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

PRESENT: Hon Joan A Madden Justice PART 11

Index Number : 100414/2010
COOL RESTAURANT
VS.
VISCOSO, SAVINO
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 is decided w/ attached decision

FILED
MAY 25 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 18, 2010

HON. JOAN A. MADDEN J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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COOL RESTAURANT CORP.,

Plaintiff,

INDEX NO.. 100414/10

-against-

SAVINO VISCOSO and RITA VISCOSO and ANDO LTD.,

Defendants

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JOAN A. MADDEN, J.:

In this action alleging fraud in connection with a lease agreement, defendants move pursuant to CPLR 3211(a)(1) to dismiss the complaint based on a defense founded upon documentary evidence, for failure to state a cause of action and for lack of jurisdiction over defendant Rita Viscoso. Plaintiff opposes the motion, which is granted for the reasons below.

Defendants Savino Viscoso and Rita Viscoso are the owners of 140 West 13th Street, New York, NY ("Building"). Plaintiff is the tenant of a restaurant located on the ground floor of the Building ("the Restaurant") pursuant to a written commercial lease between the individual defendants and the plaintiff dated July 1, 2002 ("the Lease"). Also on July 1, 2002, plaintiff purchased the restaurant from Ando Ltd ("Ando"), a corporation whose individual shareholders are the defendants.

In this action, plaintiff seeks damages in connection with defendants' purported misrepresentations about means of egress from the rear of the restaurant and easements appurtenant to the property. Specifically, the complaint alleges that "prior to the execution by the Plaintiff of the Lease for the Restaurant, Defendants actively represented to Plaintiff that the Restaurant had egress from the rear of the Restaurant into the open area located at the rear of the structure occupied by the Restaurant pursuant to an easement which belonged or was appurtenant to the Property (Complaint, ¶ 6). It is further alleged that "the leasehold for the Restaurant also

included an easement from the rear of the Restaurant into the adjoining yard, thereby providing the Restaurant with a second means of egress" (Id, ¶ 15). The complaint also alleges that on an unspecified date that the individual defendants "represented to Plaintiff that the existence of the easement in favor of the Property had been litigated and that the Viscoscos had prevailed in said litigation" (Id, ¶ 7), but that prior to the execution of the lease "the Viscoscos knew that they had abandoned the Easement Action and that issue of whether there was an easement in favor of the Property in which Restaurant was located had not decided in their favor." (Id, ¶ 14). The complaint then alleges that "in the event that it is determined that the Restaurant lacks a second means of egress from the rear, the Restaurant's legal capacity will be reduced to seventy-five persons (from 120 persons)" ((Id, ¶ 18).

Defendants move to dismiss arguing, inter alia, that the provisions of the Lease provide a complaint defense to the action. Specifically, defendants rely on Paragraph 20 of the Lease entitled "No Representations by Owner" which states, in relevant part, that "neither the Owner nor the Owner's agents have made any representations or promises with respect to the physical condition of the Building, the land upon which it is erected or the demised premises...or any other matter or thing relating to the premises...and no rights, easements or licenses are acquired by the Tenant by implication or otherwise except as expressly set forth in the Lease. Tenant has inspected the building and the demised premises and is throughly acquainted with their condition and agrees to take same 'as is'. In addition, defendants points to Paragraph 62 of a rider to the lease entitled "AS IS" condition which states, in relevant part: "The Tenant represents that Tenant is familiar with the physical condition of the premises without any representation by the Landlord as to the condition of the demised premises or the legal suitability of the demised premises for the intended purpose."

In addition, defendants rely on paragraph 63 states that the "[t]he Landlord makes no representation as to the legal status of the ground floor at the present time. The Tenant may

make any and all searches or due diligence to investigate the legal status of the premises." Defendants also point to paragraph 53 of the rider which states that:

> This lease contains the entire agreement of the parties hereto with respect to the letting and hiring the demise premises described above, and this lease may not be amended, modified, released, or discharged, in whole or in part, except by an instrument in writing signed by the parties hereto, their respective successors or assigns.

Plaintiff opposes the motion arguing that the complaint alleges misrepresentations that were made after the lease was executed.

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be terminated liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, "'[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference'" Morgenthow & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff'd, 94 NY2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.'" Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

"Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms." Beal Sav. Bank v. Sommer, 8 NY3d 318, 324 (2007); see Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co., 1 NY3d 470, 475 (2004).

When, as here, the contract contains a merger clause and provides that the purchaser has inspected the premises and agreed to take it "as is," there can be no cause of action for fraudulent inducement based on a purported material omission. See East 15360 Corp. v Provident Loan Society, 177 AD2d 280, 281 (1st Dept 1991)(dismissing claim for fraudulent inducement based on the seller's failure to obtain permits for the removal of an elevator, where this defect was discovered prior to the closing date but after the contract was signed containing a provision that the purchaser inspected the premises and agreed to take it "as is"); see also Dannan Realty Corp. v Harris, 5 NY2d 317 (1959).

Moreover, insofar as the complaint alleges fraud after the inception of the Lease, it is insufficient to state a cause of action as no damages have been alleged as a result of such fraud. In fact, the complaint only alleges that the Restaurant will lose seating capacity in the event that it is determined that the Restaurant lacks a second means of egress.

The complaint is also dismissed as to Ando since although Ando sold the Restaurant's assets to plaintiff, the complaint is devoid of any allegations that Ando made misrepresentations about any easements in connection with such sale. Furthermore, contrary to plaintiff's position at oral argument, paragraphs 3, 4, 21, 22 and 23 do not contain any allegations from which it could be inferred that such misrepresentations were made.

Accordingly, the motion to dismiss must be granted and the court need not reach whether it must be dismissed as against Rita Viscoso for lack of proper service.

In view of the above, it is

ORDERED that the motion to dismiss the complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety.

DATED: May 18, 2010

HON. JOAN A. MADDEN
J.S.C.