SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MARMARK HOLDINGS CORP.,

Plaintiff,

-against-

LAW OFFICES OF KENNETH M. MOLLINS, P.C.,

Defendant.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No.: 13785/03
Motion Seq. Nos.: 06 & 07

DECISION AND ORDER

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The motion by Defendant Law Offices of Kenneth M. Mollins, P.C. (the "Defendant") by order to show cause to stay the trial of this action, or in the alternative to order an immediate hearing on whether or not Plaintiff Marmark Holdings Corp. (the "Plaintiff") has capacity to sue is **denied** for the reasons set forth herein. The cross motion of Plaintiff is granted to the extent indicated herein.

The Plaintiff commenced this action for the alleged failure of the Defendant to pay rent on certain property. The Plaintiff corporate entity was founded by Marvin Kramer and his law partner Mark Fisherman for the sole purpose of leasing property to the law practice of Kramer and Fisherman at 1325 Franklin Avenue, Garden City, N.Y. In 1993 Fisherman died. Kramer offered to sublease some office space to Kenneth Mollins ("Mollins"), the principal of Defendant. The rent of the space was allegedly based on a percentage of the office space as well as property taxes, utilities and the use of common areas of the overall office space. Mollins allegedly recalculated the Defendant's percentage of the office space, and sent in rental payment checks based on the

Defendant's recalculation of the size of the office space. Plaintiff brought this action for the alleged failure of Defendant to pay the full amount as stated in the lease.

Mollins alleges Kramer as the sole shareholder of Plaintiff, in 1999, was to offer Mollins all the shares of Plaintiff corporation as a way of hiding income from Kramer's wife. Mollins alleges he is now the sole shareholder of Plaintiff Marmark Holding Corp., and, as such, Mollins contends he wants the Plaintiff's action discontinued as to the corporate Defendant. Mollins offers the affidavits of William Mlotok and Dennis Elkin (annexed following the affirmation in support of Kenneth M. Mollins) to give credence to Mollins' allegations that Kramer wishes to "hide" the revenue stream generated by the Plaintiff corporation for Kramer's children by Kramer's first wife.

Despite Defendant's allegations, affidavits to the contrary establish Mollins' position as the sole shareholder in Marmark, Plaintiff had presented before the Appellate Division, Second Department, through tax returns, affidavits, etc., that Kramer was the sole shareholder of Marmark. The Appellate Division, Second Department, found that there were issues of fact as to the ownership of the stock of Marmark. Clearly, the fact that the Appellate Division, Second Department found issues of fact as to the ownership of the Marmark stock is enough to deny Defendant's request (see Exhibits J, S, T and V annexed to Plaintiff's cross motion). The court finds Defendant's current argument that the stock ownership issue is a "new" issue is unavailing. Again, the issue as to the ownership of the stock is for the trier of facts to resolve.

Also, in order to obtain a stay or preliminary injunction, a party has the burden of demonstrating a likelihood of ultimate relief on the merits, irreparable injury if provisional relief is withheld, and a balancing of the equities in Plaintiff's favor (*Aetna Insurance Co. v Capasso*,

75 NY2d 860; *Quinones v Bd. of Managers of Regalwalk Condominium I*, 242 AD2d 52). Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law and upon undisputed facts found in the moving papers. The burden of showing an undisputed right rests with the movant (*Anastasi v Majopon Realty Corp.*, 181 AD2d 706). Bare conclusory allegations are insufficient to support a motion for preliminary injunction (*Kaufman v International Business Machines*, 97 AD2d 925, *aff'd.* 60 NY2d 930). At this point, this is all Defendant and Mollins are offering. As for the various evidence offered by the respective parties on their respective claims, the trial court at the time of trial shall evaluate the same as to its validity, admissibility, etc. (*see Ando v Woodbury*, 8 NY2d 165; *see also Roger Trading Corp. v Quality Fruit Wines Corp.*, 27 NY2d 837).

The Court will now consider the Plaintiff's cross motion. First, the Court shall consider the Defendant's defense of fraud.

Defenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken (*see Petracca v Petracca*, 305 AD2d 566, 567; *Robbins v Growney*, 229 AD2d 356, 358; *Bentivegna v Meenan Oil Co.*, 126 AD2d 506, 508; *Propoco, Inc. v Birnbaum*, 157 AD2d 774, 775; *Staten Island-Arlington, Inc. v Wilpon*, 251 AD2d 650).

An answer alleging fraud raises more than, in the most conclusory terms, a defense of fraud; an allegation of fraud should include the circumstances constituting the wrong and plead the material elements of the defense of fraud (*Prudential Insurance Company of America v Kelly*, 174 AD2d 717; *see also Fiorilla v County of Putnam*, 1 AD3d 475. As noted by Plaintiff, the Defendant's defense of fraud is set forth only in the most conclusory terms (see Exhibit C, ¶ 3 annexed to Plaintiff's counterclaim).

Fraud in the inducement could not be based upon the alleged misrepresentation regarding the size of the commercial rental premises, so as to avoid obligations of the lease, where the dimensions of the premises were not within the lessor's peculiar knowledge and the dimensions could have been ascertained by the lessee in an arm's length commercial real estate transaction (*see 1537 Associates v Kaprielian Enterprises, Inc.*, 259 AD2d 447). This mirrors Defendant's allegations of fraud. Taking the allegations of the answer as true and according the Defendant the benefit of every favorable inference, the allegations of fraud in the inducement, even as amplified by the Mollins affidavit, fail to state defenses for fraud in the inducement (*see Mendelovitz v Cohen*, 37 AD3d 670).

A cause of action sounding in fraud does not lie where, as here, the alleged fraud relates to a breach of contract (*see Clement v Delaney Realty Corp.*, 45 AD3d 519). Clearly, the "inducement of fraud" alleged by Defendant relates only to the contract for the sublease of the space. Defendant has not set forth an appropriate, independent cause of action for the "inducement of fraud." It must be stricken.

Next, the court will consider the defense of accord and satisfaction. Ordinarily, the retention of a check enclosed in a letter which refers to the amount as the balance due on accounts between parties will not be held to be an accord and satisfaction so far as to bar an action for the balance due; it is only in cases where a dispute has arisen between the parties as to the amount due and a check is tendered on one side in full satisfaction of the matter in controversy that the other party will be deemed to have acquiesced in the amount offered by the acceptance and retention of the check (*Eames Vacuum Brake Co. v Prosser*, 157 NY 289; *Dover Plumbing & Heating Corp. v Graymark Estates, Inc.*, 111 NYS2d 521).

The Statute of Frauds bars oral modifications to a contract which expressly provides that modification must be in writing; oral modification is enforceable if there is part performance that is unequivocally referable to the oral modification and a showing of equitable estoppel (*B. Reitman Blacktop, Inc. v Misserlian*, ___ AD3d ___, 2008 WL 2522515). This court has previously determined that issues of fact existed as to the question of accord and satisfaction (see Exhibit E annexed to Plaintiff's cross motion). Thus, the issue is still viable for resolution by the trier of the facts.

The third area of discussion is Defendant's counterclaim. In Defendant's counterclaim, it alleges Plaintiff defaulted on its obligation to pay the rent to the landlord on the main lease and Plaintiff had to terminate the lease. Defendant alleges Plaintiff failed to give Defendant written notice of the termination of the lease, and thus Defendant had to vacate the sublease and enter a new lease at a higher rent. Defendant seeks damages in the amount of $250,000. Plaintiff avers it, Plaintiff, had the right to terminate the sublease on three (3) months' notice, the sublease was terminated on three months' notice, and Defendant found suitable office space within that period.

Defendant also alleges it was given in the sublease the ability to take over Plaintiff's entire lease, but Plaintiff's default to the main landlord precluded this. Plaintiff states under its main lease with the landlord, the landlord had to give it permission for such an assignment from Plaintiff to Defendant (see Exhibit A, Article XXV, pg. 29 annexed to Plaintiff's reply affirmation), and Defendant never sought such permission.

Clearly, from the record, there are issues of fact herein such as whether or not Defendant was in any way actually damaged by Plaintiff's action as to the over lease, the sublease and whether Defendant's conduct constituted a waiver of any viable lease and/or sublease provisions.

Also, an issue in the proceeding herein is credibility.

The credibility of the witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory of not, are issues for the trier of facts (*Lelekakis v Kamamis*, 41 AD3d662; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397).

Thus, Defendant's motion is **denied**. Plaintiff's cross motion is **granted** only to the extent that the Defendant's defense of fraud in the inducement is deemed stricken upon service of a copy of this order.

This constitutes the **DECISION** and **ORDER** of the Court.

DATE: July 16, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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