

**Escrown LLC v Arepas NYC Corp.**

2023 NY Slip Op 33782(U)

October 24, 2023

Supreme Court, New York County

Docket Number: Index No. 655905/2020

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

INDEX NO. 655905/2020

ESCROWN LLC,

Plaintiff,

MOTION DATE 04/27/2022, 07/06/2023

- v -

MOTION SEQ. NO. 002 004

AREPAS NYC CORP., RUBEN ROJAS

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54, 86, 87

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85

were read on this motion to/for EXTEND - TIME

Upon the foregoing documents, plaintiff's motion to dismiss defendants' counterclaims is granted, and the motion to extend the time to file the note of issue is granted without opposition.

Plaintiff, Escrown LLC, commenced this action for breach of a lease against Arepas NYC Corp., the lessee, and Ruben Rojas (collectively "defendants"), the guarantor on the lease. Plaintiff alleges that Defendants owe it money damages for breach of the lease. On April 4, 2022, Arepas filed counterclaims against Plaintiff based on, inter alia, Plaintiff's failure to timely deliver the premises.

Plaintiff now moves pursuant to CPLR § 3211(a)(1) and (7) to dismiss Defendants' counterclaims. Initially, there is a dispute as to which lease is operative. The Plaintiff attached one lease to its moving papers (NYSCEF #37) while Arepas attaches a different lease to its opposition papers (NYSCEF #48). However, at oral argument, the parties agreed that the terms

1 The Court would like to thank Jason Lowe Esq., for his assistance in this matter.

of both leases were the same with the difference in the two leases being the numbering and headings of the sections of the lease. NYSCEF #87, page 12:24-13:3. Thus, there is nothing preventing the Court from considering whether the terms of the lease mandate dismissal of the counterclaims<sup>2</sup>.

Plaintiff argues the counterclaims should be dismissed because several clauses in the lease prohibit Arepas from asserting counterclaims. Section 1.12 (page 32)<sup>3</sup> of the lease states:

Landlord and Tenant hereby waive trial by jury and counterclaims in any action, proceeding or counterclaim brought by either against the other on any matter whatsoever arising out of or in any way connected with this Lease, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Premises, including any claim of injury or damage, or any emergency or other statutory remedy with respect thereto.

Further, section 2.2(b) (page 8) states:

If for any reason Landlord shall be unable to deliver possession of the Premises to Tenant on any date specified in this Lease for such delivery, Landlord shall have no liability to Tenant therefor and the validity of this Lease shall not be impaired, nor shall the Term be extended, by reason thereof, except as expressly provided herein. This Section 3.02(b) shall be an express provision to the contrary for purposes of Section 223-a of the New York Real Property Law and any other law of like import now or hereafter in effect.

Finally, section 1.4 (page 32) states:

Wherever in this Lease Landlord's consent or approval is required, if Landlord shall refuse such consent or approval, Tenant in no event shall be entitled to make, nor shall Tenant make, any claim, and Tenant hereby waives any claim, for money damages (nor shall Tenant claim any money damages by way of setoff, counterclaim or defense) based upon any claim or assertion by Tenant that Landlord unreasonably withheld or unreasonably delayed its consent or approval or Landlord failed to act in good faith.

### Discussion

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<sup>2</sup> The sections of the lease the Court will refer to will be the section numbers in the lease uploaded by Arepas at NYSCEF # 48.

<sup>3</sup> This version of the lease sometimes repeats sections, thus, for clarity, the page number of the section is also referenced.

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible *inference*. See *Avgush v Town of Yorktown*, 303 AD2d 340, 755 N.Y.S.2d 647 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348, 756 N.Y.S.2d 96 [2d Dept 2003].

The Court may dismiss a cause of action pursuant to CPLR § 3211 (a) (1) the grounds that "a defense is founded upon documentary evidence." "A motion to dismiss founded upon documentary evidence may be granted 'only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law'" (*Stem v Farney Daniels, P.C.*, 2018 NY Slip Op 32768[U], 2018 NY Misc LEXIS 4955, \*13 [Sup Ct, NY County 2018], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]).

"Courts have held that the waiver of the right to assert defenses, counterclaims or setoffs is enforceable and thus not violative as against public policy" (*Weiss v Phillips*, 157 AD3d 1, 10, 65 N.Y.S.3d 147 [1st Dept 2017]; *Parasram v DeCambre*, 247 AD2d 283, 284, 668 N.Y.S.2d 454 [1st Dept 1998]).

In this case, there is a general waiver of the right to assert counterclaims (section 1.12). Section 1.12 is broad and general nature prohibiting counterclaims "on any matter whatsoever arising out of or in any way connected with this Lease, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Premises, including any claim of injury or damage, or any emergency or other statutory remedy with respect thereto." Defendants do not articulate a proper reason why the Court should ignore this clause. The fact that section 1.12 mentions a

counterclaim to a counterclaim is prohibited does not negate the fact that it also prohibits counterclaims in any action or proceeding.

Further, though section 2.2(b) does not specifically prohibit Defendant from asserting a counterclaim it does specifically state that the validity of the lease shall not be impaired for the failure to timely deliver the premises and that Defendants Arepas is not entitled to monetary damages for any delay in delivery. Thus, to the extent the counterclaims are based on allegations regarding a delay in delivery, section 2.2(b) provides an additional basis for dismissal. Defendant Arepas' argument that Real Property Law § 223-a applies is incorrect because section 2.2(b) (page 8) of the lease is an express term declaring Real Property Law § 223-a to be inapplicable. See Pac. Coast Silks, LLC v 247 Realty, LLC, 76 AD3d 167, 169 [1st Dept 2010] ("The inclusion in the lease of an express term declaring Real Property Law § 223-a to be inapplicable took the lease out of the statute's purview.")

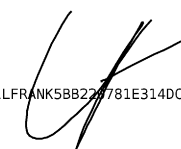
Accordingly, it is hereby

ORDERED that Plaintiff's motion to dismiss the counterclaims is granted and the counterclaims are dismissed in their entirety; and it is further

ORDERED that the time for plaintiff to file its Note of Issue is extended to January 24, 2024.

10/24/2023

DATE

  
20231024105951LFRANK5BB229781E314DCB80B8017217F8197B  
LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE