

**Morrison Cohen Singer & Weinstein, LLP v 750  
Lexington Ave. Assoc.**

2005 NY Slip Op 30610(U)

March 9, 2005

Supreme Court, New York County

Docket Number: 109965/04

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

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MORRISON COHEN SINGER AND WEINSTEIN, LLP,

Plaintiff, Index No.  
109965/04

-against-

DECISION

750 LEXINGTON AVENUE ASSOCIATES,  
INTERNATIONAL PLAZA ASSOCIATES, L.P.,  
COHEN BROTHERS REALTY CORPORATION  
and SCHMELKIN AND SCHMELKIN, C.P.A.,

Defendants.

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YORK, J.:

Plaintiff *pro se*, a prominent law firm, is the tenant of defendants 750 Lexington Avenue Associates and International Plaza Associates, L.P. ( hereafter, collectively, landlord), defendant Cohen Brothers Realty Corporation (hereafter, Cohen) is the landlord's management company, defendant Schmelkin and Schmelkin, C.P.A. (hereafter, Schmelkin ) is the landlord's accountant.

The instant motion seeks dismissal of plaintiff's second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth causes of action as insufficiently pleaded pursuant to CPLR 3211 (a) (7), or CPLR 3016 (b), or both.

Under the lease with landlord, plaintiff agreed to be responsible for

a percentage of the annual real estate management fees incurred by landlord, based on the square footage occupied by plaintiff, as included in the landlord's operation and expense statement, not to exceed "competitive costs for similar management services where such services are provided by affiliates of landlord" (Paragraph 1 of Complaint, Exhibit 1, annexed to plaintiff's affirmation in opposition of Malcolm I. Lewin, dated September 14, 2004).

It is alleged by plaintiff that the landlord obtained letterhead stationary from its accountant, Schmelkin, and either with or without Schmelkin's connivance and knowledge, used the letterheads to fraudulently certify the costs of landlord's affiliates as comparables of "competitive costs" defined in the lease. The alleged result was a fraudulent competitive costs basis upon which plaintiff was excessively overbilled, and upon which plaintiff relied as accurate due to the apparent verification of Schmelkin as a Certified Public Accountant.

The first cause of action against landlord alleges breach of the contract by misrepresenting expenses and charging higher amounts to plaintiff than were contemplated by the lease between the parties. No relief is sought regarding this first cause of action.

The third cause of action against the landlord and Cohen alleges intentional fraud by ~~them~~<sup>their</sup> acting in concert to deceive the plaintiff. The fourth cause of action

alleges that Cohen aided and abetted landlord's intentional fraud by supplying false and forged documents. The fifth cause of action extends the aiding and abetting allegations to Schmelkin.

Defendants rely on *First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291-292 (1<sup>st</sup> Dept 1999), which held in relevant part as follows:

A fraud claim should be dismissed as redundant when it restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract [citation omitted]. By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract [citation omitted]. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim [citation omitted]. Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contracts...and therefore involves a separate breach of duty [citation omitted].

However, this above-quoted language, included verbatim in defendants memorandum of law, speaks more in favor of plaintiff's position than of defendants'.

The third, fourth, and fifth causes of action, do not, as defendants suggest, allege fraud based on insincerity of the landlord's promises as contained in the lease agreement. Rather they allege specific affirmative acts of intentional fraud, forgery, and submission of false documents to induce plaintiff to pay sums of

money in excess of his just obligations under the terms of the said lease. In reliance thereon, plaintiff has alleged that it paid the said excessive sums. Indeed, the third, fourth, and fifth causes of action alleged nothing of fraud in the inducement to enter into a contract, but rather, fraud in the performance of the contract, and therefore impose no redundancy.

Defendants assert that the fifth cause of action against Schmelkin for “aiding and abetting” fraud is insufficient for failure to allege actual knowledge, as opposed to constructive knowledge of its fraudulent conduct, pursuant to *National Westminster Bank USA v Weksel*, 124 AD2d 144, 149 (1<sup>st</sup> Dept 1987). The fifth cause of action specifically alleges the unequivocally intentional participation by Schmelkin in creating the bogus operating expense statements on which plaintiff relied to its detriment. The language of the instant complaint is clearly distinguishable from the court’s analysis of the allegations in *National Westminster Bank USA*, relied on by defendants herein.

“Plaintiffs’ allegations, that [defendant] knew of the false and misleading representations made by his brother in order to induce plaintiffs to invest in various real estate corporations and that he participated in the diversion of corporate assets for his own use and in furtherance of a fraudulent scheme...to the harm...of plaintiffs, were sufficient to state a cause of action against him for aiding and

abetting the alleged fraud [citations omitted].” (Rizel v Bodner, 225 AD2d 410 [1<sup>st</sup> Dept 1996]). “ It is well established that liability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not itself suffice to constitute the fraud [citations omitted].” (Kuo Feng Corporation v Mah, 248 AD2d 168, 168-169 [1<sup>st</sup> Dept ], appeal dismissed, 92 NY2d 845, lv denied, 92 NY2d 809[1998]).

The sixth cause of action alleges that Schmelkin negligently failed in its duty to safeguard its letterhead from fraudulent use by third parties in the perpetration of a fraud. Defendants rely heavily on Parrott v. Coopers and Lybrand, 95 NY2d 479 (2000) for the proposition that plaintiff has not sufficiently pleaded “linkage” or privity between plaintiff and Schmelkin which would give rise to a duty to act with care as to the interests of a third party. Parrott v. Coopers involved a claim of negligent misrepresentation of the value of stock owned by an employee in a report prepared by the employer’s accountant for the employer. The case is inapposite. There is no issue of correct or incorrect valuation in the instant matter, but rather an allegation of failure to safeguard a device—in this case a letter head—that can be used to fraudulently authenticate a document to the detriment of the plaintiff—a circumstance which may be more properly analogized to a stolen notary seal.

As with any motion pursuant to CPLR 3211 (a) (7), “the court is required to view every allegation of the complaint as true and resolve all inferences in favor of plaintiff regardless of whether the plaintiff will ultimately prevail on the merits.” (Grand Realty Company v. City of White Plains, 125 AD2d 639 [2nd Dept 1986]).

Accordingly, so much of the instant motion as seeks dismissal of the third, fourth, fifth, and sixth causes of action are denied.

The second cause of action asserts a claim against Landlord for retaining the benefits of his overcharges to the plaintiff. “A claim for unjust enrichment may not be maintained where a contract exists between the parties covering the same subject matter.” (Goldstein v CIBC World Markets Corporation, 6 AD3d 295 [1<sup>st</sup> Dept 2004]). The first cause of action alleges breach of contract by overcharging plaintiff sums far in excess of defendants’ entitlements under the said contract. Plaintiff raises nothing herein to demonstrate that the second cause of action concerns subject matter missing from the first cause of action, or that the said second cause of action is other than duplicative of the first. Accordingly this branch of the defendant’s motion for dismissal of the second cause of action is granted.

The ninth cause of action alleges that, inasmuch as defendants obtained funds as unjust overcharges of the plaintiff, in breach of the contract between the

parties, landlord should be estopped from retaining said funds. Again, plaintiff fails to demonstrate a sufficient distinction between the elements of the first cause of action for breach of contract, for which a money judgment could be obtained in recovery, and the ninth cause of action , for which recovery of the same money is sought by estopping the landlord from retaining it. These causes of action are duplicative on their face and so much of the defendant's motion as seeks dismissal of the ninth cause of action is granted.

The defendants seek dismissal of the tenth cause of action for a declaratory judgment that: a) landlord is in breach of the lease and charging far in excess of the expenses to which landlord is entitled; b) landlord shall pay damages and restitution; and c) landlord shall hereafter charge plaintiff for expenses in accordance with the terms of the lease. A declaration as to one or more of these issues would be dependent upon a determination of the very issues central to the plaintiff's causes of action for breach of contract and fraud, i.e., whether or not the landlord defrauded plaintiff by submitting bogus documents to establish the expense base on which to charge additional rent under the lease between the parties. Thus, the existence of a controversy which could be resolved by the declaration sought by plaintiff would await a determination as to plaintiff's causes of action for breach of contract and fraud herein. and thus lacks the required ripeness.

(Prashker v. United States Guarantee Company, 1 NY2d 584{1956}).

The cases relied upon by plaintiff for its proposition that “(d)eclaratory judgments are particularly appropriate in cases involving lease agreements,” (Plaintiff Memorandum of Law in Opposition, at 28, Essex Green, Inc. v. Arnold Constable Corporation, 32 Misc 2d 1013, 1015[Sup Ct NY County1962], and Allen v Thousand Island Park Corporation, 18 Misc 2d 1079, 1080[Sup Ct Jefferson Cty 1959], *affd* 10 AD2d 812[4th Dept], *affd* 11AD2d 635 [1960]are distinguishable from the instant matter in that they both require a declaration of tenants’ payment obligation to avoid the risk of tenants’ default and consequent eviction. No such protection is required in the instant matter. The defendant’s motion is granted as to the tenth cause of action.

The seventh and eighth causes of action against landlord respectively allege reckless and negligent misrepresentation of material facts—i.e., the bogus expenses— on which plaintiff relied to its detriment, in each case in violation of the landlord’s special duty to plaintiff. (Grammer v, Turtis, 271 AD2d 664, 665 [2<sup>nd</sup> Dept 2000]). Landlord asserts that these causes of action are insufficient inasmuch as the facts as alleged do not set forth the required special duty relationship between landlord and plaintiff and that such a relationship is not established merely by the allegation of a landlord-tenant relationship.

However, the allegations herein establish that the contract between the parties imposed a special duty on landlord by the parties' agreement, inasmuch as it was contemplated that landlord would be the source of the data on which plaintiff's obligations would be computed. This is sufficient, on its face, to allege a special duty and to retain the seventh and eighth causes of action.

Accordingly, the defendants' motion is granted to the extent of dismissing the second, ninth, and tenth causes of action and is otherwise denied. Defendants are directed to interpose their respective answers within ten days from the date of service of a copy of this court's decision and order with notice of entry.

This constitutes the decision and order of the court.

Dated: 3/9/05

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ENTER:

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J. S. C.

**LOUIS B. YORK**

**FILED**  
MAR 23 2005  
NEW YORK  
COUNTY CLERK'S OFFICE