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| Cafe Mocha, Inc. v 48 E. 7th St. Assoc. Inc. |
| 2023 NY Slip Op 30372(U) |
| February 6, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 155292/2020 |
| Judge: Sabrina Kraus |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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CAFE MOCHA, INC.,

Plaintiff,

- v -

48 E. 7TH ST. ASSOCIATES INC., 116 2ND AVENUE, LLC

Defendant.

-----X

INDEX NO. 155292/2020

MOTION DATE 2/7/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 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, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 136, 138, 140, 141, 142, 143, 148, 149, 150, 151, 152, 153, 154, 155, 156

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 137, 139, 144, 145, 146, 147, 157, 158, 159, 160, 161, 162, 163

were read on this motion to/for DISMISS.

BACKGROUND

This action arises out of a fire that occurred on February 10, 2020, at the premises located at 48 East 7th Street, New York, New York (Subject Premises). 116 2nd Avenue LLC (Landlord) is the owner and landlord of the Subject Premises. Plaintiff is a tenant in a commercial premises sharing an adjoining wall with 48 E.7th St. Associates Inc. d/b/a Via Della Pace (Tenant).

ALLEGED FACTS

On or about January 25, 2009, Plaintiff and Landlord entered into a ten-year Lease Agreement for a ground floor space in the Subject Premises which Plaintiff leased for the

purpose of operating a restaurant business. The lease was twice extended for a term through and including December 31, 2028.

Plaintiff and Tenant occupied neighboring spaces, both operating restaurants, and shared a common wall. On February 16, 2020, a fire originated from the kitchen in Tenant's space causing damage to Plaintiff's Unit. Plaintiff alleges it suffered \$300,000.00 in damages beyond what was covered by its insurance.

Two reports were submitted regarding as to the cause of the fire. The report prepared by Hayden Karn Consulting, asserts the cause and origin of the fire was a heat transfer from a stove adjacent to a wall, and states as follows:

AREA/POINT OF FIRE ORIGIN

The fire originated within the combustible wall assembly on the west interior wall of the kitchen where the natural gas range was located and operating at the time of the fire occurrence.

At the time of the fire occurrence there was a pot on the natural gas range heating water to make pasta.

SUMMARY

As a result of my fire scene examination, it is my opinion that this fire originated within the combustible wall assembly on the west interior wall of the kitchen where the natural gas range was located and operating at the time of the fire occurrence.

Examination revealed the natural gas range was positioned against the combustible wall assembly. The natural gas range required 12" of clearance to a non-combustible wall assembly. The construction of the wall assembly was not substantial enough to be considered a non-combustible wall assembly.

Another report prepared by Joseph Myers Investigations, LLC stated that the fire originated in Tenant's kitchen in the wall near a 6-burner natural gas stove located in the rear of the kitchen, inside the restaurant. The inspection of the stove revealed evidence of broken and degraded grates above each burner from extensive heating and use. On top of the stove were two

metal pots/pans used for cooking. The inspection further showed that when ignited, the heat and continual flame from the gas burner would roll out from underneath the pot. The front burner was continually on to heat up spaghetti and noodles. Myers opined that the cause of the fire was the transfer of heat from the flame of the stove burner operated by Tenant's cook to the metal sheathing attached to the wall, and that the origin of the fire was in Tenant's kitchen.

PENDING MOTIONS

On August 17th, 2022, Tenant moved for an order dismissing the action pursuant to CPLR §3211(a)(1) and (a)(7).

On October 3, 2022, Landlord cross-moved for an order pursuant to the same CPLR provisions dismissing Plaintiff's complaint and all crossclaims.

On December 2nd, 2022, Landlord moved for the identical relief sought in the cross-motion.

Although argument was scheduled for February 7, 2023, the parties elected to forgo argument and asked that the motions be marked submitted. The motions are consolidated herein for disposition. For the reasons stated below, the motions are denied.

DISCUSSION

THE MOTIONS TO DISMISS PURSUANT TO CPLR §3211(a)(1) ARE UNTIMELY

CPLR §3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: a defense is founded upon documentary evidence."

The Court of Appeals has held that a CPLR 3211 dismissal may be granted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Leon v. Martinez*, 84 N.Y.2d 83, 88).

CPLR §3211(e) requires that a motion to dismiss a cause of action under CPLR 3211(a) be made before service of the responsive pleading “is required.”

All motions under CPLR 3211 are to be made “[a]t any time before service of the responsive pleading” (CPLR 3211[e]), except that CPLR 3211 motions may be made after service of the party's answer in three circumstances: when the motion is based upon subdivision (a)(2) subject matter jurisdiction, (a)(7) failure to state a cause of action, or (a)(10) nonjoinder of a necessary party (*see* CPLR 3211[e]).

Hendrickson v. Philbor Motors, Inc., 102 A.D.3d 251, 257 (2012).

Here defendants’ motions to dismiss based on documentary evidence are made well after the statutory time limit and therefore must be denied.

***Assuming The Truth of The Allegations in The Complaint,
The Complaint Does Set Forth a Cause of Action Against Both Defendants***

The standard on a motion to dismiss for failure to state a cause of action is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275; *Foley v. D'Agostino*, 21 A.D.2d 60, 64–65, 248 N.Y.S.2d 121.

Additionally, on a motion to dismiss a complaint for failure to state a cause of action, the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party. *See EBCI, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19; *Sokol v. Leader*, 74 A.D.3d 1180. In considering such a motion, the court must “accept the facts as alleged in the complaint as true, accord plaintiff(s) the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” *Nonnon v. City of New York*, 9 N.Y.3d 825, 827. “Whether a plaintiff can ultimately establish its allegations is not part of the calculus.” (*Id.*).

“The elements of negligence are “(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Solomon v. City of New*

York, 66 N.Y.2d 1026, 1027, 499 N.Y.S.2d 392, 489 N.E.2d 1294).” *Abbott v. Johnson*, 152 A.D.3d 730, 732 (2017).

The complaint does make these allegations as to both of the defendants in the case at bar.

The complaint also asserts a second cause of action for breach of contract against Landlord. However, this issue was not addressed in the moving papers and based on the foregoing, the court assumes movant was not seeking dismissal of this cause of action pursuant to CPLR §3211(a)(7).

WHEREFORE it is hereby:

ORDERED that Motion Seq Nos 1 & 2 are denied in their entirety; and it is further

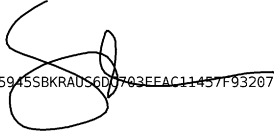
ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that the parties are to appear for a virtual preliminary conference on March 8th, 2023, at 3:30 pm; and it is further

ORDERED that this constitutes the decision and order of this court.


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2/6/2023
DATE

SABRINA KRAUS, 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: