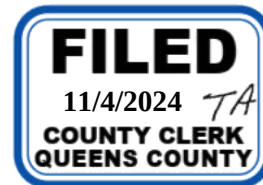


Norbert Kimmel, Inc. v 323 B 74 LLC
2024 NY Slip Op 35366(U)
November 1, 2024
Supreme Court, Queens County
Docket Number: Index No. 716488/2022
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



NORBERT KIMMEL, INC.,

IAS Part - 42

Plaintiff,

Index No.: 716488/2022

-against-

Motion Date: 5/4/23

323 B 74 LLC,

Motion Cal. No. 28

Defendant.

Motion Seq. No. 1

The following electronically filed (“EF”) documents read on this motion by Norbert Kimmel, Inc. (“Kimmel” or “plaintiff”) for order pursuant to CPLR §§ 3211(a)(1), (a)(6), and (a)(7) dismissing the two “Counterclaims” as asserted against Norbert Kimmel personally via a “Counterclaims Summons” filed by 323 B 74 LLC (“74 LLC” or “defendant”) with prejudice, along with any further relief the Court deems just. Moreover, 323 B 74 LLC cross moves for an order: 1) denying plaintiff’s motion in all respects; 2) granting the defendant’s cross-motion amending the caption of the action pursuant to CPLR § 3019(a) and CPLR § 3025.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memorandum of Law.....	EF 09 – 21
Notice of Cross Motion-Affirmation in Opposition-Exhibits.....	EF 23 – 25
Plaintiff’s Memorandum of Law in Opposition.....	EF 26
Memorandum of Law in Opposition to Cross Motion.....	EF 27

Upon the foregoing papers it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action to recover damages based upon an alleged breach of a commercial lease in connection with property located at 323 Beach 74th Street, Arverne, New York 11692 (“subject premises”). The plaintiff alleges on or about December 1, 2017, he entered into a commercial lease with 323 B 74 LLC for the subject premises for a term extending from

September 10, 2017 to August 31, 2022. However, the plaintiff alleges that the defendant breached the lease: a) renting the commercial space to numerous other persons and organizations, unjustly benefitting from doubling up on the rent by utilizing plaintiff's build out of the premises; b) exercising dominion over the leased premises by constructing structural additions to the premises that made the property unusable for plaintiff, resulting in constructive eviction, etc. As a result, on August 9, 2022, the plaintiff commenced the instant action; and on September 23, 2022, the defendant interposed an answer with counterclaims. Now, the counterclaim defendant moves to dismiss the defendant's two counterclaims: the first asserting that Norbert Kimmel, Inc. is an improper party-plaintiff herein, as defendant entered into a lease with Norbert Kimmel, personally; and the second, declaring that both the corporation and the individual are liable, pursuant to the terms of the lease, for all costs, damages, and expenses sustained by reason of the plaintiff's default in payment. Furthermore, the defendant's cross-motion seeks the addition of "Norman Kimmel" as a "counterclaim defendant," pursuant to CPLR § 3019(a). Here, the court finds that the defendant's cross-motion is granted, as it is required by CPLR § 3019 (d), which states, in relevant part, that "[w]here a person not a party is alleged to be liable a[n] . . . answer containing the counterclaim . . . shall be filed, whereupon he or she shall become a defendant." Such requirement has been met herein.

Furthermore, as to plaintiff's motion, a motion to dismiss merely addresses the adequacy of a pleading, and does not reach the substantive merits of, in this instance, defendant's counterclaims (*see Fernando v. Wilmington Sav. Fund Socy., FSB*, 208 AD3d 1217 [2d Dept 2022]; *Oluwo v. Sutton*, 206 AD3d 750 [2d Dept 2022]; *Kaplan v. New York City Dept of Health and Mental Hygiene*, 142 AD3d 1050 [2d Dept 2016]; *Lieberman v. Green*, 139 AD3d 815 [2d Dept 2016]). However, "[c]onclusory allegations or bare legal assertions with no factual specificity are not sufficient, and will not survive a motion to dismiss. (*Matter of Kenneth Cole Prods., Inc. Shareholder Litig.*, 27 NY3d 268, 278 [2016]; *see Young v. 101 Old Mamaroneck Road Owners Corp.*, 211 AD3d 771 [2d Dept 2022]). Whether the pleadings will later survive a summary judgment motion, or either side will ultimately prevail on their claims, is not relevant on a pre-discovery motion to dismiss. (*see Principis Capital, LLC v. I Do, Inc.*, 201 AD3d 752 [2d Dept 2022]; *Victory State Bank v. EMBA Hylan, LLC*, 169 AD3d 963 [2d Dept 2019]; *Mirro v. City of New York*, 159 AD3d 964 [2d Dept 2018]). In the case at bar, the plaintiff's motion seeks dismissal of the counterclaims based on documentary evidence, in the form of the instant "Lease Agreement." While a lease may be considered "documentary" within the meaning of

CPLR § 3211(a)(1), such evidence must be of undisputed authenticity, unambiguous and undeniable (see *Qureshi v. Vital Tranp., Inc.*, 173 AD3d 1076 [2d Dept 2019]; *Xu v. Van Zwienen*, 212 AD3d 872 [2d Dept 2023]; *Greenstein v. Danzy*, 210 AD3d 745 [2d Dept 2022]; *Anderson v. Armento*, 139 AD3d 769 [2016]); must conclusively establish defenses to plaintiff's claim as a matter of law (see *Greenberg v. Spitzer*, 155 AD3d 27 [2d Dept 2017]; *Shofel v. DaGrossa*, 133 AD3d 649 [2015]); and utterly refute plaintiff's factual allegations (see *Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Alleyne v. Rutland Development Group, Inc.*, 213 AD3d 887 [2d Dept 2023]; *Davis v. Henry*, 212 AD3d 597 [2d Dept 2022]; *Bellevue Towers & Gardens, LLC v. Atlantis Natl. Servs., Inc.*, 208 AD3d 1300 [2d Dept 2022]; *Bernard v. Citibank, N.A.*, 195 AD3d 783 [2d Dept 2021]). Further, such evidence must resolve all factual issues as a matter of law, and conclusively dispose of plaintiff's claim. (see *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [2d Dept 1996]; *Xu v. Van Zwienen*, 212 AD3d 872; *Philips v. Taco Bell Corp.*, 152 AD3d 806 [2d Dept 2017]; *Sciadone v. Stepping Stones Associates, L.P.*, 148 AD3d 953, 954 [2d Dept 2017]). Here, the plaintiff asserts that the subject Lease was entered into by Norbert Kimmel "on behalf of" plaintiff, which it claims to be the corporate entity, Norbet Kimmel, Inc., based upon the addition of the handwritten abbreviation "Inc." after one of the references to "Norbert Kimmel" in the Lease, and defendant's "knowledge" that the tenant would be a corporate entity. Defendant opposes, maintaining that Norbert Kimmel, personally, was the intended tenant.

Plaintiff's assertion that the defendant knew that the corporation was the tenant, based on the fact that the Lease was entered into after rent had been paid, solely, by corporate checks, for a period of months, pursuant to an oral agreement permitting the tenant to build out/partition portions of the open, warehouse area of the leased premises. While this argument maybe relevant, it fails to conclusively demonstrate defendant's knowledge that the corporate entity would be the tenant, rather than the individual. Similarly, the addition of "Inc." after the name on the Lease, at best, raises an issue of fact, as the Lease describes the "Tenant" as Norbert Kimmel, at the outset, and Kimmel's signature, at the end, is below his printed name, without any mention of "Inc." or that he signed "on behalf of," or as "President of," the corporation. The only place where "Inc." has been added to the Lease is in the paragraph designating the entity for service of notice on the tenant, which can be subject to various interpretations, other than what plaintiff proposes. Certainly, a clearer narrative would have been presented had the "Inc." designation been at the beginning, "parties" paragraph, or at the signatory portion, at the

end. (*see generally, Salzman Sign Co. v. Beck*, 10 NY2d 63 [1961]; *Y.B. Associates Group, LLC v. Rubin*, 216 AD3d 851 [2d Dept 2023]). Furthermore, counterclaim defendant's reliance on the case of "*American Media Concepts v. Atkins Pictures*," 179 AD2d 446 [1st Dept 1992], is not compelling herein. In *American Media Concepts*, the issue was whether corporate officials could be personally bound by corporate "guarantees of payment," and set forth the use of titles and/or "capacity in which they signed," combined with assertions as to "understandings" of the parties, as sufficient proof to defeat "intent to be individually bound." Here, the situation is reversed, as the Lease, facially, appears to show that the individual, and not the corporation, is bound by the contract. The applicable law herein would be that "[a]n agent executing a contract on behalf of a disclosed principal 'is not liable for a breach of the contract unless it clearly appears that he or she intended to bind himself or herself personally'" (*Y.B. Associates Group, LLC v. Rubin*, 216 AD3d 851, 853 [2d Dept 2023], quoting *Stamina Prods., Inc. v. Zintec USA, Inc.*, 90 AD3d 1021, 1022 [2d Dept 2011]). In either case, "[t]here must be clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal" (*GMS Batching, Inc. v. TADCO Constr. Corp.*, 120 AD3d 549, 552 [2d Dept 2014]; *see Westerman Ball Ederer & Scharfstein, LLP v. Allstar Elects., Inc.*, 217 AD3d 904, 905 [2d Dept 2023]). No such "clear and explicit evidence" has been proffered by plaintiff herein. Additionally, this matter lacks any "explicit" evidence that the corporate entity was "a disclosed principal" in the negotiations between the parties (*L'Aquila Realty, LLC v. Jalyng Food Corp.*, 148 AD3d 1004, 1006 [2d Dept 2017]; *see Westerman Ball Ederer & Scharfstein, LLP v. Allstar Elects., Inc.*, 217 AD3d 904; *Y.B. Associates Group, LLC v. Rubin*, 216 AD3d 851; *Giambrone v. Arnone, Lowth, Wilson, Leibowitz, Adriano & Greco*, 197 AD3d 459 [2d Dept 2021]). Further, plaintiff's evidence has failed to demonstrate that any "partial performance [is] unequivocally referable to [any] alleged . . . modification" of the Lease herein (*Ejoy Realty Corp. v. Van Wagner Communications, LLC*, 22 NY3d 413, 425 [2013], quoting *Rose v. Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]; *see Hylan Ross, LLC v. 2582 Hylan Blvd. Fitness Group, LLC*, 206 AD3d 893 [2d Dept 2022]).

Here, on this motion to dismiss the two counterclaims, the language of Kimmel's counterclaims is adequately particularized only to raise a triable issue as to whether sufficient facts exist to allow him to overcome such clauses of the Lease (*see generally, Rose v. Spa Realty Assoc.*, 42 NY2d 338 [1977]; *Wynkoop v. 622A President St. Owners Corp.*, 169 AD3d 1106 [2d Dept 2019]; *Joseph Rustins, Inc. v. Manzo's Furniture City, Inc.*, 155 AD3d 848 [2d Dept

2017)), but not enough to make such determination, regarding a reformation of the Lease, as a matter of law. Thus, the Lease, alone, fails to resolve all factual issues as a matter of law, or to conclusively dispose of defendant's counterclaims (*see Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1996]; *Xu v. Van Zwienen*, 212 AD3d 872; *Philips v. Taco Bell Corp.*, 152 AD3d 806 [2017]; *Sciadone v. Stepping Stones Associates, L.P.*, 148 AD3d 953, 954 [2017]), warranting denial of counterclaim defendant's entitlement to dismissal on the basis of documentary evidence.

Lastly, the plaintiff also seeks dismissal of the defendant's "counterclaim complaint" on the basis of the corporation's alleged lack of right to interpose said counterclaims, pursuant to CPLR § 3211(a)(6). However, the language of the Lease fails to include any prohibition against such claims. Further, there is no issue raised herein as to the validity of the party's standing to sue (*see generally, Catnap, LLC v. Cammeby's Mgt. Co., LLC*, 170 AD3d 1103, 1104 [2d Dept 2019]). Pursuant to a CPLR §3211(a)(7) motion, the sole criterion to dismiss a complaint is whether or not the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v. Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]; *Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]; *May Dock Lane, LLC v. Harras, Bloom & Archer, LLP*, 227 AD3d 635 [2d Dept 2023]; *Langley v. Melville Fire Dist.*, 213 AD3d 748 [2d Dept 2023]). "When assessing the adequacy of a complaint in light of a CPLR § 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff. . . 'the benefit of every possible favorable inference'" (*AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *see J.P.Morgan Securities, Inc. v. Vigilant Ins. Co.*, 21 NY3d 324 [2013]; *Garcia v. Shah*, 206 AD3d 626 [2d Dept 2022]; *Cajigas v. Clean Rite Ctrs., LLC*, 187 AD3d 700 [2d Dept 2020]; *Webster v. Sherman*, 165 AD3d 738 [2d Dept 2018]), and "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d at 87-88; *see also Alleyne v. Rutland Development Group, Inc.*, 213 AD3d 887 [2d Dept 2023]; *Polite v. Marquis Marriot Hotel*, 195 AD3d 965 [2d Dept 2021]; *Kassapian v. City of New York*, 155 AD3d 851 [2d Dept 2017]), and not whether plaintiff can ultimately prove such facts (*see J.P.Morgan Securities, Inc. v. Vigilant Ins. Co.*, 21 NY3d 324; *People ex rel. Cuomo v. Coventry First LLC*, 13 NY3d 108 [2009]; *Odierna v. RSK, LLC*, 171 AD3d 769 [2d Dept 2019]; *Ramirez v. Donado Law Firm, P.C.*, 169 AD3d 940 [2d Dept 2019]; *Starr Indem. & Liab. Co. v. Global Warranty Group*,

LLC, 165 AD3d 1308 [2d Dept 2018]). Of primary concern, herein, is the issue, raised in support of the subject motion, of whether Norbert Kimmel, personally, is a proper party-defendant. There is evidence that he signed, and/or that his name appeared in, the subject Lease in this matter. Therefore, there exists an issue of privity of contract, which would bar the dismissal of the counterclaims against him, personally, in this matter. Therefore, that branch of plaintiff's motion seeking dismissal, pursuant to CPLR § 3211(a)(7), is denied.

The parties' remaining contentions and arguments either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, it is hereby

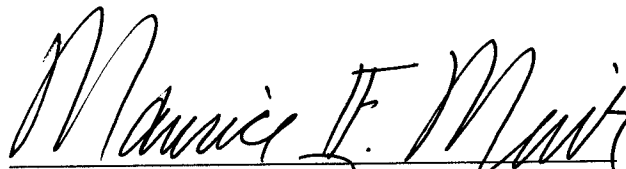
ORDERED that Norbert Kimmel, Inc. motion, pursuant to CPLR §§ 3211(a)(1), (6), and (7) dismissing 323 B 74 LLC's counterclaims is denied; and it is further,

ORDERED that 323 B 74 LLC's cross motion is granted; and it is further,

ORDERED that 323 B 74 LLC shall serve a copy of this decision and order with notice of entry upon the plaintiff on or before November 25, 2024.

The foregoing constitutes the decision and order of the court.

Dated: November 1, 2024
Long Island City, NY


MAURICE E. MUIR, J.S.C.

