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

PRESENT: DIANE A. LEBEDEFF PART 8

Justice

JACOBS PRIVATE EQUITY LLC

- v -

450 PARK LLC

INDEX NO. 115108/04

MOTION DATE 1/10/05

MOTION SEQ. NO. 001

MOTION CAL. NO. 7

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

	PAPERS NUMBERED
~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits ...	1-10
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~

Motion is decided in accordance with the accompanying memorandum decision.

FILED
APR 13 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: APR 05 2005

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ Reference

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
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JACOBS PRIVATE EQUITY, LLC,

Plaintiff,

-against-

Index No. 115108/04
Mot. Seq. No. 001

450 PARK LLC,

Defendant.

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DIANE A. LEBEDEFF, J.:

Plaintiff Jacobs Private Equity, LLC ("JPE" or "Tenant") moves for a preliminary injunction staying defendant's right to draw against the letter of credit posted by plaintiff as security.[1] Defendant 450 Park LLC ("450 Park" or "Landlord") cross-moves for an order dismissing the amended complaint (CPLR 3211 [a][1] and [7]; CPLR 3016). For the reasons set forth below, plaintiff's application for a stay is denied, and the cross-motion is granted in its entirety.

Factual Background

Plaintiff JPE entered into a lease dated March 2, 2004 (the "Lease"), for the 28th and 29th floors of the building known as 450 Park Avenue, New York, New York. JPE

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[1] The other branches of plaintiff's motion, including the request for *Yellowstone* injunctive relief, were resolved pursuant to a so-ordered stipulation dated November 11, 2004.

posted a letter of credit for up to $1,043,190, as a security deposit under the Lease. Landlord agreed to contribute up to $1,038,000 to JPE's initial "build-out" of the premises, to be completed within one year after the commencement date of the lease (Lease, Art. 1 and section 4.2).

Under the Lease, Tenant was able to occupy temporary space on the ninth floor for six months after the commencement date, while the premises were being built out (Lease, section 26.20). In accordance with the Lease provisions, Tenant in fact occupied the temporary space for six months, and commenced payment of rent on September 17, 2004, six months after the March 17, 2004, commencement date (cross-motion, exhibit E). Landlord demolished the premises, removing work and installations of the prior tenant, prior to the commencement date of the Lease (Lease, section 4.01).

Shortly after taking possession of the leased space, JPE determined, as a result of changed business circumstances, that it did not need the space and would seek to sublet the premises or assign the Lease (Jacobs affidavit, para. 12). Its principal, Bradley Jacobs, entered discussions with Landlord's principal, Paul Pariser, concerning the possibility of extending the time within which to undertake a build-out of the premises. According to plaintiff, Jacobs and Pariser reached an oral agreement, sometime between March and June of 2004, to extend the build-out period, and Landlord's corresponding obligation to contribute $1 million to such build-out, for six months, *i.e.*, through September 17, 2005 (*id.*, paras. 13-14). JPE, working with a broker, identified a potential subtenant for the premises, Arden Asset Management, Inc. ("Arden"), but no firm agreement was reached (*id.*, para. 12). The amended complaint alleges, on information and belief, that Arden was

ready, willing and able to sublet the premises for a higher rent than provided for under the Lease (amended complaint, para. 28).

The amended complaint further alleges that, on or about October 14, 2004, Jacobs met with Pariser to memorialize the alleged oral agreement to a six-month extension of the build-out period (*id.*, paras. 33-34). According to plaintiff, Pariser indicated that an advisor to Landlord's partner, ING Clarion, would not agree to JPE's request for an extension, would "cause problems" for JPE unless it relinquished rights under the Lease, and would "sniff around the market" to interfere with any possible assignment or subtenant (*id.*, paras. 35-36). It further alleges that Pariser asserted that Landlord would only contribute to the build-out if the premises were occupied by JPE, that JPE must occupy the space before Landlord would consider a sublease or assignment, and demanded that JPE surrender the Lease and pay $4 million, "under threats of denying JPE its rights and privileges under the Lease and causing economic loss and injury to JPE, Jacobs" and an affiliated company (*id.*, paras. 37-39).[2]

On October 22, 2004, JPE surrendered possession of the premises and delivered a letter advising Landlord that the Landlord had repudiated the Lease, and/or that Tenant had elected to rescind the Lease based on Landlord's fraudulent misrepresentations inducing the Lease (motion, exhibit G). The repudiation/rescission notice did not refer to any

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[2] Pariser denies Jacobs' account of the meeting and, in essence, asserts that Jacobs sought a buy-out agreement, while Landlord, having determined that the Lease would cost Tenant $4 million over the course of the Lease term under current market conditions, preferred to hold JPE to its Lease obligations (Pariser affidavit, para. 6).

problem with the life safety system or fire alarm box. Landlord rejected Tenant's rescission (motion, exhibit H). On November 9, 2004, Landlord served Tenant a notice to cure based on default in payment of rent (motion, exhibit L).

Plaintiff's initial motion papers asserted that Landlord had made fraudulent misrepresentations about the sublet/assignment provisions of the lease, and also alleged that the fire alarm system was not functional at the time Landlord sent the commencement date letter. The amended complaint now rests on the allegations concerning the fire alarm system and the threats allegedly made during the October 14th meeting.

Legal Discussion

I. *Motion to Enjoin Defendant From Drawing Down Letter of Credit*

The three part test for granting a preliminary injunction requires the movant to establish: (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of injunctive relief; and (3) that a balancing of the equities favors the movant's position (*W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496 [1981]).

Plaintiff is unable to show irreparable injury that could not be redressed by monetary damages, as there is no contention that Landlord would be unable to answer in damages (*410 Sixth Ave. Foods, Inc. v. 410 Sixth Ave., Inc.*, 197 A.D.2d 435 [1st Dept. 1993]; *Chiat/Day Inc. v. Kalimian*, 105 A.D.2d 94 [1st Dept. 1984]). Moreover, nowhere in Tenant's submissions is there any denial that it is in default of its obligation to pay rent under the Lease, and Landlord accordingly is "entitled to the security agreed upon" (*Joseph v. Solow Building Co., L.L.C.*, 284 A.D.2d 214 [1st Dept. 2001]; *see 410 Sixth Ave. Foods,*

Inc. v. 410 Sixth Ave., Inc, supra, denying motion to enjoin drawing down of letter of credit, although tenant alleged landlord refused in bad faith to approve sublease, prompting tenant's nonpayment of rent).

As for the merits of the fraud allegations, plaintiff, having withdrawn its fraud in the inducement claims, argues that there was "fraud in the transaction" because the Landlord misrepresented the conditions of the premises on the date of the lease commencement. Such claims that the landlord failed to fulfill a contractual obligation, even if established, would not warrant interference with the letter of credit (*see, e.g.*, *Chiat/Day Inc. v. Kalimian, supra*, tenant alleged landlord had breached subsidiary lease provisions, but "underlying lease between the tenant and the landlord cannot be said to be so fraudulent or devoid of value to the tenant that it could be said to vitiate the entire underlying transaction"). Nor does plaintiff show any balance of equities favoring its position.

Accordingly, plaintiff's motion seeking to enjoin the Landlord from drawing down on the letter of credit is denied.

II. *Cross-Motion to Dismiss the Amended Complaint*

The cross-motion to dismiss, now directed to the amended verified complaint, dated December 27, 2004, is granted in its entirety. When considering a motion to dismiss for failure to state a claim (CPLR 3211 [a][7]), it is well settled that "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion

for dismissal will fail" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). The factual allegations of the complaint are to be taken as true, and the complaint must be interpreted in a fair and reasonable manner (*see Tobin v. Grossman*, 24 N.Y.2d 609, 612 [1969]; *Williams v. Williams*, 23 N.Y.2d 592 [1969]). Dismissal based on documentary evidence under CPLR 3211 (a)(1), "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 A.D.2d 243, 246 [1st Dept. 2000]).

Affidavits and other evidence submitted by plaintiffs may be considered for the limited purpose of remedying any defects in the complaint, thus preserving inartfully pleaded, but potentially meritorious claims (*Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633 [1976]). When documents and affidavits are submitted on a motion to dismiss, the "criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it can be said that no significant dispute exists regarding it" a motion for dismissal will fail (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

1. *Constructive Eviction and Related Claims*

Tenant alleges that the failure to provide a working fire alarm box, when Landlord had related open permits and outstanding violations, constitutes a constructive eviction because it deprived Tenant of beneficial use and enjoyment of the premises. Landlord responds that, not only was there no constructive eviction, but that the fire alarm box issue is a pretext, belatedly asserted *after* Tenant's renunciation of the Lease, in an attempt to

extricate itself from its obligations under a disadvantageous lease. Landlord's overriding point is that it did not breach any obligation under the Lease, which places the obligation to make the fire alarm box functional on Tenant.

Under the terms of the Lease, Tenant represented that it had inspected the premises and accepted them in their existing "Delivery Condition,"[3] with the provision that "[l]ife safety system tie-ins shall be delivered to the floor on which the Premises are located with reasonable promptness after the Commencement Date" (Lease, section 4.1). The Lease further provides that Tenant is obligated at its expense to make all repairs needed to the "life safety systems, exclusively serving and contained within the Premises" (section 6.2; see also section 8.1 [c], providing that if "tenant is required to perform work ... in order to cause such condition[s] to comply with Requirements, then Landlord shall be responsible for the reasonable third party out-of-pocket costs incurred by Tenant to perform" the work required to bring the premises into compliance with applicable laws, rules, codes and regulations). Thus, the Lease clearly places the obligation on Tenant to make the fire alarm

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"Delivery Condition" is defined in the Lease to mean that "Landlord's Work" has been substantially completed and the premises are vacant, free of tenancies, and "not in violation of applicable Requirements and are free of Hazardous Materials all to the effect that Tenant will not be delayed or prevented from obtaining a construction permit upon the filing of proper plans and documentation in connection with Landlord approved work to be performed by Tenant in the Premises for its initial occupancy" (Article 1, "Commencement Date"). "Landlord's Work" means the premises were to be delivered with all existing installations demolished, and in a broom free condition free of asbestos (section 4.1). The Lease provides a "punchlist" procedure, under which the Tenant was required to give notice of any unfinished item within 30 days after the commencement date of the Lease, and the Landlord would then be obligated to "correct and/or perform punchlist work with respect to unfinished details" with all due diligence (section 4.1).

system functional, and anticipates that Tenant would be involved in bringing the premises into compliance with applicable building codes and regulations. Even assuming the fire alarm system were Landlord's responsibility, Tenant accepted the premises "as is" following inspection, and made no complaint to Landlord.

The contention that the absence of a working fire alarm system constituted a violation of law does not add weight to tenant's constructive eviction claim. A constructive eviction occurs where "the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*see*, *Barash v. Pennsylvania Term. Real Estate Corp.*, 26 N.Y.2d 77, 83 [1970]). No basis is shown for an allegation that the failure to connect the fire alarm box deprived Tenant of the beneficial use and enjoyment of the premises (*see 56-70 58th St. Holding Corp. v. Fedders-Quigan Corp.*, 5 N.Y.2d 557, 564 [1959], landlord's failure to obtain amended certificate of occupancy did not justify tenant's vacating premises and ceasing paying rent, "tenant could not simply vacate the premises in cavalier fashion on the pretext that further occupancy was illegal"; *Jordache Enterprises, Inc. v. Gettinger Associates*, 182 A.D.2d 488 [1st Dept.], *lv. dismissed*, 80 N.Y.2d 925 [1992], absence of a Certificate of Occupancy alone does not amount to a constructive eviction, "particularly where ... tenant cannot demonstrate that any wrongful acts by the landlord materially deprived it of the beneficial use of the premises subsequent to the commencement of the lease"; *Silver v. Moe's Pizza, Inc.*, 121 A.D.2d 376 [2d Dept. 1986], absence of certificate of occupancy does not amount to a constructive eviction, even assuming such absence rendered occupation and use of the premises illegal).

To the extent the repudiation, rescission and breach of contract claims are based on the same insufficient allegations of constructive eviction and breach related to the fire alarm system, they are also insufficient and are dismissed (*see Phoenix Garden Restaurant, Inc. v. Chu*, 245 A.D.2d 164 [1st Dept. 1997]). To the extent those claims are based on statements made during the October 14th meeting, taking the allegations in the amended complaint as true, Landlord's statements of its positions concerning the parties' obligations under the Lease do not constitute a breach, anticipatory breach or repudiation of the Lease.

As for the repudiation claim, it is settled that "there must be a definite and final communication of the intention to forego performance before the anticipated breach may be the subject of legal action" (*Rachmani Corp. v. 9 East 96th Street Apartment Corp.*, 211 A.D.2d 262, 270 [1st Dept. 1995], citations omitted; *Coney Island Exhaust, Inc. v. Mobil Oil Corp.*, 304 A.D.2d 706 [2d Dept. 2003], a stipulation between landlord and tenant, which depended on third party approval to become operative, "was not an unequivocal, definite and final repudiation of the lease agreement" or anticipatory breach thereof). Here, Tenant abandoned the premises one week after the meeting, without any further attempt to negotiate a modification of the Lease and without ever having submitted a firm proposal for a subtenancy or assignment to the Landlord. Moreover, Tenant's claim that Landlord repudiated the Lease is inconsistent with the undisputed fact that it was Tenant who was seeking a modification of the Lease, because it was unable to perform its obligations under the Lease unless its terms were modified.

The rescission claim is also inadequately pleaded, especially in light of Tenant's abandonment of the fraud in the inducement claims which originally formed the basis for the request for rescission (*see generally Berzin v. W.P. Carey & Co., Inc.*, 293 A.D.2d 320 [1st Dept. 2002], dismissing cause of action for rescission based on fraud, "since the promises that allegedly induced him to enter into the revised agreement were either kept by defendant, or are too vague to be enforced, or, giving the complaint every favorable inference, involved no misrepresentation of fact"). The alleged misrepresentations concerning the fire alarm system could not support a fraud claim, since the Lease placed the obligation to make the system operable on Tenant, and, even accepting Tenant's reading of the Lease, Tenant had the ability to inspect the premises itself, and therefore could not reasonably have relied on any misrepresentations related thereto (*see generally, Culver & Theisen, Inc. v. Starr Realty Co.*, 307 A.D.2d 910 [2d Dept. 2003], "[s]ince the plaintiff had the opportunity to ascertain whether or not it could erect the display, it cannot argue that the lease should be rescinded to avoid the consequences of its own negligence"). No other claim of fraud or breach of contract is set forth in the amended complaint.

Accordingly, the first through fourth causes of action are severed and dismissed.

2. *Tortious Interference With Business Opportunities*

Plaintiff alleges that Landlord was aware of a proposed sublease between Tenant and Arden, and that the sublease would have been entered into but for Landlord's wrongful conduct. There are no allegations that Landlord either acted with malice, or engaged in the type of wrongful conduct, such as "physical violence, fraud or misrepresentation, civil suits

and prosecutions, and some degrees of economic pressure," required to state such a claim (*Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 [1980]). At worst, plaintiff alleges that Landlord engaged in hardball negotiation tactics when Tenant sought to modify the terms of the Lease. A party to a contract is entitled to act in furtherance of its "own economic benefit," as Landlord allegedly did (amended complaint, para. 66), without such conduct giving rise to a claim for tortious interference with a separate proposed contract with a third party (*see Foster v. Churchill*, 87 N.Y.2d 744, 750-57 [1996], defense of economic justification). Any economic pressure on Tenant resulted from the terms of the Lease, which had been voluntarily negotiated and entered into between sophisticated commercial entities. Finally, since Tenant terminated the Lease and left the premises without ever having submitted a proposed subtenant for approval, there is no basis for a claim that Landlord breached its obligations under the Lease with respect to approving subleases or assignments.

3. *Claims of Bad Faith and 'Economic Duress'*

Plaintiff alleges that Landlord's "threats and demands" constituted bad faith acts that deprived it of its bargained-for rights, imposed economic duress, and breached the implied covenant of good faith and fair dealing. Suffice to say that, taking the pleadings in the light most favorable to plaintiff, no cause of action is stated in relation to the October 14th meeting or any other allegations concerning the Landlord's motives in dealing with Tenant. Any economic duress experienced by Tenant was a result of its obligations under a written Lease, and its own changed circumstances. Landlord was not obliged to modify the

Lease or release Tenant from its obligations (*805 Third Ave. Co. v. M.W. Realty Associates*, 58 N.Y.2d 447, 452 [1983], a "party cannot be guilty of economic duress for refusing to do that which it is not legally required to do"; *Gubitz v. Security Mut. Life Ins. Co. of New York*, 262 A.D.2d 451 [2d Dept. 1999], "where the alleged menace was, as here, to stop performance under a contract or to exercise a legal right, there is no actionable duress").

Finally, the claim for breach of implied covenant of good faith and fair dealing, which is wholly duplicative of the insufficient breach of contract claim, must be dismissed (*Skillgames, LLC v. Brody*, 1 A.D.3d 247, 252 [1st Dept. 2003]; *Triton Partners LLC v. Prudential Securities Inc.*, 301 A.D.2d 411 [1st Dept. 2003]).

Conclusion

Plaintiff's motion is denied and the cross-motion to dismiss is granted. No sooner than five days after service of a copy of this order with notice of entry and a proposed judgment upon plaintiff, the clerk shall enter judgment accordingly upon the presentation of appropriate papers.

This decision constitutes the order of the court.

Dated: April 5, 2005

J.S.C.