

**MJJ Rest., Inc. v Gabriel Mgt. Corp.**

2007 NY Slip Op 30096(U)

February 22, 2007

Supreme Court, Queens County

Docket Number: 0015668

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17  
Justice

MJJ RESTAURANT, INC., et al. x Index  
Number 15668 2006

- against -

Motion  
Date October 18,

2006

GABRIEL MANAGEMENT CORP., et al. Motion  
Cal. Number 48

x

The following papers numbered 1 to 9 read on this motion by the defendants, pursuant to CPLR 3211, to dismiss the first cause of action asserted against them.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-7
Reply Affidavits.....	8-9

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages arising from a lease agreement, dated June 1, 2005, concerning the premises located at 43-10 through 43-24 Queens Boulevard in Sunnyside, New York.

The plaintiff's first cause of action alleges fraud in the inducement. According to the complaint, on April 12, 2005, plaintiff Sherpa went to the subject premises with defendant B.L. Management, Inc. to view the premises with the intention of renting it on behalf of plaintiff Kiosk Tokyo Restaurant for the purpose of operating an Asian and Japanese restaurant and full music bar. Defendant B.L. Management represented to plaintiff Sherpa that it was the exclusive broker for the premises. Defendant B.L. Management told plaintiff Sherpa that the premises are owned by Colonial Operating Corp. and managed by defendant Gabriel Management, Inc. During the plaintiff's viewing of the premises, defendant B.L. Management Inc. allegedly told plaintiff Sherpa that "the basement of the subject premises has a

certificate of occupancy and can be used as a bar.” On or about 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.