

767 Third Avenue LLC v Greble & Finger, LLP

2003 NY Slip Op 30054(U)

September 30, 2003

Supreme Court, New York County

Docket Number: 0601317/3172

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER R. TOLUB
Justice

PART 15

767 thru one LLC
Robert Finger, LLP & TC
etc

INDEX NO. 601317-02
MOTION DATE _____
MOTION SEQ. NO. 02
MOTION CAL. NO. 167

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

SCANNED
OCT 02 2003

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 9/30/02

Check one: FINAL DISPOSITION

W
WALTER B. TOLUB
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 15

-----x
 767 THIRD AVENUE LLC,

Plaintiff,

Index No. 601317/2002
 Mtn Seq. 002

-against-

GREBLE & FINGER , LLP, THOMAS C. GREBLE,
 and JOEL L. FINGER,

Defendants.

-----x

WALTER B. TOLUB, J.:

By this motion Defendants collectively move to **dismiss the** instant complaint pursuant to CPLR 3211 and 3016(b). Plaintiffs cross move for a default judgment pursuant to CPLR 3215.

Plaintiff's verified amended complaint is comprised of four causes of action. The first three causes of action allege breach of contract and fraud (misrepresentation and inducement). The fourth cause of action seeks recovery of legal fees.

Facts

Defendant Greble and Finger, LLP ("G&F") is a law firm in New York. In 1981, the predecessor of defendant "G&F" executed a lease with plaintiff's predecessor in interest, Sage Realty Corporation (Sage Realty) for office space (the "premises") located at 767 Third Avenue, New York, New York. Pursuant to the terms of the lease, defendant-tenant was to occupy the 12th floor of the building for a period of ten years, the fixed annual rent to be paid in monthly installments. By a December, 1991 amendment to the lease, **the**

initial rental term for the premises was extended for an additional ten years

A second amendment to the lease was made in August, 1992, replacing the original provisions of Article 44. Among the replaced sections was section 44.03 which states that:

Tenant (as opposed to the individual partners of Tenant) shall be liable for all monetary obligations under this Lease, including, without limitation, all damages and liabilities provided for under Articles 18 and 19 of the Lease, to a maximum of \$100,000; such amount to be reduced to \$80,000 on October 1, 1996; to \$60,000 on October 1, 1997; to \$40,000 on October 1, 1998; to \$20,000 on October 1, 1999; and all such liability to be eliminated as of October 1, 2000, provided that Tenant vacates the Demised Premises and surrenders possession thereof to Landlord as of the last day of the last month for which Tenant has paid all Fixed Rent and additional rent due under the lease (not including any payment due pursuant to the foregoing. Notwithstanding the foregoing, Tenant shall at all times be responsible for full compliance with all non-monetary obligations under the Lease. Notwithstanding anything contained in the Lease, or this Amendment of Lease to the contrary, should Tenant surrender possession of the Demised Premises to Landlord, pay all Fixed Rent and additional rent due through the last day of the month in **which** Tenant so vacates, and pay the then applicable aforesaid amount, the Lease shall be deemed terminated as of the last day of the month for which Tenant has made regular payment of Fixed Rent and additional rent (provided Tenant vacates and surrenders possession of the Demised Premises to Landlord as of such date).

A December, 1997 amendment added additional space on the 14th Floor.

On July 9, 2001, Sage Realty and defendant G&F executed a fourth amendment to the lease. Pursuant to this amendment, the lease on the 12th floor was extended to September 30, 2006. **The** lease on the 14th floor space remained the same, scheduled to expire on September 30, 2001.

In September 2001, defendant G&F notified plaintiff that it would be vacating the leased premises effective October 31, 2001. Defendant G&F paid the monies it believed due under the lease consistent with § 44.03 and surrendered the premises.

Plaintiff commenced the instant litigation in May, 2002. In November 2002, defendants moved to dismiss the instant complaint, and the motion **was** denied for failure to attach a copy of the complaint. Following the February 2003 denial of their motion, defendants brought the instant motion to dismiss.

Discussion

"Single Motion Rule"

Pursuant to CPLR 3211, "at any time before service of the responsive pleading is required, a party may move on one or more grounds set forth in subdivision (a) and no more than one such motion shall be permitted" (CPLR 3211[e]). See generally, **Barr, Altman, Lipshie and Gerstman; New York Civil Practice Before Trial** [James Publishing 2001-2002] §36:01, 36:03, 36:53). Therefore, once this court denied defendants' first motion to dismiss on

procedural grounds, under the express language of the statute, defendants were barred from making a second motion to dismiss.

However, notwithstanding this rule, it has been held that where the moving party has demonstrated that the matter under review is ripe for disposition, the single motion rule of 3211(e) is not applicable. (*Ultramar Energy Limited v. Chase Manhattan Bank, N.A.*, 191 A.D.2d 86 [1st Dept. 1993]) (second motion to dismiss held to be curative, defendant merely cured a documentary gap identified by the court). Review of the instant application indicates that like the defendant in *Ultramar*, defendants in the instant action merely sought to cure a documentary gaffe in their prior application. Accordingly, although the more appropriate procedure would have been for defendants to answer plaintiff's complaint and then make their motion pursuant to CPLR 3212, in the interest of judicial economy, and considering that the matter is indeed ripe for disposition, this court sees no reason to not consider the instant application.

Motion to Dismiss

On a motion to dismiss, the Court, accepting all of plaintiffs allegations as true and affording all favorable instances to be drawn from them, is strictly limited to determining "whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). However, each allegation or cause of action must be supported by facts. Accordingly, failure

to support a cause of action with adequate evidence, or failure to demonstrate the existence of an element of the cause of action warrants dismissal of that cause of action (DiPalma v. Phelan, 81 N.Y.2d 754 [1992]; Creed v. United Hospital et al., 190 A.D.2d 489 [2nd Dept. 1993]).

Breach of Contract

At the outset, the court notes that although plaintiff alleges breach of contract in its first cause of action, the complaint fails to identify any provision alleged to have been breached. Absent evidence of defendant's alleged breach of the lease, plaintiff's cause of action for breach of contract is improperly pled (Sud v. Sud, 211 A.D.2d 423 [1st Dept. 1995]) and is therefore dismissed.

Fraudulent Misrepresentation and Inducement

Plaintiff's second and third causes of action', both

¹ Plaintiff's second cause of action (fraudulent misrepresentation claims that:

16. ... in negotiating the Fourth Amendment, the Defendants jointly and severally represented to the Plaintiff their intention to have G&F occupy the subject premises under the terms of the Lease for the duration of the extended term. However, the Defendants in reality intended and knew that G&F would vacate the subject premises in or about October, 2001, and did in fact vacate the subject premises on or about **October** 26, 2001. Accordingly the Defendants' representations to the Plaintiff that they intended for G&F to occupy the subject premises for the duration of the extended term were knowingly and intentionally false, and were made with the intention of deceiving the plaintiff.

17. The Plaintiff relied to its detriment upon the aforesaid knowing and intentional misrepresentations of the Defendants, in that the Plaintiff was induced to **forebear** from marketing the subject premises prior to G&F's sudden abandonment of the subject premises without notice, to find a

containing allegations of fraud, fail to meet the pleading requirements set forth in CPLR 3106 and are also dismissed. "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016(b)). Each of the elements of fraud must be additionally supported with allegations of fact, not merely conclusory allegations (Fink v. Citizens Mortgage Banking Ltd., 148 A.D.2d 578 [2nd Dept. 1989]; Lanzi v. Brooks, 54 A.D.2d 1057 [3rd Dept. 1976], *aff'd* 43 N.Y.2d 778 [1977]).

In the instant case, both plaintiff's second and third causes of action allege that defendant committed acts of fraudulent misrepresentation and fraud in the inducement at the time of the lease renegotiation because while defendant represented that they

suitable new tenant to occupy the subject premises at the applicable market rental rate for comparable office space ...

Plaintiff's third cause of action (fraudulent inducement) claims that:

20. In reliance upon and consideration of the Defendants' joint and several knowing and intentional false misrepresentation of their intention to have G&F occupy the subject premises for the duration of the extended term, the Plaintiff was induced to grant the Defendants an abatement of G&F's October, 2001 rent in the amount of \$33,194.16 and its November, 2001 rent in the amount of \$6,407.02, which abatement provision was incorporated into the Fourth Amendment as clause 3B thereof (the "Abatement Clause").

21. Accordingly, as a direct consequence of the Defendant's fraudulent misrepresentations, the Plaintiff was induced to its detriment to include the provisions of the Abatement Clause in the Fourth Amendment.

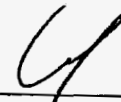
required an additional five year lease term, they never **intended** to occupy the premises for the entire lease term. However, neither cause of action contains factual support for these allegations. To draw an inference of fraud based on the fact that defendant opted to leave before the end of the lease term is on its own, insufficient to factually support an allegation of fraud (Lanzi, at 1058). Accordingly, plaintiff's second and third causes of action for fraudulent misrepresentation and fraudulent inducement **are** dismissed. Plaintiff's fourth cause of action for attorney's fees is also dismissed. Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint pursuant to CPLR 3211 and 3016(b) is granted; and **it is** further

ORDERED that plaintiff's cross motion for a default judgment pursuant to CPLR 3215 is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/30/01



HON. WALTER B. TOLUB, J.S.C.