

237 42nd St. Corp. v LMEG Wireless LLC
2022 NY Slip Op 31101(U)
April 4, 2022
Supreme Court, Kings County
Docket Number: Index No. 518068/2020
Judge: Lillian Wan
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 17

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237 42ND STREET CORP., AND COZINE
AVENUE LLC,

Index No.: 518068/2020
Motion Seq. Nos.: 01, 02 & 03

Plaintiffs,

-against-

LMEG WIRELESS LLC,

DECISION AND ORDER

Defendant.

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LMEG WIRELESS LLC,

Third-Party Plaintiff

-against-

E.S. SIGNATURE EVENT RENT LLC and
LUXE LIVING DESIGN LLC,

Third-Party Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of
these motions.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 6-11
(Motion 02) 18-25, 84-93 and (Motion 03) 30-56 and 66-75 were read on the motions set forth
below.

The plaintiff moves to dismiss, pursuant to CPLR §§ 3211(a)(1), (a)(7) and § 3013, the
first and second counterclaims (Motion 01) of defendant, LMEG Wireless LLC (LMEG).
LMEG seeks dismissal of the plaintiff’s complaint (Motion 02), pursuant to CPLR § 3211(a)(7),
and for a judgment on default, pursuant to CPLR § 3215, against the third-party defendants, E.S.
Signature Event Rent, LLC and Luxe Living Design LLC, in the amount of \$1,027,609.24. The
plaintiff cross-moves for summary judgment, pursuant to CPLR § 3212, on its first and second
causes of action for breach of contract based on rental arrearages against LMEG (Motion 03).
After oral argument and upon consideration of the parties’ submissions, the motions are decided
as set forth below.

Defendant, LMEG, is the tenant and sublessor of a portion of the building located at 303
Louisiana Avenue, Brooklyn, NY 11207 a/k/a 1 Wortman Avenue, Brooklyn, NY 11207.
Plaintiffs, 237 42nd Street Corp., and Cozine Avenue LLC, are the landlords of the premises.

The defendant, LMEG, sublets the premises to third-party defendants, E.S. Signature Event Rent LLC and Luxe Living Design LLC, with the knowledge of the plaintiffs, who signed the sublease agreement.

By way of background, pursuant to a decision and order of this Court dated March 14, 2022, LMEG's motion (Motion 04) seeking a default judgment against the third-party defendants (Motion 04) in the amount of \$1,231,917.61 was referred to a special referee for a traverse hearing to determine the issue of personal jurisdiction over the third-party defendants. The third-party defendants' motion (Motion 05) seeking an extension of time to answer the third-party complaint of LMEG was stayed pending the outcome of the hearing.

The plaintiffs commenced this proceeding by filing a summons and complaint on September 24, 2020, seeking a judgment for the rent arrears. At the time of the filing of the summons and complaint, Executive Order 202.64, dated September 18, 2020, was issued which "prohibited the initiation of a proceeding or enforcement of an eviction of any commercial tenant for nonpayment of rent...through October 20, 2020. The moratorium was extended by subsequent Executive Orders 202.75 and 202.81.

The plaintiff seeks dismissal of the two counterclaims asserted by defendant LMEG in its answer (Motion 01), pursuant to CPLR §§ 3211(a)(1) and (a)(7). The first counterclaim is based on tortious interference with contract. The counterclaim states:

[T]he Plaintiffs in commencing the instant lawsuit was brought to solely intimidate and/or harass Defendant. That the motivations of the Plaintiffs are not genuine and nothing more than an abuse of process while it tortuously [sic] interferes with Defendant's contractual relationship with its Subtenant. That as a result, Defendant demands judgment in an amount to be determined at trial but no less than \$200,000.00.

The second counterclaim seeks legal fees and sanctions, pursuant to NYCRR § 130.1. On the record at oral argument, the defendant withdrew this counterclaim, and therefore that branch of the defendant's motion is denied as moot.

To plead a cause of action for tortious interference with existing contracts, a plaintiff must plead the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of the contract without justification, actual breach of the contract, and damages. *See Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584 (2012). The claim must specifically allege that the contract would not have been breached but for the defendant's conduct. *See White Knight of Flatbush, LLC v Deacons of the Dutch Congregation of Flatbush*, 159 AD3d 939 (2d

Dept 2018). “Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim, a plaintiff must support his [or her] claim with more than mere speculation.” *See Ferrandino & Son, Inc. v Wheaton Bldrs., Inc.*, LLC, 82 AD3d 1035, 1036 (2d Dept 2011), quoting *Burrowes v Combs*, 25 AD3d 370 (1st Dept 2006).

“[T]he sole criterion [on a motion to dismiss pursuant to CPLR § 3211(a)(7)] is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.” *See Guggenheimer v Ginzburg*, 43 NY2d 268 (1977).

Here, viewing the four corners of the defendant’s answer, and according the defendant the benefit of every possible inference, the defendant’s first counterclaim for tortious interference with the contract must be dismissed, pursuant to CPLR § 3211(a)(7). The defendant has failed to allege how the contract was actually breached by the third party, and that the contract would not have been breached but for the defendant’s conduct. The counterclaim seems to allege facts that show the plaintiffs have attempted to get the sublessee to breach the lease, and in doing so are acting in bad faith, but this is insufficient to establish a tortious interference with contract claim. There must be an actual breach of the contract by the third party. *See Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584.

The defendant, LMEG, cross-moves seeking dismissal of the complaint (Motion 02), pursuant to 3211(a)(7), for failure to state a cause of action because the plaintiffs have no cognizable claim at law based on the moratorium on initiating nonpayment of rent proceedings put in place by the Executive Order of September 18, 2020.

The defendant’s motion must be denied, as the commercial tenant eviction moratorium issued by numerous Executive Orders do not preclude plenary actions for non-payment of rent and related damages. *See VNO 100 West 33rd Street LLC v Exp. Fashion Operations, LLC*, Sup Ct, NY County, October 6, 2021, Perry, J., index No. 657046/2020; *BSREP III Nero LLC v Modern Parking LLC*, Sup Ct, NY County, June 10, 2021, Kotler, J., index No. 157119/2020; *135 East 57th Street, LLC v Saks Inc.*, Sup Ct, NY County, January 29, 2021, Cohen, J., index No. 155234/2020; *BKNY1, Inc. v 132 Capulet Holdings, LLC*, Sup Ct, Kings County, September 23, 2020, Knipel, J., index No. 508647/2016. As such, the plaintiffs have stated a proper cause of action for breach of contract relating to the unpaid rent by LMEG.

The defendant also seeks a default judgment against third-party defendants E.S. Signature Event Rent and Luxe Living Design LLC in the amount of \$1,027,609.24. As set forth above, the issue of whether LMEG has asserted personal jurisdiction over the third-party defendants has

previously been referred to a special referee by decision and order dated March 14, 2022. This branch of LMEG's motion is held in abeyance pending the special referee's report.

Plaintiffs' motion seeking summary judgment (Motion 03) against LMEG must be denied. "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." *See Brea v Salvatore*, 130 AD3d 956, 956 (2d Dept 2015); *see also Village of Dobbs Ferry v Landing on the Water at Dobbs Ferry Homeowners Assn., Inc.*, 198 AD3d 838 (2d Dept 2021). A party contending that a summary judgment motion is premature must demonstrate that "discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant." *See Rutherford v Brooklyn Navy Yard Dev. Corp.*, 174 AD3d 932, 933 (2d Dept 2019), quoting *MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040 (2d Dept 2015) (internal quotation marks omitted). A party opposing summary judgment "is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated." *See Brea v Salvatore*, 130 AD3d at 956.

The defendant, LMEG, argues that no discovery and/or depositions have taken place, and that the plaintiffs are in sole possession of information and/or documents that are necessary to oppose the motion. The defendant further argues that the issue of whether the sublessor is in default has yet to be determined. The defendant contends that there are issues of fact concerning whether the plaintiffs breached the implied duty of good faith and fair dealing by directly negotiating with LMEG's subtenant, and whether the plaintiffs are attempting to interfere with the contractual relationship between LMEG and its subtenant in an attempt to "squeeze" the defendant out of the lease so the plaintiffs can directly enter into a lease with the third party. In opposition, LMEG has raised triable issues of fact as to the plaintiffs' motion, and the defendant is entitled to conduct discovery relating to those issues prior to adjudication of a summary judgment motion.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiffs' motion (Motion 01) is **GRANTED** as to the defendant, LMEG's first counterclaim; and **DENIED** as moot as to the defendant's second counterclaim; and it is further

ORDERED, that the defendant, LMEG's motion for dismissal of the plaintiffs' complaint (Motion 02) is **DENIED**, and that branch of the motion seeking entry of a default judgment against the third-party defendants, E.S. Signature Event Rent LLC and Luxe Living Design LLC,

in the amount of \$1,027,609.24 is held in abeyance pending the determination of the special referee's report; and it is further

ORDERED, that the plaintiffs' motion for summary judgment on the first and second causes of action is **DENIED**.

This constitutes the decision and order of the Court.

Dated: April 4, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.