

**Futurist 1952, Inc. v Westbeth Corp. Hous.
Dev. Fund Co., Inc.**

2007 NY Slip Op 31476(U)

June 1, 2007

Supreme Court, New York County

Docket Number: 0111796/2001

Judge: Carol R. Edmead

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

PRESENT: Edmead
Justice

PART 35

Futurist 1952, Inc.

INDEX NO. 111796/01

MOTION DATE 5/31/07

MOTION SEQ. NO. 07

MOTION CAL. NO. _____

- v -

West Beth Corp.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequences 007, 008 and 009 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that plaintiff Futurist 1952, Inc.'s motion (motion sequence number 007) for partial summary judgment is granted and defendant Westbeth Corporation Housing Development Fund Company, Inc.'s second counterclaim is severed and dismissed; and it is further

ORDERED that defendant Westbeth Corporation Housing Development Fund Company, Inc.'s motion (motion sequence number 008) for partial summary judgment dismissing the portions of plaintiff's claims concerning the alleged repudiation of roof rights is denied; and it is further

ORDERED that defendant Westbeth Corporation Housing Development Fund Company, Inc.'s motion (motion sequence number 009) for partial summary judgment on its second counterclaim is denied; and it is further

ORDERED that the remainder of the action shall continue. It is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

Dated: 6/1/07

[Signature]
J.S.C.

HON. JUDGE EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X

FUTURIST 1952, INC.
a/k/a MoDerNist, Inc.,

Plaintiff,

Index No. 111796/01

-against-

DECISION/ORDER

WESTBETH CORPORATION HOUSING
DEVELOPMENT FUND COMPANY, INC.; and
THE BOARD OF DIRECTORS of the Westbeth
Housing Development Fund Company, Inc.,

Defendants.

-----X

Edmead, J.:

MEMORANDUM DECISION

FILED
JUN 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 007, 008 and 009 are consolidated
for disposition.

This action involves a landlord-tenant dispute between
plaintiff-tenant Futurist 1952, Inc. (Futurist) and defendant-
landlord Westbeth Corporation Housing Development Fund Company,
Inc. (Westbeth).¹ The four-count amended complaint asserts
causes of action for breach of contract, and declaratory and
injunctive relief. Westbeth's answer asserts three
counterclaims, including claims for attorneys' fees, rescission
based upon fraudulent misrepresentations, and breach of contract.

Futurist now moves (in motion sequence number 007), by order

¹ This action was dismissed as against Westbeth's board of
directors by decision and order of Judge Lebedeff dated December
11, 2001.

to show cause, for partial summary judgment dismissing Westbeth's second counterclaim for rescission based upon fraudulent misrepresentations.

Westbeth moves (in motion sequence number 008), by order to show cause, for partial summary judgment dismissing the first and fourth causes of action of the amended complaint, which seek damages to compensate Futurist for its alleged loss of roof rights. Westbeth also seeks dismissal of the third cause of action, which seeks declaratory and injunctive relief in connection with Futurist's alleged roof rights. Westbeth moves (in motion sequence number 009), by order to show cause, for partial summary judgment on its second counterclaim to rescind the parties' lease.

Facts

In 1988, Eric Michelson (Michelson), the president of Futurist, was searching for a larger space to operate M Studio, his film/photography business. Westbeth and Michelson entered into a five-year lease dated March 1, 1989 (M Studio Lease). Under the M Studio Lease, Westbeth leased Michelson the fourth floor of 463 West Street in Manhattan (Demised Premises). The lease granted Michelson a five-year lease renewal option. On October 17, 1994, Michelson assigned the M Studio Lease to Futurist, and Futurist exercised the renewal option.

The lease permitted Michelson to use the Demised Premises

"only for the purpose of a photography studio with darkroom shop, and for no other purpose." Mazzola Aff., Ex. D, ¶ 41 (B).

However, Michelson claims that part of his business involved hosting special events, and that "[c]ounsel negotiated terms in the M Studio Lease enabling Michelson to allow third parties to utilize the Demised Premises for special events and other uses not more than 10 days per month or 75 days per year." Amended Complaint, ¶ 23.

Michelson claims that he made substantial improvements to the Demised Premises for special events, investing approximately \$500,000, in reliance upon his agreement with Westbeth that the Demised Premises could be used for special events. Futurist claims that, between June 1996 and February 2001, it held 67 special events at the Demised Premises. Westbeth allegedly knew that Michelson hosted special events but never notified him that this use violated the M Studio Lease.

At some point, Michelson requested permission to use the roof of the building above the Demised Premises. By letters dated July 28 and August 2, 1993, Miranda Winston (Winston), at that time Westbeth's property manager, stated that Michelson's request would be granted if he executed a hold harmless agreement, made the roof compliant with Department of Buildings requirements, included roof access in the liability clause of his Certificate of Insurance, and agreed not to build any structures

on the roof (Winston Letters). The Winston Letters state that Michelson could begin working on the roof once these four conditions were submitted to, and approved by, Westbeth's board of directors.

When the parties executed the M Studio Lease, the Demised Premises was not accessible by elevator. Michelson installed a hoist to bring work materials from the building's courtyard into the Demised Premises. Michelson sought to install an elevator in order to increase his business volume at the Demised Premises. On December 16, 1999, Westbeth and Futurist entered into an Amendment of Lease, extending the M Studio Lease an additional 10 years, through February 2009 (Lease Amendment).

The Lease Amendment also permitted Michelson to install an elevator, "subject to the Landlord's review and approval of the plans for such work, which review and approval shall not be unreasonably withheld, conditioned or delayed." Lease Amendment, ¶ 9 (i) and (ii). Futurist allegedly obtained a proposal for the elevator installation and retained Westbeth's elevator consultant to review the plans. On November 10, 2000, Westbeth's consultant allegedly approved the plans and Futurist submitted the plans to Westbeth's board for approval.

By letter dated December 8, 2000, Westbeth notified Futurist of, among other things, Futurist's allegedly improper use of the Demised Premises for special events and improper use of the roof

for photography shoots. Westbeth then allegedly refused to review the elevator plans submitted by Futurist. Through counsel, the parties attempted to resolve their dispute. Meanwhile, Westbeth allegedly continued to accept Futurist's rent payments. By letter dated April 25, 2001, Futurist demanded that the elevator plans be approved by April 30th. In response to this letter, on April 27th, Westbeth issued a notice of default to Futurist.

Michelson avers that Westbeth approved the elevator plans in May 2002. Futurist allegedly submitted the required documents to Westbeth, pursuant to the Lease Amendment, and scheduled installation dates. According to Futurist, Westbeth then purposely delayed the elevator installation.

Discussion

Westbeth's Second Counterclaim

Westbeth's second counterclaim alleges that, in negotiating the terms of the Lease Amendment, Michelson falsely represented to Westbeth's board of directors that Futurist would use the Demised Premises only as a photography studio; meanwhile, Michelson allegedly intended to use the Demised Premises for special events. According to Westbeth, after executing the Lease Amendment, Futurist used the Demised Premises for special events. Westbeth claims that if it had known that Futurist intended to use the Demised Premises for special events, Westbeth would not

have offered the monetary rental terms of, or agreed to the installation of an elevator in, the Lease Amendment. Based upon these allegations, Westbeth seeks rescission of the Lease Amendment.

Futurist moves for summary judgment dismissing Westbeth's second counterclaim, arguing that Westbeth fails to identify any injuries, and that Westbeth's claim is barred by the merger clause in the M Studio Lease. Westbeth counters that its rescission claim is based on Futurist's misrepresentation that it was acting in compliance with the lease, and that it need not have suffered pecuniary damages in order to obtain rescission.

A cause of action for rescission based upon fraudulent representations requires a showing that there was a "representation of a material existing fact, falsity, scienter, deception and injury." *Zimmerman v Zimmerman*, 86 AD2d 525, 529 (1st Dept 1982), quoting *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407 (1958) (internal quotation marks omitted). Moreover, although it "is not incumbent upon the plaintiff to establish actual pecuniary loss" (*Urquhart v Philbor Motors*, 9 AD3d 458, 458 [2d Dept 2004]), "injury is an essential element in an action for fraud, even where rescission is sought." *Mott v Tri-Continental Financial Corp.*, 330 F2d 468, 470 (2d Cir 1964), citing *Sabo v Delman*, 3 NY2d 155 (1957) and *Channel Master Corp.*, 4 NY2d 403, *supra*.

Here, Westbeth fails to identify any injury that it sustained as a result of Futurist's alleged misrepresentations and omissions. In a footnote, Westbeth suggests that its litigation costs in this action constitute pecuniary loss. However, "[d]amages attributable solely to the existence of litigation are clearly insufficient to sustain the necessary element of damages" *Raymond Corp. v Coopers & Lybrand*, 105 AD2d 926, 927 (3d Dept 1984).

Moreover, paragraph 21 of the M Studio Lease contains a merger clause, stating that:

[a]ll understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between [Westbeth] and [Michelson] and any executory agreement hereafter made shall be ineffective to change, modify, discharge, effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

This provision was incorporated by reference into the Lease Amendment. Having "acknowledged no reliance on any extracontractual representations" made by Futurist, Westbeth cannot now rely upon claims of Michelson's alleged misrepresentations prior to the execution of the Lease Amendment. *Sorenson v Bridge Capital Corp.*, 30 AD3d 1144, 1145 (1st Dept 2006). This is particularly true where, as here, Michelson's alleged pre-contractual misrepresentation is inconsistent with

the plain language of the lease that limited Futurist's use of the Demised Premises to use as a photography studio, "and for no other purpose." M Studio Lease, ¶ 41 (B).

Furthermore, the court notes that, although not raised by the parties, "[a] cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." *Krantz v Chateau Stores of Canada Ltd.*, 256 AD2d 186, 187 (1st Dept 1998). As discussed above, the M Studio Lease expressly states that Michelson may use the Demised Premises "only for the purpose of a photography studio with darkroom shop, and for no other purpose." M Studio Lease, ¶ 41 (B). Westbeth's central claim in this action, and, specifically, in its claim for rescission based upon fraudulent misrepresentations, is Michelson's failure to comply with this provision. Westbeth affirmatively argues that "its rescission claim is based upon the elemental grounds that Futurist misrepresented that it was acting in compliance with the Lease's terms." 11/20/06 Mazzola Aff., ¶ 16. Thus, the only fraud claimed by Westbeth relates to Michelson's breach of contract.

On June 27, 2005, a hearing was held before Judge Faviola Soto on the issue of whether "Michelson's use of the photo studio for special events is prohibited" 1/27/05 Tr., at 2. The court declared that the Demised Premises were to be used only as a photography studio, and for no other purpose, consistent with

paragraph 41 (B) of the M Studio Lease, and that Futurist's use of the Demised Premises was in breach of the lease. On February 22, 2007, the First Department affirmed Judge Soto's decision. Thus, Westbeth has already prevailed on the breach of contract claim that underlies its claim for rescission based upon fraudulent misrepresentations.

For the foregoing reasons, Westbeth fails to state a claim for rescission based upon fraudulent misrepresentations. Accordingly, Futurist's motion for partial summary judgment dismissing Westbeth's second counterclaim is granted, and Westbeth's motion for partial summary judgment on this claim is denied.

Futurist's Roof Rights

Westbeth moves for partial summary judgment dismissing the portions of Futurist's first, third and fourth causes of action that seek recovery for Westbeth's alleged repudiation of Futurist's purported right to use the roof above the Demised Premises. Westbeth argues that Futurist's claim to roof rights is barred by the statute of frauds. Futurist counters that the Winston Letters set forth the terms of the parties' agreement with respect to roof rights and satisfy the statute of frauds.

Under section 5-703 (1) of New York's General Obligations Law:

[a]n estate or interest in real property ...
cannot be created, granted, assigned,

surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.

While "signed and unsigned writings may be read together to satisfy the Statute of Frauds," they must "contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is." *Kobre v Instrument Sys. Corp.*, 54 AD2d 625, 626 (1st Dept 1976), *affd* 43 NY2d 862 (1978) (citation omitted).

The parties do not dispute that the M Studio Lease, Michelson's lease assignment to Futurist, and the Lease Amendment do not expressly grant roof rights to Futurist. As discussed above, the Winston Letters granted Futurist roof rights contingent upon Futurist satisfying certain conditions. These letters are signed by Winston as Westbeth's property manager.

However, in a letter dated June 2, 1999, almost six years after the Winston Letters, Futurist's attorney stated to Westbeth's attorney that Futurist's "right to use the roof has ... been repeatedly discussed," acknowledged Westbeth's intention to prepare the Lease Amendment, and requested that the Lease Amendment contain Futurist's purported roof rights. *Mazzola Aff.*, Ex. H. Thus, counsel's June 2, 1999 letter raises a factual issue as to whether the parties' discussions concerning Futurist's request for roof rights were ongoing after Futurist

received the Winston Letters. Moreover, the minutes of Westbeth's December 13, 1999 board meeting, just days before the Lease Amendment was executed, state that "[r]oof use is to be crossed out of the lease" (*id.*, Ex. I), and roof rights are not included in the final Lease Amendment. Therefore, it is not clear to the court whether the Winston Letters "contain substantially the whole agreement, and all its material terms and conditions" (*Kobre*, 54 AD2d at 626), or, alternatively, only a portion of the parties' agreement with respect to roof rights or mere discussions that were never memorialized in writing.

Moreover, in support of Futurist's argument that it performed its purported obligations under the Winston Letters, Michelson submits a proposed hold harmless agreement and a proposal for the installation of roof fencing. However, even assuming for the moment that the Winston Letters satisfy the statute of frauds, nothing contained in Futurist's papers establishes that these documents satisfied the required conditions of the Winston Letters, or that Westbeth's board granted approval based upon these documents. Moreover, while Michelson claims that his insurance broker told him that his insurance policy covered the roof, Futurist fails to submit a copy of its certificate of insurance establishing that roof access is included in the liability clause. For the foregoing reasons, Westbeth's motion for partial summary judgment

dismissing the portions of Futurist's claims concerning roof rights is denied.

Accordingly, it is hereby

ORDERED that plaintiff Futurist 1952, Inc.'s motion (motion sequence number 007) for partial summary judgment is granted and defendant Westbeth Corporation Housing Development Fund Company, Inc.'s second counterclaim is severed and dismissed; and it is further

ORDERED that defendant Westbeth Corporation Housing Development Fund Company, Inc.'s motion (motion sequence number 008) for partial summary judgment dismissing the portions of plaintiff's claims concerning the alleged repudiation of roof rights is denied; and it is further

ORDERED that defendant Westbeth Corporation Housing Development Fund Company, Inc.'s motion (motion sequence number 009) for partial summary judgment on its second counterclaim is denied; and it is further

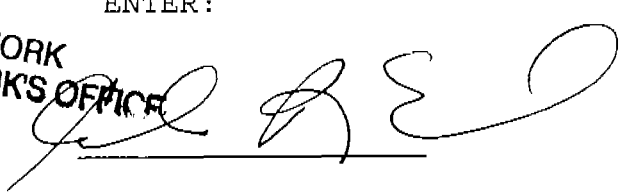
ORDERED that the remainder of the action shall continue.

Dated: June 1, 2007

FILED

JUN 06 2007 ENTER:

NEW YORK
COUNTY CLERK'S OFFICE


Carol Robinson Edmead, J.S.C.