

148 E. 30th St. Co., LLC v Chun

2023 NY Slip Op 33219(U)

September 18, 2023

Supreme Court, New York County

Docket Number: Index No. 151541/2023

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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148 EAST 30TH STREET CO., LLC

Plaintiff,

- v -

HEATHER CHUN,

Defendant.

-----X

INDEX NO. 151541/2023

MOTION DATE 09/14/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISSAL.

Defendant’s motion to dismiss is granted.

Background

Plaintiff brings this case seeking reimbursement of fines it allegedly incurred due to defendant’s purportedly “illegal sublet” of an apartment she rented from plaintiff. It alleges that defendant illegally rented out her apartment on Airbnb and that plaintiff had to pay fines imposed by various city agencies. Plaintiff seeks more than \$55,000.

Defendant moves to dismiss on the ground that she appeared at a hearing before the Office of Administrative Trials and Hearings (“OATH”) in response to four notices of violation and that all the violations were dismissed. She claims that these violations all related to the allegedly illegal Airbnb activity and so the complaint should be dismissed as plaintiff did not incur any fines or penalties. Defendant asserts that the documentary evidence she presented refutes the four-paragraph complaint filed in this action.

In opposition, plaintiff contends that defendant impermissibly hosted Airbnb guests and that it incurred expenses in connection with two trials before OATH. It asserts it had to hire counsel for these two hearings and insists that the lease requires defendant (as the tenant) to pay the landlord for such fees.

In reply, defendant emphasizes that plaintiff's opposition makes clear that there was no finding by OATH that imposed fines on plaintiff. She insists that she prevailed in each trial.

Discussion

“In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction. Indeed, we accord plaintiffs the benefit of every possible favorable inference” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002] [internal quotations and citation omitted]). A motion to dismiss based on documentary evidence (CPLR 3211[a][1]) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*id.*).

The Court grants the motion to dismiss as defendant presented documentary evidence showing that there were no fines imposed on plaintiff as a result of the alleged Airbnb use. The record shows that there were two hearings and no fines were imposed at either (NYSCEF Doc. No. 17). The complaint alleges that “Plaintiff and defendant entered into a lease agreement and the defendant illegally sublet her apartment through AIR BNB resulting in DOB/ECB and FDNY violations and fines resulting in fees which plaintiff had to pay in the amount of \$56,066.65” (NYSCEF Doc. No. 1, ¶ 3).

Plaintiff did not raise anything in opposition to show that there were, in fact, violations and fines imposed on it based on defendant's behavior. Instead, plaintiff changed its entire theory of the case to allege that defendant must now repay plaintiff for the legal fees that plaintiff

incurred in connection with the two OATH hearings. The problem for this Court is that plaintiff's complaint makes no mention of legal fees, does not cite to specific portions of the lease, or even explain the basis under which it could recover against defendant. As noted above, the complaint alleges that defendant has to repay plaintiff for fines imposed by the "DOB/ECB" even though, as this record shows, no fines were ever imposed by these entities.

Moreover, plaintiff did not cross-move to amend its pleading to reflect its new theory of recovery and to remove the allegation about the imposition of fines (clearly this allegation is, at best, misleading, and, at worst, false). And while plaintiff is certainly entitled to submit an affidavit in opposition to supplement a pleading, the Court finds that the plaintiff here is not permitted to fundamentally change their only cause of action in the opposition.

The fact is that defendant met her burden in the moving papers to irrefutably rebut the sole cause of action alleged. And in opposition, plaintiff did not raise an issue of fact about that claim—recovery based on fines imposed by governmental agencies. Instead, it sought to dramatically modify its theory of recovery without moving to amend. That is impermissible and compels the Court to grant the motion to dismiss.

To be clear, nothing prevents plaintiff from bringing another case on its new theory of recovery. This Court's decision is based solely on the allegations in the subject pleading and defendant's submission of documentary evidence that no fines were imposed on plaintiff because of defendant's conduct.

Accordingly, it is hereby

ORDERED that defendant’s motion to dismiss is granted and the Clerk is directed to enter judgment accordingly in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

9/18/2023
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE