

<b>RT Realty LLC v Sayegh</b>
2024 NY Slip Op 35076(U)
October 8, 2024
Supreme Court, Westchester County
Docket Number: Index No. 57031/2024
Judge: Alexandra D. Murphy
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October 24<sup>th</sup>, 2020. In addition to the per diem payments as aforesaid, there shall be paid over to the purchaser out of the said escrow fund, the costs of any legal proceeding and reasonable attorney's fees, to recover possession of the premises should the seller fail or refuse to deliver the premises to the purchaser as proved for herein (NYSCEF Doc. 11).

The defendants remained in the premises past October 24, 2020. On March 15, 2021, the plaintiff issued a notice to quit to the defendants. Ultimately, the defendants vacated the premises on or about May 20, 2021. While it appears that the \$7,500 held in escrow was paid to the plaintiff, the defendants failed to make any further payments to the plaintiff for remaining in the premises through May 20, 2021.

#### *The Prior Action*

In June 2023, the plaintiff commenced a prior action against the defendants for breach of contract. The complaint in that action alleged that the parties entered into a written agreement wherein the defendants agreed to a monthly use and occupancy of \$7,500 payable on the first of each month for the term of September 2020 to May 2021. The complaint alleged that the defendants vacated the premises after the expiration of the agreement and failed to make payments for use and occupancy of the premises in the amount of \$52,399.32.

The defendants moved to dismiss the complaint in the prior action, pursuant to CPLR 3211(a)(1), on the grounds that the documentary evidence contradicted the allegations in the complaint. In that action, the defendant Rami Nasser submitted an affirmation attesting:

I understood that if I stayed past a month, then the amount I would receive back from the escrow would go down \$250 for every day I stayed in the second month after [c]losing. So my understanding was that the \$7,500 was to cover the cost of staying at most sixty (60) days past the [c]losing (NYSCEF Doc. 13).

Counsel for the defendants argued that the terms of the post-closing possession agreement utterly refuted the allegations in the complaint, i.e. there was no agreement for monthly rental payments of \$7,500. Counsel further argued:

Defendants are due dismissal of the [c]omplaint pursuant to CPLR 3211(a)(1),(7) based on the conduct of Plaintiff, which is consistent with an interpretation that the scope of the [a]greement was limited to \$7,500 for the sixty (60) days from the date of closing on the [p]remises. ... Plaintiff[] would not be prejudiced by such a dismissal, as they [sic] would still be able to re-plead in equity with a new complaint that would actually align with the facts of the case and the letter of the writing they are claiming was breached (NYSCEF Doc. 9).

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The plaintiff opposed the motion.

In an order dated December 14, 2023, the Supreme Court, Westchester County (Torrent, AJSC) granted the defendants' motion to dismiss the complaint based upon the documentary evidence. The Court found that the possession agreement refuted the allegations in the complaint. Specifically, the Court found that contrary to the assertions in the complaint, there is no provision in the possession agreement "beyond depletion of the specified escrow fund" and the parties expressly disclaimed the creation of a landlord-tenant relationship (NYSCEF Doc. 23).<sup>1</sup>

### *This Action*

The plaintiff commenced this action with the filing of a summons and complaint on February 10, 2024. The complaint alleges that the defendants resided in the premises from September 2020 to May 2021. The complaint alleges that the defendants failed to make any payments for the use and occupancy of the premises between November 24, 2020, and May 20, 2021. The complaint alleges that the reasonable use and occupancy of the premises for that period is \$52,000. The plaintiff also seeks costs, disbursements, and legal fees.

Although the defendants argued in the prior action that the plaintiff would not be prejudiced by the dismissal of the complaint as "they would still be able to re-plead in equity with a new complaint" (NYSCEF Doc. 9), the defendants now move, pre-answer, to dismiss the complaint on the grounds that it is barred by res judicata and by the documentary evidence. The defendants argue that the prior complaint was dismissed on the merits and that the current action is based on the same events and transactions as the prior action. Notably, Nasser does not submit an affidavit in support of the motion to dismiss the complaint in this action.

In opposition, the plaintiff argues that res judicata does not apply and the prior action was not dismissed with prejudice.

### **Discussion**

On a motion to dismiss pursuant to CPLR 3211(a)(5), the court must "accept the facts as alleged in the complaint as true [and] accord the plaintiff the benefit of every possible favorable inference" (*Faison v Lewis*, 25 NY3d 220, 224 [2015]; *Gross v Capital One, N.A.*, 204 AD3d 761, 764 [2d Dept 2022]). "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding"

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<sup>1</sup> The Court notes that while no appeal has been taken from the decision and order in the prior action, it does not appear that a final judgment has been entered dismissing the complaint in the prior action. Therefore, if a final judgment has not been entered in the prior action, the plaintiff's time to appeal from a final judgment has not run (see CPLR 5501[a]).

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(*DeSouza v LSREF2 Apex 2, LLC*, 171 AD3d 702 [2d Dept 2019] [internal quotation marks omitted] quoting *Bayer v City of New York*, 115 AD3d 897, 898 [2d Dept 2014]).

The complaint in the prior action sought damages for breach of contract. The Court dismissed that complaint based upon the terms of the post-closing possession agreement which the Court found contradicted the allegations in the complaint.

The complaint in this action seeks damages for unjust enrichment based upon the defendants' continued occupancy of the premises between November 24, 2020, and May 20, 2021, for which no payment had ever been made. "Unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Whitson's Food Serv., LLC v A.R.E.B.A.-Casriel, Inc.*, \_\_\_ AD3d \_\_\_, 2024 NY Slip Op 04480, 2 [2d Dept 2024], quoting *Bedford-Carp Constr., Inc. v Brooklyn Union Gas Co.*, 219 AD3d 1293, 1295 [2d Dept September 18, 2024]).

The Court finds that the doctrine of res judicata does not bar the complaint in this action. In actions that assert both a breach of contract cause of action and an unjust enrichment cause of action, courts have dismissed the unjust enrichment cause of action as duplicative of the breach of contract cause of action based out of the same facts and seeking identical relief (see e.g. *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005] [holding that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter"]; *Tzu Yen Cheung v Dolar Shop Rest. Group, LLC*, 229 AD3d 738 [2d Dept 2024]; *Saadia v National Socy. Of Hebrew Day Schs., Inc.*, 225 AD3d 806 [2d Dept 2024]; *Guzman v Ramos*, 191 AD3d 644 [2d Dept 2021]). Thus, a cause of action for unjust enrichment could only have been raised in the prior action as an alternative to the breach of contract cause of action (*F & R Goldfish Corp. v Furleiter*, 210 AD3d 643, 646 [2d Dept 2022]).

If the prior action had alleged a cause of action for unjust enrichment, it would not have been dismissed pursuant to CPLR 3211(a)(1). The possession agreement does not conclusively establish a defense as a matter of law to a cause of action based upon unjust enrichment (see *Whitson's Food Serv., LLC v A.R.E.B.A.-Casriel, Inc.*, \_\_\_ AD3d \_\_\_, 2024 NY Slip Op 04480, 2). Moreover, to any extent that the prior complaint did assert a cause of action for unjust enrichment, the Court in that action deemed all other alternative relief as academic. Thus, there has been no disposition on the merits of any claim for unjust enrichment.

The Court has considered the defendants' remaining contentions and finds them to be without merit.

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Accordingly, it is

**ORDERED** that the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (5) is DENIED; and it is further

**ORDERED** that the plaintiff shall serve a copy of this order with notice of entry upon the defendants within 15 days of the date herein.

Counsel for all parties are directed to appear for a **Preliminary Conference** at a date and time to be provided by the part clerk.

Dated:           White Plains, New York  
                  October 8, 2024

  
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HON. ALEXANDRA D. MURPHY, J.S.C.