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

PRESENT: HON. ROLANDO T. ACOSTA Justice

PART 61

Index Number : 603809/2006
CITADEL BROADCASTING
vs
RENAISSANCE 632 BROADWAY, LLC
Sequence Number : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, ... ; motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	See attached
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 01 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

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

Dated: 5/22/07

SO ORDERED

J.S.C.
ROLANDO T. ACOSTA
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Citadel Broadcasting Compnay,	**DECISION/ORDER**
Plaintiff,	Index No. 603809/06
– against –	Seq. No. 1
Renaissance 632 Broadway, LLC	Present
Defendant.	**Rolando T. Acosta** Supreme Court Justice

The following documents were considered in reviewing defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1),(7) & (8):

Papers	**Numbered**
Notice of Motion, Affirmation, Affidavit & Memorandum of Law	**1-2 (Exhibits A-W)**
Memorandum of Law in Opposition	**3**
Reply Memorandum of Law	**4**

Facts

Defendant Renaissance 632 Broadway, LLC ("Renaissance") is the owner and landlord of commercial property located at 632 Broadway in New York County. After lengthy negotiations, the parties entered into an agreement dated August 28, 2006 ("Agreement"), whereby defendant agreed to lease the entire twelfth floor to plaintiff for a term of seven years. The Agreement (Defendant's Exhibit C), was entitled "Deal Sheet:632 Broadway" and immediately below the title, it stated in bold letters, "**This deal[] sheet constitutes a legally binding Offer to lease space, and does legally bind all parties. THIS IS NOT A LEASE.**" The sheet went on to list various terms, including the space, square footage, term of lease (7 years), option to extend, construction reimbursement, annual rent, additional cost (water, sewage, and sprinkler charge), annual charges (various taxes), other charges (fuel), various fees due upon lease signing, a list of work landlord had to

complete by a certain date, tenant's work, and "Additional Notes." The fifth additional note provided:

> Please sign below indicating your agreement to the terms and conditions outlined above, and Return to Kenneth Fishel along with a check for $3,000.00 made out to Renaissance 632 Broadway LLC, which is required to draw leases. This fee is fully refundable ONLY in the event agreement on the wording of the lease cannot be reached; not in the event the Tenant has a unilateral change of heart. The deposit will be deducted from the security deposit at the time the lease is executed.

The Agreement was executed by both sides.

The parties commenced negotiating a lease. Frustrated with the negotiations, defendant returned the $3,000 to plaintiff in early October 2006. The parties nonetheless continued negotiating until late October 2006 when defendant sent plaintiff an e-mail which stated "[t]he owner has decided to terminate all further negotiations on the proposed leasing to Citadel. During the course of these negotiations the owner has received numerous unsolicited offers for substantially more and will be pursuing them instead." Defendant's Exhibit R.

Plaintiff commenced this action in November 2006, where it asserted two causes of action, specific performance and breach of contract. Defendant now moves to dismiss the complaint pursuant to CPLR 3211(a)(1)(7) & (8). While the motion was pending, plaintiff withdrew its first cause of action seeking specific performance from the complaint. See Stipulation in Supreme Court file.

Analysis

In evaluating a motion to dismiss for failure to state a claim under CPLR § 3211(a)(1), the Court will construe every fact alleged by plaintiff as true. Fern v. International Business Machines Corp., 204 A.D.2d 907 (3rd Dept. 1994). The motion will be granted only where the documentary evidence unequivocally contradicts plaintiff's factual allegations and conclusively establishes a defense as a matter of law. Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); Landenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc., 275 A.D.2d 243 (1st Dept. 2000).

With respect to CPLR § 3211(a)(7), the Court must accept the allegations of the complaint as true, and accord plaintiff the benefit of every possible favorable inference and

determine only whether the facts as alleged fit within a cognizable legal theory. CBS Corp. v. Dumsday, 268 A.D.2d 350 (1st Dept. 2000); see also Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46 (2001)(motion must be denied if "from [the] four corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law"); Weiner v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dept 1998 ("so liberal is th[is] . . . standard that the test is simply 'whether the pleading has a cause of action,' not even 'whether he has stated one'").

Letters of intent or term sheets are enforceable as contracts "when they contain all the material elements of the contemplated contract, or when the remaining acts to arrive at a contract, e.g., drafting and execution of formal contract documents, are merely ministerial." Local Union 813, International Brotherhood of Teamsters v. Waste Management of New York, LLC, 469 F. Supp 2d 80, 86-87 (E.D.N.Y. 2007)(citing V'Soske v. Barwick, 404 F.2d 495, 499 (2nd Cir. 1968). "When, [however,] the parties include a term in their letter of intent or term sheet that shows the intent not to be bound prior to implementation of what otherwise would be a ministerial step, then the instrument is not binding. Thus, for example, a term sheet or letter of intent that provides that the parties 'will proceed to draft a formal agreement implementing these terms' is a binding contract, for the formality is presumed to be a ministerial act; on the other hand, one that provides, 'this agreement is not binding until the parties execute formal documentation' is not binding, even if the terms of the two instruments would be otherwise identical." Id at. 87. Thus, in Prospect Street Ventures I, LLC v. Eclipsys Solutions Corp., 23 A.D.3d 213, 213 (1st Dept. 2005), the "letter agreement [at issue] was a mere 'agreement to agree' rather than an enforceable contract, since it was expressly conditioned on the 'execution of a definitive agreement satisfactory in form and substance' to both sides, and nothing in the complaint or record reflects that this condition was waived. The continued applicability of this condition precluded the formation of a contract in the form of the letter agreement, since that document manifested an intent not to be bound unless there was such a definitive agreement or a waiver thereof."

Applying these legal precepts to the facts of this case, defendant's motion must be denied. Viewing the facts in the light most favorable to plaintiff, Citadel clearly plead sufficient facts for a breach of contract claim. The deal sheet contained all the material terms of the lease, was signed by both sides and in bold letters specifically stated that the parties were legally bound by its terms. These facts are sufficient to prevent dismissal pursuant to CPLR 3211(a)(7). Nor has defendant presented documentary evidence that unequivocally contradicts plaintiff's factual allegations and conclusively establishes a defense as a matter of law. CPLR 3211(a)(1). At most, defendant's allegations create an issue of fact as to whether notwithstanding the bold print on the deal sheet, the parties did not intend to be legally bound by the deal sheet until a formal lease was negotiated.

Last, defendant's argument that it was not properly served pursuant to CPLR 311-a has no merit. Renaissance argument is that the summons and complaint was personally served on a secretary who was not the official registered agent authorized to accept service of process on behalf of the defendant nor was she even employed by defendant. Instead, she was the receptionist for a real estate firm that shared the same floor. CPLR 311-a, however, allows service "(iii) to any agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process."

Here, the process server avers in his affidavit of service that he served a Cynthia Soria who stated that she was authorized to accept service. See Defendant's Exhibit W. Significantly, defendant does not dispute that Soria in fact stated that she was authorized to receive service on behalf of defendant. It merely argues that Soria was not authorized to accept service. But, as the Court of Appeals noted in Fashion Page, Ltd v. Zurich Insurance Co., 50 N.Y.2d 265 (1980), a corporation doing business in the state can not be heard to complain that a summons was delivered to the wrong person when the process server went to the office, made proper inquiry and delivered the summons as directed; see also Leylegian v. Federal Paper Board Co, Inc., 198 A.D.2d 182 (1st Dept. 1993)(service proper where process server stated that employee stated that she was authorized to accept service); American Home Assurance Co. v. Morris Industrial Builders, Inc., 176 A.D.2d 541 (1st Dept. 1991)(secretary had apparent authority to accept summons and complaint on behalf of corporation, when process server was referred by the receptionist to the secretary when he asked the receptionist to direct him to the proper person to accept legal papers); Carlin v. Crum & Forster Insurance Co., 170 A.D.2d 251 (1st Dept. 1991)(corporate defendant properly served when process server delivered documents to employee who state that she was authorized to accept service in response to specific inquiries from process server).

Defendant's assertions to the contrary, Stuyvesant Fuel Service Corp v. 99-205 3rd Avenue Realty LLC, 192 Misc. 2d 104 (Civ Ct. Bronx Co. 2002), is not controlling. In Stuyvesant, the process server's affidavit recited that the papers had been left with "Jane Smith," whom he described as the "managing agent of the LLC." The court dismissed the complaint because defendant's affidavit contained sufficient information to infer that "Jane Smith" was not a member or a manager of the LLC, and CPLR 311-a does not authorize service on a "managing agent" thereof. As noted above, however, CPLR 311-a allows service on "any other person designated by the limited liability company to receive process," and it is undisputed that Soria in fact stated that she was authorized to receive service on behalf of defendant. On these facts, the Court finds that defendant was properly served.

ORDERED that defendant's motion is denied; and it is further

ORDERED that the matter is scheduled for a Preliminary Conference on June 28,

2007 in Part 61 at 10:00 a.m.

This constitutes the Decision and Order of the Court.

Dated: May 21, 2007

ENTER

SO ORDERED

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.