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SHORT FORM ORDER INDEX NO. 20249/2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

FEDERAL EXPRESS CORPORATION,

Plaintiff,

-against-

RECKSON ASSOCIATES REALTY CORP., S.L. GREEN REALTY CORP., and "XYZ CORP.",

Defendants.

ORIG. RETURN DATE: JANUARY 8, 2009
FINAL SUBMISSION DATE: APRIL 9, 2009
MTN. SEQ. #: 003
MOTION: MG

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Upon the following papers numbered 1 to 7 read on this motion TO DISMISS; Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Affidavit in Opposition 5; Memorandum of Law in Opposition 6; Reply Memorandum of Law in Further Support 7; it is,

ORDERED that this motion by defendants RECKSON ASSOCIATES REALTY CORP. ("Reckson") and S.L. GREEN REALTY CORP. ("SLG") (collectively "defendants") for an Order, pursuant to CPLR 3211 (a) (1) and (7) and 3016, dismissing the Amended Verified Complaint herein, is hereby **GRANTED** in its entirety for the reasons set forth hereinafter. The Court has received an affidavit and a memorandum of law from plaintiff in opposition to the instant application, and a reply memorandum of law from defendants in response thereto

Plaintiff FEDERAL EXPRESS CORPORATION ("FedEx") originally commenced this action by Verified Complaint on or about November 30, 2006,

asserting six causes of action against defendants, 225 BROADHOLLOW ASSOCIATES, L.P. ("225") and Reckson, including breach of contract and material omission/misrepresentation. Thereafter, by Amended Verified Complaint dated July 16, 2008, FedEx asserted four causes of action against the current defendants herein, also sounding in breach of contract and material omission/ misrepresentation. FedEx seeks damages against defendants in the amount of $10 million on each cause of action.

FedEx is the lessee of the premises commonly known as 225 Broadhollow Road, Suite 302, Melville, New York, which is located within a building owned by 225 ("premises"). FedEx had entered into a lease agreement, dated April 28, 1992, with 225's predecessor-in-interest, HCCC Associates ("Lease"). The parties then entered into three modifications and extensions of the Lease, the last of which expired on October 31, 2005. In addition, defendants inform the Court that pursuant to an Option to Purchase contract executed on June 2, 1995 ("Option Contract"), Reckson has an option to purchase the subject building from 225, but it has not exercised such option.

The within dispute of the parties arises out of 225's temporary refusal to agree to a fourth modification of the Lease. Defendants allege that as a disclosed agent for 225, Reckson negotiated a Fourth Lease Modification between 225 and FedEx, which was sent to 225 for execution on or about June 30, 2006, together with a payment of "holdover rent" in the amount of $196,613.52. The proposed Fourth Lease Modification provided FedEx with a credit for the holdover rent paid for the months between October 31, 2005 and June 30, 2006. Defendants contend that 225 refused to execute the proposed Fourth Lease Modification, but kept the $196,613.52. Thus, FedEx filed the instant action against 225 and Reckson. Defendants indicate that on or about January 16, 2008, FedEx settled this action with respect to 225. The settlement provided that 225 would execute a revised version of the Fourth Lease Modification, which did not include any credit to FedEx for holdover rent paid, and would keep the $196,613.52. The Court notes that no party has submitted a written settlement agreement or any other document evidencing the terms of the settlement between FedEx and 225, save the Fourth Lease Modification executed by both parties. Defendants allege that subsequent to the settlement, FedEx amended its complaint to assert essentially the same claims against Reckson, 225's agent, that it had previously asserted against 225.

Further, FedEx has now named SLG as a defendant herein, claiming that SLG is a successor-in-interest to Reckson which acquired all of its assets on or about January 25, 2007. Defendants claim that these allegations are false. Defendants inform the Court, by affidavit of SLG's general counsel and executive vice president, that Reckson merged into a subsidiary of SLG in connection with a public merger in 2007, and no longer exists. Reckson was the general partner of an entity known as "Reckson Operating Partnership, L.P." With respect to the Option Contract, defendants allege that the agreement was between Reckson Operating Partnership, L.P., not Reckson, and 225, concerning the building, and that FedEx was neither a party nor a signatory to the Option Contract.

Defendants have filed the instant motion to dismiss the Amended Verified Complaint, alleging that FedEx has asserted no valid claims against defendants. Defendants allege that at all times relevant, Reckson was acting as an agent for a disclosed principal, 225, and that FedEx dealt with Reckson solely in that capacity. Defendants argue that even if all the allegations of the Amended Verified Complaint are deemed true, the Amended Verified Complaint fails to state causes of action for breach of contract or material omission/ misrepresentation against either Reckson or SLG. Defendants contend that the first and second causes of action for breach of contract must fail, as no contract is alleged to have been entered into between FedEx and defendants, and further, that Reckson has no liability to FedEx as a disclosed agent for 225. Similarly, defendants contend that the third and fourth causes of action for material omission/misrepresentation must also fail, as the only omission alleged in the third cause of action is an omission alleged to have been made by 225, and the fourth cause of action fails to specify material facts about the alleged misrepresentations by Reckson or the necessary allegations regarding Reckson's conduct pursuant to CPLR 3016 (b). Finally, defendants argue that as FedEx has since settled with 225, it should not be able to seek damages from Reckson as 225's disclosed agent. Based upon the foregoing, defendants seek dismissal of FedEx's Amended Verified Complaint in its entirety.

In opposition, FedEx alleges that at all times it negotiated in good faith with Reckson as the disclosed agent of 225, and relied upon the representations made by Reckson in the negotiation of the Fourth Lease Modification. FedEx alleges that Reckson represented to FedEx that the terms of the Fourth Lease Modification had been agreed upon and would be fully executed by 225 once FedEx sent the $196,613.52 to Reckson. FedEx further alleges that it deposited $196,613.52 with Reckson upon the condition that such funds should

not be released unless and until 225 executed the Fourth Lease Modification. However, FedEx claims that in derogation of those terms and conditions, Reckson released the funds to 225 without securing the execution of the Fourth Lease Modification, to the detriment of FedEx. Therefore, FedEx argues that Reckson failed to act within the scope of the authority granted by 225, and as such, has become personally liable to FedEx. Furthermore, FedEx alleges that Reckson represented to it that Reckson would reimburse FedEx for its payment of penalty holdover rent, and that Reckson would purchase the subject building pursuant to its Option Contract, but failed to do either.

Moreover, FedEx alleges that it was injured as a result of its reliance upon the misrepresentations and omissions of Reckson. FedEx claims that in anticipation that the Fourth Lease Modification would be executed by 225, FedEx delivered to 225 approximately one-third of the premises and no longer occupies this space. In addition, FedEx contends that it reduced its workforce at the premises by approximately one-third and scaled back the scope of its business at the premises. The Court notes that the proposed Fourth Lease Modification, as agreed to by FedEx on or about June 30, 2006, provided for a reduction in the square footage of the premises. FedEx alleges that it was deprived the opportunity to seek a substitute location in a timely manner, or to prepare for the termination of occupancy at the premises. As such, FedEx argues that it has pled its material misrepresentation causes of action with sufficient particularity and detail.

A review of the Amended Verified Complaint herein reveals that FedEx repeatedly acknowledges that it negotiated all four of the Lease modifications with Reckson as 225's disclosed agent, and that it had "no reason to believe" 225's agent, Reckson, did not have full authority to act for or bind 225 with respect to the premises or the Lease or the negotiations thereof. FedEx alleges that at no time did 225 communicate a change in agency status or a revocation of agency status to FedEx.

Regarding that branch of defendants' motion to dismiss pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; *see Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d

330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

Next, subdivision (b) of CPLR 3016 provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). As stated by the Court of Appeals in *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 (2009), "[t]he purpose underlying CPLR 3016 (b) is to inform a defendant of the complained-of incidents . . . Although there is certainly no requirement of 'unassailable proof' at the pleading stage, the complaint must allege the basic facts to establish the elements of the cause of action" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, quoting *Pludeman v Northern Leasing Sys., Inc.* 10 NY3d 486 [2008]).

In the instant application, the Court finds that the documentary evidence submitted by defendants, to wit: the Lease, the Fourth Lease Modification and the Option Contract, do not resolve all factual issues raised herein as a matter of law. Accordingly, this ground cannot serve as a basis for dismissal. However, upon favorably viewing the facts alleged in FedEx's Amended Verified Complaint, and even affording FedEx "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that the first and second causes of action fail to sufficiently plead causes of action for breach of contract, and that the third and fourth causes of action fail to sufficiently plead causes of action for material omission/misrepresentation.

With respect to the first and second causes of action, to establish the existence of a contract under New York law, a plaintiff must allege an offer, acceptance, consideration, mutual assent, and an intent to be bound. That meeting of the minds must include agreement on all essential terms (*see e.g. Kowalchuk v Stroup*, 61 AD3d 118 [2009]). The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (*see e.g. Flomenbaum v New York University*, ___ AD3d ___,

2009 NY Slip Op 8975 [1st Dept]; *Hecht v Components Intern., Inc.*, 22 Misc 3d 360 [Sup Ct, Nassau County 2008]). In order to survive a motion to dismiss for failure to state a cause of action, a complaint alleging breach of contract need only contain statements sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action; such complaint is not required to meet any heightened level of particularity in its allegations (see CPLR 3013, 3016, 3211 (a) (7); *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 [2009]).

FedEx's first cause of action for breach of contract alleges that "225's failure to honor its obligations in providing FedEx exclusive use and occupancy of the premises under the Lease, pursuant to the terms of the proposed Fourth Lease Modification constitutes breach of contract." FedEx alleges that as a result of the foregoing, FedEx has been severely damaged; however, FedEx seeks judgment not against 225, but against Reckson and SLG in the amount of $10 million. FedEx's second cause of action, also for breach of contract, alleges that "Reckson's failure to exercise its option to purchase the building . . . and by such exercise, to honor its obligation to provide FedEx exclusive use and occupancy of the Premises under the Lease pursuant to the terms of the proposed Fourth Modification, and to compensate FedEx for all costs associated with obtaining 225's consent to such proposed Fourth Modification constitutes breach of contract." FedEx alleges that as a result of the foregoing, FedEx has been severely damaged and similarly seeks judgment against Reckson and SLG in the amount of $10 million.

The first cause of action fails to allege that any contract was entered into between FedEx and Reckson or SLG, yet seeks to hold Reckson and SLG liable for 225's alleged breach of the Fourth Lease Modification. However, it is well-settled that when an agent acts on behalf of a disclosed principal on a contract, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to be so bound (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1 [1964]; *Sargoy v Wamboldt*, 183 AD2d 763 [1992]; *City Univ. v. Finalco, Inc.*, 93 AD2d 792 [1983]). This is so even if the agent, in the course of his agency, induces the principal to breach the contract (*see Shaw v Merrick*, 60 AD2d 830 [1978]). Here, the record is devoid of any clear and explicit evidence of Reckson's intention to be personally bound in connection with its negotiation of the Fourth Lease Modification on behalf of 225. Therefore, FedEx's first cause of action must fail.

FedEx's second cause of action seeks to hold Reckson and SLG liable for breach of contract based upon Reckson's failure to exercise its option to purchase the building pursuant to the Option Contract. Again, FedEx fails to allege that any contract was entered into between FedEx and Reckson or SLG. FedEx was a stranger to the Option Contract, as the Option Contract was an agreement between Reckson Operating Partnership, L.P. and 225. Moreover, the terms of the Option Contract explicitly provide that the Option Contract was not intended to provide or create any third-party beneficiary rights or any other rights in any other person or entity. As such, the Court finds that the second cause of action must also fail.

Regarding the third and fourth causes of action sounding in fraud, the essential elements are: (1) a misrepresentation or a material omission of fact that was false and known to be false by the defendant; (2) made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury (*see e.g. Deutsche Bank Natl. Trust Co. v Sinclair*, ___ AD3d ___, 2009 NY Slip Op 9419 [2d Dept]; *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389 [2005]). Where it is alleged that a defendant fraudulently concealed a material fact, in addition to the aforementioned elements, a plaintiff must also establish that the defendant had a duty to disclose the subject information (*see Sitar v Sitar*, 61 AD3d 739 [2009]; *E.B. v Liberation Publs.*, 7 AD3d 566 [2004]; *Swersky v Dreyer & Traub*, 219 AD2d 321 [1996]).

FedEx's third cause of action alleges that despite 225's knowledge that a controversy existed between 225 and Reckson with respect to the future owner of the building, 225 omitted this material fact in the negotiation of the Fourth Lease Modification. FedEx further alleges that 225 "led FedEx to believe that its good faith negotiation with 225 and Defendant Reckson" would result in a binding agreement. However, the third cause of action further alleges that the foregoing represents material and significant omissions by *Reckson*, and seeks judgment against Reckson and SLG in the amount of $10 million. As is evident from the foregoing, FedEx has not alleged any material omissions or misrepresentations made by Reckson or SLG. Therefore, the Court finds that FedEx's third cause of action must be dismissed.

Finally, FedEx's fourth cause of action alleges that despite Reckson's knowledge that a controversy existed between 225 and Reckson with respect to the future owner of the building, Reckson: (1) omitted this material fact

in the negotiation of the Fourth Lease Modification; (2) failed to disclose to FedEx that 225 had revoked the powers of agency to Reckson during the negotiation of the Fourth Lease Modification; and (3) failed to disclose that 225 would tie the Fourth Lease Modification to Reckson's exercise of its option to purchase. Moreover, FedEx alleges that "[w]ith knowledge that it had not yet determined whether or not it would in fact exercise its option to purchase," Reckson promised and assured FedEx that: (1) the terms of the Fourth Lease Modification, including extensions and reallocation of the footage of the premises, would be honored either by 225 as current owner of the building, or Reckson as future owner; and (2) that any monies paid by FedEx to 225 on account of holdover penalty rents would be fully compensated to FedEx by Reckson by credits against rent during the extended term of the Lease. FedEx claims that if Reckson did not have the authority to negotiate the Fourth Lease Modification on behalf of 225, then the foregoing assurances were delivered by Reckson on behalf of itself, as a putative future owner of the building, and were reasonably relied upon by FedEx. The fourth cause of action goes on to allege that the foregoing represents material and significant misrepresentation and omission of fact by Reckson, and seeks judgment against Reckson and SLG in the amount of $10 million.

With respect to the alleged omissions by Reckson during the negotiations of the Fourth Lease Modification, the Court finds that during this arms-length transaction, Reckson, as agent for 225, had no duty to disclose such information to FedEx. Thus, these purported omissions cannot support a fraudulent concealment claim against defendants (*see Sitar v Sitar*, 61 AD3d 739, *supra*). In addition, the Court finds that the purported misrepresentations by Reckson contained in the fourth cause of action, in the form of "promises and assurances" also cannot support a fraud cause of action, as mere promissory statements as to what will be done in the future are not actionable (*Sabo v Delman*, 3 NY2d 155 [1957]; *Adams v Clark*, 239 NY 403 [1925]; *Braddock v Braddock*, 60 AD3d 84 [2009]; *Brown v Lockwood*, 76 AD2d 721 [1980]). Although an assurance given as to a future benefit may furnish a basis for recovery on a fraud theory where the assurance constitutes a deliberate misrepresentation of the defendant's present intention, i.e., where the defendant at the time of giving the assurance intends that it will not be fulfilled (*see e.g. Tribune Printing Co. v 263 Ninth Ave. Realty*, 57 NY2d 1038 [1982]), no such allegations are contained in the fourth cause of action. The fourth cause of action fails to allege that these promises and assurances were false at the time they were uttered and that Reckson knowingly uttered such falsehoods. Instead, the complaint recites that "[w]ith knowledge that it had not yet determined whether or

not it would in fact exercise its option to purchase," Reckson made the promises. The complaint does not allege that Reckson knew it would not purchase the building, or that it was unable to purchase the building, and made the representations thereafter. Thus, the Court finds that the element of falsity is lacking (*cf. Sabo v Delman*, 3 NY2d 155, *supra*).

Moreover, as discussed, Reckson did in fact have an option to purchase the building. According to the terms of the Option Contract, Reckson's option period was defined as a ten-year period beginning on the date of the contract, or June 2, 1995 through June 2, 2005. However, pursuant to an amendment to the Option Contract dated November 10, 2003, Reckson's option period was amended to the period beginning on November 10, 2006 through and including June 2, 2010. As such, in 2005 during the negotiation of the Fourth Lease Modification, Reckson possessed an option to purchase the building but the option was not yet exercisable.

In view of the foregoing, defendants' motion to dismiss FedEx's Amended Verified Complaint is **GRANTED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: January 19, 2010

HON. JOSEPH FARNETI
Acting Justice Supreme Court