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

PRESENT: HON. LELAND DEGRASSE Justice

PART 25

Savoy Management Corp.

- v -

Review Fulton Club, LLC

INDEX NO. 601503/07

MOTION DATE 9/17/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 17

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JAN 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

JAN 04 2008

Dated: _____

_____ J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

----------X

SAVOY MANAGEMENT CORPORATION, :

Index No.: 601503/07

Plaintiff, :

Cal. No.: 17 of 9/17/07

-against- :

:

LEVIEV FULTON CLUB, LLC, WONDER WORKS CONSTRUCTION CORP., FULTON CLUB, LLC and CONWAY STORES, INC., :

:

Defendants.

----------X

DeGRASSE, J.:

Motion sequence Nos. 001, 002 and 003 are consolidated for disposition. In motion sequence Nos. 001, 002 and 003 defendants Wonder Works Construction Corp. ("WWC"), Leviev Fulton Club, LLC ("LFC"), Fulton Club, LLC ("FCL") and Conway Stores, Inc. ("CSI") move, pursuant to CPLR 3211(a) (1) and (7), for an order dismissing the complaint on the grounds that a defense is founded upon documentary evidence and the complaint fails to state a cause of action. Plaintiff Savoy Management Corporation ("SMC") cross-moves, pursuant to CPLR 3211 (c), for an order converting the motion to one for summary judgment, and granting plaintiff judgment on its first cause of action.

FACTS

This is an action for breach of a stipulation of settlement agreement which the parties entered into in July 2006. Defendants are the owners of a building known as 143-155 William Street, a/k/a 101-117 Fulton Street, a/k/a 52-6 Ann Street, New York, N.Y. On June 5, 2006, plaintiff commenced a lawsuit against defendants entitled *Savoy Management Corp. v Leviev Fulton Club, LLC, et al.*, in the Supreme Court, New York County, under Index No. 107734/06. The action arose from a dispute between the parties concerning plaintiff's occupancy of office space on the fourth floor of the subject building pursuant to a commercial lease between plaintiff and the prior owner. In July 2006, the action was settled by a so-ordered stipulation of settlement which accelerated the expiration and termination of plaintiff's lease and gave defendants immediate possession of the subject premises. In exchange, defendants agreed to pay plaintiff a termination fee in the amount of $2,000,000. The settlement agreement further provided that if defendants filed plans or made an application to the Department of Buildings [DOB] to commence construction of residential or commercial space "higher than the highest roof on the current structure" after executing the agreement, defendants would pay plaintiff an additional $1,500,000.

Plaintiff commenced the instant action against defendants by the filing of a summons and verified complaint in May 2007, asserting two causes of action sounding in breach of contract. The first cause of action alleges that defendants breached paragraph 13 of the settlement agreement in that defendants filed building plans with the DOB on June 29, 2006, "evidenc[ing] its planned construction of residential space 'higher than the highest roof' of the [b]uilding." It is further alleged that defendants "commenced construction of the [b]uilding in accordance with such plans long before December 22, 2006, triggering the additional [t]ermination [f]ee provision of the [s]ettlement

[a]greement and entitling [plaintiff] to an additional payment of $1,500,000, plus $2,750.00 per day in liquidated damages and applicable interest." The second cause of action alleges that defendants have failed to "escrow and timely pay [plaintiff] the $2,000,000 [t]ermination [f]ee, which payment was not made until January 9, 2007," and have also failed to "pay the $2,750.00 per diem liquidated damage fee which was due ... by reason of the failure to timely deposit the initial portion of the [t]ermination [f]ee in escrow and timely pay same thereafter."

DISCUSSION

Defendants move to dismiss the first cause of action in the complaint on the grounds that it is barred by the documentary evidence which shows that the increased termination fee clause under paragraph 13 of the settlement agreement has not been triggered. In support of defendants' contentions, WWC submits an affidavit from Karl Fischer, the architect of record handling the residential conversion and rooftop addition to the subject building. Fischer avers that on June 5, 2006, he prepared the plans to add two residential stories to the roof of the building which were approved by the DOB on June 29, 2006. Fischer further avers that the height of the roof of the new two-story residential addition which measures 154'-1½", will not be higher than the bulkhead roof which measures163'-9", and is "the highest roof of said building in its original condition."

Under CPLR 3211(a) (1), a dismissal is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). Defendants rely upon the affidavit of the architect handling the rooftop addition to the subject building to rebut plaintiff's allegations. Defendants cannot rely upon the

architect's affidavit to support their motion to dismiss under CPLR 3211 [a][1], since "documentary evidence" under such section does not include affidavits (*see Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). Therefore, the court cannot consider such document to determine whether dismissal is warranted under CPLR 3211 (a) (1).

As an alternative ground for dismissal, defendants argue that the first cause of action fails to state a cause of action for breach of contract. Specifically, defendants argue that upon completion of the construction, the height of the roof of the new two-story residential addition will not be higher than the bulkhead roof, which is "the highest roof of the building in its original condition." Defendants further argue that notwithstanding the fact that the two-story residential addition will not be higher than the building's highest roof, defendants filed their building plans with the DOB on June 28, 2006, prior to entering into the July 2006 settlement agreement with plaintiff, and, therefore, the increased termination fee clause under paragraph 13 of the settlement agreement has not been triggered. In support of their contentions, defendants submit a copy of the settlement agreement. Paragraph 13 of the settlement agreement provides the following:

> "The parties agree that in the event Defendant hereinafter files plans or makes application with the [DOB] and commences construction of residential or commercial space higher than the highest roof on the current structure, the Termination Fee shall be increased to Three Million Five Hundred Thousand and 00/100 ($3,500,000.00) Dollars, it being understood that any bulkhead, mechanical or other non-usable space constructed above such height shall not trigger the increase to the Termination Fee. The additional $1,500,000.00 shall be paid to Plaintiff within ten (10) days from the commencement of the construction of any such space."

When deciding a motion made pursuant to CPLR 3211 (a) (7), the court must accept the facts alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v*

Morone, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). "However, bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion" (*see Palazzolo v Herrick*, 298 AD2d 372, 372 [2002]). A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello*, 40 NY2d at 635) and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rovello*, 40 NY2d at 636).

The court finds that plaintiff's first cause of action fails to set forth a claim for breach of contract. Paragraph 14 of the complaint alleges that "[o]n or about June 29, 2006, [d]efendants filed plans and made an application to the DOB, which evidenced [their] planned construction of residential space 'higher than the highest roof' of the [b]uilding." Further, paragraph 10 of the complaint alleges that "the parties entered into settlement negotiations, which culminated in the execution of the [s]ettlement [a]greement in July 2006." Thus, the complaint alleges that defendants filed their building plans with the DOB prior to the parties' execution of the settlement agreement. Since paragraph 13 of the settlement agreement, which is quoted in the complaint, specifically provides that the increased termination fee clause would only be triggered if defendants filed plans with the DOB and commenced construction of residential or commercial space "higher than the highest roof on the current structure" after the parties entered into the July 2006 agreement, the first cause of action fails to set forth a cause of action against defendants for breach of contract. Plaintiff's new assertion that defendants' plans were actually filed on July 3, 2006 is not set forth in the complaint. Moreover, the printout from the DOB's website submitted in support of plaintiff's contentions is unsworn and uncertified.

Plaintiff's request for discovery pursuant to CPLR 3211 (d) is denied. Plaintiff has failed to establish the need for discovery to ascertain "facts essential to justify opposition" within defendants' knowledge, which plaintiff would need to oppose the motions, so as to authorize the court to deny any relief or grant a continuance pending disclosure (CPLR 3211 [d]; *see also Weltmann v RWP Group*, 232 AD2d 550 [1996]; *Aminov v East 50th St. Rest. Corp.*, 232 AD2d 592 [1996], *lv denied* 89 NY2d 815 [1997]).

CONCLUSION

Based on the foregoing, defendants' motion is granted to the extent that the first cause of action is dismissed pursuant to CPLR 3211 (a) (7). Plaintiff's cross motion for summary judgment is denied. Either issue has not been joined or plaintiff has not submitted a copy of defendants' answer as required by CPLR 3212 (b) (*see McMahon v Wolverine Worldwide*, 233 AD2d 587 [1996]).

The parties shall appear for a preliminary conference in Part 25, Room 428, on February 25, 2008 at 2:00 p.m.

This shall constitute the decision and order of the court.

JAN 04 2008

Dated:

FILED
JAN 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.
HON. LELAND DeGRASSE