



November 28, 2005, plaintiff Kiosk Tokyo Restaurant, Inc. assigned its rights as tenant under the lease to plaintiff MJJ Restaurant. On or about May 1, 2006, plaintiffs Kiosk Tokyo Restaurant and Sherpa discovered that there was no certificate of occupancy for the basement and that the basement space could only be used for storage.

Plaintiffs Kiosk and Sherpa allege that, at the time they executed the lease, they reasonably relied on the representation from defendant B.L. Management that the basement had a certificate of occupancy permitting the use of the basement space at the premises as a bar. As a result, the first cause of action seeks damages in the amount of \$17,000 arising from an alleged fraud in the inducement.

The defendants seek dismissal of the plaintiff's first cause of action on the ground that the complaint is insufficient to maintain a claim for fraud in the inducement.

To state a cause of action for fraudulent inducement, the plaintiff must establish a misrepresentation of material fact, known to be false or recklessly made, with the intention of deceiving and inducing reliance upon, in which the other party actually and justifiably relies (Chopp v Welbourne & Purdy Agency, Inc., 135 AD2d 958 [1987]). While the plaintiffs correctly assert that "as is" or general merger clauses in a contract do not shield a defendant from judicial inquiry into specific allegations of fraud in the inducement (see Caramante v Barton, 114 AD2d 680 [1985]), "[a] contract is not fraudulently induced if the misrepresentation could have been discovered through the exercise of due diligence" (Bello v New England Financial, 3 Misc 3d 1109[A] [2004]; see Dannan Realty Corp. v Harris, 5 NY2d 317 [1959]; Cohen v Cerier, 243 AD2d 670 [1997]; Superior Realty Corp. v Cardiff Realty, Inc., 126 AD2d 633 [1987]). The existence of a certificate of occupancy is a matter of public record, not within the exclusive knowledge of the defendants, and the plaintiffs could have readily verified the accuracy or veracity of the alleged misrepresentation (Jordache Enterprises, Inc. v Gettinger Associates, 176 AD2d 616 [1991]). Thus, the plaintiffs' reliance upon the alleged misrepresentation that a certificate of occupancy existed for the basement of the premises was not justifiable.

Accordingly, the first cause of action is dismissed for failure to state a cause of action upon which relief may be granted.

Dated: February 22, 2007

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J.S.C.