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SCANNED ON 3/31/2008

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH Justice

PART 54

Index Number : 106006/2006

DOWNEY, KEVIN M.

VS.

334 GRAND STREET REALTY

SEQUENCE NUMBER : 003

SUMMARY JUDGEMENT

INDEX NO.

MOTION DATE 1/30/08

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
hibits ...	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6

FILED
MAR 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

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

Dated: 3/24/08

HON. SHIRLEY WERNER KORNREICH
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

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KEVIN M. DOWNEY and CHRISTINA DOWNEY,

Plaintiffs,

-against-

334 GRAND STREET REALTY CORP.,

Defendants.

----------X

Index No. 106006/06

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.

In this action arising out of a real estate transaction, defendant, 334 Grand Street Realty Corp., moves for summary judgment dismissing the complaint, or, alternatively, with respect to the third cause of action, limiting the damages recoverable to $2,500. Plaintiff opposes the motion and asks the court to search the record and grant summary judgment on liability on the first cause of action. There are three causes of action asserted in the amended complaint: fraudulent misrepresentation (1st cause of action); conversion (2nd cause of action); and breach of contract (3rd cause of action).

Factual Background

On May 17, 2005, the defendant agreed to sell property located at 334 Grand Street, New York, N.Y. (Property), to plaintiffs. The purchase price was $3,000,000.00. Paragraph 7.1.6 of the contract stated that the Property would be delivered "free of tenants and/or occupants on the Closing Date." The closing was to be held on September 30, 2005, and time was of the essence. Contract, ¶ 4.1. The parties agreed that the purchasers [plaintiffs] were not relying on the seller [defendant] to determine the condition of the property. Additionally, the purchasers released the

seller from all claims for damages arising out of the condition of the property:

> Purchaser shall rely solely on Purchaser's own knowledge of the Property based upon its investigation of the Property and its own inspection of the Property in determining the Property's physical condition. Except as expressly set forth in this Agreement to the contrary, Purchaser releases Seller ... from and against any and all claims which Purchaser ... has or may have arising from or related to any matter or thing related to or in connection with the Property, except as previously set forth in the Agreement to the contrary, including the documents and information referred to herein, any construction defects, errors or omissions in the design or construction and any environmental conditions, and, except as expressly set forth in this Agreement to the contrary, neither Purchaser nor any Purchaser Related Party shall look to Seller ... in connection with the foregoing for any redress or relief. This release shall be given full force and effect according to each of its express terms and provisions, including those relating to unknown and unsuspected claims, damages and causes of action. The provisions of this Section 5.5 shall survive the termination of this Agreement or the Closing Date and shall not be deemed to have merged into any of the documents executed or delivered at the Closing.

Id. at ¶5.5. The contract further provided, "Purchaser shall be afforded access to the Property required by Purchaser in connection with the Closing." *Id.* at ¶9.2. The parties agreed that in the event of the seller's default under the agreement, the purchasers were entitled to a return of their down payment or specific performance. *Id.* at ¶10.2. The contract eliminated damages as an option, stating, "in no event whatsoever shall Seller be obligated to pay Purchaser damages of any kind or nature." *Id.*

There is no dispute that at the time the contract was executed, the first floor and basement of the Property were occupied by defendant, whose President, sole employee, sole shareholder and sole officer was Elliott Shoenfeld. There also is no dispute that the second, third and fourth floors were occupied by a month to month tenant, Friedman Hosiery a/k/a Friedman Activewear, whose principals were brothers, David, Josh and Judah Friedman . On August 1, 2005, two months before closing, Mr. Shoenfeld sent letters to the three Friedman brothers, by certified

mail-return receipt requested, notifying them that the Property had been sold and that they had to move all of their belongings from the property, no later than September 29, 2005. Motion, Exh. C & Shoenfeld EBT, pp. 56-62. The return receipts reflect that the letters were delivered on August 3, 2005. *Id.* Mr. Shoenfeld testified that in August and September 2005, he observed that the Friedmans were not getting deliveries of merchandise as usual and were moving merchandise out on hand trucks. *Id.* at 53-55. As a result, he inferred that they were in the process of vacating the premises. Mr. Shoenfeld stated that the Friedmans had another space on the same block as the Property and he assumed they could move using hand trucks. *Id.* at 66. According to the affidavits of plaintiff Kevin Downey and plaintiffs' closing attorney Robert Neil, Mr. Shoenfeld represented before and after the closing that the Friedmans were in the process of moving.

In September, Shoenfeld advised plaintiffs that defendant would not be able to vacate the Property by September 29, 2005, a fact Mr. Neill avers he learned two days before the September 30 closing. Mr. Shoenfeld testified that he was unable to move out by the closing date because it was too hot in August and all the Jewish holidays fell in September. Shoenfeld EBT, pp. 44-45. The parties, therefore, negotiated a September 28, 2005 amendment to the contract (Amendment), enabling them to close on September 29. Mr. Downey states that he learned the day before the closing that Friedman would not vacate either. Plaintiffs state that the Amendment was signed at the closing. The parties dispute whether plaintiffs needed to close by September 29 in order to obtain the benefit of a tax deferred exchange pursuant to 26 U.S.C. §1031. Plaintiffs contend that defendant insisted upon the provision that time was of the essence.

Paragraph 2 of the Amendment is the clause giving rise to plaintiffs' claim for fraudulent

misrepresentation and defendant's motion for limitation of damages to $2,500.00. It provides as follows:

> The parties herewith acknowledge that there is a tenant remaining on the Premises, Friedman Hosiery & Activewear (the "Tenant"), who is using part of the Premises for storage space. Said Tenant does not have a lease and pays a monthly use and occupancy fee of $1,700.00. This Tenant has been notified of the sale and is in the process of vacating the Premises. In the event that the Tenant does not vacate the Premises by October 17, 2005, Seller agrees to:
>
> 2.1 Undertake, on Purchaser's behalf, the eviction of the Tenant, and to pay for all costs and expenses, including reasonable attorneys fees and Seller shall be entitled to choose counsel, which counsel shall be reasonably agreeable to Purchaser; or
>
> 2.2 Reimburse Purchaser for all costs and expenses, including reasonable attorneys fees (copies of all bills to be provided to Seller) incurred by Purchaser in order to evict said Tenant, not to exceed in the aggregate of $2,500.00.

The Amendment also provided that defendant was granted a license to remain at the Property until October 31, 2005 in exchange for a credit of $25,000.00 against the purchase price. Except for the modifications in the Amendment, the parties ratified the balance of the provisions in the contract. Amendment, ¶4.

Plaintiffs claim that Mr. Shoenfeld misrepresented that the Friedmans were leaving and that plaintiffs would not have agreed to close on September 29 if they knew that the Friedmans were not in the process of moving. Plaintiffs point to Mr. Shoenfeld's testimony that the Friedmans never said they would be out by the closing date and Mr. Shoenfeld never went to his tenants' premises to verify whether they were in the process of moving. Kevin Downey testified that he himself was not able to get into the Friedmans' space until defendant gave him the keys when he moved out in October. In addition, Mr. Downey testified that Mr. Shoenfeld asked him not to speak to his tenants.

Mr. Neill avers that the day after the closing, Mr. Shoenfeld called "in a panic" and advised him that the Friedmans were not moving out. Mr. Neill faxed to Mr. Shoenfeld a thirty-day notice of termination of the Friedmans' tenancy, which is in the record. Motion, Exh. E. The notice of termination sent by Mr. Neill was addressed to Friedman Hosiery at two different addresses, neither of which was the address of the Property. Mr. Shoenfeld testified that he served the notice of termination on September 30, 2005. EBT Shoenfeld, pp. 87-88. Plaintiffs complain that the notice of termination was ineffective because it was not served at the Property sought to be recovered,[1] but it was plaintiffs' attorney, Mr. Neill, who prepared the notice. On November 29, 2005, plaintiffs served another notice of termination on the Friedmans and, on January 4, 2005, plaintiffs commenced a holdover proceeding.

Plaintiffs and the Friedmans settled the holdover proceeding on February 3, 2006. In the stipulation of settlement, plaintiffs agreed that the Friedmans would vacate by April 30, 2006. In support of their second cause of action for conversion, plaintiffs rely on a handwritten representation in the stipulation that the Friedmans tendered $1,700.00 to the prior landlord [defendant] for October 2006 rent. Mr. Shoenfeld denies receiving it.

Moreover, the stipulation contains a second handwritten representation, upon which defendant relies to prove that plaintiffs suffered no damages due to the Friedmans' occupancy after the closing. The stipulation recites that "Respondent acknowledges that the Petitioner is renovating the building and shall be doing demolition work in basement and ground floor." Thus, defendant argues that plaintiffs cannot prove that they suffered damages resulting from their delay in renovating the Property because they were able to proceed with construction while

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[1] *See,* Real Property Law §232-a and Real Property Actions and Proceedings Law §235.

the Friedmans were in possession. Plaintiffs, on the other hand, claim that they had to carry the mortgage and taxes without the ability to proceed with renovations while the Friedmans remained.

Finally, plaintiffs present evidence that they incurred expenses in removing defendant's property from the basement and first floor. They allege that defendant breached an agreement to delivery the Property broom clean.

Discussion

A. Fraudulent Inducement

The elements of a claim for fraudulent inducement are reasonable reliance on a material misrepresentation by defendant and injury suffered as a as a result of that reliance. *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dept. 2003). Generally, issues of material representation and reasonable reliance are issues of fact not subject to summary disposition. *Swersky v. Dreyer & Traub*, 219 A.D.2d 321, 327 (1st Dept. 1996); *Brunetti v. Musallam*, 11 A.D.3d 280 (1st Dept. 2004). A court should not apply the rule, however, where the parties have equal means of determining the facts underlying a representation, since the element of reliance is negated; if there is any issue of fact as to whether the plaintiff had equal access to the facts, it remains a jury question. *Swersky v. Dreyer & Traub*, *supra; Vermeer Owners, Inc. v. Guterman*, 169 A.D.2d 442, 445 (1st Dept. 1991), *affirmed*, 78 N.Y.2d 1114 (1991).

Defendant's motion for summary judgment dismissing the first cause of action is denied, because there are issues of fact as to whether defendant misrepresented in the Amendment that the Friedmans were moving. Although defendant has presented evidence that, in August and September 2005, he saw the Friedmans moving merchandise and not accepting deliveries,

defendant also testified that he did not make an effort to inspect the Friedmans' premises.[2] Plaintiffs also are not granted summary judgment, since there are issues of fact as to whether plaintiffs justifiably relied on the defendant's representation. Pursuant to the terms of the contract, ¶¶5.5 and 9.2, plaintiffs had a right to inspect the Property, they represented that they relied solely on their own knowledge, investigation and inspection of the Property and they released defendant from any claim relating to the condition of the Property, with the release to survive the closing. In addition, these terms were ratified by the Amendment executed at the closing, at which plaintiffs were represented by counsel. However, given the facts that the issue of the Amendment came up so close to the time of the closing and that the Amendment was signed at the closing, as well as the evidence that plaintiffs were excluded from Friedman's premises, there are questions raised as to whether plaintiffs were prevented from exercising their right to access. Further, questions of fact exist as to whether or not plaintiffs' renovations were delayed and whether plaintiffs had to close for tax reasons. The statement in the holdover stipulation of settlement, that plaintiffs would be renovating the first floor and basement, does

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[2] The parties present conflicting hearsay statements by Josh and Judah Friedman as to whether the Friedman brothers said they were in the process of moving. Hearsay evidence may not be used by defendant to support summary judgment in its favor and, therefore, the court will not consider Mr. Shoenfeld's evidence as to what he was told by Josh Friedman. *Zuckerman v. City of New York*, 49 N.Y.2d 557(1980); *Herstand & Co., Inc. v. Gallery Gertrude Stein, Inc.*, 211 A.D.2d 77 (1st Dept. 1995). While hearsay evidence may sometimes be considered in opposition to a summary judgment motion, there must be an acceptable excuse for failure to produce evidentiary proof and other admissible evidence must be adduced to raise a factual issue. *Waiters v. Northern Trust Co.*, 29 A.D.3d 325 (1st Dept. 2006)(hearsay statement did not raise issue of fact sufficient to defeat summary judgment absent acceptable excuse for reliance on hearsay); *Balsam v. Delma Eng'g Corp.*, 203 A.D.2d 203, 204 (1st Dept. 1994); *Landisi v. Beacon Community Dev. Agency*, 180 A.D.2d 1000, 1002-1003 (3d Dept, 1992)(hearsay set forth in such affidavits may be sufficient to defeat summary judgment if there is acceptable excuse and other evidence in admissible form); *Koren v. Weihs*, 201 A.D.2d 268, 269 (1st Dept. 1994). Here, plaintiffs offer no explanation for their failure to offer an affidavit of Judah Friedman and, therefore, his out of court statements cannot be considered in opposition to the motion.

not negate the possibility that they were prevented from renovating the Friedmans' space on the upper floors. The limitation on damages for breach in the initial contract would not apply to damages for fraud.

B. Conversion

Defendant is entitled to summary judgment dismissing plaintiffs' second cause of action for conversion of $1700.00 allegedly paid by the Friedmans to defendant for October 2005. Mr. Shoenfeld denies that he received it. The sole proof that the Friedmans made the payment is inadmissible hearsay, offered without any excuse for failure to present proper proof. *See,* fn. 2, *supra* and cases cited therein. Thus, plaintiffs have failed to raise a triable issue of fact as to whether Mr. Shoenfeld received the money.

C. Breach of Contract

Defendant is entitled to summary judgment dismissing the portion of the third cause of action for breach of contract for expenses incurred in cleaning defendant's space after he vacated. This claim rests on the theory that defendant agreed to deliver the Property vacant and broom clean. However, the contract provided that the Property would be delivered "free of tenants and/or occupants." It did not say "broom clean." Broom clean relates to removal of rubbish and furniture. *1029 Sixth, LLC v. Riniv Corp.*, 9 A.D.3d 142 (1st Dept. 2004). There is no provision in the contract or the Amendment requiring defendant to deliver the Property broom clean.

Nonetheless, plaintiffs are entitled to partial summary judgment on the third cause of action in the amount of $2,500.00. Defendant agreed in the Amendment to pay up to $2,500.00 for attorneys fees incurred by plaintiff in evicting the Friedmans. Defendant consents to entry of judgment in the amount of $2,500.00 on this claim. The court rejects plaintiffs' claim for the

balance of attorneys fees and costs sought in connection with the eviction proceeding. The court cannot rewrite the terms of the contract. "[A] poor bargain may not be made good by judicial construction or recasting of the contract." *185 Lexington Holding Corp. v. Holman*, 19 Misc. 2d 521, 522 (Sup. Ct. N.Y. Co. 1959), *affirmed,* 10 A.D.2d 569 (1st Dept. 1960), *affirmed* 8 N.Y.2d 965 (1960). Plaintiffs agreed to accept $2,500.00 in the event that had to evict the Friedmans. Although plaintiffs claim that they would not have agreed to this if plaintiff had not represented that the Friedmans were moving, the clause unambiguously limits the damages to be recovered to $2,500.00. Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted solely to the extent of dismissing the second cause of action and the portion of the third cause of action seeking damages for cleaning the Property after defendant vacated; and it is further

ORDERED that summary judgment is granted on consent in favor of plaintiffs, Kevin M. Downey and Christina Downey, in the amount of $2,500.00, with interest from February 3, 2006, against defendant 334 Grand Street Realty Corp. on the portion of the third cause of action seeking attorneys' fees and costs incurred in evicting Friedman Hosiery from the Property; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, and sever the first cause of action, which shall continue.

Dated: March 24 , 2008

ENTER: