

**Marty Jaramillo, PT, PC v Araque**

2008 NY Slip Op 31249(U)

April 14, 2008

Supreme Court, New York County

Docket Number: 0111093/2007

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN  
Justice

PART 7

MARTY JARAMILLO, PT, PC, d/b/a I.C.E.  
SPORTS HEALTH GROUP,  
Plaintiff,

- v -

CARLOS ARAQUE, ESSENTIAL THERAPY,  
INC., and MITCHELL MARKS,  
Defendants.

INDEX NO. 111093/07

MOTION DATE 11/23/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 64

The following papers, numbered 1 to 4 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-C	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits (Reply Mem of Law only)	

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

**FILED**

APR 21 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**MICHAEL D. STALLMAN**  
JUNIOR COURT CLERK

J.S.C.

Dated: 4/14/08  
New York, New York

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**MICHAEL D. STALLMAN**  
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE  
DATED:

J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X  
MARTY JARAMILLO, PT, PC, d/b/a I.C.E. SPORTS  
HEALTH GROUP,

Plaintiff,

Index No. 111093/07

- against -

**Decision and Order**

CARLOS ARAQUE, ESSENTIAL THERAPY, INC., and  
MITCHELL MARKS,

Defendants.

-----X  
**HON. MICHAEL D. STALLMAN, J.:**

**FILED**  
APR 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action, a commercial subtenant alleges that the tenant fraudulently induced it into entering into a sublease, fraudulently concealed that the tenant had violated its own lease with the landlord, and that the tenant breached the lease and sublease. Pursuant to CPLR 3211 (a) (1) & (7), the tenant and its principal move to dismiss the complaint as against them.

**BACKGROUND**

Plaintiff operates physical therapy, rehabilitation, and fitness centers. On August 22, 2006, plaintiff entered into a sublease with defendants Carlos Araque and Essential Therapy, Inc. (Essential) for one room in these defendants' space. Plaintiff allegedly spent \$22,000 in improvements to his subleased space, and incurred \$30,000 in start-up costs.

Paragraph 4.1 of the sublease limits plaintiff's use of its own space to "physical therapy and fitness." Rome Affirm., Ex B [Sublease]. Under a master lease with defendant Mitchell Marks, Essential agreed to use its space for "Yoga Studio and Spa [no cooked or heated food of any kind] and for no other purpose." *Id.*, Ex C. To induce plaintiff into entering the sublease, Araque and Essential allegedly stated that they would refer clients to plaintiff, and that plaintiff in turn would

refer clients to Araque and Essential.

According to plaintiff, Araque represented that he was a duly licensed massage therapist, but on March 9, 2007, Araque was allegedly arrested and charged with operating without a license, sexual misconduct, and sexual abuse for allegedly violating a woman during a massage on January 30, 2007. The sexual misconduct charges were allegedly dropped, and Araque pled guilty to performing massage without a license. Mem. at 4. Plaintiff also alleges, that, upon information and belief, Araque and Essential used the space for sex swing parties and adult pornographic photo/film shots every 4 to 6 weeks. The complaint alleges causes of action for breach of the implied covenant of good faith and fair dealing, fraudulent concealment, breach of the sublease and Essential's lease, and fraud.

#### DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference. AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582, 591 (2005). "Dismissal is warranted under CPLR 3211(a)(1) where documentary evidence and undisputed facts negate or dispose of claims in the complaint or conclusively establish a defense." Zanett Lombardier, Ltd. v Maslow, 29 AD3d 495, 495 (1st Dept 2006).

Araque and Essential argue that the first cause of action, alleging breach of the covenant of good faith and fair dealing, must be dismissed because plaintiff did not allege that they did anything to impair plaintiff's rights under the sublease.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of

performance. This covenant embraces a pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 (2002). Although the sublease does not restrict Araque and Essential’s use of the space, implied in plaintiff’s sublease is Araque and Essential’s good faith obligation to abide by the terms of their own lease. “[B]ecause a sublease is dependent upon and limited by the terms and conditions of the paramount lease from which it is carved, a subtenancy may be terminated by the expiration of the term of the prime tenant, or a re-entry by the landlord for a condition broken.” Goldcrest Transp. v Across Am. Leasing Corp. 298 AD2d 494, 496 (2d Dept 2002). Here, Essential’s alleged use of its own space for sex parties and photo/film shoots effectively jeopardizes plaintiff’s sublease. Essential’s lease with defendant Mitchell limits Essential’s use of its space to a Yoga Studio and Spa. Article 37 of Essential’s lease states,

“Tenant agrees that Tenant ‘will not bring or permit any obscene or pornographic material on the premises, and shall not permit or conduct any obscene, nude, or semi-nude live sex club of any sort, or as a “massage parlor.” . . . Tenant agrees that if at any time Tenant violates any of the provisions of this Article, such violation shall be deemed a breach of a substantial obligation of the terms of this lease and objectionable conduct.”

Rome Affirm., Ex C. Premises that are used for the purpose of an illegal business (i.e., performing unlicensed massage) is a ground for eviction under RPAPL 711 (5). By allegedly using its space in manner which could be considered a material breach of its lease, Essential puts its own lease at risk of termination for breach, which in turn jeopardizes plaintiff’s sublease.

Nevertheless, the first cause of action does not state a valid cause of action because the element of injury is not pled. First, plaintiff does not allege that Mitchell Marks is seeking to

terminate Essential's lease. Moreover, the termination of Essential's lease does not automatically lead to termination of plaintiff's sublease, if the landlord and Essential agreed to voluntarily terminate the lease. In the event of voluntary surrender, plaintiff would become the landlord's immediate tenant, suffering no impairment of plaintiff's rights. Goldcrest Transp., 298 AD2d at 496; Duane Reade v I.G. Second Generation Partners, 280 AD2d 410, 411 (1st Dept 2001). Second, plaintiff seeks \$52,000 in damages as a result of Araque and Essential's alleged breach, but these damages are obviously the cost of improvements and start-up costs which plaintiff incurred before Araque and Essential's alleged breach. Although plaintiff also seeks lost profits, plaintiff does not allege that he lost any clientele as a result of Araque and Essential's alleged breach. Therefore, the first cause of action is dismissed with leave to replead.

As to the second cause of action, plaintiff alleges that Araque and Essential "fraudulently and intentionally failed to disclose any of the terms, conditions, behavior, operation, standard, improper or nonexistent licensing, problems, occupancy of the Lease premises, as well as . . . concealed the known violations and breaches of the Master Lease . . . prior to the execution of the Sublease." Complaint ¶ 24. Insofar as plaintiff is referring to fraudulent concealment of conditions of the space subleased to plaintiff, Araque and Essential point out that plaintiff had a right to inspect the subleased space, and agreed to take it "as is." See Sublease ¶ 1.3. In the absence of any allegation that Araque and Essential actively concealed anything about the conditions of plaintiff's space, there would be no justifiable reliance to support a claim against Araque and Essential for fraudulent concealment of the conditions of plaintiff's space. Rivietz v Wolohojian, 38 AD3d 301, 301 (1st Dept 2007).

Insofar as plaintiff alleges that Araque fraudulently concealed that he was not licensed to

perform massage, plaintiff alleges that Araque falsely represented that he was a licensed massage therapist. See Complaint ¶¶ 31, 34. Thus, this claim is addressed later in the discussion of plaintiff's fourth cause of action for fraud.

To the extent that this cause of action is based on defendants' failure to disclose the alleged sex parties and pornographic film shoots that had taken place in the space, plaintiff fails to state a cause of action under this theory. "A claim predicated on non-disclosure requires a showing that a party is duty-bound to disclose pertinent information." Rivietz, 38 AD3d at 301. If some conduct, more than mere silence, on the part of Araque rises to level of active concealment, he may have a duty to disclose such information. Boyle v McGlynn, 28 AD3d 994 (3d Dept 2006) (seller had duty to disclose to buyers a wind turbine project on an adjacent parcel). Here, the complaint lacks any allegations regarding Essential which might be construed as active concealment about the alleged activities taking place in Essential, even when the allegations are construed in a light most favorable to plaintiff. The misrepresentation about Araque's status as a licensed massage therapist pertained to Araque, not to Essential. Defendants did not make any statements to plaintiff about Essential that would give rise to a duty to disclose alleged activities that might hurt plaintiff's reputation as a sports therapist by virtue of his association with defendants. See E.B. v Liberation Pubs., 7 AD3d 566, 567 (2d Dept 2004)(allegations insufficient to impose duty upon publisher to disclose to book cover model that book dealt with homosexual themes and marketed to a homosexual audience).

As defendants indicate, lost profits are not recoverable under a fraud theory. MTI/The Image Group v Fox Studios East, 262 AD2d 20, 22 (1st Dept 1999). "Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud." Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 (1996). Thus, second cause of action is dismissed.

The third cause of action for breach of contract is dismissed. Plaintiff does not identify which provision of his sublease that Araque and Essential allegedly breached by Essential's purported use of its own space for sex parties and adult pornographic photo/film shoots. Gordon and Breach Science Publs. v New York Sys. Exch., 267 AD2d 52, 52 (1st Dept 1999). Neither does plaintiff state a valid cause of action for breach of Essential's lease, because plaintiff is not an intended third party beneficiary of Essential's lease, which was executed 2 years before plaintiff's own sublease. See Rome Affirm., Ex C. Therefore, the documentary evidence conclusively establishes that plaintiff does not state a valid cause of action against Araque and Essential for breach of any specific provision in either the sublease or lease.

The fourth cause of action for fraudulent inducement is dismissed. The alleged misrepresentations that the reputations of Araque and Essential were "stellar" constitute puffery, not actionable representations of fact. Reich v Mitrani Plasterers Co., 268 AD2d 256, 256 (1st Dept 2000). Plaintiff also alleges that Araque falsely represented that he was a licensed massage therapist, but Araque admittedly pled guilty to a charge of performing massages without a license. Looby Opp. Affirm. ¶ 2. Plaintiff maintains that he would not have entered into the sublease with Araque had he known that he was unlicensed, and thus, breaking the law each day when Araque performed massages without a license. Jaramillo Aff. ¶ 4. Plaintiff claims that he would not have referred clients to Araque for massage. Ibid.

However, plaintiff's fraud case of action lacks the element of justifiable reliance. "Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations." Stuart Silver Assocs. v Baco Dev. Corp., 245 AD2d 96, 98-99 (1st Dept 1997);

Shao v 39 College Point Corp., 309 AD2d 850 (2d Dept 2003); Cohen v Colistra, 233 AD2d 542, 543 (3d Dept 1996). As Araque and Essential point out, plaintiff could easily have verified whether Araque was a licensed massage therapist by using the online verification services of the New York State Education Department, Office of the Professions. See <http://www.op.nysed.gov/opsearches.htm>.

On the issue of attorneys' fees, Araque and Essential did not assert a counterclaim for attorneys fees against plaintiff. In any event, plaintiff has the opportunity to replead the remaining cause of action for breach of the covenant of good faith and fair dealing against Araque and Essential. Thus, it is premature to determine that Araque and Essential are prevailing parties, entitled to attorneys' fees as set forth in plaintiff's sublease.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants Carlos Araque and Essential Therapy Inc. is granted to the complaint is dismissed; and it is further

ORDERED that plaintiff is granted leave to replead the dismissed first cause of action, and plaintiff has 60 days from service of a copy of this order with notice of entry to replead; and it is further

ORDERED that if plaintiff does not timely replead the first cause of action, then the Clerk is directed to enter judgment in favor of defendants accordingly.

Dated: *April 14, 2008*  
New York, New York  
**FILED**

ENTER: *[Signature]*

J.S.C.

APR 21 2008

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NEW YORK

*[Faint stamp]*