

<b>Volivetska v Daror Assoc., LLC</b>
2023 NY Slip Op 30280(U)
January 19, 2023
Supreme Court, New York County
Docket Number: Index No. 650863/2022
Judge: Suzanne J. Adams
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE J. ADAMS PART 39TR

Justice

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MARYNA VOLIVETSKA, SHISHAKTI YOGA LLC. D/B/A.
BEU,

Plaintiff,

INDEX NO. 650863/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

DAROR ASSOCIATES, LLC., KF BRAUN MANAGEMENT,
LLC., UNIVERSAL CONTRACTING OF NEW YORK CORP.
D/B/A UNIVERSAL CONTRACTING, ACA ASSOCIATES,
NAVI STRUCTURAL ENGINEERING, PLLC.

Defendant.

DECISION + ORDER ON
MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15,
16, 17, 18, 19, 20, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53,
54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82,
83, 84, 85, 86

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motion of defendants Daror
Associates, LLC ("Daror"), KF Braun Management, LLC ("KF Braun"), and ACA Associates
("ACA") is granted in part. Plaintiff Shishakti Yoga LLC ("Yoga LLC") entered into a lease
agreement dated April 8, 2019, with Braun, as agent for Daror, to lease the premises at 160
Broadway, 4th Floor, in Manhattan, in order to open a yoga studio. Plaintiff Maryna Volivetska
personally guaranteed the lease. Yoga LLC also contracted with defendant Universal Contracting
of New York Corp. to undertake certain construction work on the premises. The Verified
Complaint alleges that Yoga LLC opened in late January, 2020, then shut down on March 16,
2020, due to the pandemic, but then was unable to re-open later that year because of a New York
City Department of Buildings "stop work" order. The pleading alleges that defendants made

factual misrepresentations to plaintiffs regarding the premises, construction thereon, and the stop work order, to plaintiffs' detriment, and asserts four causes of action, sounding in breach of contract, fraud, promissory estoppel, and punitive damages. Defendants Braun, Daror, and ACA now move pursuant to CPLR 3211(a)(1), (3), (4), (5), (7), and (8), and CPLR 3016(b) to dismiss the action. Plaintiffs oppose the motion. (Separately, defendant Navi Structural Engineering, PLLC moves to dismiss the Verified Complaint in motion sequence 002, which motion is being decided separately and concurrently with the instant motion.)

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). 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." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). With respect to ACA, plaintiffs have failed to state any cause of action. The Verified Complaint contains no allegations as to ACA's role with respect to the premises, whether plaintiffs had a contractual relationship with ACA, or whether they relied on any statements by ACA. As such, dismissal of ACA from this action is warranted.

Dismissal as to Daror and Braun, however, is not warranted. Apart from the Fourth Cause of Action, plaintiffs' other causes of action are sufficiently pled. The Fourth Cause of Action seeks punitive damages, for which there is no separate cause of action under New York law. *Steinberg v. Monasch*, 85 A.D.2d 403, 405-06 (1<sup>st</sup> Dep't 1985). Thus, the Fourth Cause of Action is dismissed.

As to the other claims, under CPLR 3211(a)(7), the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. *Leon*, 84 N.Y.2d at 88 (citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)). Although it may be "inartfully drafted,"

the Verified Complaint alleges “for pleading survival purposes” a breach of contract claim insofar as it alleges that plaintiffs were unable to use the premises pursuant to the lease because of a stop work order issued to Daror by the Department of Buildings. *See* 84 N.Y.2d at 88. Further, “[t]he elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages [citations omitted]. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b).” *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). Plaintiffs allege that Daror and KF Braun made knowingly false representations about the premises and construction thereon, which plaintiffs relied on to their detriment. Likewise, in claiming that they relied upon defendants’ representations about the stop work order’s effect on the premises, plaintiffs allege a claim for promissory estoppel, the elements being: “(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance [citation omitted].” *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 32 (1<sup>st</sup> Dep’t 2015).

Finally, defendants’ remaining contentions are without merit. Plaintiff Volivetska has standing to bring this action in her individual capacity, as she is the personal guarantor of the lease at issue. The purported prior pending action between the parties herein was never served on any of the defendants, and does not appear to be, in any sense, “pending.” The defendants in this action were indeed served, and while the moving defendants maintain that service was improper, the affidavits of service filed in this action conform with CPLR service requirements and defendants submit no proof by a person with knowledge that contest the validity of said affidavits.

Accordingly, it is hereby

ORDERED that the within motion is granted to the extent that the action is dismissed in its entirety as against defendant ACA and the Fourth Cause of Action is dismissed as to defendants Daror and KF Braun, and the remainder of the motion is otherwise denied; and it is further

ORDERED that the action is severed as to ACA and continued against the remaining defendants (in conformity with the concurrent decision in motion sequence 002); and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the moving defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that within 35 days of the date of this order, the remaining parties to this action shall submit to the Part Clerk of Part 39 an agreed upon Preliminary Conference Order for the judge's review and signature, as per the Part Rules.

This constitutes the decision and order of the court.

1/19/2023

DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: