

**37 E. 50th St. Corp. v Restaurant Group Mgt. Servs.,
L.L.C.**

2014 NY Slip Op 31876(U)

July 15, 2014

Supreme Court, New York County

Docket Number: 653067/2013

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

Management Agreement (Agreement), pursuant to which RGMS was to operate and manage a new restaurant on the Premises. The Agreement expressly stated that 37 East held a long-term operating lease for the Premises, which would not expire until 2011. RGMS opened a restaurant named Maloney & Porcelli.

Eurofinch Limited L.L.C. (Eurofinch) and an affiliate have held the lease to the Premises since 2006. Well before the original lease was set to expire, at the end of 2010, the Stillman Group, the principals of RGMS, represented to the Pappas Group that they would negotiate a new lease on behalf of 37 East with the appropriate landlord entity. Thus, to the best of the Pappas Group's knowledge and understanding, its Restaurant, Maloney & Porcelli, was never at risk of losing its tenancy rights because the terms of a new lease were being worked out with the landlord. This understanding is memorialized in a Modification Agreement to the Agreement:

The Restaurant is located in premises subleased by the Pappas Group []. That sublease has expired by its terms. The Stillman Group has been operating the Restaurant pursuant to a certain restaurant management agreement with the Pappas Group, and continues to manage the Restaurant under the terms of that management agreement while it negotiates the terms of a new sublease for the Premises to be entered into between Eurofinch, Ltd., as Landlord, and the Stillman Group and 37 East 50th Street Corporation, as Tenants.

In short, the Pappas Group delegated the authority to the Stillman Group to negotiate a new lease on behalf of both the Pappas Group, as owners, and the Stillman Group, as managers, of the Restaurant. During the gap between the expiration of the original lease and the effective date of the Stillman Lease, the Restaurant continued to operate and 37 East – not the Stillman Group, RGMS or MJS – remained responsible for rental payments to the landlord. However, rather than negotiating with 37 East's interest in mind, the Stillman Group negotiated a lease that cut 37 East out as a tenant and named as the tenant a Stillman Group-controlled entity, MJS. This constituted a violation of the Modification Agreement and the parties' understanding, and

37 East now seeks relief tailored towards remedying this breach. The relief that 37 East seeks intrinsically implicates Eurofinch's rights as the landlord, as it requires Eurofinch's consent to an assignment of the Stillman Lease to rectify RGMS's breaches of contract and fiduciary duties.

Discussion

On a motion to dismiss for failure to state a claim, the court accepts all factual allegations pleaded in plaintiff's complaint as true and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fountanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (2d Dept 2001), *leave to appeal denied* 97 NY2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Eurofinch is not a necessary party pursuant to CPLR 1001 (a). "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or

who might be inequitably affected by a judgment in the action shall be made . . . defendants.”

“In making the determination whether an absentee need be joined as an indispensable party, it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party. It also must be determined if the court's decision in the case, in the absence of the proposed parties, will have the element of finality for the protection of those before the court.” *Joanne S. v Carey*, 115 AD2d 4, 7 (1st Dept 1986). The primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter. *Id.* Because Eurofinch has no interest in the dispute between 37 East and RGMS, and because 37 East’s interest in seeking complete relief against RGMS would not be prejudiced in the absence of Eurofinch, Eurofinch is not a necessary party to this lawsuit.

Eurofinch should not be joined as a necessary party because neither 37 East nor Eurofinch would be prejudiced by nonjoinder. 37 East would not be prejudiced because it made no legal claims or asserted any factual allegations against Eurofinch; nonjoinder will not prevent 37 East from obtaining full relief against RGMS. *See Joanne*, 115 AD2d at 9. 37 East argues that Eurofinch’s consent to the assignment of the Premises is necessary to effectuate an order of specific performance directing RGMS to use its best efforts to have the Stillman Lease transferred to 37 East. According to 37 East, if the court grants a direct leasehold interest in the Premises to 37 East, RGMS would be required to bring an action against Eurofinch if Eurofinch unreasonably withholds its consent to a lease assignment.

However, in order for an entity to be a necessary party, it must be one against whom plaintiff can assert a right to relief. *Id.* at 8. In the present case, before 37 East could assert any

claim for breach of an obligation by Eurofinch under the Stillman Lease to not unreasonably withhold consent to a proposed assignment of tenancy interests, it needs to prevail against RGMS. Since the dispute between 37 East and RGMS has not been disposed yet, 37 East's joinder theory is based on speculation as to hypothetical court orders and not on any claim that Eurofinch is not presently performing any required acts. Thus, 37 East does not have a right to relief against Eurofinch at this time.

37 East contends that Eurofinch is a necessary party since no declaration regarding the Stillman Lease can be made in its absence. However, the court has found it unnecessary to join parties that are required to provide some cooperative acts if a judgment is adverse to the defendants. *Id.* In *Joanne*, the court found the city agencies that were merely directed to cooperate with the defendant State in fulfilling the State's responsibility should not be joined as a necessary party. *Id.* at 7. Similarly in the present case, 37 East founded its joinder motion solely on the obligation of Eurofinch to cooperate in the fulfillment of the assignment of the leasehold interest that this court may later grant; therefore, Eurofinch should not be joined as a necessary party.

37 East's argument that joinder is necessary to ensure Eurofinch's compliance with the Stillman Lease is speculative. In such circumstances, Eurofinch will be presumed to voluntarily comply with the Lease provisions and thus is unnecessary to this action. *See id.* at 9. In *Joanne*, the defendant failed to prove that the city agencies sought to be joined refused to assume their statutory duty to cooperate; the court thus denied the defendant's joinder request. *Id.* Here, 37 East also failed to provide concrete evidence that Eurofinch would unreasonably reject the assignment upon 37 East's proper application. Since 37 East has not submitted the proper application for an assignment, the contention that Eurofinch attempts to use the present dispute

for its own benefit and unreasonably withhold its consent so as to extract additional value from the Stillman Lease is likewise speculation. Presumably, Eurofinch will comply its obligation under the Lease and therefore should not be joined as a necessary party.

37 East tries to distinguish the present case from *Joanne*, where no specific legal duties were assigned to the city agencies. 37 East argues that unlike the city agencies that were only required to cooperate, Eurofinch has specific legal duties under the Stillman Lease. However, 37 East is not a party to the Stillman Lease. Any specific duty under the Stillman Lease is owed to the counterparty of the Stillman Lease, rather than 37 East. Additionally, the duty to not unreasonably withhold consent to a proposed assignment has not arisen due to the uncertainty of the outcome of dispute between 37 East and RGMS and 37 East's failure to make proper application for an assignment.

Nor would Eurofinch's interest be compromised by the nonjoinder. 37 East contends that Eurofinch, as the landlord and counterparty on the Stillman Lease, is a necessary party. 37 East relies on cases where courts have found that third parties with an interest in the property underlying the litigation between plaintiff and defendant were necessary parties. In *Sorbello v Birchez Associates, LLC*, the property owners whose land abutted that to which plaintiff sought quiet title, and who "could be adversely affected by the outcome of plaintiff's action, particularly if they had a right to use the private road on the property," were necessary parties. 61 AD3d 1225, 1226 (3d Dept 2009). In *Apex Two Inc. v Terwilliger*, the property owner was a necessary party in action to reform mortgage on property. 211 AD2d 856 (3d Dept 1995). In *Berlin v Sordillo*, the co-owners of the property that was the subject of a partition lawsuit were necessary parties. 179 AD2d 717 (2d Dept 1992).

Although a property owner can be made a necessary party even if no accusation of wrongdoing has been made against it, the status as a landlord does not give rise to the basis for joining Eurofinch as a necessary party. The cases cited by 37 East are distinguishable from the present case because Eurofinch has no material interests in the merits of the litigation. Unlike the property owners whose interests might be adversely affected by the litigation or whose property might be encumbered with mortgage, Eurofinch's property rights in the Premises will not be abrogated regardless of the outcome of the litigation between 37 East and RGMS. Eurofinch retains the right to reasonably reject a proposed assignment no matter which party wins the lawsuit.

The present case is similar to *Windy Ridge Inc. v Windham Ridge Homeowners Ass'n*, 23 Misc 3d 1120(A) (Sup Ct Greene County 2009). In that case, the court refused to join the law firm hired by the plaintiff because the law firm's sabotaging act against the plaintiff had no material relation to the declaration of the plaintiff's rights to utilize defendant's wastewater treatment facility. *Id.* at 4. Likewise, Eurofinch's presence has no bearing on the resolution of 37 East's breach of contract or breach of fiduciary duty claim against RGMS.

Additionally, there is no duplicative litigation concern in this case. Even if Eurofinch refused 37 East's proposed assignment upon proper application, the future litigation would focus on the reasonableness of withholding the assignment and would be irrelevant to the merits of the current dispute, which deals with RGMS' breach of its contractual and fiduciary obligations. "Joinder of these acquiescent and nonadversarial parties would only serve to impede and delay disposition of plaintiffs' claims without any visible benefit." *Joanne*, 115 AD2d at 9 (quoting *Klostermann v Cuomo*, 126 Misc 2d 247, 249-250 (1984)). Joining Eurofinch at this stage would not be beneficial to 37 East in its goal to obtain relief from RGMS.

Also, there is the basic rule that a landlord cannot be compelled to consent to a proposed assignment even before the proposed assignee has even submitted all of the relevant financial disclosure and other information identified in the subject lease as relevant to the landlord's assignment analysis. Accordingly, in this formal respect as well, 37 East's demands now for an injunction against Eurofinch, compelling Eurofinch to accept 37 East as assignee, are certainly premature, and should be dismissed without prejudice to renewal only if and when 37 East has established the merits of its claims against RGMS, and only after a proper submission to Eurofinch of, e.g. the indicated financial disclosures by 37 East, and without prejudice to Eurofinch's right to reject any such proposed assignment based on the circumstances obtaining at that time, taking into account 37 East's financial condition and all other relevant circumstances concerning the tenancy.

For the reasons stated above, Eurofinch is not a necessary party to the current lawsuit and its motion to dismiss is granted.

ORDERED that the motion of defendant Eurofinch Limited L.L.C. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the following amended caption:

