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

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 102123/2009

WBM 295 MADISON OWNER LLC

vs

E.J. ASSOCIATES, INC.

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss by defendants Eric Levine + Jeffrey Sonnenblum is granted in accordance with the attached memorandum decision.

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

JUDGE DORIS LING-COHAN

Dated: Oct. 5, 2009

_____ 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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WBM 295 MADISON OWNER, L.L.C.,

Plaintiff,

Index No.: 102123/09
DECISION/ORDER

-against-

E.J. ASSOCIATES, INC., E.J. ASSOCIATES OF NEW YORK, INC., ERIC LEVINE and JEFFREY SONNENBLUM,

Motion Seq. No.: 001

Defendants.

----------X

HON. DORIS LING-COHAN, JSC:

In this commercial landlord/tenant action, two of the defendants move to dismiss a portion of the complaint (motion sequence number 001). For the following reasons, this motion is granted.

BACKGROUND

Plaintiff WBM 295 Madison Owner, L.L.C. (WBM) is a foreign limited liability corporation that is licensed to do business in New York, and is the current owner of a building located at 295 Madison Avenue (the building) in the County, City and State of New York. *See* Ross Affirmation in Opposition, Exhibit A (complaint), ¶¶ 1, 10. Individual defendants Eric Levine (Levine) and Jeffrey Sonnenblum (Sonnenblum) are both New York residents and are, respectively, the vice-president and president of both corporate defendants E.J. Associates, Inc. (E.J., Inc) and E.J. Associates of New York, Inc. (E.J. of NY). *Id.*, ¶¶ 2, 5-8. The former, E.J., Inc., was evidently dissolved by order of the New York Secretary of State on September 25, 1991. *Id.*, ¶ 3; Exhibit B.

E.J. of NY (as tenant) entered into several leasehold agreements with WBM's predecessor-in-interest (as landlord) to occupy commercial space in the building. The first of these was a lease that ran from August 1, 1995 through July 31, 2000 (the first lease). *Id.*;

Exhibit C. The next agreement was an extension of the first lease's term from August 1, 2000 through July 31, 2005 (the first lease extension). *Id.*; Exhibit D. The next agreement, dated January of 2006, was a modification of the first lease that permitted "[E.J., Inc.], as successor-in-interest to [E.J. of NY]" to occupy additional premises in the building, and obligated both it and the landlord to perform certain renovation work (the first lease modification). *Id.*; Exhibit E. The final agreement, dated March of 2006, was a new lease between the former landlord and E.J., Inc. that ran for a seven year term (the second lease). *Id.*; Exhibit F. The second lease was signed on behalf of the tenant by "Eric Levine, VP, Operations, E.J. Associates." *Id.* The personal guaranty provision that appeared below the signature lines was crossed out. *Id.* WBM thereafter purchased the building in July of 2007. *Id.*; Exhibit A, ¶ 10. Subsequently, defendants surrendered possession of their commercial space and vacated the building on January 7, 2009. *Id.*, ¶ 19.

WBM commenced this action on February 13, 2009, by serving a summons and complaint that sets forth causes of action for: 1) breach of the lease (against E.J., Inc.); 2) breach of the lease (against E.J., of NY); 3) liquidated damages (against E.J., Inc. And E.J. of NY); and 4) breach of the lease and liquidated damages (against Levine and Sonnenblum). *Id.*; Exhibit A. Prior to serving an answer, Levine and Jeffrey Sonnenblum now move to dismiss the fourth cause of action (motion sequence number 001).

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test "'is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained'." *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), *quoting Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept

1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." *See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 (2001). However, where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 (1st Dept 2001) *affd as mod Goshen v Mutual Life Insurance Co. of N.Y.*, 98 NY2d 314 (2002), *citing Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994). The Court of Appeals has held that a "CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, * * * may be appropriately granted 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 at 326, *quoting Leon v Martinez*, 84 NY2d 83, 88 (1994). Here, the documentary evidence clearly supports defendants' allegations and refutes WBM's claims.

> The fourth cause of action in the complaint states that:
>
> Levine and Sonnenblum are liable to WBM for the rent and additional rent ... and the liquidated damages ... pursuant to the second lease, because [E.J., Inc.] was dissolved when those obligations were incurred, and said obligations were not incurred for the purpose of winding up [E.J., Inc.].

See Ross Affirmation in Opposition, Exhibit A (complaint), ¶ 34. Defendants note that neither Levine nor Sonnenblum executed a personal guaranty for E.J. of NY's obligations under the second lease, and that, indeed, the guaranty paragraph of that lease was crossed out. *See* Notice of Motion, Lawler Affirmation, ¶ 20. Defendants further note that Levine signed the second lease as "Eric Levine, VP, Operations, E.J. Associates," and that Sonnenblum did not sign the second lease at all. *Id.*, ¶ 19. Finally, defendants argue that the variance in the second lease in the tenant's corporate name - i.e., E.J., Inc. Instead of E.J. of NY - is immaterial and a mere

typographical error. *Id.*, ¶¶ 21-22. They further assert that Levine "executed the [second] lease with the intent, as an agent of [E.J. of NY], to bind [E.J. of NY]," and annex, as supporting evidence, copies of rent checks made out by E.J. of NY to the landlord that date from 2000 to 2008. *Id.*; Levine Affidavit, ¶ 8; Exhibit 2. WBM responds that "Levine and Sonnenblum acted on behalf of a non-existent corporation," and "are personally liable for the obligations of the non-existent corporation." *See* Ross Affirmation in Opposition, ¶ 8. Levine and Sonnenblum reply that "there was no fraud, ... no deliberate attempt to deceive ... [and no] intent to execute the [second] lease on behalf of a dissolved corporation," and assert that "plaintiff knew that the [second] lease was executed on behalf of [E.J. of NY] and accepted each and every rent payment from [E.J. of NY for nearly 19 years]." *See* Defendants' Reply Memorandum, at 5-6. After careful consideration, defendants' arguments are persuasive and warrant the dismissal of this case as against the individual defendants.

The documentary evidence before the court establishes the following: 1) that E.J., Inc. was dissolved on September 25, 1991; 2) that neither Levine nor Sonnenblum signed a personal guaranty with respect to the second lease; 3) that the tenant on the first lease and the first lease extension was listed as "E.J. of NY," while the tenant on the first lease modification and the second lease was listed as "E.J., Inc.;" 4) that Sonnenblum signed the former two documents as "President, E.J. of NY," while Levine signed the latter two documents as "VP, Operations, E.J. Associates;" 5) that all of the lease agreements were drafted by either WBM or its predecessor-in-interest; and 6) that all of the tenant's rent for the commercial space in the building was paid by "E.J. of NY." The foregoing discloses that the parties may have irregularly interchanged the names "E.J. of NY" and "E.J., Inc." on documents, but that the day-to-day relations between them always involved WBM and E.J. of NY. This, coupled with Levine's admission that E.J., Inc. was dissolved in 1991, and his statement that he intended to bind E.J. of NY on the second

lease, leads the court to conclude that the foregoing irregularity in corporate name usage should be construed against the second lease's draftsman (i.e., WBM) and that said irregularity should be treated as a mere, immaterial typographical error. As such, it is insufficient to sustain WBM's fourth cause of action. *See e.g. USI Capital and Leasing, a Div. of USI Credit Corp. v Chertock*, 172 AD2d 235 (1st Dept 1991). Instead of pursuing claims against a corporation that it knows to be dissolved, and against that defunct corporation's former officers on an attenuated theory of personal liability, WBM should press them against E.J. of NY, the party that defendants have admitted both still exists, and is a signatory to the lease in question. Accordingly, defendants' motion is granted in accordance with the foregoing.

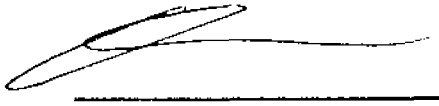
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendants Eric Levine and Jeffrey Sonnenblum is granted and the fourth cause of action in the complaint is dismissed as against these defendants; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: New York, New York
~~September~~ October 5, 2009



Hon. Doris Ling-Cohan, J.S.C.