

Stop 24X7 Mart, LLC. v Madina Fresh Market, LLC

2023 NY Slip Op 35058(U)

June 5, 2023

Supreme Court, Queens County

Docket Number: Index No. 716163/2022

Judge: Joseph Risi

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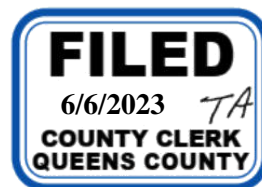
Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI

IA PART 3

A. J. S. C.



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STOP 24X7 MART, LLC., ARTI ASHOK GUPTA,
AND PRAKASH SINGH,

Index Number: 716163/2022

Plaintiffs,

Motion Date: October 4, 2022

-against

Motion Sequence #2

MADINA FRESH MARKET, LLC, ACTIVENY,
LLC., KHALID MAHMOOD, ASAD (AKA
HAROON) MAHMOOD, JOFRESH LLC, AND
MIDWOOD MANAGEMENT CORP.,

DECISION/ ORDER

Defendants.

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The following electronically filed documents read on this motion by defendants JOFRESH LLC and MIDWOOD MANAGEMENT CORP for an Order, pursuant to CPLR §3211(a)(1) and (7), dismissing plaintiffs’ claims as against said defendants:

	Papers <u>Numbered</u>
Notice of Motion-Affirmations-Exhibits-Service.....	EF 23 – 30
Memorandum of Law in Support.....	EF 31
Affidavits in Opposition-Service.....	EF 50 – 51
Memorandum of Law in Opposition.....	EF 52 – 56
Memorandum of Law in Reply.....	EF 65

Upon the foregoing papers, this motion is determined as follows:

This is an action relating to a lease of the commercial space located at 6671-6697 Fresh Pond Road, Ridgewood, New York. The subject property is owned by defendant JOFRESH LLC (“Jofresh”) and managed by co-defendant MIDWOOD MANAGEMENT CORP. (“Midwood”). Defendants Jofresh and Midwood seek to dismiss plaintiffs’ complaint pursuant to CPLR §3211(a)(1)(7).

Movants submit an affirmation of Daniel McInerney, Executive Vice President of defendant Midwood, in support of this motion. The affirmation states that defendants Jofresh and MADINA FRESH MARKET, LLC (“Madina”) entered into a written lease agreement dated

January 27, 2021, and Madina subsequently entered into possession of a portion of the subject premises. However, in or around June of 2022, Jofresh became aware that Madina had allowed a third-party to occupy and operate a business in the leased premises, without the landlord's prior consent. He states that the moving defendants were never asked to consent to an assignment of the lease, and moving defendants never provided consent to an assignment of the lease to plaintiffs or anyone else. Subsequently on June 17, 2022, Madina was notified via letter that it was in default of the lease, and if Madina continued to allow the third-party to occupy the premises after 30 days, the landlord would be permitted to exercise its remedies under the lease. Madina failed to respond to the letter or take any steps to rectify the default. Accordingly, pursuant to Article 17.01 of the lease, the landlord sent a five-day notice of termination causing the lease to expire on August 3, 2022. The affirmant states that the landlord never accepted payments from plaintiffs or anyone else towards rent or use and occupancy after the termination of the lease on August 3, 2022. Subsequently, on or about August 8, 2022, Jofresh commenced a holdover proceeding against tenant Madina, with "XYZ Corp." as the undertenant, in Queens County Civil Court.

Movants' counsel also submits a memorandum of law in support of this motion, referencing the portion of plaintiffs' complaint which states that plaintiff STOP 24X7 MART, LLC ("Stop Mart") and Madina entered into an agreement, whereby Madina sold its business to Stop Mart for \$50,000.00. Counsel presumes that this was an oral agreement, as there are no allegations that this agreement was memorialized in writing. Plaintiff Stop Mart alleges: "the parties entered the agreement on December 6, 2021 with all the understanding that upon sale and receipt of payment, defendant will obtain consent from the landlord for assignment of the lease." Movants' counsel argues that the gravamen of plaintiffs' complaint is that Madina breached their agreement by failing to obtain an assignment of the lease, and Stop Mart further acknowledges that it has been operating in the leased premises. However, plaintiffs do not allege that they were a party to any contract with the movants herein.

Movants' counsel cites to Section 8.01 of the lease, entitled No Assignment or Subletting. The relevant portion states:

"(a) Subject to the further provisions of this Article 8, **neither this Lease nor the term and estate hereby granted, nor any part hereof or thereof, shall be assigned**, mortgaged, pledged, encumbered or otherwise transferred voluntarily, involuntarily, by operation of law or otherwise, and neither the Premises, nor any part thereof, shall be subleased, be licensed, be used or occupied by any person or entity other than Tenant or be encumbered in any manner by reason of any act or omission on the part of Tenant, and no rents or other sums receivable by Tenant under any sublease of all or any part of the Premises shall be assigned or otherwise encumbered, **without the prior consent of Landlord**. The dissolution or direct or indirect transfer of control of Tenant or of a majority of economic interest in Tenant shall be deemed an assignment of this Lease regardless of whether the transfer is made by one or more transactions. No assignment or other transfer of this Lease and the term and estate hereby granted, and no subletting of all or any portion of the Premises shall relieve Tenant of its liability under this Lease or of the obligation to obtain Landlord's prior consent to any further assignment, other transfer or

subletting. **Any attempt to assign this Lease or sublet all or any portion of the Premises in violation of this Article 8 shall be null and void.**” (Emphasis added).

Counsel argues that plaintiffs have not alleged a violation any of their rights—rather, the sole wrongful act or omission that plaintiffs allege moving defendants to have committed is refusing to consent to an assignment of the lease. However, this contention fails, as the landlord was never asked to consent to an assignment, and the lease requires the landlord’s consent to an assignment in order for it to be valid. As such, counsel argues that plaintiffs’ cause of action for breach of contract should be dismissed.

Movants’ counsel also argues that plaintiffs’ first, second, fourth, fifth and sixth causes of action are not causes of action at all and should be dismissed. He states that the first cause of action for specific performance is a remedy, and even if specific performance were a cause of action, this claim seeks specific performance of an alleged contract between plaintiffs and Madina, and therefore is not properly directed to the movants. Similarly, plaintiffs’ second cause of action for a permanent injunction is not a proper cause of action and should also be dismissed. Counsel cites to *Corsello v. Verizon New York, Inc.*, 77 A.D.3d 344, 368 (2d Dep’t 2010), which states: “Although it is permissible to plead a cause of action for a permanent injunction, permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted by a plaintiff.” Additionally, counsel argues that plaintiffs’ fourth, fifth, and sixth causes of action, for loss of profits, compensatory damages, and punitive damages, are also not cognizable causes of action, as they are all alleged categories of damages.

Plaintiffs’ counsel submits an affirmation in opposition, stating that plaintiff made rent payments routinely from its accounts to defendants, and submits copies of wire transfers dated March 5, 2022, April 22, 2022, June 21, 2022, and July 11, 2022, in support. Counsel states that around January of 2022, plaintiffs requested that Midwood repair a leak, and upon Midwood realizing the repair will incur significant cost, Midwood took advantage of plaintiff Madina’s failure to obtain consent of assignment as retaliation. Counsel argues that defendants Jofresh and Midwood have knowingly and willingly continued to receive rents without assigning the lease as necessary, despite plaintiffs having completed all the contractual obligations as required by them.

Plaintiff ARTI ASHOK GUPTA (“Gupta”), principal officer of Stop Mart, submits an additional affidavit in opposition. He states that made a personal visit to the management company’s office following the issues with the roof leaking, after which the landlord conspired with Midwood to terminate the lease. He states that a rental payment was also made for August of 2022, but was subsequently rejected via wire reversal on the date this complaint was served. Gupta also submits copies of text messages purportedly exchanged between representatives of Madina and the co-defendants, in effort to refute defendants’ representations that they were never asked to consent to an assignment of a lease. Said text messages involve Madina’s representative asking, “What if I get my management company to take over the lease by providing you additional security in lieu of p&l? Whats the minimum increase I can discuss with them so they can save their business and do it the right way” to which he receives the response, “net worth has to meet or exceed \$2.5 million. If it doesn't then 12 months (lumpsum) additional security is required if the board even chooses to entertain it in the first place.”

Defendants Jofresh and Midwood's counsel submits an affirmation in reply, stating that plaintiffs provide utterly no support for the argument that their payment of rent, in lieu of payment from the tenant, before August 3, 2022, operated to create a new tenancy. Additionally, counsel references paragraph 8.02(c) of the lease, which states, in pertinent part:

“Notwithstanding any assignment, sublease or transfer, whether or not in violation of this lease, notwithstanding the acceptance of any Rent by Landlord from an assignee, subtenant, transferee, or any other party, the original named Tenant and each successor Tenant shall remain liable for the payment of the Rent and the performance of all of Tenant's other obligations under this Lease.”

Counsel argues that the lease explicitly states that the landlord's acceptance of rent from a third-party does not relieve the tenant of its contractual obligation to obtain the landlord's consent to an assignment. Additionally, counsel notes that plaintiffs' papers are devoid of any purported legal basis that would force the landlord's consent to an assignment.

It is well settled that in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleadings must be liberally construed. The sole criterion is whether, from the complaint's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept. 2003]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see *Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept. 1985], affirmed 66 NY2d 946 [1985]). The Court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (see *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept. 2010]).

In order to recover on a breach of contract claim a plaintiff must prove that there is (1) an existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, (4) and resulting damages (see *JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]).

Here, plaintiffs' cause of action for breach of agreement states:

“Defendant by violating the terms of the agreement has breached the agreement resulting into damages to the Plaintiff. Defendant Madina failed to obtain consent to assignment of the lease from Defendant Jofresh and Midwood in timely manner. Defendant, Jofresh and Midwood, have received and continue to receive rents and other charges from the Plaintiff routinely. Defendant Jofresh and Midwood have waived their right to either object to the tenancy, or assignment of lease to the Plaintiff.”

The only allegation of a breach agreement with relation to the movants herein stems from the fact that movants received rent from plaintiffs, which plaintiffs allege to have constituted a waiver of the landlord’s right to object to the tenancy or assignment of the lease.

“While waiver of a lease provision may be inferred from the acceptance of rent in some circumstances, it may not be inferred, and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise” (see *VRA Family Limited Partnership v. Salon Management USA, LLC*, 183 A.D.3d 614, 123 N.Y.S.3d 195, 2020 N.Y. Slip Op. 02639). Here, the lease expressly states that any acceptance of rent from any party does not relieve the tenant of its obligations under the lease, which were not fulfilled. Additionally, the text messages presented by plaintiffs do not show that any assignment was either requested or accepted.


Viewing the evidence in the light most favorable to the nonmoving party and accepting plaintiffs’ allegations as true, this Court finds that plaintiffs’ complaint fails to state a cause of action for breach of agreement against Jofresh and Midwood. No contractual agreement was created, and a waiver of the lease provisions in relation to an assignment did not occur. Plaintiffs’ remaining causes of action against movants are simultaneously dismissed, as said causes of action are merely remedies which flow from a breach of contract.

Accordingly, the defendants’ motion is granted and it is hereby

ORDERED, that plaintiffs STOP 24X7 MART, LLC., ARTI ASHOK GUPTA, AND PRAKASH SINGH’s complaint is hereby dismissed in its entirety as against defendants JOFRESH LLC, AND MIDWOOD MANAGEMENT CORP.

This is the decision and order of the Court.

Date: June 5, 2023



Hon. Joseph Risi, A.J.S.C.

