held before this court on October 14, 2021, the court denies Plaintiff Devora Avikzer's ("Plaintiff") motion for summary judgment and to strike Defendants Ricky's East Hampton, Inc.'s ("Ricky's") and Todd Kenig's ("Kenig") (collectively, "Defendants") answer with affirmative defenses. The court grants in part Defendants Ricky's and Kenig's cross-motion for dismissal and/or summary judgment to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff's complaint against Kenig and grants the portion of the motion seeking dismissal of Plaintiff's second, third, fourth and fifth causes of action against Ricky's, but denies dismissal of Plaintiff's sixth cause of action for money damages.

Plaintiff brought this action against Defendants for their failure to pay rent, fees and repair costs due pursuant to a commercial lease, dated April 24, 2004, in a building owned by Plaintiff. Plaintiff brought claims for breach of contract, promissory estoppel and detrimental reliance, negligent misrepresentation and inducement, breach of implied covenant of good faith

and fair dealing, anticipatory breach and repudiation and money damages in the amount of \$256,986.87.

Plaintiff now moves for summary judgment in her favor as against Defendants, to strike Defendants' answer with affirmative defenses and for costs of the motion. Plaintiff argues in substance that she is entitled to judgment in her favor as a matter of law pursuant to the terms of the lease, that Defendants' purported surrender of the premises was invalid and that the property was damaged. Plaintiff further argues in substance that Ricky's improperly assigned the lease to Ricky's East Hampton, LLC ("LLC") on December 21, 2011 and that Kenig guaranteed both leases on behalf of both entities and in his personal capacity. Additionally, Plaintiff argues in substance that Kenig represented that the LLC was a valid New York company when it was never registered and never existed as a valid corporate entity.

Plaintiff further argues that Defendants' answer and counterclaims are meritless and that she is entitled to \$189,158.11 from loss of rental income and late fees, \$69,883.33 for repairs to restore the premises, plus interest, reasonable attorney's fees and disbursements. Plaintiff alleges that Defendants failed to vacate the property in broom clean condition as the property was damaged and that Defendants' letter to Plaintiff could not be deemed delivered since Plaintiff did not waive any of her claims under the terms of the lease.

Defendants now cross-move for dismissal of Plaintiff's complaint and/or summary judgment in their favor as to all claims against Kenig and as to Plaintiff's second, third, fourth, fifth and sixth causes of action against Ricky's. Defendants mistakenly cited to CPLR 3212(a)(1) and (a)(7), which do not exist, but mention summary judgment dismissal, so the court will treat Defendants' motion as a motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) and for summary judgment pursuant to 3212.

Defendants argue in substance that Kenig is entitled to dismissal of all causes of action against him and that he was not personally liable for payments pursuant to the lease because his personal guaranty was limited and it terminated once the premises were vacated, surrendered in broom-swept condition, the rent was current, the keys were returned to Plaintiff and Kenig provided Plaintiff with a letter confirming that the premises were vacant and free from all tenancies.

Defendants further argue that Ricky's surrendered the premises on December 15, 2015 and satisfied all of the conditions necessary to terminate Kenig's limited personal guaranty. Defendants further argue that Plaintiff brought this action five years later after previously accepting a check for \$35,000 in full satisfaction of any claims for the alleged repairs.

Defendants further argue in substance that Kenig is not personally liable for any alleged default under the lease for executing the assignment to a nonexistent entity because he never signed it on behalf of the LLC and the transfer was supposed to occur at the time of corporate restructuring when Ricky's was supposed to merge with the LLC, but such merger never happened. Therefore, the purported assignment was null and void and Ricky's remained responsible and satisfied its obligations under the lease.

Defendants further argue in substance that Ricky's is entitled to dismissal of Plaintiff's second through sixth causes of action because these claims are duplicative of Plaintiff's breach of contract claim. Additionally, Defendants argue that Plaintiff failed to establish her entitlement to judgment against Defendants as a matter of law because Defendants raised material issues of fact regarding whether Ricky's defaulted under the lease.

Both parties oppose each other's motion.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

When considering Defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible

inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

Dismissal is warranted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon definitively disposed of a plaintiff's claim (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

The doctrine of promissory estoppel is an extraordinary remedy and a plaintiff must establish 1) an oral promise that is sufficiently clear and unambiguous, 2) reasonable reliance on the promise by the plaintiff, and 3) injury caused by the reliance (*N.Y. City Health and Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]). It does not apply in cases where there is a contract between the parties (*Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012]). In the absence of a duty independent of the agreement, a claim for promissory estoppel is duplicative of a claim for breach of contract (*Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 303 [1st Dept 2008]).

Negligent misrepresentation and inducement require a violation of a legal duty independent of the obligation imposed by a contract (*see Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389-390 [1987] [internal citations omitted]). “This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” (*id.* at 389 [internal citation omitted]).

All New York contracts imply a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

Here, the court finds that Plaintiff failed to demonstrate her entitlement to judgment in her favor against Defendants as a matter of law on any of her claims or against Defendants’ affirmative defenses, that the complaint against Kenig must be dismissed and that material issues of fact in dispute remain to be determined by a trier of fact as to Plaintiff’s claims against Ricky’s. Such issues of material fact include, but are not necessarily limited to, whether Ricky’s defaulted on the terms of the lease regarding the requirements to vacate and surrender the premises; whether Ricky’s is liable for Plaintiff’s alleged damages for rent and fees owed until the conclusion of the lease term and for repairs needed to restore the property; and whether Plaintiff is estopped from claiming additional damages in light Ricky’s execution of an Estoppel Certificate and/or Plaintiff’s acceptance of payment allegedly to satisfy Ricky’s outstanding obligations.

However, the court grants the portion of Defendants’ motion seeking dismissal of Plaintiff’s complaint against Kenig pursuant to CPLR 3211(a)(1), (a)(7) and 3212. The court finds that Kenig demonstrated that he cannot be held personally liable for Ricky’s alleged default and that he did not breach the provisions of his limited personal guaranty under the provisions of

the lease as a matter of law. Kenig demonstrated that all of the conditions were satisfied to terminate his obligations as a personal guaranty under the terms of the lease.

Additionally, the court finds that Kenig demonstrated that he cannot be held to be personally liable for Ricky's purported improper assignment of the lease since the effective date of the assignment was not until the date that Ricky's was converted to the LLC and Kenig did not sign the lease on behalf of the LLC, but as a member of a separate entity, which was supposed to be the sole member of the future LLC. Since the conversion of Ricky's to the LLC never occurred, the assignment never took effect. Based upon the admissible evidence, the court finds that Plaintiff's arguments regarding the repairs needed to restore the premises may obligate Ricky's, but not Kenig. Furthermore, the court is not persuaded by Plaintiff's arguments regarding material issues of fact in dispute to refute Kenig's claims.

Additionally, even after accepting all facts in the complaint as true and according Plaintiff the benefit of every possible inference, the court finds that the factual allegations set forth in Plaintiff's complaint as to the second through fifth causes of action fail to establish cognizable legal theories. Therefore, the court grants the portion of Ricky's motion seeking dismissal of Plaintiff's second cause of action for promissory estoppel/detrimental reliance, third cause of action for negligent misrepresentation and inducement, fourth cause of action for breach of implied covenant of good faith and fair dealing, and fifth cause of action for anticipatory breach and repudiation, respectively. The court agrees with Ricky's that these claims are duplicative of Plaintiff's first cause of action for breach of contract. The court finds that Plaintiff failed to demonstrate that Ricky's violated a legal duty independent of its obligation imposed by the lease agreement between the parties. Therefore, the court dismisses these claims as duplicative of Plaintiff's breach of contract claim.

However, the court denies Ricky's motion as to dismissal of Plaintiff's sixth cause of action for money damages and finds that Ricky's failed to demonstrate its entitlement to dismissal of this claim and that such motion may be premature as discovery has yet to be completed.

The court has considered any additional arguments raised by the parties which are not discussed herein and the court denies all requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court denies Plaintiff Devora Avikzer's motion for summary judgment and to strike Defendants Ricky's East Hampton, Inc.'s and Todd Kenig's answer with affirmative defenses; and it is further

ORDERED that the court grants in part Defendants Ricky's East Hampton, Inc.'s and Todd Kenig's cross-motion for dismissal and/or summary judgment to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff's complaint against Todd Kenig and grants the portion of the motion seeking dismissal of Plaintiff's second, third, fourth and fifth causes of action against Ricky's, but denies dismissal of Plaintiff's sixth cause of action for money damages; and it is further

ORDERED that the court directs the Clerk of the Court to dismiss Plaintiff Devora Avikzer's complaint as against Defendant Todd Kenig only and to dismiss Plaintiff's second cause of action for promissory estoppel/detrimental reliance, third cause of action for negligent misrepresentation and inducement, fourth cause of action for breach of implied covenant of good faith and fair dealing, and fifth cause of action for anticipatory breach and repudiation as against Defendant Ricky's East Hampton, Inc. and to enter judgment in favor of Defendant Todd Kenig as against Plaintiff on all claims and in favor of Defendant Ricky's East Hampton, Inc. as to

Plaintiff's second through fifth causes of action, without costs or disbursements to any party; and it is further

ORDERED that the parties are directed to appear for a preliminary conference before this court on February 22, 2022, at 3:30 p.m., separate link will be provided via email.

This constitutes the decision and order of the court.


ERIKA EDWARDS, J.S.C.

12/13/2021
DATE

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