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

PRESENT: SALIANN SCARPULLA Justice

PART 19

Index Number : 600807/2008

2350 FIFTH AVENUE LLC

VS.

2350 FIFTH AVENUE CORPORATION

SEQUENCE NUMBER : # 004

DISMISS COMPLAINT

INDEX NO. 600807-08

MOTION DATE

MOTION SEQ. NO. #004

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

FILED
JUL 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

~~motion and cross-motion are~~ is decided in accordance with accompanying memorandum decision.

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

Dated: July 9, 2010

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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2350 FIFTH AVENUE LLC,

Plaintiff,

- against -

2350 FIFTH AVENUE CORPORATION, ALEXANDER KARTEN and JOSEPH KARTEN,

Defendants.

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Index No.: 600807/08
Submission Date: 04/28/10

DECISION AND ORDER

For Plaintiff:
Penn Proefriedt Schwarzfeld & Schwartz
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New York, NY 10036

For Defendant:
Mitchell Silberberg & Knupp LLP
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Papers considered in review of this motion for summary judgment:

Notice of Motion..... 1
Aff. in Supp..... 2
Aff. in Opp..... 3
Reply Aff..... 4

HON. SALIANN SCARPULLA, J.:

In this action involving a commercial lease dispute, defendant 2350 Fifth Avenue Corporation ("Landlord") and defendants Alexander and Joseph Karten (the "Kartens") move to dismiss the amended complaint (the "Amended Complaint") pursuant to CPLR 3211(a)(1), (5) and (7).

In December 2001, Plaintiff 2350 Fifth Avenue LLC ("Tenant") and Landlord entered into a thirty-year lease (the "Lease") on the property located at 2350 Fifth Avenue, New York, New York (the "Building"). As Landlord's representatives, the

Kartens negotiated the Lease with Tenant. The Lease divided the Building into two spaces: the Demised Space and the Option Space. Tenant had the right to immediately occupy the Demised Space, and an option to add the Option Space to the Lease if it ever became vacant. The Lease also specifically referenced two New York State Department of Environmental Conservation ("DEC") consent orders signed on behalf of Landlord, which designated the Building as an Inactive Hazardous Waste Disposal Site, and provided that Tenant accepted the Building on an "as is" basis. Further, Tenant agreed not to make structural alterations to the Building without the consent of Landlord.

When the Option Space became vacant in June 2005, the parties amended the Lease to reflect Tenant's decision to rent the Option Space. In June 2006, while preparing to use the Option Space, Tenant met with representatives from the DEC, who advised Tenant that certain uses of the Option Space were not allowed due to the two DEC consent orders referenced in the Lease. In September 2006, Tenant then advised Landlord of its intention to build a mini-storage facility in the Option Space, and Landlord responded with a letter warning that the Lease did not permit making structural alterations to the Building without the Landlord's consent. Tenant treated the correspondence as a notice to cure, and initiated an action ("Action One") by order to show cause seeking a Yellowstone injunction.

The Court (Edward Lehner, J.) denied the order to show cause on October 20, 2006, holding that Landlord's letter was not a notice to cure and thus relief was not necessary. Tenant then amended its complaint in Action One to seek the following: (1) a judicial declaration that the proposed alterations to the Option Space did not breach the

Lease; (2) money damages for the lost revenues caused by Landlord's alleged refusal to consent to the alterations; (3) money damages in an amount equal to the rent for the Option Space from September 15, 2006 until the date of a aforementioned judicial declaration due to the constructive eviction of Tenant; and (4) an injunction to prevent Landlord from terminating the Lease on account of the alterations.

Tenant moved for summary judgment on the complaint, and Landlord cross-claimed to dismiss the last three causes of action. After hearing oral argument on February 23, 2007, Judge Lehner issued a written order on March 26, 2007 denying Tenant's motion for summary judgment and granting Landlord's motion to dismiss the last three causes of action, emphasizing that the Landlord's mere assertion that the proposed alterations were structural was not a breach of contract, and Tenant did not need Landlord's permission to make non-structural alterations. Judge Lehner also stated in dicta that "it would appear (without deciding) that the renovations proposed would involve structural alterations." Additionally, Judge Lehner made various comments during oral argument on February 23, 2007, alluding to his opinion that the alterations were likely structural.

Tenant appealed the March 26, 2007 order, but did not perfect the appeal at that time. Tenant and Landlord then engaged in settlement discussions, during which Landlord offered to release Tenant from its Option Space lease obligation provided that Tenant also reduce the 30-year lease agreement to a five-year term for the Demised Space.

On or about March 3, 2008, Tenant commenced this action seeking the following: (1) money damages for economic duress caused by Landlord's settlement demand; (2) a judicial declaration stating that the alterations to the Option Space did not constitute waste due to the restrictions of the DEC consent orders; (3) money damages for rent of the Option Space caused by the Kartens' and Landlord's fraudulent misrepresentation that it could be used as a self-storage facility; (4) rescission of the Lease Amendment because of the parties' mutual mistake that the Option Space could be used as a self-storage facility; and (5) money damages for rent of the Option Space caused by the Kartens' and Landlord's fraud in not disclosing that the Building was an inactive hazardous waste site.

Additionally, Tenant returned to the trial court to adjudicate the first cause of action asserted in Action One, and on February 10, 2009, after completion of a bench trial, the Court held that Tenant's proposed alterations to the Building were non-structural and therefore not barred by the Lease. Tenant then returned to its appeal of the dismissal of the three other claims in Action One, but the Appellate Division dismissed the appeal due to long inactivity.

On March 5, 2009, Tenant amended its complaint in this action to seek (1) compensatory damages in the form of returned rent on account of Landlord's threat to terminate the lease if Tenant altered the Option Space; (2) punitive damages for Landlord's actions during settlement negotiations which created economic duress; and (3) compensatory damages from the Kartens for concealing environmental conditions affecting the Building, namely the inactive hazardous waste status.

In May 2008, after Tenant failed to pay rent, Landlord issued a notice to cure. Tenant then sought *Yellowstone* relief in this, the second action. On May 16, 2008, the Court (Lehner, J.) denied the *Yellowstone* application and held that Tenant must continue to pay its rent.

Landlord now moves to dismiss the complaint, arguing that res judicata and collateral estoppel preclude Tenant from asserting its first cause of action because the Court heard and dismissed Tenant's claim for breach of contract in Action One. Additionally, Landlord argues Tenant's second cause of action based upon economic duress fails to plead the requisite elements. In particular, Landlord argues that second cause of action should be dismissed because Landlord had a legitimate belief that the alterations were structural, Tenant never agreed to Landlord's settlement terms, Tenant had an alternative to accepting Landlord's settlement terms, and the claim only seeks punitive damages, which is not allowed by New York State law.

As to Tenant's third cause of action for fraud, Landlord argues that this claim should be dismissed because Landlord did not conceal the inactive hazardous waste status of the Building, and in fact, the Lease specifically references the DEC consent orders. Landlord asserts that the reference to the DEC consent orders in the Lease at the very least put Tenant on inquiry notice of the environmental issues with the Building. Further, Landlord argues the alleged fraud is barred by the applicable Statute of Limitations.

Discussion

Pursuant to CPLR 3211(a)(5) the Court may dismiss an action on the ground of res judicata or collateral estoppel. The doctrine of res judicata precludes a party from

bringing claims on matters already litigated or which should have been raised in former litigation. *Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 N.Y. 2d 343, 347-348 (1999). The collateral estoppel doctrine bars relitigation of an issue decided in a previous action. *Parker*, 93 N.Y. 2d at 349.

To determine res judicata issues, New York adheres to the transactional analysis approach, which provides that "once a court brings a claim to final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981) (internal citations omitted). In determining what amounts to a "transaction" or a "series of transactions," courts consider "'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Reilly v. Reid*, 45 N.Y.2d 24, 29 (1978) (quoting Section 61 of Restatement of Judgments, Second (Tent. Draft No. 1, 1973)). *See also Smith v. Russell Sage College*, 54 N.Y.2d 185, 193-194 (1981) (res judicata barred a second suit where both suits were found to be part of the same "factual grouping" even though the second was "embellished by later events;" the overall transaction formed a convenient trial unit.)

Here, Tenant's first cause of action in the amended complaint relates to Landlord's threat to terminate the Lease if Tenant altered the Option Space, and seeks a return of the rent paid to Landlord for the Option Space from September 15, 2006 until the Court issued a judicial declaration that the proposed alterations were non-structural on February

10, 2009. Tenant's third cause of action in Action One sought returned rent for this same time period and related to Landlord's constructive eviction of Tenant from the Option Space. Therefore, the two suits form a convenient trial unit and arise from the same transaction or series of transactions for purposes of res judicata. The underlying facts of both suits originated from the same agreement, the Lease signed in December 2001, and relate to the same dispute regarding renovations to the Option Space. Additionally, the chief participants – Tenant and Landlord – are the same in Action One and this action, and Tenant's motivation for bringing the claims in both suits – to recover rent money paid to Landlord from September 15, 2006 through February 10, 2009 – is the same. *See Smith*, 54 N.Y.2d at 193-194. Further, as Landlord had threatened to terminate the Lease if Tenant altered the Option Space at the time that Tenant commenced Action One, Tenant could have asserted the first cause of action in Action One.

Even if res judicata did not bar the Tenant's first cause of action, it is barred by collateral estoppel. Collateral estoppel allows an issue decided in a prior action to control in a later action where the facts do not involve the same "transaction" or "series of transactions," but a main issue in both actions is the same. *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485 (1979). "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling." *Buechel v. Bain*, 97 N.Y.2d 295, 303-304 (N.Y. 2001) (citing *Gilberg v. Barbieri*, 53 N.Y.2d 285, 291 (1981)).

Justice Lehner already decided the identical issue presented in Tenant's first cause of action in Tenant's third cause of action in Action One. Even considering that the final resolution of Action One was that the proposed alterations did not violate the Lease, the Court still decided on March 26, 2007 that the Landlord's mere contention that the proposed alterations were structural and violated the Lease was not a breach of contract, and the Tenant deserved no damages in the form of returned rent. For this Court to decide otherwise in this action would result in inconsistent results, and collateral estoppel bars this Court from doing so.

With respect to whether the Tenant had a full and fair opportunity to litigate the rent claim in Action One, the Court notes that the parties engaged in extensive proceedings relating to the third cause of action in Action One. Tenant submitted arguments to the Court in support of its claim for return of rent when Justice Lehner dismissed the cause of action for rent. Tenant had an opportunity to appeal that decision. That Tenant did not perfect its appeal in a timely fashion and the Appellate Division therefore dismissed the appeal does not alter that Tenant had a full and fair opportunity to litigate the cause of action for return of rent in Action One. Collateral estoppel thus bars Tenant from bringing its first cause of action here because the ultimate issue underlying the claim is identical to an issue previously decided in Action One, and Tenant had a full and fair opportunity to contest the issue in Action One.

Defendants also move to dismiss the second cause of action for failure to state a cause of action pursuant to CPLR 3211(a)(7). On a motion to dismiss for failure to state a cause of action, the court must afford the complaint a liberal construction, accepting the

allegations of the complaint as true and deferring to the plaintiff when possible. *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 591 (2005) (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87(1994). The court is not to determine whether the allegations are true, but whether the complaint states a cause of action recognizable at law. *Foley v. D'Agostino*, 21 A.D.2d 60, 65-66 (1st Dep't 1964). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). With regard to a CPLR 3211(a)(7) motion to dismiss a cause of action, the court looks to the substance rather than to the form, so "[l]ooseness, verbosity and excursiveness, must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading. *Foley*. at 64-65 (internal citations omitted). *See also Continental Ins. Co. v. 115-123 West 29th St. Owners Corp.*, 275 A.D.2d 604, 605 (1st Dep't 2000).

Landlord correctly argues that Tenant fails to state a cause of action for economic duress by Landlord during settlement negotiations. The Court may invalidate a contract on the ground of economic duress only where a party involuntarily agreed to the terms of the contract because of a wrongful threat that prevented the party from exercising free will. *Stewart M. Muller Const. Co., Inc. v. New York Tel. Co.*, 40 N.Y.2d 955, 956 (1976). Economic duress can also exist where one party to a contract threatens to breach unless the other party agrees to a further demand. *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 254 (1st Dep't 1989). A threat that does not result in a party consenting to a demand does not amount to duress. *Minnelli v. Soumayah*, 41 A.D.3d 388, 389 (1st Dep't 2007). Moreover, there can be no claim for economic duress where there is

no allegation of the existence of a contract. *Friends Lumber, Inc. v. Cornell Development Corp.*, 243 A.D.2d 886, 888 (3rd Dep't 1997) ("The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the contract by withholding performance unless the other party agrees to some further demand").

Here, Tenant did not enter into a settlement agreement with Landlord, thus Landlord's settlement demands did not preclude Tenant from exercising its free will. Even affording the complaint a liberal construction, Tenant fails to state a cause of action for economic duress relative to the settlement agreement because the parties never entered into an agreement.

Even supposing that Tenant is asserting a claim of economic duress relative to the Lease, Tenant fails to state a cause of action for economic duress because Landlord never threatened to breach the Lease. The Court must give the allegations of the amended complaint every favorable inference, but here, Judge Lehner held in Action One that the mere assertion that the proposed alterations were structural was not a breach of contract, and Tenant did not need Landlord's permission to make non-structural alterations to the Building. Landlord's demands during settlement negotiations related to releasing Tenant from the Lease on the Option Space, but Landlord had no contractual duty to release Tenant from the Lease. Further, Landlord never threatened to withhold performance of the Lease.

Defendants Kartens and Landlord move to dismiss the third cause of action for fraud based on documentary evidence. Tenant asserts in its third cause of action that Landlord and the Kartens fraudulently misrepresented the condition of the Building when

they failed to disclose that the DEC listed the Building as a "Classification 2" hazardous waste disposal site. Landlord and the Kartens argue that the Lease itself disclosed the DEC classifications by reference to the consent orders, which were available as public records.

Tenant argues, without citation to case law or statute, that although Tenant was on notice of the environmental condition, Landlord and the Kartens still had a duty to advise Tenants that the DEC required approvals before Tenant could make use of the Option Space. This argument is belied by the plain language of Section 4.03 of the Lease, which plainly puts Tenant on notice of the consent orders, by docket number. Once on notice, Tenant was to make its own investigation into the DEC orders. "It is well-settled that with respect to a real property contract...[the] party must make use of the means available to learn, by the exercise of ordinary intelligence, the truth of such matters, 'or he [or she] will not be heard to complain that he [or she] was induced to enter into the transaction by misrepresentation.'" *Culver & Theisen v. Starr Realty Co.*, 307 A.D.2d 910, 910 (2nd Dep't 2003) (quoting *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317 (1959)).

There are five elements, all of which must be proven, to prevail on a claim for fraudulent concealment: first, defendant concealed a material fact; second, defendant was duty-bound to disclose the material fact; third, scienter on the part of the defendant; fourth, justifiable reliance by the other party; and fifth, injury. *Mitschele v. Schultz*, 36 A.D.3d 249, 254-255 (1st Dep't 2006). To successfully state a cause action for fraud, the claim must be sufficiently detailed; conclusory allegations are not sufficient. *Bank Leumi Trust Co. of New York*, 163 A.D.2d at 32. Here, the Lease disproves Tenant's allegation

that the Landlord and the Kartens fraudulently concealed the environmental condition of the Building, therefore the claim is dismissed without the need to evaluate the other elements. *Bank Leumi Trust Co. of New York*, 163 A.D.2d at 32. For this same reason the Court need not address the Statute of Limitations argument.[1]

In accordance with the foregoing, it is

ORDERED that the motion by defendants 2350 Fifth Avenue Corporation, Alexander Karten and Joseph Karten to dismiss 2350 Fifth Avenue LLC's amended complaint is granted, the amended complaint is dismissed, and the Clerk of the Court is directed to enter a judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 9, 2010

ENTER:

Saliann Scarpulla, J.S.C.

[1] The Court simply notes that the Statute of Limitations started running at the time Tenant received inquiry notice. The Lease gave Tenant notice of DEC consent orders relating to the Building's inactive hazardous waste status in December 2001, and this action was not commenced until 2008.