

**Savoy Mgmt. Corp. v Leview Fulton  
Club, LLC**

2009 NY Slip Op 30761(U)

March 30, 2009

Supreme Court, New York County

Docket Number: 601503/07

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

SAVOY MANAGEMENT CORPORATION,  
Plaintiff,

Index No.: 601503/07

Motion Date: 11/25/08

- v -

Motion Seq. No.: 04

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

Motion Cal. No.: 112

Defendants.

The following papers, numbered 1 to 7 were read on this motion to amend.

- Notice of Motion/Order to Show Cause
- Answering Affidavits - Exhibits
- Replying Affidavits - Exhibits

PAPERS NUMBERED

1

2, 3, 5

**UNFILED JUDGMENT**  
This judgment is not to be entered by the County Clerk until the County Clerk has received a certified copy of the judgment from the court. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion:       Yes       No

Upon the foregoing papers,

The court shall deny plaintiff's motion to amend the complaint. The dismissal of the first cause of action by Order dated January 4, 2008 (DeGrasse, J.) was affirmed by the Appellate Division (Savoy Management Corp. v Leviev Fulton Club, LLC 51 AD3d 520, 521 [1<sup>st</sup> Dept 2008] ["This agreement simply does not support plaintiff's contention that the additional termination fee provision extended to plans filed before execution of the stipulation"]).

Plaintiff now attempts to amend the complaint to allegedly

Check One:       FINAL DISPOSITION       NON-FINAL DISPOSITION

Check If appropriate:       DO NOT POST       REFERENCE

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

correct the deficiencies that led to dismissal. Plaintiff's application fails and therefore the court shall deny plaintiff's attempt to resuscitate the cause of action.

Plaintiff's current motion to amend the complaint is essentially a cross-motion in response to the defendants' successful motions to dismiss the original complaint. Contrary to plaintiff's argument, the legal standard to be applied to the current motion is

Where a cross motion for leave to amend a complaint to correct a defect in pleading is made in response to a motion to dismiss the complaint for failure to state a cause of action and both motions are supported by extrinsic proof, CPLR 3211 (e) requires the court to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one. For a defendant to be successful on a motion to dismiss pursuant to CPLR 3211 (a) (7) which has not been converted to a summary judgment motion, the evidence submitted by the parties and received for the limited purpose of remedying defects in the complaint must establish conclusively that the plaintiff has no cause of action. Moreover, it must be shown that, in light of the evidence presented, no significant dispute exists. The rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom on a motion addressed to the sufficiency of the pleadings does not apply to allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence.

SRW Associates v Bellport Beach Property Owners, 129 AD2d 328, 330 -331 (2d Dept 1987) (citations and internal quotations omitted). The First Department in a case such as this where it affirmed the initial dismissal of a complaint and then subsequently denied a motion to amend held similarly that

the rule that the facts alleged are presumed to be true and are to be accorded every favorable inference \*319 which can be drawn therefrom on a motion addressed to the sufficiency of the pleading does not apply to allegations such as those herein consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence. Leave to amend should not be granted where, as here, the proposed amendment is obviously without merit. Examination of the merits of the proposed pleading was also proper in these circumstances pursuant to CPLR 3211 (e).

Mobil Oil Corp. v Joshi, 202 AD2d 318, 319 (1st Dept 1994)

(citations omitted).

Plaintiff attempts to recast its breach of contract action by asserting that the February 2007 filing with the Department of Buildings itself constitutes a breach of the Settlement Agreement that occurred after the execution of the Agreement. However, as defendants' argue, the plaintiff made this same argument in its papers opposing the motion to dismiss. In paragraph 10 of the Affidavit of Jacob Frydman in Opposition to Defendants' Motion to Dismiss and In Support of Plaintiff's Cross-Motion for Partial Summary Judgment, it is averred that "In addition, the DOB's records reflect that in or about February 2007, Defendants filed additional plans seeking, among other things, 'post approval amendment to change the number of stories [of the Building].'" Paragraph 18 of the same affidavit further states "[e]ven if Defendants' interpretation of this provision was correct, the DOB's records show that in February 2007 Defendants filed plans . . . at the very least an issue of fact exists as to whether such

agreement was actually signed after the plans relied upon by Defendants were filed with the DOB in July 2006 or before."

Therefore, contrary to plaintiff's argument, this court and the Appellate Division considered the very allegations plaintiff now attempts to raise and rejected their sufficiency. The plaintiff had argued that the February 2007 DOB filing brought the original June 2006 filing within the ambit of the Settlement Agreement. The Appellate Division specifically stated in its decision that "the purported documentary evidence submitted by plaintiff in opposition to defendants' motions did not remedy the defect in its complaint." Savoy, 51 AD3d at 521. Furthermore, the February 2007 application specifically states that no plans were filed and sets forth that the filing date of the application was July 3, 2006.

Therefore, the evidence cited by plaintiff wholly fails to support its application to amend the complaint to allege a revised cause of action for breach of contract. Similarly, plaintiff's cause of action for breach of the duty of good faith and fair dealing must be dismissed along with the breach of contract cause of action because "the allegation of a breach of the duty of good faith is duplicative of the cause of action for breach of contract since, where appropriate, the courts will imply the obligation of good faith and fair dealing between

