

Chef Michael Barton Rest., LLC v Knapp

2023 NY Slip Op 33747(U)

October 11, 2023

Supreme Court, New York County

Docket Number: Index No. 654339/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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CHEF MICHAEL BARTON RESTAURANT, LLC, and
MICHAEL BARTON,

Plaintiffs,

INDEX NO. 654339/2022

MOTION DATE 02/27/2023

MOTION SEQ. NO. 001

- v -

WILLIAM KNAPP, WKNAPP LTD., and ELISSA HECKER,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Plaintiffs bring this action for breach of an asset sale agreement (the “ASA”) between plaintiff Chef Michael Barton Restaurant, LLC (the “Buyer”), and defendant WKnapp Ltd. (the “Seller”), pursuant to which Buyer purchased Seller’s restaurant operated in the building located at 44 East 92nd Street in Manhattan (the “Building”), and its associated lease and equipment. Plaintiffs allege causes of action for breach of contract and indemnification against Seller and defendant William Knapp (“Knapp,” and together with Seller the “Knapp Defendants”), Seller’s principal. Plaintiffs also allege legal malpractice by defendant Elissa Hecker, Esq., who represented buyer during the transaction. Presently before the court is the Knapp Defendants’ motion to dismiss the complaint based on documentary evidence (CPLR 3211[a][1]) and for failure to state a cause of action (CPLR 3211[a][7]).

Background

Central to the dispute between plaintiffs and the Knapp Defendants are the express warranties set forth in the ASA. As referenced in the complaint, Seller represented in the ASA that it had “legal title to the Assets, free and clear of all liens, claims, pledges or encumbrances of any kind, nature or description arising by, through or under seller” (ASA [NYSCEF Doc. No. 2] ¶ 10[b]). Seller represented that it “has complied, and is now complying, with all applicable federal, state and local laws and regulations applicable to ownership and use of the Assets” (*id.*, ¶ 10[c]). “To the best of seller’s knowledge, there are no judgments, consents, decrees, injunctions or any other judicial or administrative mandates outstanding against” it (*id.*, ¶ 10[e]). Finally, “[a]ll of the Tangible Personal Property being transferred hereunder is in good operating condition and, to the best of seller’s knowledge, free from material defects” (*id.*, ¶ 10[k]). Assets are defined as “all assets of every kind and description related to the Business that are owned by Seller and in which Seller has any right, title, or interest, except for those specifically excluded by the terms of [the ASA]” (*id.*, ¶ 1). “Tangible Personal Property,” which is listed as a category of Assets, is defined as “all furniture, furnishings, fixtures, equipment, signage, tools, devices, machinery, trade fixtures, including, but not limited to, leasehold improvements, security systems, kitchen and other equipment” (*id.*, ¶ 1[a][i]).

Plaintiffs allege that following the sale of the restaurant, they learned that the restaurant was the subject of five active and unresolved violations from the New York City Department of Buildings (“DOB”), as well as numerous job filings (Complaint [NYSCEF Doc. No. 1] ¶ 10). Further, there was need to “cure out-of-code duct work running from the kitchen up to the roof” of the Building, as well as problems with the oven hood and fire suppression system around the oven (*id.*, ¶¶ 11-12). On March 15, 2022, Con Edison shut off the gas to the Building to repair a

leak, which shutoff continued while the Building's gas meters were replaced (*id.*, ¶ 18). Plaintiff asserts that after the work on the meters was completed, the gas remained shut down due to the unresolved DOB matters (*id.*). In order to mitigate their damages, plaintiffs purchased an electric oven, but learned that the Building's electrical capacity was insufficient to power the oven (*id.*, ¶¶ 21-22). In total, the restaurant was closed for five months (*id.*, ¶ 23).

Standard of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.*, at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

As an initial matter, the complaint must be dismissed against Knapp individually. Knapp signed the ASA on behalf of Seller, and in his own name only as to a covenant not to compete with plaintiffs following the sale (ASA [NYSCEF Doc. No. 2] ¶ 14; *id.*, at 20). The non-

competent provision is not in issue. Plaintiffs implicitly concede this point by not opposing this branch of the Knapp Defendants' motion.

Seller primarily argues that the unresolved DOB matters are not the source of plaintiffs' damages, as they concern the landmarked status of the Building and the boiler, neither of which were within Seller's control, and further, that the matters remained unresolved after the restaurant reopened. Plaintiffs do not meaningfully dispute that Seller was not responsible for the boiler or the landmarked status of the Building. To the extent that plaintiffs' claim relates to the oven and related safety equipment such as the hood and fire suppression system, the oven is clearly listed among the equipment that is considered Tangible Personal Property (*see*, ASA [NYSCEF Doc. No. 2] Exhibit A). At best, the broad text of the definition of Tangible Personal Property is ambiguous, as it is written to extend to all "furniture, furnishings, fixtures, equipment, signage, tools, devices, machinery, trade fixtures, including, but not limited to, leasehold improvements, security systems, kitchen and other equipment" (*id.*, ¶ 1[a][i]). Ambiguities in a contract may not be resolved on a motion to dismiss (*Almah LLC v AIG Empl. Services, Inc.*, 157 AD3d 416, 416 [1st Dept 2018] ["If a contract is ambiguous, the complaint should not be dismissed pre-answer before the development of a full factual record as to the parties' intent"]).

Seller additionally argues that that it was unaware of any problems with the oven hood and fire suppression system related to the oven, and in any case, the Tangible Personal Property was sold in an "as is" condition.¹ Neither argument is persuasive. Firstly, Seller's knowledge or lack thereof is a question of fact that cannot be resolved on a motion to dismiss (*Peacock v*

¹ To the extent that Seller relies on a certificate from the Lund Fire Products Company, Inc., regarding the status of the fire suppression system, such is inadmissible hearsay as it is not properly authenticated as a business record (CPLR 4518).

Herald Sq. Loft Corp., 67 AD3d 442, 443 [1st Dept 2009]). Moreover, the specific warranty at issue provides that “the Tangible Personal Property being transferred hereunder is in good operating condition and, to the best of seller’s knowledge, free from material defects” (ASA [NYSCEF Doc. No. 2] ¶ 10[k]). The unambiguous reading of this provision suggests that Seller’s knowledge is only relevant to material defects in the Tangible Personal Property, not to whether or not it was in “good operating condition.” “[A]greements are generally construed in accord with the parties’ intent and the best evidence of the parties’ intent is what they say in their writing” (*Osprey Partners, LLC v Bank of N.Y. Mellon Corp.*, 115 AD3d 561, 562 [1st Dept 2014] [internal quotation marks and citations omitted]). Finally, an “as is” provision operates to bar any claim for breach of an implied warranty, but does not bar claims for breach of an express warranty, such as plaintiffs’ claims herein (*cf. Sarfowaa v Claflin Apts. LLC*, 284 AD2d 228, 228 [1st Dept 2001] [“We dismiss the claims by third-party plaintiffs based on breach of contract and warranty since the contract of sale was an ‘as is’ agreement providing no warranties”]).

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted as to defendant William Knapp, and is otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant William Knapp dismissing the case as against him; and it is further

ORDERED that the action is severed and continued as to defendants WKnapp Ltd. and Elissa Hecker; and it is further

ORDERED that defendant WKnapp Ltd. shall file an answer to the complaint within 20 days of the date of filing hereof; and it is further

ORDERED that the parties shall appear at the Courthouse for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on November 22, 2023, at 2:15 PM.

This constitutes the decision and order of the court.

ENTER:



<u>10/11/2023</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <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