

**Signature Health Ctr., LLC v Fulton Fraklin  
Partners**

2008 NY Slip Op 31218(U)

April 16, 2008

Supreme Court, Nassau County

Docket Number: 1071-06/

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----X  
**SIGNATURE HEALTH CENTER, LLC**

**TRIAL PART: 48**

**Plaintiff,**

**-against-**

**INDEX NO.:021071/06**

**MOTION DATE:1-30-07  
SUBMIT DATE:3-20-08  
SEQ.NUMBER- 002**

**FULTON FRANKLIN PARTNERS,**

**Defendants.**

**MOTION DATE: 2-27-08  
SUBMIT DATE: 3-20-08  
SEQ. NUMBER - 003**

-----X  
**The following papers have been read on this motion:**

- Notice of Motion, dated 12-31-07..... 1**
- Notice of Cross Motion, dated 2-4-08.....2**
- Affirmation in Opposition, dated 3-5-08.....3**
- Reply Affirmation, dated 3-17-08.....4**

The cross motion by the defendant pursuant to CPLR 3211 and CPLR 3212 to dismiss stated causes of action and for summary judgment dismissing the complaint, and for judgment on its counterclaim for attorney's fees is granted, except to the extent of \$23.59 on the first cause of action, for which partial summary judgment is granted to the plaintiff for return of this sum. The complaint is otherwise dismissed, the counterclaim is severed and continued, and a damages trial shall be held as directed in this order. The motion by the plaintiff pursuant to CPLR 3124 to compel disclosure is denied as academic.

This is an action for fraud and reformation of a lease under which the plaintiff was the defendant's commercial tenant from May 1, 2000 until May 31, 2006 at property located at 49N Franklin Street in Hempstead, New York.. The lease itself was executed November 1, 1999. This action was begun with the filing of a summons and complaint on or about December 14, 2006. The lease was annexed to the complaint and incorporated by reference. An amended complaint was served in April, 2007. It too incorporated the lease.

Four causes of action are stated. The first is for return of a security deposit in the amount of \$8,400. The second alleges fraud. The central allegations are that the defendant represented that the proportionate share of the building being rented was 4.8% of the total, upon which figure the tenant was charged "additional rent" for property taxes and other expenses, whereas the proportionate share was actually only 2.88%. The tenant charges that as a result it overpaid additional rent by \$67,132.78. The third cause of action sounds in fraud in the inducement of making the lease based on the aforestated allegations. The fourth cause of action seeks reimbursement of these taxes and expenses based upon a "mistake in fact" that vitiates the lease to the extent it called for the alleged overpayment. The fifth cause of action is for attorney's fees under the lease.

Because the defendant's cross motion is dispositive in nature, it will be addressed first.

The Court finds that by way of reference to the lease, the pleadings in this case and the affidavit of Morris Bakhsh, a partner in defendant limited partnership, the defendant has made a *prima facie* showing that the second, third and fourth causes of action are barred by operation of the six-year limitations period applicable to those claims. CPLR 213(8) and 203(g) provide that an action for fraud must be commenced within six years from the date the cause of action accrued, or two years from the time the fraud was discovered or could have

been discovered with reasonable diligence, which ever is longer. *See, Oggioni v Oggioni*, 46 AD3d 646 (2d Dept. 2007); *Town of Poughkeepsie v Espie*, 41 AD3d 701 (2d Dept. 2007). Because the fraud is alleged to have occurred sometime before the lease was executed in November of 1999, and this action was not commenced until December of 2006, the two fraud claims are barred unless the plaintiff can show that it could not have discovered it with reasonable diligence within six years prior to December, 2006. That has not been accomplished here.

Initially, the Court must reject plaintiff's attempt to challenge the lease presented on support of defendant's cross motion. It is undisputedly the same one the plaintiff annexed to its complaint and amended complaint, and this constitutes an admission that the same was indeed the written agreement between the parties. Moreover, both this and all other opposition is put forth in the form of an attorney's affirmation, which is without probative value. *See, e.g., Zuckerman v City of New York*, 49 NY2d 557 (1980).

In any event, with respect to the statute of limitations plaintiff's counsel does not even mention when the alleged fraud was discovered, which means that plaintiff cannot even identify the time when the statute allegedly began to run. The Court also must reject counsel's argument that the facts from which the fraud may have been discovered were not available to his client prior to the time the Nassau County Department of Assessment began to provide property information on its website. The defendant has annexed a printout of a portion of the website in which the Chairman of the Board of Assessors, Harvey Levinson, in effect states that the website brings together real property and real property tax information that was already available to the public. Accordingly, the Court finds that the plaintiff has failed to show or raise any issue of fact that it could not have discovered the fraud in the

exercise of reasonable diligence prior to the running of the statute of limitations.

Finally, there is no merit to the argument that each bill rendered by the defendant for additional rent constituted a fresh act of fraud. There is only one misrepresentation alleged here, and that took place, if it took place at all, before or at the time the lease was signed. The cases cited by plaintiff simply do not have to do with a single act of fraud or other wrong, but rather violations of contractual or other rights occurring on multiple occasions. *1050 Tenants Corp. v Lapidus*, 289 AD2d 145 (1<sup>st</sup> Dept. 2001)[ongoing use of air conditioning affecting apartments below defendants’]; *State v SCRI Ltd. Partnership*, 289 AD2d 394 (2d Dept. 2001) [continuing violations of State law and regulations]; *Kearney v Atlantic Cement Co.*, 33 AD2d 848 (3d Dept. 1969) [continuing nuisance from operation of quarry and cement manufacturing].

In view of the foregoing determinations, the Court does not reach the other bases for dismissal and for summary judgment advanced by the defendant regarding these causes of action. However, the Court notes that paragraph 20 of the lease contains a merger clause, which provides that the defendant was making no representations about, among other things, the building itself or expenses of operation, that the agreement expressed the entire understanding between the parties and that the tenant inspected the building and the demised premises and was “thoroughly acquainted with their condition.” This would serve to negate any claim that the plaintiff justifiably relied on the alleged misrepresentation, fatally undermining the fraud causes of action. *Danann Realty Corp. v Harris*, 5 NY2d 317 (1959).

Similarly, the fourth cause of action for rescission of the additional rent clause based on a “mistake” must be dismissed. The applicable period is six years, and runs from the time

the “mistake” occurred, here no later than November, 1999. CPLR 213(6); *Zavaglia v Gardner*, 245 AD2d 446 (2d Dept. 1997). In any event, the plaintiff has not presented any opposing admissible proof that would demonstrate the existence of issues of fact regarding a different intent on the part of the contracting parties. *See, Chimart Assocs. v Paul*, 66 NY2d 570 (1986).

The Court notes that the plaintiff has referred to the alleged “stonewalling” of its requests for discovery, but has not demonstrated how this discovery might bear on the statute of limitations. In any event, the mere absence of discovery, standing alone, is insufficient to stave off a summary judgment motion because of the mere hope that something might be revealed that would form a reason to deny the motion. *See, Companion Life Ins. Co. of N.Y. v All State Abstract Corp.*, 35 AD2d 519 (2d Dept. 2006).

That branch of the cross motion that is to dismiss the first cause of action is granted. The defendant has made out its *prima facie* case by way of the Bakhsh affidavit and an annexed rent statement, indicating that the plaintiff vacated the premises owing \$8,212.17 for the May, 2006 rent and February 2006 arrears. Pursuant to paragraph 31 of the lease, it was entitled to apply the security deposit to recover this sum. Most of the small additional balance, \$187.83, is covered by the first paragraph of the lease rider (paragraph 40), which calls for a 2% penalty for installments of rent not timely paid. In this case that figure is \$164.24. No opposing proof having been offered, the Court grants partial summary judgment to the defendant dismissing plaintiff’s claim for return of the security deposit to the extent of \$8,376.41. However, dismissal of the remaining balance of \$23.59 is not supported by any specific references to necessary expenses incurred nor proof thereof, and therefore upon a

search of the record (*see* CPLR 3212(b)) the Court grants partial summary judgment to the plaintiff for return of this sum. It shall be paid within 30 days of the date of this order.

As defendant's cross motion has in all essential respects been granted and the matters addressed in the complaint concluded, the plaintiff's motion to compel discovery is denied as academic.

Finally, pursuant to paragraph 53, the prevailing party in any action or proceeding is entitled to recover legal fees and expenses associated with such action or proceeding. The Court finds that in view of the determinations made in this decision and order the defendant is the prevailing party. *See, Sykes v RFD Third Ave. I Assocs., LLC*, 39 AD3d 279 (1<sup>st</sup> Dept. 2007). Accordingly, the Court grants judgment on defendant's counterclaim in an amount to be determined upon a damages trial thereof. The Court notes that the counterclaim sought counsel fees only and not fees and expenses. However, the lease allows the latter and both parties clearly relied upon the subject clause in preparing their pleadings, in which both sought attorney's fees. Accordingly, as the Court may in an appropriate case grant judgment on an unpleaded cause of action (*Town of Putnam Valley v Sacramone*, 16 AD3d 669 [2d Dept. 2005]), the defendant may pursue expenses as well as fees.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for an damages trial on the defendant's counterclaim on **May 22, 2008** at 9:30 A.M. The conference previously scheduled for that day is cancelled.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an

abandonment of the counterclaim giving rise to the trial.

The directive with respect to a trial on attorney's fees and expenses is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

This shall constitute the Decision and Order of this Court

ENTER

DATED: April 16, 2008.

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**ENTERED**

APR 21 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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