

A&N Food Mkt., Inc. v Amerasia Bank
2015 NY Slip Op 30976(U)
May 7, 2015
Supreme Court, Queens County
Docket Number: 704060/2014
Judge: Marguerite A. Grays
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NEW YORK SUPREME COURT - QUEENS COUNTY

The complaint asserts four causes of action. According to allegations of the complaint, plaintiff A&N Food Market, Inc. (A&N) is the landlord and owner of the premises located at 41-79 Main Street in Flushing, New York. Pursuant to a lease agreement dated January 2, 2008, the plaintiff leased the premises to non-party New K&S Supermarket (New K&S). In addition, the plaintiff sold the supermarket business located within the subject premises to New K&S and extended a \$1,800,000.00 purchase money mortgage to New K&S to cover a portion of the purchase price for the premises. The terms of the purchase money mortgage loan were memorialized in a loan and security agreement. In order to secure the purchase

money mortgage, New K&S and its principals executed several security instruments at the closing, including a General Security Agreement and UCC-1 financing statement, giving the plaintiff a security interest in certain collateral at the premises, including but not limited to New K&S's fixtures, equipment, and food and beverage inventory. On January 2, 2008, New K&S then sublet the subject premises to New A&N Food Market, Inc. (New A&N). In July 2012, New A&N entered into a business loan agreement and promissory note with Amerasia Bank whereby Amerasia Bank loaned \$300,000 to New A&N, which was secured by a General Security Agreement and a UCC-1 filing.

New K&S allegedly defaulted under the terms of the lease and loan agreements with the plaintiff and never cured its defaults. Consequently, on or about August 20, 2013, the plaintiff commenced an action entitled *A&N Food Market, Inc. v New K&S Supermarket, Inc, et. al*, and bearing Supreme Court, Queens County Index Number 15836/13 (the prior action), wherein the plaintiff seeks to regain legal possession of the premises and collateral in accordance with the terms of the lease, loan agreement, and related security agreements, including the UCC-1 financing statement. Thereafter, Amerasia Bank successfully sought to intervene in that prior action on the ground that it possesses a superior interest in the collateral of the premises pursuant to the secured business loan, totaling \$300,000.00, that Amerasia Bank made to subtenant New A&N. By Order of the court dated October 31, 2013, (McDonald, J.), Amerasia Bank was permitted to intervene in the prior action in order to seek a determination of the superiority of interests in the collateral as between A&N and Amerasia Bank. The court held therein that a material issue of fact exists regarding whether Amerasia Bank has a superior security interest in the subject collateral and whether the plaintiff or Amerasia is entitled to foreclose on its respective security agreement, which is the question that is at the heart of the plaintiff's present complaint.

Subsequently, in or about December 2013, the plaintiff commenced a summary proceeding in Civil Court, entitled *A&N Food Market, Inc v New K&S Supermarket, Inc.*, and bearing Civil Court, Queens County Index Number 085053/13, to recover legal possession of the premises from New K&S based upon its defaults under the lease agreement. Amerasia Bank was not a party to the summary proceeding but, the plaintiff alleges, on February 24, 2014, counsel for Amerasia Bank appeared in court with a copy of Justice McDonald's order, dated October 31, 2013, that was entered on the motion by Amerasia Bank to intervene in the prior Supreme Court action. This resulted in dismissal of the summary proceeding on the ground that the summary proceeding was duplicative of issues that would be resolved in the prior action.

According to the complaint, the purpose of the present action is two-fold. Inasmuch as Amerasia Bank has asserted a security interest in the collateral in which the plaintiff claims to hold a superior security interest, the plaintiff states that it seeks declaratory relief

to settle questions concerning the agreements between defendant Amerasia Bank and New A&N. Specifically, the first cause of action seeks a declaration that Amerasia Bank does not possess a valid security interest in the subject collateral, which the plaintiff alleges is owned by New K&S, the supermarket tenant, and not New A&N, an alleged trespasser. Here, as in the prior action, the plaintiff alleges a superior security interest and claims that it is entitled to regain legal possession of the subject premises and collateral contained therein in accordance with the terms of the primary lease, Loan Agreement and related security agreements, including but not limited to its UCC financing statement, which Amerasia Bank contends has expired. Next, the plaintiff's second, third and fourth causes of action seek monetary damages against Amerasia Bank, respectively, for tortious interference with business relations arising from Amerasia Bank's intervention in the prior action; prima facie tort for interfering in the plaintiff's ability to regain legal possession of the premises from New K&S in a summary proceeding that was dismissed due to the pendency of the prior Supreme Court action; and commercial bad faith by Amerasia Bank for providing a business loan to New A&N based upon an alleged fraudulent sublease that was not authorized by the plaintiff.

Amerasia Bank moves to dismiss the causes of action alleged in the complaint against it on documentary evidence grounds; on the ground that another action is pending between the same parties for the same cause of action; for failure to state a cause of action; and on the ground that the court should not proceed in the absence of a party.

"Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether [a cause of] action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action. A court may dismiss an action pursuant to CPLR 3211(a)(4) where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same.... The critical element is whether both suits arise out of the same subject matter or series of alleged wrongs" (*Jadron v. 10 Leonard Street, LLC.*, 124 AD3d 842 [2015][citations omitted]). In light of the foregoing factors, the Court finds that the first cause of action for declaratory relief must be dismissed, pursuant to CPLR 3211(a)(4), on the ground that another action is pending between the parties for the same relief that is sought in this cause of action. This is highlighted by the October 31, 2013, Order of the court in the prior action permitting Amerasia Bank to intervene in the prior action in order to seek a determination of the superiority of interests in the subject collateral as between the plaintiff and Amerasia Bank. In the court's finding that a material issue of fact exists regarding whether Amerasia Bank possesses a superior security interest in the subject collateral and whether the plaintiff or Amerasia Bank is entitled to foreclose on its security agreement, it is clear that the claims asserted in the prior action are identical to the claims for declaratory relief asserted in this action.

The Court also finds that the plaintiff's second, third and fourth causes of action warrant dismissal for failure to state a cause of action.

In assessing a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see, *Nonnon v. City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83 [1994]). “Where, however, a defendant has submitted evidence in support of a motion to dismiss pursuant to CPLR 3211(a)(7), and the motion has not been converted into one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate. Dismissal pursuant to CPLR 3211(a)(7) is warranted if the evidentiary proof disproves an essential allegation of the complaint, even if the allegations of the complaint, standing alone, could withstand a motion to dismiss for failure to state a cause of action” (*Shaffer v. Gilberg*, 125 AD3d 632 [2015] [citations omitted]). In view of the stated criterion, dismissal of the plaintiff's second, third and fourth causes of action is warranted.

In asserting a claim for tortious interference with business relations, a plaintiff must demonstrate the existence of a valid contract, the defendant's knowledge of the contract, that the defendant intentionally and improperly procured a breach, and damages (*White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 NY3d 422, [2007]). “[C]onduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship” (*Carvel Corp. v. Noonan*, 3 NY3d 182, 192 [2004]). With respect to the plaintiff's second cause of action for tortious interference with business relations, which is predicated merely upon Amerasia Bank's intervention in the prior action, the plaintiff has not sufficiently pleaded this cause of action. Moreover, it is worth noting that the breach of contract that underlies the prior action was not procured by Amerasia but, rather, predated Amerasia's motion to intervene in the underlying action.

The plaintiff's third cause of action for prima facie tort is predicated upon Amerasia Bank's action in intervening in the aforementioned holdover proceeding. “The requisite elements of a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal” (*Smallwood v. Lapel*, 107 AD3d 782 [2013]; see *Diorio v. Ossining Union Free School Dist.*, 96 AD3d 710 [2012]). It is well-established that “[p]rima facie tort was designed to provide a remedy for intentional and malicious

actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch all alternative for every cause of action that cannot stand on its legs" (*Bassim v. Hassett*, 184 AD2d 908 [1992]). Here, the complaint generally indicates and the documentary evidence submitted herein demonstrates that the Amerasia Bank's motivation for intervening in the summary proceeding in Civil Court was to protect its security interest in the collateral located within the subject premises, rather than malevolence toward the plaintiff (see *Etzion v. Etzion*, 62 AD3d 646 [2009]). The plaintiff's complaint fails to state a cause of action for prima facie tort, requiring dismissal of this cause of action.

Regarding the fourth cause of action, Amerasia Bank asserts that the plaintiff consented to the sublease between New K&S and New A&N in writing, while the plaintiff contends that the writing was a forgery and the sublease was improperly made. Notwithstanding the plaintiff's claim to the contrary, relevant case law dictates that Amerasia Bank cannot be held liable for commercial bad faith based on independent acts of New A&N that were clearly contrary to Amerasia Bank's asserted interests in the collateral that is the subject of this action (see, *Chambers Associates LLC v. 105 Acquisition LLC*, 37 AD3d 365 [2007]). Thus, dismissal of this cause of action is also required.

Accordingly, the complaint is hereby dismissed in its entirety.

In light of the foregoing, the movant's remaining contentions are academic and need not be addressed.

Dated:

MAY 07 2015


J.S.C.

FILED
MAY 27 2015
COUNTY CLERK
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