

Cleaning Concept 888 Inc. v Pan Am Equities, Inc.

2024 NY Slip Op 32525(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 653685/2023

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

-----X	INDEX NO.	<u>653685/2023</u>
CLEANING CONCEPT 888 INC.,		08/10/2023,
		09/11/2023,
Plaintiff,		09/14/2023,
		03/15/2024,
- v -	MOTION DATE	<u>04/10/2024</u>
PAN AM EQUITIES, INC., and WHITEHALL PROPERTIES II LLC,		002 003 004
Defendants.	MOTION SEQ. NO.	<u>006 007</u>

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 33, 38, and 39

were read on this motion by plaintiff for PRELIMINARY INJUNCTION.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 28, 29, 30, 31, 32, 54, 57, 58, 59, and 60

were read on this motion by defendants to DISMISS THE AMENDED COMPLAINT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 34, 35, 36, 37, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, and 61

were read on this motion by plaintiff to CONSOLIDATE/JOIN FOR TRIAL.

The following e-filed documents, listed by NYSCEF document numbers (Motion 006) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, and 73

were read on this motion by plaintiff to CONSOLIDATE/JOIN FOR TRIAL.

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, and 90

were read on this motion by plaintiff to CONSOLIDATE/JOIN FOR TRIAL.

In motion sequence number 002, plaintiff moves for injunctive relief, essentially, to allow it to continue to operate out of the space it had worked out of within the building owned by defendant Whitehall Properties II LLC (“Whitehall”) located at 60 West 23rd Street, New York, New York (the “Building”). In motion sequence number 003, defendants move to dismiss the

second and third causes of action in the amended complaint. In motion sequence numbers 004, 006, and 007 plaintiff seeks an order consolidating various other actions with this action.

Introduction

The Amended Complaint asserts causes of action for breach of contract, retaliatory eviction, and commercial harassment. The first cause of action for Breach of Contract asserts that Plaintiff has an interest in the Licensed Space (defined below) as a month-to-month tenant by a “course of dealing” (Amended Complaint, ¶ 22). However, the “relationship” between Plaintiff and Defendants is governed by a license agreement and its subsequent amendments (the “License Agreement”) between defendant Whitehall Properties II LLC (“Whitehall”), as licensor, and non-party valet and cleaning service Cleaning Concept 88 Corp., as licensee (“Licensee”) (*see* NYSCEF Doc. Nos. 21-24). Pursuant to the License Agreement, Whitehall granted a license to Licensee for a certain space in the ground floor lobby (“the Licensed Space”) of Whitehall’s building located at 60 West 23rd Street, New York, New York (the “Building”). The Amended Complaint alleges that Plaintiff was a sublessee of the Licensed Space from Licensee, although it paid rent to Defendants. The Amended Complaint alleges that Defendants have prevented Plaintiff from operating out of the Licensed Space. The First Cause of Action for Breach of Contract alleges that Defendants owe Plaintiff the sum of \$134,092.43 for “service fees” earned in the provision of “laundry, cleaning and maid services” to Defendants (Amended Complaint [NYSCEF Doc. No. 30] ¶ 20).

The Second Cause of Action sounding in retaliatory eviction is susceptible to dismissal pursuant to CPLR 3211(a)(1) and (a)(7) because this claim is only available for residential tenants under Real Property Law 223-b(6) and Plaintiff is not a residential tenant and the Licensed Space is not a residential premise. By its own admission, Plaintiff is a commercial

company which, as stated throughout the Amended Complaint, performs “cleaning, laundry, and maid services” in the Building (Amended Complaint ¶¶ 1, 3, 9, 20, 22, 26; *see also*, License Agreement at 12). Moreover, the Licensee is also a commercial entity. Because Plaintiff’s Second Cause of Action sounding in retaliatory eviction is only available for residential tenants, it cannot be maintained against Defendants (RPL 223-b[6]; *Tirse v Andrews*, 128 AD3d 1112 [3d Dept 2015]).

Finally, the demand for a “legal service fee” asserted in Plaintiff’s Third Cause of Action for commercial harassment should be dismissed, as Plaintiff admittedly does not have any written agreement with Defendants that would authorize an award of attorneys’ fees (*Reade v Highpoint Assocs. IX, LLC*, 36 AD3d 496 [1st Dept. 2007]).

Detailed Discussion

Dismissal under CPLR 3211(a)(7) is warranted if, accepting plaintiffs’ factual averments as true and according plaintiffs the benefit of all favorable inferences, the court determines that plaintiffs cannot succeed upon any reasonable view of the facts as stated (*Board of Educ. v County of Westchester*, 282 AD2d 561 [2d Dept 2001]). However, mere “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by the documentary evidence” are “not presumed to be true of accorded every favorable inference” (*David v Hack*, 97 AD3d 437 [1st Dept 2012]).

When a motion is made pursuant to CPLR 3211(a)(1) based on documentary evidence, “[b]are legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true on a motion to dismiss for failure to state a cause of action. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one.”

(*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 45 [1st Dept 2009]. “Contracts are among the documents that qualify as documentary evidence” (*Hohwald v Farm Family Cas. Ins. Co.*, 155 AD3d 1009, 1010 [2d Dept 2017]).

The Second Cause of Action (Retaliatory Eviction)

Plaintiff’s Second Cause of Action, sounding in retaliatory eviction, should be dismissed under CPLR 3211(a)(1) and (a)(7) because this claim is only available for residential tenants and Plaintiff is a commercial entity operating as a laundry and valet service in the Building. The only possible statute upon which Plaintiff can base this claim is Real Property Law Section 223-b, which sets out the requisites to successfully assert a claim for retaliation by landlord against a tenant. In pertinent part, 233-b(6) states:

This section shall apply to all rental residential premises except owner-occupied dwellings with less than four units. However, its provisions shall not be given effect in any case in which it is established that the condition from which the complaint or action arose was caused by the tenant, a member of the tenant's household, or a guest of the tenant. Nor shall it apply in a case where a tenancy was terminated pursuant to the terms of a lease as a result of a bona fide transfer of ownership.

(*See also Tirse, supra* [“Retaliatory eviction is a statutory cause of action limited to “rental residential premises” and, accordingly, has no applicability to the alleged commercial lease here”]; *Lazy Acres Park, LLC v Ferretti*, 118 AD3d 1406 [4th Dept 2014].)

Pursuant to Section 223-b(6) of the Real Property Law, in order to properly assert a claim for retaliatory eviction, the claimant must be a residential tenant. Plaintiff is not a residential tenant, and admits this in its Amended Complaint in its Third Cause of Action for Commercial Harassment (*see* Amended Complaint, ¶¶ 42-44).

The Second Cause of Action revolves around Plaintiff’s assertion that Plaintiff is a month-to-month tenant in the Building (Amended Complaint, ¶¶ 22-24). However, any “relationship” between Plaintiff and Defendants is governed by the License Agreement, which

only permitted Licensee to utilize the Licensed Space for certain specific concierge services in the Building.

The License Agreement clearly limited the Licensee's use of the Licensed Premises for providing certain "concierge services" pursuant to Exhibit A of the License Agreement (*see* Nowhere in the License Agreement does it allow the Licensed Space to be used for residential purposes. The Licensed Space simply is not a "residential premises" as required by RPL 223-b(6).

Thus, because a retaliatory eviction claim is limited to residential tenants, and Plaintiff is, under no circumstances a residential tenant, the Second of Action must be dismissed.

The Third Cause of Action (Attorneys' Fees)

Plaintiff's demand for attorneys' fees asserted in its Third Cause of Action must also be dismissed. It is well settled in New York that attorneys' fees are not recoverable absent a specific contractual provision or statutory authority (*see, City of New York v Zuckerman*, 234 AD2d 160 [1st Dept 1996]).

Plaintiff admits that its interest in the Licensed Space is, at most, that of a month by month tenant (Amended Complaint ¶ 34). Plaintiff, by its own admission, does not have a valid, written, lease for the Licensed Space. Indeed, no privity of contract, at all, exists as between Plaintiff and Defendants. Nor does any basis seem to exist for continued occupancy by Plaintiff of the Licensed Space, as Plaintiff is not a party to the subject license agreement. Therefore, the Third Cause of Action must be dismissed. For the same reason, Plaintiff's motion for an injunction compelling Defendants to continue to allow Plaintiff to operate out of the Licensed Space must be denied.

Consolidation

Motion Sequence No. 004 is Plaintiff's motion for consolidation of four other cases into this one. Motion Sequence No. 006 seeks the same relief, adding additional other cases, and Motion Sequence No. 007 is essentially redundant of Motion Seq. No. 006.

Oral argument on Motion Seq. No. 006 was conducted yesterday on the record. For the reasons briefed and argued by defendants' counsel, the court denies all three motions for consolidation (seq. nos. 004, 006, and 007).

Accordingly, it is

ORDERED that Plaintiff's motion for injunctive relief (seq. no. 002) is denied; and it is further

ORDERED that Defendants' motion to dismiss the second and third causes of action of the Amended Complaint (seq. no. 003) is granted and, therefore, said causes of action are dismissed; and it is further

ORDERED that Plaintiff's motions for consolidation (seq. nos. 004, 006, and 007) are denied; and it is further

ORDERED that the action shall continue with regard to Plaintiff's remaining first cause of action for breach of contract, seeking the sum of \$134,092.43 for "service fees" earned in the provision of "laundry, cleaning and maid services" to Defendants (Amended Complaint [NYSCEF Doc. No. 30] ¶ 20); and it is further

ORDERED that Defendants shall serve and file an answer addressed to the first cause of action in the Amended Complaint on or before 20 days from the date of filing hereof.

Louis L. Nock

<u>7/12/2024</u>				<u>LOUIS L. NOCK, J.S.C.</u>	
	DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" 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