

Dumann Realty, LLC v 1375 Mgt. Group, LLC

2010 NY Slip Op 31838(U)

July 9, 2010

Supreme Court, New York County

Docket Number: 106001/09

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 106001/2009
DUMANN REALTY LLC
vs.
1375 MANAGEMENT GROUP, LLC
SEQUENCE NUMBER : 001
STRIKE ANSWER

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

n this motion to/for _____

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

PAPERS NUMBERED
1, 2
3, 4
6

Cross-Motion: Yes No

5

Upon the foregoing papers, it is ordered that this motion *and cross motion are*
decided to the extent set forth in the attached
memorandum decision.

FILED
JUL 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: [Signature]

[Signature]
JUDGE DORIS LING-COHAN 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: IAS PART 36

-----X
DUMANN REALTY, LLC,

Plaintiff,

-against-

1375 MANAGEMENT GROUP, LLC, HARRY
ASHKENAZI, BISTRO NEW YORK
INTERNATIONAL, INC., BISTRO
MARKETPLACE 1375, INC. and
STATECOURT ENTERPRISE, INC.,

Defendants

Index No. 106001/09

Motion Seq. No. 001

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-----X
DORIS LING-COHAN, J.:

Plaintiff moves for an order, *inter alia*, striking the Answer and Affirmative Defenses of all defendants, or, in the alternative, setting a date certain for compliance or scheduling a case conference, based on defendants' failure to provide discovery.¹ Plaintiff further seeks leave to amend its complaint, pursuant to CPLR 3025(b). Defendant Statecourt Enterprise, Inc. ("Statecourt") cross-moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint as to it and seeks sanctions to be imposed upon plaintiff.

This action is based upon a breach of a brokerage fee agreement (the "Agreement") entered into between plaintiff and defendant 1375 Management Group, LLC ("1375 Management"), and signed by defendant Harry Ashkenazi ("Ashkenazi"), as 1375 Management's principal. Pursuant to the Agreement, plaintiff was to be the exclusive leasing agent to find a sub-tenant for the property being rented by 1375 Management at 1375 Broadway, New York, New York. Defendant Statecourt Enterprise, Inc. ("Statecourt") is the net lessee and landlord of 1375 Broadway. The Agreement stated that defendant 1375 Management agreed to

¹ At a preliminary conference held on March 12, 2010, plaintiff withdrew this first branch of its motion, as the parties entered into a discovery schedule.

pay the commission set forth in the commission agreement to plaintiff when a lease agreement was fully executed between defendant 1375 Management and a sub-tenant of the premises. The commission agreement provided for defendant 1375 Management to pay plaintiff a total of \$432,998.45.

Plaintiff alleges that on November 9, 2007, it produced defendants Bistro New York and Bistro Marketplace (the "Bistro Defendants") as potential tenants for the premises. Plaintiff further alleges that on April 18, 2008, defendant 1375 Management fully executed a sub-lease agreement with the Bistro Defendants, which was consented to by the landlord, Statecourt. Plaintiff alleges that, as it fully performed under the contract, it is entitled to the brokerage commission, pursuant to the agreements between the parties.

When defendant 1375 Management failed to pay plaintiff the commission, plaintiff commenced this action for: breach of contract against 1375 Management and Ashkenazi, quantum meruit against all defendants, account stated against all defendants, and unjust enrichment against all defendants. Plaintiff now moves to amend its complaint to include four causes of action: breach of promise against 1375 Management and Ashkenazi, tortious interference with contract against Statecourt and the Bistro Defendants, misrepresentation against all defendants, and breach of covenant of good faith and fair dealing against all defendants.

Motion to Amend Complaint

Leave to amend pleadings is generally freely granted, absent prejudice and surprise resulting from the delay. *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 (1983); *Antwerpse Diamantbank, N.V. v Nissel*, 27 AD3d 207, 208 (1st Dep't 2006). Nevertheless, in determining whether to grant leave to amend, a court must examine the merits of the proposed amendment "in order to conserve judicial resources . . . and leave to amend will be denied where

the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law.” *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 (1st Dep’t 2001) (internal citations omitted); *Non-Linear Trading Co. v Braddis Assocs., Inc.*, 243 AD2d 107, 116 (1st Dep’t 1998). A motion for leave to amend pleadings must be accompanied by an affidavit of merit and evidentiary proof that could be considered on a motion for summary judgment. *See Marinelli v Shifrin*, 260 AD2d 227, 229 (1st Dep’t 1999). Leave to amend a pleading should be denied where the proposed amendment clearly lacks merit. *See Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 (1st Dep’t 2007).

Defendant Ashkenazi opposes any amendment that includes causes of action against him individually, in particular, the fifth, seventh and eighth causes of action. As plaintiff has not shown that defendant Ashkenazi took any actions in his individual capacity, any proposed claim against him individually lacks merit. Plaintiff attached to its first amended verified complaint: the Agreement, the commission agreement, and the proposal of the Bistro Defendants as potential tenants to 1375 Management. None of these documents demonstrates or even suggests that defendant Ashkensazi, at any time, acted in his individual capacity instead of on behalf of the company. Therefore, plaintiff’s motion to amend its complaint is denied to the extent that the fifth, seventh and eighth causes of action are brought against Ashkenazi.

Defendant 1375 Management opposes the amendment, with regard to the inclusion of the second, fourth and seventh causes of action. The second and fourth causes of action were included in the original complaint and, thus, 1375 Management seeks inappropriate relief in essentially attempting to dismiss those causes of action by opposing plaintiff’s amended complaint as to them. As to the seventh cause of action for misrepresentation, such claim may proceed, as it does not lack merit on its face. Plaintiff has alleged that defendant 1375 Management, in its communications with plaintiff, intentionally misrepresented to plaintiff that

the Bistro Defendants were financially unable to go forward with the lease, so that it would not have to pay plaintiff its fee. While this cause of action is based on the same facts as the breach of contract cause of action, plaintiff is entitled to allege alternative theories in its complaint.

The Bistro Defendants have submitted an affidavit by Kevin K. Kim, an officer and director of the Bistro Defendants, in opposition to plaintiff's motion to amend the complaint. While the affidavit focuses on the other defendants and supports their opposition to plaintiff's motion, the affiant fails to attest to any facts that would demonstrate that the new additional claims against it lack merit. Thus, plaintiff's motion to amend the complaint to add the sixth, seventh and eighth causes of action against the Bistro Defendants is granted.

As to defendant Statecourt, the motion to amend the complaint is denied. With regard to the sixth cause of action for tortious interference with a contract, plaintiff has failed to allege facts that would support such a cause of action. "Active and intentional procurement of a breach is an essential elements of a cause of action alleging tortious interference with contract." *First Keystone Consultants, Inc. v DDR Constr. Svcs*, 2010 NY Slip Op 05508, *3 (2d Dep't 2010). Plaintiff has not alleged such "active and intentional procurement of a breach," but, instead, only alleged, in a conclusory fashion, that defendant Statecourt tortiously interfered with its contract with 1375 Management. *Id.*

The seventh and eighth causes of action against Statecourt also lack merit. Plaintiff alleges in its seventh cause of action for misrepresentation that "[u]pon information and belief, all defendants deliberately misrepresented to the Plaintiff that the original sublease could not be completed because the tenant Bistro did not have the funds to complete the deal." First Am Verified Compl ¶ 61. Yet, plaintiff has not asserted what statements or in what manner defendant Statecourt, in particular, made misrepresentations to it, as it appears these two parties had little, if any, communications with each other. Further, the only evidentiary proof submitted

by plaintiff is *not* any correspondence between it and defendant Statecourt directly, but merely inquiries between the parties into whether Statecourt had approved the lease (Richard Du Aff in Opp, Exhs B and C), since as the landlord, Statecourt was required to give approval, although it could not unreasonably withhold its consent (Lewis A. Lindenberg Affirmation in Support of Cross Motion, Exh B, Lease Agreement ¶ 8). Lastly, as to the eighth cause of action for breach of covenant of good faith and fair dealing, plaintiff bases this cause of action on the alleged fact that “all defendants deliberately avoided their obligation to pay the brokerage fee by conspiring to misinform the Plaintiff.” First Am Verified Compl ¶ 66. However, as plaintiff has admitted that there was no contract between it and Statecourt (Richard Du Aff in Opp to Cross Motion ¶ 10), there was no obligation for Statecourt to pay plaintiff any brokerage fee. Thus, the pleading as to Statecourt fails to state a breach of covenant of good faith and fair dealing as to defendant Statecourt.

Cross Motion for Summary Judgment

As to defendant Statecourt’s cross motion for summary judgment, it is denied without prejudice, on procedural grounds. Defendant Statecourt’s motion papers failed to include a notice of cross motion. Defendant Statecourt’s failure to properly notice plaintiff as to the relief it was seeking against it precludes the granting of such relief. CPLR 2211 provides that a “motion on notice is made when a notice of the motion or an order to show cause is served.” Pursuant to CPLR 2214, a notice of cross motion must include “the relief demanded and the grounds therefor.” The CPLR also references the requirements of a notice of cross motion in CPLR 2215, which provides that “a party may serve upon the moving party *a notice of cross-motion demanding relief.*” Moreover, CPLR 2214(b) requires that a “notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard.” Furthermore, a cross motion for summary judgment at this juncture is

premature as discovery has not been completed and the complaint has been amended. Thus, cross-movant may so move once discovery is completed, if appropriate.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to include the fifth, seventh and eighth causes of action against 1375 Management Group, LLC and the sixth, seventh and eighth causes of action against Bistro New York International, Inc. and Bistro Marketplace 1375, Inc., and to this extent the amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to all additional proposed causes of action as to defendants Harry Ashkenazi and Statecourt Enterprise, Inc., and those causes of action are stricken; and it is further

ORDERED that the defendants shall answer their amended complaints or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that defendant Statecourt Enterprise Inc.'s cross motion for summary judgment is denied without prejudice; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry, upon all parties.

Dated: _____

7/9/10

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JUL 13 2010
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Hon. Doris Ling-Cohan, J.S.C.