

25 Tudor Owners Corp. v Red Apple Child Dev. Ctr.
2022 NY Slip Op 31042(U)
March 28, 2022
Supreme Court, New York County
Docket Number: Index No. 653548/2021
Judge: Laurence Love
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**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

-----X

25 TUDOR OWNERS CORP.,

Plaintiff,

- v -

RED APPLE CHILD DEVELOPMENT CENTER,
 METROKIDS CRADLE (SOUTH END) INC., PRESCHOOL
 OF AMERICA (USA) INC., ZIMING SHEN, XIAO FAN

Defendants.

-----X

INDEX NO. 653548/2021

MOTION DATE 09/09/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
 MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 62, 66

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

The following read on defendants’ motion to dismiss, per CPLR 3211(a)(1) – defense founded upon documentary evidence, 3211(a)(4) – there is another action pending between the same parties ... the court need not dismiss upon this ground, 3211(a)(7) – pleadings fail to state a cause of action, and CPLR 3211(a)(8) – the court has not jurisdiction of the person of the defendant.

A Complaint states nine (9) causes of action for “declaratory, injunctive, and monetary relief” in relation to a commercial landlord-tenant dispute of a preschool at 25 Tudor Place. Per the complaint, “the Lease had a fifteen-year term ... ending on September 30, 2018. The Lease naturally expired by its terms, and Red Apple continued its tenancy and occupation of the space on a month-to month basis. Plaintiff commenced a holdover case against Defendants in the New York City Civil Court, New York County, bearing index no. LT – 301193-21/NY. Defendants have not yet appeared in that case” (see NYSCEF Doc. No. 2 Par. 12, 15, 42).

Plaintiff's causes of action include a i) permanent injunction – against all defendants, ii) declaratory judgment – against holdover tenants, iii) breach of contract – against holdover tenants, iv) breach of guaranty – against individual defendants, v) breach of implied contract/RPL 233-c against holdover tenants, vi) account stated – against holdover tenants, vii) prima facie tort – against holdover tenants, viii) in the alternative – tortious interference with economic relations – against holdover tenants, and ix) attorney's fees – against holdover tenants.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

A so – ordered stipulation was agreed upon where, “[d]efendants shall provide access to the Ground and Basement Floors” (see NYSCEF Doc. No. 64).

On a motion to dismiss based upon documentary evidence, defendant must present evidence which “utterly refutes” plaintiff's allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]).

Defendants submit affidavits from named defendants Xiaoping Fan, Ziming Shen, and non-named defendant Jessica Xiao (see NYSCEF Doc. Nos. 40 – 42). These affidavits do not “utterly refute” any of plaintiff's causes of action.

Defendants' affirmation states “[t]his action should be stayed pending a determination of the Civil Court eviction action.” CPLR 2201 states, “except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.”

Plaintiff's affirmation in opposition states, "the central relief sought in the Housing Court Proceeding and the instant proceeding are distinct, and the issues are properly adjudicated to the appropriate courts for resolution. Specifically, the Housing Court Proceeding is an *eviction* proceeding, principally seeking a possessory judgment and warrant of eviction. This action, on the other hand, seeks primarily declaratory and injunctive relief, claims that *cannot be brought in Housing Court*" (see NYSCEF Doc. No. 66 P. 11).

"We find, contrary to the defendants' contentions, that this action was properly commenced in the Supreme Court. The plaintiff commenced this action for both a declaratory judgment and a permanent injunction. Since the New York City Civil Court cannot grant the injunctive relief sought by the plaintiff, the action was properly commenced in the Supreme Court" (see *Trump Vil. Section 3, Inc. v. Sinrod*, 219 A.D.2d 590 [2d Dept. 1995]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining "only whether the facts as alleged fit within any cognizable legal theory" (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

Defendants' affirmation states, "[p]laintiff failed to properly serve the order to show cause and complaint upon the individual defendants. The Order to Show Cause issued by Hon. Laurence L. Love ordered that 'personal service of a copy of this order to show cause ... together with a copy of the summons and complaint herein, by personal service ... on or before 7/7/21, 2021 [sic], shall be good and sufficient service. Plaintiff has failed to personally serve individual defendant Ziming Shen. Rather, plaintiff 'served' Mr. Shen by leaving papers with John Doe

conciere and mailing the papers. Plaintiff has also failed to personally serve individual defendant Xiao Ping Fan. Rather, plaintiff ‘served’ Ms. Fan by leaving papers with the John Doe conciere and mailing the papers” (see NYSCEF Doc. No. 39 Par. 30 - 32).

A review of CPLR 308 states, “personal service upon a natural person” and explains in six (6) subsections how personal service is affected. One of these methods of “[p]ersonal service upon a natural person shall be made by ... delivering the summons with the state to a person of suitable age and discretion ... and by either mailing the summons” (see CPLR 308(2)).

Defendants have not shown documentary evidence that would warrant dismissal of this litigation per CPLR 3211(a)(1).

The “another action” in the New York City Civil Court does not seek a declaratory judgment nor a permanent injunction. This action in the New York Supreme Court seeks relief that is distinct and different from above mentioned Civil Court litigation.

The pleadings in the complaint state a viable controversy between the parties that would prohibit dismissal per CPLR 3211(a)(7).


Lastly, the New York State Supreme Court has jurisdiction as the real property is located within the confines of New York City, 25 Tudor Place.

ORDERED that defendants’ motion to Stay this proceeding is DENIED; and it is further ORDERED that defendants’ motion to dismiss per CPLR 3211(a)(1) – defense founded upon documentary evidence, is DENIED; and it is further

ORDERED that defendants’ motion to dismiss per 3211(a)(4) – there is another action pending between the same parties ... the court need not dismiss upon this ground, is DENIED; and it is further

ORDERED that defendants’ motion to dismiss per 3211(a)(7) – pleadings fail to state a cause of action, is DENIED; and it is further

ORDERED that defendants’ motion to dismiss per CPLR 3211(a)(8) – the court has not jurisdiction of the person of the defendant, is DENIED.

3/28/2022		
DATE		LAURENCE LOVE, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE