

Excelsior Trading Inc. v Star N.Y. Group Inc.

2021 NY Slip Op 34209(U)

March 10, 2021

Supreme Court, Queens County

Docket Number: Index No. 707785/19

Judge: Robert I. Caloras

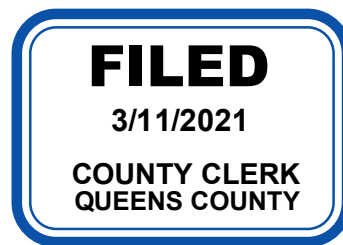
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**Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS PART 36
Justice**

-----X
EXCELSIOR TRADING INC.,
Plaintiff,
-against-
STAR NEW YORK GROUP INC. and
JIAN GUO QU,
Defendants.

**Index No. 707785/19
Seq. No. 2**



-----X
STAR NEW YORK GROUP INC.,
Third Party Plaintiff,
-against-
TUNG LAMN,
Third Party Defendant.

-----X
The following numbered papers EF 58-EF75, EF77-EF89, EF91-EF98 read on this motion by defendants for summary judgment dismissing the complaint against defendant Jiang Guo Qu (Qu), for partial summary judgment dismissing the second, third, and fourth causes of action against defendant/third-party plaintiff Star New York Group Inc. (Star), and for an order pursuant to CPLR 3124 and/or CPLR 3126 compelling plaintiff to respond to outstanding discovery demands and/or precluding plaintiff from offering evidence not disclosed; and on this cross motion by plaintiff and third-party defendant Tung Lam (Lam) for summary judgment in favor of plaintiff on its first and second causes of action and for summary judgment dismissing the third-party complaint against Lam.

	<u>Papers</u>
	<u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	EF 58 - 75
Notice of Cross Motion - Affidavits - Exhibits	EF 77 - 89
Reply Affidavits	EF 91 - 98

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

On June 4, 2014, plaintiff and Star entered into a sublease agreement for the premises located at 52-08 Grand Avenue, Third Floor, Space #1, Maspeth, New York 11378, which commenced on June 15, 2014 and ended on January 31, 2023. The sublease agreement was signed by Lam, president of plaintiff, and Qu, principal of Star. On January 10, 2013, Star and nonparty Steel Seven, LLC (landlord) entered into a lease agreement for the subject premises. On January 29, 2018, the landlord sent a notice to cure to Star, stating that Star was in default of the master lease because Star improperly assigned and/or subleased the premises to plaintiff without obtaining the landlord's consent, which was required by the lease. By letter dated March 9, 2018, the landlord sent a notice of termination to Star stating that the lease would be terminated on March 26, 2018. On March 15, 2018, Star brought an action in Supreme Court, Queens County for, among other things, a preliminary injunction and an order declaring that the master lease is in full force and effect. By an order dated September 28, 2018, Justice Leonard Livote denied Star's motion seeking a preliminary injunction pursuant to CPLR 6301, enjoining and restraining the landlord from terminating the lease,

commencing any summary proceedings to recover possession of the subject premises, and engaging in any tortious interference with Star's contractual relations with the subtenants, and granted that branch of the landlord's cross motion to dismiss the first cause of action pertaining to Star being required to provide gas service at the demised premises. Significantly, Justice Livote also concluded that those branches of the landlord's cross motion to dismiss the remaining causes of action were denied because "the motion to dismiss relies on factual determinations outside the four corners of the contract." On October 30, 2018, the landlord commenced a holdover proceeding in Civil Court, Queens County (index No. 74272/2018) to evict Star and plaintiff. Pursuant to a stipulation of settlement dated January 30, 2019, the landlord was granted a judgment of possession and warrant of eviction against Star, plaintiff, and nonparty Ling Chen Jie. In accordance with this stipulation, plaintiff vacated the subleased premises in April 2019. On May 2, 2019, plaintiff commenced the within action against Qu and Star alleging causes of action for breach of contract, breach of the covenant of quiet enjoyment, fraudulent misrepresentation, and a violation of General Business Law § 349. On October 16, 2019, Star instituted a third-party action against Lam for breach of contract.

Defendants moved for summary judgment dismissing the action against Qu on the grounds that the complaint failed to state a cause of action against him. On a motion for summary judgment pursuant to CPLR 3212 premised on failure to state a cause of action, the court must consider evidentiary material in addition to the pleadings, and the relevant criterion is not whether the proponent of the pleading has stated a cause of action but whether that party has one (*see Seidler v Knopf*, 186 AD3d 889 [2d Dept 2020]).

Those branches of defendants' motion for summary judgment dismissing the third cause of action for fraudulent misrepresentation against them are denied. To state a cause of action alleging fraudulent misrepresentation, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Here, the complaint alleges that Qu "knew that he had no authority or right to sublet the Subleased Premises to the Sublessee without the Landlord's written consent," that Qu's "representation of his authority and right to rent the Subleased Premises to the Sublessee was false, was known to be false and was made to induce the Sublessee to enter into the Sublease Agreement," that Qu's "misrepresentations did deceive the Sublessee into believing that the Sublessor has the authority to sublease the Entire Premises," and that "the Sublessee relied upon Defendant Qu's misrepresentation of the Sublessor's authority to sublet the Entire Premises, entered into the Sublease Agreement and renovated the Subleased Premises, but eventually was constructively evicted and forced to vacate the Subleased Premises about four years before the Sublease Agreement expires." Moreover, Article 22 of the master lease, entitled "assignment, mortgaging, and subletting," provides, in pertinent part, that the tenant must obtain the prior consent of the landlord to sublet the premises. Yet, the sublease agreement between Star and plaintiff is silent as to whether defendants had the consent of the landlord to sublet the premises to plaintiff. In addition, Lam, president of plaintiff, stated in his affidavit that Qu orally represented to him that he had the landlord's permission and authority to sublet the premises to plaintiff. However, Qu, principal of Star, stated in his affidavit that he made no oral representations to Lam regarding

defendants' right to sublet the premises. Significantly, Qu's affidavit does not mention whether defendants had the landlord's consent before entering into the sublease agreement with plaintiff. As such, this evidence reveals triable issues of fact, at least, as to whether defendants obtained the prior consent of the landlord to sublet the premises to plaintiff and whether misrepresented their authority to enter into the subject sublease.

The first cause of action for breach of contract and the second cause of action for breach of the covenant of quiet enjoyment against Qu must be dismissed. Inasmuch as Qu was neither a signatory nor a party to the contract between Star and plaintiff, the complaint fails to state causes of action for breach of contract and breach of the covenant of quiet enjoyment stemming from the subject contract against him. Notably, plaintiff did not submit any opposition to these issues. Therefore, that branch of defendants' motion for summary judgment dismissing the first and second causes of action against Qu is granted, and that branch of the cross motion by plaintiff and Lam for summary judgment in their favor on the first and second causes of action against Qu is denied.

That branch of the cross motion by plaintiff and Lam for summary judgment in their favor on the first cause of action for breach of contract against Star is denied. The elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach (*see Dee v Rakower*, 112 AD3d 204, 208-209 [2d Dept 2013]). In support of their cross motion, plaintiff and Lam contend that defendants breached the sublease agreement between Star and plaintiff by failing to obtain prior written consent from the landlord as required in the master lease, which caused plaintiff to suffer damages as a result of the termination of the sublease. As discussed above, however, the evidence in the record reveals there are triable issues of fact, at least, as to whether defendants obtained the landlord's consent before entering into the sublease agreement with plaintiff.

Those branches of defendants' motion for partial summary judgment dismissing the second cause of action for breach of the covenant of quiet enjoyment against Star and the cross motion by plaintiff and Lam for summary judgment in their favor on said cause of action are denied. To make out a prima facie case of breach of the covenant of quiet enjoyment, a tenant must establish that the landlord's conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises (*see River Park Assoc. [1972] L.P. v Richman Plaza Garage Corp.*, 178 AD3d 422 [1st Dept 2019]). Breach of the covenant of quiet enjoyment requires actual or constructive eviction (*see 34-35th Corp. v 1-10 Indus. Assoc., LLC*, 16 AD3d 579 [2d Dept 2005]). Constructive eviction may occur when, as alleged in the instant case, the landlord does not have legal authority to rent the premises (*see e.g. H. B. A. Realty Co. v Miller*, 14 AD2d 607 [3d Dept 1961]). As previously discussed, however, there are triable issues of fact, at least, as to whether defendants obtained the consent of the landlord before entering into the sublease agreement with plaintiff.

Those branches of defendants' motion for summary judgment dismissing the fourth cause of action alleging a violation General Business Law § 349 against defendants are granted. A cause of action for deceptive business practices under General Business Law § 349 requires proof that the defendant engaged in consumer-oriented conduct that was materially deceptive or misleading, causing injury. To constitute a violation of General Business Law § 349, the alleged conduct must satisfy a threshold requirement "that is consumer oriented. The conduct need not be repetitive or

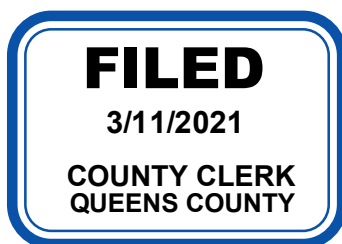
recurring but defendant's acts or practices must have a broad impact on consumers at large" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). Here, the alleged misrepresentation affected only a single real estate transaction involving a single piece of property and there was no impact on consumers or the public at large (*see LoGerfo v Trustees of Columbia Univ. in City of New York*, 35 AD3d 395 [2d Dept 2006]; *Canario v Gunn*, 300 AD2d 332 [2d Dept 2002]).

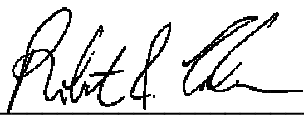
That branch of plaintiff and Lam's cross motion for summary judgment dismissing the third-party complaint against Lam is denied. Specifically, the third-party complaint alleges a single cause of action for breach of contract against Lam, as the personal guarantor on behalf of plaintiff on the sublease agreement between Star and plaintiff, which is premised on plaintiff's failure to pay rent from November 1, 2018 through May 31, 2019. For the reasons stated above, it has not yet been determined that Star breached the sublease agreement by failing to obtain the consent of the landlord prior to subletting the premises to plaintiff. Therefore, it also cannot be determined whether plaintiff's failure to pay rent from November 1, 2018 through May 31, 2019 constituted a breach of the sublease and, thus, whether Lam is personally liable for damages stemming the breach.

Finally, that branch of defendants' motion for an order pursuant to CPLR 3124 and/or CPLR 3126 compelling plaintiff to respond to outstanding discovery demands and/or precluding plaintiff from offering evidence not disclosed is denied. If a person fails to respond to or comply with any request, notice, interrogatory, demand, question, or court order, a party seeking disclosure may move to compel compliance or a response (CPLR 3124). It is the burden of the party seeking disclosure "to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Quinones v 9 E. 69th St., LLC*, 132 AD3d 750 [2d Dept 2015], quoting *Vyas v Campbell*, 4 AD3d 417 [2d Dept 2004]). Here, defendants contend that plaintiff's responses to their Notice to Produce for Discovery and Inspection were incomplete or insufficient. Specifically, plaintiff objected to demands # 2, 3, 4, 9, and 13 on the grounds that they are overly broad, irrelevant, vague, or unduly burdensome, plaintiff objected to demand # 5 on the ground that it is not in possession of the documents requested, plaintiff objected to demands # 6 and 7 on the grounds that they seek information that is privileged or confidential, and plaintiff objected to demand # 12 on the ground that the information requested is irrelevant. However, defendants' bare, conclusory assertion that the requested information is relevant is insufficient to establish the factual predicate regarding the relevance and materiality of such information to the issues in this action (*see Beckles v Kingsbrook Jewish Med. Ctr.*, 36 AD3d 733 [2d Dept 2007]; *County of Suffolk v Love 'M Sheltering, Inc.*, 2017 NY Slip Op 31005[U] [Sup Ct, Suffolk County 2017]).

Accordingly, those branches of defendants' motion for summary judgment dismissing the first, second, and fourth causes of action against Qu and for partial summary judgment dismissing the fourth cause of action against Star are granted. In all other respects, defendants' motion is denied. Plaintiff and Lam's cross motion for summary judgment in favor of plaintiff on its first and second causes of action and for summary judgment dismissing the third-party complaint against Lam is denied.

Dated: March 10, 2021




 ROBERT I. CALORAS, J.S.C.