

**OTR Media Group, Inc. v Kelenzon**

2007 NY Slip Op 32540(U)

August 13, 2007

Supreme Court, Kings County

Docket Number: 0033113/2006

Judge: Carolyn E. Demarest

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I  
 At a Commercial Division, of the  
 Supreme Court of the State of New  
 York, held in and for the County of  
 Kings, at the Courthouse, at Civic  
 Center, Brooklyn, New York, on the  
 13<sup>th</sup> day of August, 2007.

P R E S E N T:

HON. CAROLYN E. DEMAREST,  
 Justice.

----- X  
 OTR MEDIA GROUP, INC.,

Plaintiff,

- against -

**DECISION AND  
 ORDER**

Index No. 33113/06

ALEX KELENZON, MARTINGALE REAL  
 ESTATE & PROPERTY CORP., JOHNSON  
 MEDIA CORP., LIANA JOHNSON, and R&R  
 CAPITAL VENTURE LLC,

Defendants.

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The following papers numbered 1 to 5 read on this motion:

Papers Numbered

Notice of Motion/Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2, 2a
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
Affidavits (Affirmations)	
Other Papers (Memoranda of Law)	3

Defendants Alex Kelenzon (“Kelenzon”) and Martingale Real Estate and Property Corporation (“Martingale”) (collectively the “Martingale Defendants”) cross-move pursuant to CPLR 3212 for partial summary judgment dismissing the First through Fifth Causes of Action of the plaintiff’s Verified Complaint (“Complaint”). In the alternative, Kelenzon individually cross-moves to dismiss the action in its entirety as against him. Defendants Johnson Media

Corporation (“JMC”) and Liana Johnson (collectively the “Johnson Defendants”) cross-move pursuant to CPLR 3212 for summary judgment dismissing the complaint as against them. Plaintiff’s motion, brought by Order to Show Cause, seeking an order permitting it to amend its complaint to add R&R Capital Venture, LLC (“R&R”) as a defendant, and staying a related summary holdover proceeding brought by R&R against OTR Media Group, Inc. (“OTR”) in Civil Court, Kings County, was granted by the Court at the close of oral argument. Since the Amended Complaint has been authorized and served as part of the motion and counsel for the Martingale Defendants having also appeared on behalf of R&R, the Court will consider the cross-motion in light of the Amended Complaint. See Sage Realty Corp. v. Proskauer Rose LLP, 251 AD2d 35, 38 (1<sup>st</sup> Dep’t, 1998); Siegel, Practice Commentaries (McKinney’s Cons. Laws of NY, Book 7B, CPLR C 3211:65, at 108-109.

### **BACKGROUND**

This action arises out of a letter agreement that was entered into by plaintiff with the Martingale Defendants on August 9, 2006, providing for OTR’s installation of advertising signs upon Martingale’s property at 4002 Third Avenue in Brooklyn. Plaintiff commenced the instant action on October 30, 2006, seeking a declaration that OTR is entitled to enforce its rights as lessee under the August 9 letter, a direction that the Martingale Defendants execute a formal lease on terms set forth in the August 9 letter and other documents, and money damages for breach of contract, trade defamation and fraudulent inducement. The complaint alleges that OTR and Kelenzon, President of Martingale, entered into negotiations in Summer 2006 regarding a lease of certain space at 4002 Third Avenue, Brooklyn, New York (the “premises”) and that the negotiations led to the drafting of a formal lease document which provided that OTR could

install advertising copy on two existing 20' x 60' roof advertising signs and one 26' x 24' wall sign on the south wall of the premises for a ten year term with a twenty year renewal option.

Although never signed by either party, plaintiff maintains that Kelenzon orally assured OTR that the lease would be signed.

While lease negotiations were ongoing, prior to execution of the letter agreement of August 9, 2006, Martingale sent a handwritten Memorandum of Understanding to OTR, setting forth potential lease terms. The Memorandum reads, in part, as follows:

“subject to both sides entering into a lease agreement[,] the terms of which are yet to be agreed upon[,] Martingale will lease to OTR advertising roof structure & the one large wall at [the premises]. The potential term of the lease could/might be as follows: 1) 10 year term w/ 20 year renewal option 2) Annual rate of the lease will begin at \$84000 per year. 3) The lease shall commence on August 1<sup>st</sup> 2006. Use and conditions are yet to be agreed upon between the parties. This Memorandum of Understanding is not a lease but a memorandum to recognize that the parties have agree [sic] to try to negotiate a lease that is binding on neithe [sic] sid [sic].”

Alex Kelenzon signed upon the line provided; there is no indication that he acted solely as a corporate officer. Plaintiff, however, did not sign the memorandum. Subsequently, on August 8, 2006, plaintiff sent a proposal to Kelenzon and Martingale providing permission to OTR to install signs pending execution of a lease, which Kelenzon refused to sign. Accordingly, plaintiff sent another letter on August 9, which was signed by Kelenzon as president of Martingale. The August 9 letter reads, in part, as follows:

“This letter shall serve as confirmation that OTR Media Group, Inc. is permitted to install its advertising signs at the above property until such time that a fully executed Lease is signed between OTR and Martingale Real Estate & Property Corp . . . OTR will pay to Martingale an amount equal to \$7,000 per month or prorated for a partial month.”

The letter also indicates that plaintiff would be liable for any damages it causes to the property, and that plaintiff would provide Martingale with an insurance certificate. Plaintiff’s complaint

alleges that the August 9 letter, together with other documents exchanged, constitutes an enforceable lease for the term of ten years with an option to renew for twenty years. In moving for summary judgment dismissing the complaint as to them, the Martingale Defendants argue that the letter provided OTR with a month-to-month license to utilize the sign space, revocable at will if a formal lease was not ultimately executed, which license was effectively revoked in September 2006, and that plaintiff's claims are not reflected in a signed written document, and are barred by the Statute of Frauds, General Obligations Law §5-701(a)(i).

Plaintiff's signs were initially installed with OTR's nameplate on or about August 9. In reliance upon the August 9 letter, plaintiff contends that it entered into contracts with third parties and incurred substantial expense in anticipation of supplying advertising space to those customers. However, as early as September 27, 2006, in the absence of an executed lease, plaintiff was refused access to defendants' property for the purpose of installing new advertising. Defendants assert that by the end of September 2006, they in fact had completely revoked OTR's alleged license.

At oral argument, it was agreed that by the end of September, at Martingale's request, OTR had removed all of its signs and has been out of possession of the purportedly leased premises since that time. Defendants acknowledge accepting rent pursuant to the August 9 letter for the months of August and September but insist that plaintiff's check for October was returned and accepted by plaintiff. Defendant Kelenzon contends that he revoked plaintiff's license to use a portion of the space on September 7, 2006 and refunded to plaintiff \$3500 in a check that was deposited. Concluding that no lease would be executed, at the end of September, Martingale revoked the license entirely and returned the check proffered by plaintiff for the October rent.

Martingale alleges that OTR, however, continued to install signs after being specifically directed to remove all advertisements. Accordingly, in response to a letter from plaintiff's attorney, on October 12, counsel for the Martingale Defendants sent a letter to OTR's counsel denying that the August 9 letter constituted a lease and clarifying that OTR's license was revoked since a lease agreement was never executed.

Sometime during the month of October, Martingale entered into a triple net lease for the entire building with R&R Capital Venture, LLC. On October 20, 2006, R&R entered into a lease agreement with JMC for the advertising space previously licensed to plaintiff, to take effect November 1. When plaintiff learned of this agreement, OTR's attorney communicated with Liana Johnson, President of JMC, representing that a lease was in effect with OTR for that space. Communication between counsel for OTR and Martingale ensued culminating, subsequent to commencement of the instant action, in a formal notice of termination dated November 15, 2006, effective December 31, 2006, followed by commencement by R&R of a summary holdover proceeding by petition dated January 29, 2007. Plaintiff's motion to stay that holdover proceeding in deference to the instant action was granted in the interests of judicial economy.

The original complaint sets forth seven causes of action.<sup>1</sup> The First Cause of Action seeks a judgment declaring Martingale in default under the August 9 letter, and declaring that OTR is entitled to enforce its rights as lessee. The Second Cause of Action alleges breach of contract against Martingale, and demands damages that include profits that OTR would have made pursuant to its rights as lessee. The Third Cause of Action seeks a judgment requiring Martingale to execute a formal lease. The Fourth Cause of Action seeks damages on the ground

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<sup>1</sup>With Counsel's affirmation, plaintiff has submitted an Amended Verified Complaint, reflecting the addition of R&R as a named defendant.

that Kelenzon made false representations that were reasonably relied upon by OTR. The Fifth Cause of Action alleged trade defamation against both Martingale Defendants but has been withdrawn. With respect to the Johnson Defendants, the Sixth Cause of Action alleges tortious interference with contractual relationships, and the Seventh Cause of Action alleges trade defamation. This latter claim is based upon Ms. Johnson's notice to Zenith Media, a buying service with which plaintiff also did business, of JMC's anticipated take-over of the advertising space previously controlled by OTR. It is further maintained that the Johnson Defendants, in collusion with the Martingale Defendants, contrived to have OTR install advertising for an OTR customer, Lexus, with the intention of letting Zenith Media believe it was the work of JMC. While the Johnson Defendants acknowledge that they contacted Zenith Media and advised them that JMC would be taking over the premises, they insist that they were unaware of Martingale's interest in the property, unaware of any agreement or dispute between Martingale and OTR, and unaware of OTR's claim of a leasehold interest in the premises at the time they made statements to Zenith Media. Plaintiff contends that such statements were made with the intent to interfere with OTR's relationship with both Martingale and Zenith Media. Accordingly, plaintiff's complaint alleges that the conduct of the Johnson Defendants amounted to tortious interference with OTR's alleged lease agreement and constitutes trade defamation.

### **DISCUSSION**

To obtain summary judgment, the movant must establish its cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); CPLR 3212 (b). Where the proponent of the motion makes a prima facie

showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. Vermette v. Kenworth Truck Company, 68 NY2d 714, 717 (1986); Zuckerman v. City of New York, supra at 562. The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dep't, 1990); Trustco Bank v. Canon Building of Troy Associates, 246 AD2d 797 (3d Dep't, 1998). However, the rule that the facts are presumed to be true and are accorded every favorable inference does not apply to factual claims either inherently incredible or flatly contradicted by documentary evidence. SRW Assoc. v. Bellport Beach Prop. Owners, 129 AD2d 328 (2d Dep't, 1987).

A motion made pursuant to CPLR 3212 must be supported by an affidavit of "a person having knowledge of the facts" and "shall show that . . . the cause of action . . . has no merit." CPLR 3212(b). Once the movant's burden has been met, the burden passes to the opposition to produce competent admissible evidence to defeat the motion. Zuckerman v. City of New York, supra at 562. The only opposition to defendants' cross-motions for dismissal of all causes of action herein is an attorney's affirmation<sup>2</sup> which relies upon the fact that the complaint was verified by a principal of plaintiff to demonstrate "the existence of Lease." The incorporation of allegations contained in pleadings, in response to a motion for summary judgment, is insufficient to defeat such motion. Strongback Corp. v. N.E.D. Cambridge Ave. Development Corp., 25 AD3d 392 (1<sup>st</sup> Dep't, 2006). Moreover, the affirmation of an attorney without personal

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<sup>2</sup>Plaintiff's Order to Show Cause seeking to amend its complaint is similarly unsupported by an affidavit of an individual with personal knowledge, but relies upon the Holdover Petition filed by R&R.

knowledge of the facts, while effective to present documents, is of no probative value and is insufficient to raise a triable issue of fact. Zuckerman, 49 NY2d 557; Lewis v. Safety Disposal System of PA, Inc., 12 AD3d 324 (1<sup>st</sup> Dep't, 2004). Plaintiff's counsel has submitted, in response to defendants' motions for summary judgment dismissing the complaint, the pleadings in the summary proceeding in Civil Court (L&T Ind. No. 55844/07), an unsigned draft of a "Net Lease Agreement", the Answer of the Martingale Defendants in this action and a Notice of Deposition. Defendants' cross-motions are supported by the affidavits of the individual defendants and corporate principals, affirmations of counsel, copies of the afore-cited correspondence and documentation, including the critical letter of August 9, 2006, a copy of the negotiated \$3,500 refund check, the Holdover Petition, a copy of the deed to the premises, and the pleadings. Accordingly, the cross-motions will be determined upon the affidavits of the individual defendants and the documents submitted by all parties.

#### The Martingale Defendants' Motion

The Martingale Defendants move for summary judgment dismissing all claims against them on the grounds that the purported lease upon which plaintiff sues is not reflected in any enforceable writing and therefore would violate the Statute of Frauds which requires that an agreement, which by its terms is not to be performed within one year, be in writing and subscribed by the party to be charged. General Obligations Law § 5-701 (a) (1).<sup>3</sup> As plaintiff seeks to enforce an alleged ten year term, the agreement must be in writing subscribed by the

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<sup>3</sup>The Martingale Defendants cite to this provision of the General Obligations Law, apparently based upon their theory that plaintiff's interest was limited to a license which does not create an interest in real property. (See Kohman v. Rochambeau, 17 AD3d 151, 153 (1<sup>st</sup> Dep't, 2005)). However plaintiff's claim to a leasehold for a ten to twenty year term is unenforceable in the absence of a written document subscribed by the party to be charged pursuant to General Obligations Law § 703(2).

Martingale Defendants. See Becker v. New York News, Inc., 92 AD2d 823 (1<sup>st</sup> Dep't, 1983), aff'd, 61 NY2d 620 (1983). Plaintiff relies on the letter of August 9, 2006, which is concededly subscribed by Alex Kelenzon, as President of Martingale, to satisfy the Statute of Frauds.

Plaintiff contends this document, together with other correspondence between the parties, created an enforceable lease for ten years. The Martingale Defendants insist that the letter of August 9 merely created a revocable license which was revoked at their election when it became apparent that no lease would be concluded.

It is well-recognized that “[t]o create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.” Express Industries and Terminal Corp. v. New York State Dept. of Transportation, 93 NY2d 584, 589 (1999); see also, Danton Const. Corp. v. Bonner, 173 AD2d 759, 760 (2d Dep't, 1991). It is also well-settled that unambiguous written documents are to be interpreted in accordance with the expressed intention set forth therein, without resort to extrinsic evidence, by the court as a matter of law. Wallace v. 600 Partners Co., 86 NY2d 543 (1995); Kohman v. Rochambeau Realty & Development Corp., supra at 154 (Sullivan, J., dissenting).

The documentation before the Court begins with a handwritten “Memorandum of Understanding” subscribed by Alex Kelenzon but not by Levi Eichenstein for plaintiff. The document clearly states, repeatedly, that the terms of a prospective lease had not been agreed and that the Memorandum was not a lease but merely an agreement to negotiate. This document was followed by the letter of August 8, 2006, from Levi Eichenstein, Senior Vice President of OTR, “as confirmation” that OTR “is permitted to install its advertising signs at the above property until such time that a fully executed Lease is signed.” (emphasis added). Though referencing

“Lease for Advertising”, this letter clearly was not meant to be a lease but merely reflects the granting of a license. The August 8 letter was not signed by Kelenzon; however, a second letter dated the next day, August 9, containing the same language but including a provision for prorating the charges for partial use of the space described, was signed by Kelenzon, but not by Eichenstein. Mr. Kelenzon attests that he made extensive handwritten notations thereon indicating the pro-rated amount due for August, beginning on the 9<sup>th</sup>. Mr. Kelenzon states in his affidavit that this letter reflected “our understanding that OTR was granted a license that would be revokable [sic] if we did not execute a lease together . . . The agreement was not anticipated to last forever more . . .” (Kelenzon Reply Affidavit). This representation is not disputed and is accepted by the Court as accurately describing the understanding of the parties. In the same affidavit, Kelenzon states that he revoked the license when the parties’ failure to agree became apparent by personally hand-delivering to “Levi” the check for October and advising him not to place any sign as of October.<sup>4</sup>

The only evidence submitted by plaintiff even suggestive of a lease is a draft document captioned “Net Lease Agreement” which is a form document, much-edited by hand, with numerous provisions crossed out and modified, and ultimately not signed by either party. The document appears to have been faxed to plaintiff by Martingale’s attorneys on or about July 20, 2006, well prior to the letter of August 9. There is no indication that the parties ever reached an agreement on the terms of a lease.

Although, where all essential terms of a contract have been agreed but for a particular element that might be supplied by reference to extrinsic objective factors, and only the execution

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<sup>4</sup>Though OTR did place a “Lexus” sign in violation of this instruction, it was removed by OTR shortly thereafter and was observed by Kelenzon upon another building a few blocks away.

of a written document has been deferred while performance has commenced, an enforceable complete contract may be discerned (see Cobble Hill Nursing Home, Inc. v. Henry and Warren Corporation, 74 NY2d 475 (1989); Metro-Goldwyn-Mayer, Inc. v. Schneider, 40 NY2d 1069 (1976)), the more general rule is that a contract will not be found where the material terms are not defined. “Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract.” Cobble Hill at 482. See also, Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 NY2d 105, 109 (1981) (“a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable”); Danton Const. Corp. v. Bonner, 173 AD2d at 760 (“an ‘agreement to agree’, which leaves material terms of a proposed contract for future negotiation, is unenforceable”). The only certainty discernable in the documentation before the Court is the absence of a meeting of the minds of the parties and the need for further negotiations on nearly every issue. See Nesbitt v. Penalver, 40 AD3d 596 (2d Dep’t, 2007).

Plaintiff argues that its reliance on the promise of negotiation should estop the Martingale Defendants from disavowing an agreement for ten years with an option to renew for an additional ten years. There is no merit to this contention. Where, as here, all documentation evidences an intent not to be bound until negotiations have culminated in the execution of a formal agreement, “[t]he necessary finality of assent is lacking” and “either party may withdraw with impunity” prior to the execution of such agreement. Brouse v. Goldman, 10 AD2d 328, 332 (1<sup>st</sup> Dep’t, 1960). The rule which permits avoidance of the Statute of Frauds where a party has been induced to partially perform in reliance upon an oral agreement is applicable only where such performance is unequivocally referable to the oral agreement (Yenom Corp. v. 155 Wooster

Street, Inc., 33 AD3d 67, 71 (1<sup>st</sup> Dep't, 2006)) and is inapplicable here. Plaintiff's reliance upon the payment of rent pursuant to the terms of the license agreement of August 9 is misplaced as such payments were not "unequivocally referable" to a lease agreement but were consistent with the rent charged for the revocable license. The only agreement reflected in the documents is a license to place signage pending negotiations. Plaintiff's contracts with third parties, entered in anticipation of a written long-term lease, were speculation on plaintiff's part and any losses resulting from the failure to execute such lease were not caused by defendants.

"A license is a personal, revocable and non-assignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein."

Kohman v. Rochambeau Realty & Dev. Corp., *supra*, 17 AD3d at 153, quoting Greenwood Lake & Port Jervis R.R. Co. v. New York & Greenwood Lake R.R. Co., 134 NY 435, 440 (1892). It is revocable at the option of the licensor, unless the conduct of the licensor makes it inequitable to permit revocation. Ski-View, Inc. v. State of New York, 129 Misc 2d 106, 108 (Ct Cl. 1985). Licenses are revocable even if the licensee expends money in reliance thereupon, and damages may only be sought for breach of contract if the license is for a definite term. *Id.*

Analogous to the case here, in Ski-View, the parties had negotiated a revocable permit to allow plaintiff advertising company to post advertisements at Gore Mountain ski resort owned by the State of New York. Plaintiff thereafter sought a similar arrangement at Belleayre Mountain resort and, in reliance upon oral communications that a contract would be executed, the advertising company installed brackets on towers at Belleayre. Subsequently, the Gore Mountain permit was revoked; no permit was issued for Belleayre. Upon claimant's suit for money damages, the Court determined that since the permit was explicitly entitled "Revocable

Permit”and was not for a definite term, plaintiff merely took a calculated business risk by beginning to install new advertisements. Thus, the state could not be liable for breach of contract, as the permits were merely licenses, revocable at will by the licensor. Any investment by the licensee could not reasonably have been made in reliance upon the actions of defendant State in permitting the installation of equipment. Such finding is equally applicable to the case at bar.

Plaintiff relies upon the Notice of Termination dated November 15, 2006, signed by Alex Kelenzon, and the petition in the summary Holdover Proceeding brought by R&R to establish its entitlement to the use of the billboard space through December 31, 2006. While defendants did allege in these documents their right to possession effective December 31, 2006, upon expiration of the “term”, commencement of this litigation was clearly provoked by plaintiff’s action in approaching defendants’ new tenant Liana Johnson, president of JMC, demanding that JMC “cease and desist from its illegal activity” in contacting Zenith media and plaintiff’s client Lexus regarding use of the advertising space alleged to be leased to plaintiff. (Letter of October 25, 2006, from Edward Burnbaum, Counsel to OTR, to Liana Johnson, Exhibit A to Johnson Affidavit.) Mr. Burnbaum accused JMC of interference with OTR’s contractual relations and false representation that JMC would be taking over the space effective November 1, and threatened to join JMC in a lawsuit, which plaintiff has done. Confronted with plaintiff’s contentions of an extended lease-hold and its refusal to accept Martingale’s termination of its license, such legal action was apparently deemed necessary. Since a thirty-day notice of termination is required prior to commencement of a proceeding to remove a month to month tenant (Real Property Law § 232-a), defendants were required to allege a tenancy terminating on

December 31 in order to comply with the statute. There is nothing in the documents signed by the parties in the course of their negotiations to suggest that the license given to OTR effective August 9 was to terminate on December 31. Rather, the clear intent was to create a temporary license terminable at will by Martingale upon a failure to reach agreement as to the terms of a lease. The subsequent commencement of the summary proceeding in response to plaintiff's intransigence did not alter the terms of the agreement between the parties as reflected in the August 9 letter. Competent evidence from Alex Kelenzon that the license was revoked in September is undisputed by any competent contrary representation from plaintiff.

Upon the evidence, this Court concludes that plaintiff has failed to demonstrate the existence of an enforceable contract between the plaintiff and Martingale providing for a lease term of ten years which would comply with the Statute of Frauds. Accordingly, the cross-motion of the Martingale Defendants must be granted dismissing the First through the Fourth Causes of Action against them. Plaintiff has withdrawn its Fifth Cause of Action for "trade defamation" against both Martingale and Kelenzon. The Eighth Cause of Action has been added to the Amended Verified Complaint against R&R as Martingale's lessee and is premised upon OTR's allegations of a valid and enforceable leasehold. Since such allegations are not sustainable, the Eighth Cause of Action must also be dismissed.

### **The Johnson Cross-Motion**

Plaintiff's Sixth Cause of Action alleges that the Johnson Defendants have interfered with OTR's contractual relationship with Martingale by "falsely" representing to Zenith Media that it would be taking over the advertising space on November 1. In order to state a claim for tortious interference with contract, plaintiff must allege "(1) the existence of a contract between plaintiff

and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance of the contract impossible; and (4) damages to plaintiff.'" M.J. & K. Co. v. Matthew Bender & Co., 220 AD2d 488, 490 (2d Dep't, 1995), quoting Kronos, Inc. v. AVX Corp., 81 NY2d 90, 94 (1993). In light of this Court's determination that no lease existed between OTR and Martingale, the first element cannot be sustained. Moreover, Liana Johnson attests that she had no knowledge of any contract between plaintiff and her co-defendants prior to the receipt of the October 25 letter from plaintiff's attorneys, after she had executed her own lease with R&R. In fact, Ms. Johnson states she did not know that R&R was not the owner of the premises until this letter was received. Thus, the evidence adduced by movant competently establishes the right of the Johnson Defendants to summary judgment dismissing the Sixth Cause of Action. No competent evidence has been adduced to dispute the Johnson Defendants' representations.

Plaintiff's Seventh Cause of Action alleges that the acts of the Johnson Defendants constitute trade defamation. "[T]he tort of trade defamation is the knowing publication of a false matter derogatory to the plaintiff's business calculated to prevent or interfere with relationships between the plaintiff and others to its detriment. [Citation omitted] The communication must play a material and substantial part in inducing others not to deal with the plaintiff." Jurlique, Inc. v. Austral Biolab Pty., Ltd., 187 AD2d 637, 639 (2d Dep't, 1992); Waste Distillation Tech., Inc. v. Blasland & Bouck Engr., 136 AD2d 633, 634 (2d Dep't, 1988). The basis of plaintiff's trade defamation claim appears to relate back to the allegations of the claim for interference with contract as set forth in the Sixth Cause of Action and is redundant thereof. Moreover, based upon the above-recited uncontroverted attestations of Liana Johnson, there is no merit to this

claim, particularly since the representation that JMC would be taking over the space was true based upon JMC's lease. See Jurlique, Inc. v. Austral Bioblab Pty, Ltd., supra (dismissing claim for trade defamation that alleged defendant contacted and told plaintiff's customers that defendant could provide the same product cheaper, a fact that plaintiff did not dispute). Therefore, the Johnson Defendants' motion with respect to the Seventh Cause of Action must also be granted, as plaintiff fails to state a cause of action.

Accordingly, it is,

**ORDERED** that the Martingale Defendants' cross-motion for partial summary judgment dismissing the First through Fourth Causes of Action is granted; and it is further

**ORDERED** that the Eighth Cause of Action alleged against defendant R&R Capital Ventures, LLC is dismissed sua sponte as failing to state a cause of action in light of the findings herein; and it is further

**ORDERED** that the Johnson Defendants' cross-motion for summary judgment dismissing the Sixth and Seventh Causes of Action is granted.

The Fifth Cause of Action has been withdrawn. Accordingly, the action is dismissed in its entirety.

The foregoing constitutes the decision of the Court.

ENTER:

A handwritten signature in black ink, appearing to read 'Mon. Carolyn E. Demarest', written over a horizontal line.

J.S.C.

**MON. CAROLYN E. DEMAREST**