STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHOHARIE

PHYLLIS VAN AMBURGH and PAUL VAN AMBURGH,

Plaintiffs,

-against-

PATRICIA BOADLE and JOHN BOADLE,

Defendants.

DECISION & ORDER
Index No.: 2020-349

(Supreme Court, Schoharie County, Motion Term)

APPEARANCES: Dana Salazar, Esq.
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HON. JAMES H. FERREIRA, Acting Justice:

In this action, plaintiffs seek damages arising from the destruction of crops they planted on land leased to them by defendants. In lieu of an answer, defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Plaintiffs oppose the motion and defendants have submitted a reply.

In the complaint, plaintiffs allege that they are full time organic dairy farmers and also "make much of their living by planting and harvesting crops" on their land and on leased land (Affirmation in Support of Motion, Exhibit A, Complaint ¶ 3). They entered into an Organic Farm Land Lease Agreement (hereinafter the Lease) with defendants, effective January 1, 2016, pertaining to the use

of two parcels of agricultural land. The Lease had a five-year term and was scheduled to expire on January 1, 2021. On February 1, 2020, defendants gave notice that the Lease for both parcels would effectively terminate on May 1, 2020. The notice advised that plaintiffs could harvest existing crops in the spring and that new tenants would be taking over in March 2020.

Plaintiffs allege that they had planted crops in the Fall of 2019, specifically "cereal crops" which were planted in strips with a buffer zone between them, as required for the crops to be certified organic. Plaintiffs allege that they contacted defendants' counsel and advised that they had crops that could not be harvested until September. Plaintiffs "offered to relinquish the remaining strips provided that a 60' buffer around the crops was maintained" (Affirmation in Support of Motion, Exhibit A, Complaint ¶ 11). Defendants did not respond. In May 2020, defendants or their agents sprayed an herbicide on plaintiffs' crops, thereby killing them. Plaintiffs allege causes of action for breach of contract, conversion and destruction of property.

"[D]ismissal of a complaint under CPLR 3211(a)(1) . . . 'is appropriate where the documentary evidence utterly refutes the plaintiff's . . . allegations, conclusively establishing a defense as a matter of law' " (Jenkins v Jenkins, 145 AD3d 1231, 1234 [3d Dept 2016], quoting Benetech, Inc. v Omni Fin. Group, Inc., 116 AD3d 1190, 1192 [3d Dept 2014], lv denied 23 NY3d 909 [2014]). " 'Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable' " (Ganje v Yusuf, 133 AD3d 954, 956-957 [3d Dept 2015], quoting Midorimatsu, Inc. v Hui Fat Co., 99 AD3d 680, 682 [2d Dept 2012], lv dismissed 22 NY3d 1036 [2013]). "The defendant bears the burden of proving that the proffered documentary evidence conclusively refutes the plaintiff's factual allegations" (Calhoun v Midrox Ins. Co., 165 AD3d 1450, 1450 [3d Dept 2018]).

In addition, in considering a motion to dismiss for failure to state a cause of action, "the complaint is liberally construed, the facts as alleged are accepted as true and the plaintiff is accorded the benefit of every favorable inference" (Murray Bresky Consultants, Ltd v New York Compensation Manager's Inc., 106 AD3d 1255, 1258 [3d Dept 2013]; see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; NYAHSA Servs., Inc., Self Ins. Trust v Recco Home Care Servs., Inc., 141 AD3d 792, 794 [3d Dept 2016]). The inquiry before the Court is "whether the facts as alleged in the claim fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d at 87-88; see IMS Engrs.-Architects, P.C. v State of New York, 51 AD3d 1355, 1356 [3d Dept 2008], lv denied 11 NY3d 706 [2008]).

Breach of Contract

"To state a cause of action for breach of contract, a plaintiff must allege 'formation of a contract, performance by one party, failure to perform by another and resulting damage' " (New York State Workers' Compensation Bd. v Consolidated Risk Servs., Inc., 125 AD3d 1250, 1257 [3d Dept 2015], quoting New York State Workers' Compensation Bd. v SGRisk, LLC, 116 AD3d 1148, 1153 [3d Dept 2014]). Here, in their first cause of action, plaintiffs allege that the parties entered into an agreement, they fully performed their obligations under the agreement and defendants "breached the agreement and failed to allow Plaintiffs to harvest their crops," thereby causing damages to plaintiffs (Affirmation in Support of Motion, Exhibit A, Complaint ¶ 25). Defendants argue that the Lease conclusively demonstrates that plaintiff's breach of contract cause of action is without merit because the Lease provided both parties with a 90-day termination notice option and there is nothing therein which provides plaintiffs with any rights to reap crops in existence after the termination of the Lease.

Upon review, the Court agrees. The Lease – a one-page document – provides that it "constitutes a commitment for the use of agricultural land" and that the "commitment shall be for

[five] years commencing January 1, 2016 to January 1, 2021" (Affidavit in Support of Motion, Exhibit A). The Lease also states that "[a]ll land shall be managed organically" and that organic fertilizers will be applied" and provides for remuneration of $1,600.00 per year. The Lease further states: "This agreement may be terminated by either party upon 90 days notice" (id.). As defendants point out, the Lease does not provide plaintiff with any right to reap crops planted at the time the lease is terminated. In their complaint, plaintiffs cite no provision of the Lease which was breached and there is no support in the Lease for their allegation that defendants breached the contract by failing to allow plaintiffs to harvest their crops. In the absence of any evidence that a specific provision of the Lease was breached, plaintiffs' breach of contract cause of action fails as a matter of law (see Trump on Ocean, LLC v State of New York, 79 AD3d 1325, 1326 [3d Dept 2010], lv denied and lv dismissed 17 NY3d 770 [2011]).

The Court is not persuaded by plaintiffs' argument that their breach of contract claim survives dismissal if construed as a claim that defendants breached the implied covenant of good faith and fair dealing. "New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced" (Murphy v American Home Prods. Corp., 58 NY2d 293, 304 [1983]). "The implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (Moran v Erk, 11 NY3d 452, 456 [2008] [internal quotation marks and citation omitted]). "However, for this cause of action to stand, a plaintiff must allege an applicable contractual term because the implied obligation is only in aid and furtherance of other terms of the agreement of the parties" (Michaels v MVP Health Care, Inc., 167 AD3d 1368, 1373 [3d Dept 2018] [internal quotation marks and citation omitted]). Here, plaintiffs have not alleged

or identified any applicable contractual term in support of this claim. On this point, plaintiffs proffer only that "the entire purpose of the [Lease] was to grant Plaintiffs permission and authority to seed, maintain and harvest their Triticale crops," an assertion that does not have textual support in the Lease (Memorandum of Law in Opposition, at 3-4). As such, plaintiffs' breach of contract cause of action is dismissed.

Conversion and Destruction of Property

In their second cause of action (conversion), plaintiffs allege that they had a right of possession in the crops they planted on defendant's land, that possession was transferred to defendants after they terminated the lease and that defendants intentionally destroyed the crops by spraying an herbicide on them. In their third cause of action (destruction of property), plaintiffs allege that their crops were damaged and became valueless as a result of defendants' actions.

Initially, the Court dismisses plaintiffs' cause of action for destruction of property. The specific nature of this cause of action is not clear from the complaint or from plaintiffs' papers in opposition. To the extent that plaintiffs are alleging an intentional tort arising from the destruction of their crops, the Court finds that the claim is duplicative of plaintiffs' conversion claim. Inasmuch as plaintiffs are alleging negligent destruction of property, they have failed to allege the elements of a negligence claim. As such, the third cause of action is dismissed.

As to conversion, "[a] conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 [2006]). A key element of conversion is "the plaintiff's possessory right or interest in the property" (Ciprich v Atwood, 163 AD3d 1332, 1334 [3d Dept 2018] [internal citation, quotation marks and brackets omitted]). Here, even assuming that the conversion claim is not duplicative of

plaintiffs' breach of contract claim, plaintiffs have failed to allege facts which would support a finding that they had a property right in the crops at the time of their destruction in May 2020 after the Lease had been terminated. Inasmuch as they rely on the Lease for such a right, the Lease, as noted above, is silent as to the parties' rights to any crops on the land at the time of termination.

In addition, inasmuch as, in opposition to defendants' motion, plaintiffs argue that they had a right to harvest the crops after the termination of the Lease pursuant to the doctrine of emblements, that doctrine is inapplicable where, as here, the duration of the tenant's tenancy is for a certain period (see Triggs v Kahn, 167 AD2d 680, 682 [3d Dept 1990]; see 3 NY Jur 2d Agriculture and Crops § 3. The Appellate Division, Third Department, has summarized the doctrine of emblements as follows:

> "On grounds of a public policy, in order that an unforeseen termination of their interest may not cause them to lose the fruits of their industry, tenants at will, as well as tenants for life, or their representatives, except where the tenancy ends by the voluntary act of the tenant, are entitled when their tenancies end to emblements, that is, to the annual crops, produced by the labor of the tenant, which have been sown before the time when the tenant has knowledge that his lease is to terminate" (Hatfield v Lawton, 108 AD 113, 116-117 [3d Dept 1905]).

Here, plaintiffs were not tenants at will or tenants for life and, given that the Lease was terminable by either party upon 90 days notice, the Court does not find that the termination was unforeseen, such that public policy dictates that the tenant be entitled to reap the crops planted prior to the termination. As such, plaintiffs' conversion cause of action is dismissed for failure to state a claim.

Based upon the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed in its entirety.

The foregoing constitutes the Decision and Order of the Court.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
August 27, 2021

Hon. James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

1. Notice of Motion, dated March 3, 2021;
2. Memorandum of Law in Support by Benjamin W. Hill, Esq., dated March 3, 2021;
3. Affidavit in Support by Patricia Boadle, sworn to February 25, 2021, with attached exhibits;
4. Affirmation in Support by Benjamin W. Hill, Esq., dated March 3, 2021, with attached exhibit;
5. Memorandum of Law in Opposition by Dana L. Salazar, Esq., dated April 7, 2021;
6. Affirmation in Opposition by Dana L. Salazar, Esq., dated April 7, 2021, with attached exhibits;
7. Affidavit in Opposition by Phyllis Van Amburgh, sworn to March 29, 2021, with attached exhibit; and
8. Reply Response by Benjamin W. Hill, Esq., dated April 13, 2021.