Kantor v 75 Worth St., LLC
2010 NY Slip Op 33933(U)
October 26, 2010
Sup Ct, NY County
Docket Number: 600811/09
Judge: Bernard Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED
Justice

E-FILE

PART ______

Index Number : 600811/2009
KANTOR, AMY
VS.
75 WORTH STREET, LLC
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGEMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. 003
MOTION CAL. NO. ______

e 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

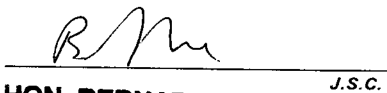
Upon the foregoing papers, it is ordered that this motion

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

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

Dated: 10/26/2010



J.S.C.
HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 60

---x

AMY KANTOR d/b/a WORTH STREET VETERINARY HOSPITAL, Individually and as Representative of the beneficiary of the Lien Law Trust this Action Seeks to Establish,

Plaintiff,

Index No.: 600811/09

-against-

DECISION

75 WORTH STREET, LLC and JODI RICHARD,

Defendants.

---x

FRIED, J.:

FOR PLAINTIFF

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New York, New York 10038

FOR DEFENDANTS

Scott A. Brody, Esq.
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Motion sequence numbers 003 and 005 are consolidated for disposition.

In motion sequence number 003, defendants move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint, and for an order, pursuant to CPLR 3212, granting defendants partial summary judgment on their counterclaim for past due rent and additional rent for the period ending in February, 2009.

In motion sequence number 005, plaintiff cross-moves, pursuant to CPLR 3212 and 5015 (a) (1) (a), for partial summary judgment dismissing paragraph 51 (c) of defendants' counterclaims that alleges that plaintiff agreed to pay defendants $529,500.00 in construction costs.

Defendant Jodi Richard (Richard) is a real estate developer and the owner of defendant 75 Worth Street, LLC (75 Worth). In December, 2007, plaintiff entered into a commercial lease, with 75 Worth as lessor and Worth Street Veterinary Hospital as tenant, for premises that plaintiff intended to use for a veterinary practice. Motion, Ex. D. The rent for the premises was set at $10,000.00 per month, the first rental payment due four months after execution of the lease. Plaintiff gave $10,000.00 as a deposit, and executed a personal guaranty for the lease. *Id.* Plaintiff states, in her cross motion, that Richard urged her to sign the lease before she, plaintiff, had secured a loan in order to allow Richard to show a signed lease to her, Richard's, bank to enable Richard to obtain a commercial loan. Cross Motion, Ex. 5.

In order to defray the costs of starting up her veterinary practice, plaintiff sought an SBA-guaranteed loan in the amount of $1.2 million, which was assigned to United Western Bank (UWB) in Denver. According to the complaint, plaintiff alleges that, in an e-mail dated November 27, 2007, Richard informed plaintiff that she would be able to cancel the lease at any time. Complaint, ¶ 12. The exact words of that e-mail are:

> "I think we need to keep the lawyers out of it. Would
> you feel ok with me writing a letter and signing it
> stating that you can cancel your lease at anytime without
> any penalty?
> Let me know what you think and I will see you Friday

[* 4]

Jodi"

Cross Motion, Ex. 6.

There is no evidence that any such letter was ever executed. In addition, the lease contains a merger clause (paragraph 23.1), and the Tenant Estoppel Certificate, signed by plaintiff, states that "[t]he lease represents the entire agreement between the undersigned, as Tenant, and Landlord, with respect to the leasing of the Demised Premises."

After the lease was signed, plaintiff engaged the services of an architect to design the space, allegedly at Richard's insistence. Complaint, ¶ 13.

In compliance with SBA loan procedures, plaintiff made an "equity injection" of approximately $140,000.00, which funds she acquired by liquidating her IRA account. Further, plaintiff was required to execute a personal guaranty on the loan, and also agreed to allow a second mortgage on her home in Massachusetts as a condition of closing the loan. *Id.*, ¶ 15.

Plaintiff alleges that, in early May of 2008, the UWB loan officer informed her that she would need to find a co-guarantor for the loan, and the loan officer suggested Richard. Plaintiff states that Richard orally agreed to be the co-guarantor (*id.*, ¶ 16), an allegation that Richard denies.

The SBA loan was conditionally approved on June 24, 2008, but it does not contain any indication that Richard was acting as a co-guarantor. Cross Motion, Ex. 20. Plaintiff states that the loan commitment was issued on June 25, 2008.

Two e-mails have been produced, allegedly sent to plaintiff by Richard on December 19, 2008. The December 19, 2008, e-mail provided by Richard, timed at 8:14 A.M., states:

> "Your lawyer never spoke to my lawyer (she's copied in this email). Neither of us really have any idea what is going on except for what the bank is telling us. I am not guaranteeing your loan. I am not deceiving my lender by doing so quietly as your banker is suggesting. You need to understand that I cannot and will not guarantee this loan. I've already given you $500,000.00 I am not risking another $1m."

Motion, Ex. D.

The one provided by plaintiff, timed at 10 A.M., states that Richard said:

> "I think there's been a huge misunderstanding. the [*sic*] loan commitment that was faxed to Debra yesterday does not have me listed anywhere. I am not going to guarantee the loan because I can't. You are correct about the loan to you. I am already at risk as your construction lender and as your landlord, I cannot also be at risk as a guarantor."

Cross Motion, Ex. 21.

Also on December 19, 2008, at 9:36 A.M., in response to Richard's 8:14 AM e-mail, plaintiff e-mailed to Richard the following:

> "Also, I have never seen the 500k as anything you've given me. As I understood it, it's a loan, with interest. It was something you offered as a way to get the practice going, being able to do the structural things at a time they made sense, rather than later when they's [*sic*] cost more and take more time. It was something I always appreciated, and my sole intention is to be able to pay you back within the first years of the practice, as we've discussed.
>
> * * *
>
> Clearly I don't want you to do anything unethical or that you are not happy with. I guess my impression was that you had agreed to personally guarantee my loan when [the loan officer] was struggling to put it

> together based on what I have and the size of the loan.
> I never thought the real estate was involved in it
> because as I said yesterday, I didn't think you could
> do that being my landlord."

Motion, Ex. D.

In her cross-motion, plaintiff argues that, in the above-referenced e-mail, she indicated that, only if the SBA loan went through, would she would pay for *de minimus* renovations to the portion of the space that she would use, and that she never accepted a loan from Richard.

The complaint further alleges that the contractor hired by plaintiff, allegedly at Richard's insistence, leveled the floor of the premises and laid in plumbing without plaintiff's approval. According to plaintiff, any contractor that she used had to be approved by the SBA, but the contractor that she engaged at Richard's insistence did not forward the necessary forms to the SBA for approval. The complaint (paragraph 22), however states that Plaintiff signed a contract with the contractor, but in her cross-motion she states that she never signed an agreement with him.

Shortly before the SBA loan was scheduled to close, plaintiff gave Richard a $20,000.00 payment towards back rent. Complaint, ¶ 24.

Plaintiff asserts that, because Richard reneged on her promise to co-guarantee the SBA loan, the loan did not close, and, thereby, plaintiff contends that Richard constructively terminated the commercial lease.

The complaint alleges five causes of action: (1) breach of agreement to guarantee as against Richard, for which plaintiff claims lost opportunity costs, as well as the sums that she

[* 7]

paid Richard for rent, and her start-up costs; (2) breach of agreement to collateralize loan as against both defendants, based on the allegation that defendants agreed to place a second mortgage on the Worth Street property to assist plaintiff in securing a loan; plaintiff asserts this cause of action as against Richard based on theories of respondeat superior and alter ego, and seeks lost opportunity costs plus the sums that she paid to Richard for rent, and her start-up costs; (3) declaratory judgment terminating plaintiff's obligations under the lease as against 75 Worth, alleging the imposition of excessive rents; (4) establishment of a lien law trust as against both defendants, alleging that Richard has induced contractors to sue plaintiff for work performed on the premises, which plaintiff contends was performed for Richard's benefit; and (5) tortious and wrongful interference with contract as against both defendants, the contract being the SBA loan, for which plaintiff seeks lost opportunity costs plus the sums that she paid to Richard for rent, and her start-up costs.

In the instant motion, defendants assert that, despite claims by plaintiff made in her cross motion that neither the lease itself nor the leased premised were ever delivered to her, a valid lease did exist between plaintiff and 75 Worth, which is evidenced by plaintiff tendering partial rent thereunder, by plaintiff's attorney accepting delivery of the lease without objection, and by an e-mail from plaintiff to Richard, dated August 5, 2008, in which plaintiff said, among other things:

> "What I know is that the lease commenced in July, that I owe you rent from that point onward as well as an additional month's security which I have been unable to pay you yet. ... I know you've bent over backwards to help make this whole thing happen for me and I truly both understand the risk you've taken and truly appreciate it. ... I am willing to assume all my

> responsibilities as a tenant and have always expected
> to pay you all monies owed as soon as the loan clears.
> I never had any other expectation ... ."

Motion, Ex. D.

Defendants further argue that the lease contains no provision that it is conditioned upon plaintiff acquiring an SBA loan. In addition, defendants contend that plaintiff's allegation that Richard's oral agreement to co-guarantee the loan took place in May of 2008, more than six months after the lease was executed, in itself belies the fact that loan approval was a condition to fulfilment of the lease obligations.

Defendants also maintain that the complaint must be dismissed because the relief being sought by plaintiff is for lost profits and opportunity costs, allegedly occasioned by Richard "reneging" on a promise to co-guaranty the SBA loan, relief which cannot be granted because of its speculative nature.

In plaintiff's cross-motion, she only seeks dismissal of paragraph 51 (c) of defendants' answer and counterclaim, in which Richard is seeking the return of her construction loan to plaintiff in the amount of $529,500.00. Plaintiff avers that there never was a loan between her and Richard.. In support of this contention, plaintiff cites to a May 22, 2008, e-mail from plaintiff to Richard, which states:

> "Hi Jodi. Hope all's well with you, the girls and
> Dwight–and of course the business and the triathlon
> training (its soon I think). I have the 140k for the
> deposit and closing costs and its solely in my name. I
> do need a guarantor to have it go through, though. Obviously it's a start-up for me and since there's no
> real estate involved as a purchase (at this time anyway–
> I know we talked about buying it in 10 years time)
> apparently a guarantor is need at least for the first 1-2

> years. The loan is for the full amount (1.2 million) and as we discussed you and I can work out a separate legal arrangement to pay back the money you've already invested either as a straight loan or as equity. I will do everything possible to make this practice highly successful as quickly as possible and am completely comitted [*sic*] and excited to do so. However, I also would understand if being a guarantor is not something you want to do, Jodi. If it is, though, the loan is completely ready to go forward and can happen quickly. I would like to talk to you at any point today if possible. I've been swamped with work in Boston and the start of the end-of-the-year school stuff so haven't been down to the city since I saw you on the 9th. My cell works where I'm working today (there's no e-mail) but I should also be done by 3. You can also contact Annemarie[1] directly (I think she sent you an email) to discuss exactly what's involved. Thanks so much, as always Jodi, and hopefully we'll talk soon. All the best, amy [*sic*]"

Cross Motion, Ex. 10.

According to plaintiff's interpretation of this correspondence, she only agreed to pay for de minimus alterations that had already been done to the premises, and that Richard could not reasonably expect plaintiff to pay for any additional renovations unless the SBA loan went through. Memo in Opposition, at 3-4.

Plaintiff also states that a measure of her lost profits can be obtained by measuring the profitability of a similarly situated business, and that, regardless, her claims should go forward based on her actual, out-of-pocket damages that she sustained based on her reliance on Richard's oral promise to co-guarantee the SBA loan. In her affidavit in support of her cross motion and in opposition to defendants' motion, plaintiff lists the following items that she claims reflect her actual out-of-pocket damages:

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[1]Annemarie is the SBA loan officer.

"(a) Ronco (Plainfield NJ), installation of oxygen and
active scanner system (labor, copper piping, etc)-
$10,084.29
(b) Ronald Restivo (physicist)-ray protection plan for
lead installation to walls for area architecturally
planned for x-ray room–$200.00
(c) DEA license for Worth Street Practice-$551.00
(d) Empire Blue Cross/BS plan for Alex Aristizabal
(manager and technician) and Louise Levine (receptionist)
and Mary Xanthos (the other vet to work in practice)
(e) Health insurance for self and employees: $8,163.60
(f) Alex Aristizabal salary-$2,091.25 every two weeks from
November 1, 2008 through May 2009-$25,095.00
(g) 75 Worth Street (rent advance and deposit)-$30,000
(h) John Michelmore (lawyer)-$1215.00
(i) Rod Poling (vet consultant)-$2200.00
(j) Business license NYC-$120.00
(k) Waiting room benches-$879.00
(l) Workman's Compensation Insurance-$900.00
(m) Builder's Risk Insurance- $685.00
(n) Cages-$5,925.41
(o) Overnight Fedex/faxes etc.–over $1000.00
(p) Travel expense NY back and forth Boston starting June
2008 through February 2009, over $5,000.
(q) Small Business Loan Deposit to UWBank-$11,000
(r) Indexx lab machines lease for equipment-$36,000
(s) Luxar Laser machine lease-$16,295.00
(t) $450 paid to an acquaintance of Richard to oversee
construction of my space who declined to continue because
of an issue he had with Richard."

Cross Motion, at 19-20.

Plaintiff also argues that she never received a countersigned lease, nor did Richard relinquish possession and control of the premises. Plaintiff points to an e-mail of July 14, 2008, in which plaintiff asks that construction work on the premises stop until the SBA loan goes through, because of strict SBA requirements. It is noted that, in this same e-mail, plaintiff acknowledges that she entered into the lease with defendants in December of 2007,

also in derogation of SBA procedures. Cross Motion, Ex. 11. In response to this e-mail, Richard wrote back:

> "The work we are doing has to be done for me to be able to complete my construction, so we can tell the SBA that I am getting the space ready for you to rent and takeover the space. Hope that helps."

Cross Motion, Ex. 12.

Plaintiff states that the sum and substance of the Richard e-mail proves that Richard was performing the construction for Richard's benefit, not plaintiffs. Memorandum in Support of Cross Motion, at 6. However, the e-mail from Richard indicates that the work was being performed to obtain an SBA loan approval, which appears to be plaintiff's loan, since no evidence has been presented that defendants were seeking such financing for themselves.

Plaintiff also argues that the lease is defective in that it fails to describe the leased premises. However, the court notes that the title page of the lease describes the premises as:

> "+/- 2150 square feet known as Suite D Located in a portion of the basement at 77 Worth Street New York, New York"

Lastly, plaintiff argues that it was Richard, not she, who terminated the lease by reneging on her oral promise to co-guaranty the SBA loan, or, in the alternative, based on the above-referenced e-mail dated November 27, 2007, that plaintiff had the right to terminate the lease at any time. It is noted that in the letter that her lawyer sent to Richard on February 18, 2009, plaintiff's lawyer states that:

> "As you are aware, this [Richard's alleged reneging of the promise to co-guaranty the SBA loan] is the

> sole reason Dr. Kantor's lease with 75 Worth Street,
> LLC has been terminated. Since your withdrawal of the guaranty prevented Dr. Kantor's performance you may not enforce the lease or harass her by claiming that she owes you money."

Motion, Ex. D.

In reply to plaintiff's opposition, Richard points to paragraph 4 (D) of plaintiff's affidavit in support of her cross motion, in which plaintiff states that "in May 2008, I learned that I could receive a Small Business Administration Loan from United Western Bank ('UWB') *so long as I found a guarantor.*" Richard states that this statement under oath by plaintiff definitively proves that the lease could not have been entered into based on a condition that Richard guaranty the loan, since the lease was executed five months before plaintiff was informed that she would need a co-guarantor.

CPLR 3211 (a), governing motions to dismiss a cause of action, states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

* * *

(7) the pleading fails to state a cause of action ... ."

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 87-88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference [internal quotation marks and citation

omitted]." *Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff's cross motion for partial summary judgment dismissing defendants' counterclaim appearing in paragraph 51 (c) of defendants' answer, for repayment of an alleged construction loan, is denied.

In the above-cited e-mails from plaintiff to defendant, plaintiff acknowledges that Richard loaned her $500,000.00, which plaintiff says that she will repay with interest, but no evidence has been presented as to whether such funds ever changed hands or were actually expended on plaintiff's behalf. As a consequence, material questions of fact exist precluding summary judgment on this issue.

That portion of defendants' motion seeking to dismiss plaintiff's claim for damages resulting from her lost profits is granted.

"[T]o recover damages for lost profits, it must be

> shown that: (1) the damages were caused by the breach; (2) the alleged loss must be capable of proof with reasonable certainty; and (3) the particular damages were within the contemplation of the parties to the contract at the time it was made. ... [i]n the case of a new business seeking to recover loss of future profits, a stricter standard is imposed because there is no experience from which lost profits may be estimated with reasonable certainty and other methods of evaluation may be too speculative."

Ashland Management Inc. v Janien, 82 NY2d 395, 404 (1993).

There is no indication that defendants reasonably contemplated that they would assume liability for plaintiff's failure to realize her veterinary venture. *Kenford Company, Inc. v County of Erie,* 73 NY2d 312 (1989). Furthermore, plaintiff's argument that her lost profits could be quantified by looking at the profits of a neighboring veterinarian is too speculative for the court to consider, since such animal care practices are greatly dependent upon the personality of the veterinarian and his or her staff. Their dismissal of this claim is warranted.

The remainder of defendants' motion seeking to dismiss the complaint is denied.

As indicated by the plethora of e-mails reproduced above, the conflicting interpretations of such e-mails by the parties, and the disparity between the complaint and plaintiff's affidavit in opposition to the instant motion, there are too many questions of fact and credibility remain unresolved to support dismissal of the complaint at this point in the proceedings. *See Nesenoff v Dinerstein & Lesser, P.C.,* 5 AD3d 746 (2d Dept 2004).

In addition, since plaintiff is seeking what she alleges are actual out-of-pocket expenses, the argument that plaintiff's claim for lost profits is insufficient to maintain a cause

of action is countered by a claim for actual damages, which may support such causes of action. However, review of the itemized account of damages provided by plaintiff in her opposition papers, reveals that many of the items included in the total $155,763.30 claimed reflect either costs which may have been reasonably expended by someone with actual possession of a commercial space, or costs attributable to the maintenance of a veterinary practice in New York regardless of the physical location of the office. These items of alleged expenses also raise questions regarding possession of the leased premises.

Since there are questions regarding plaintiff's possession of the premises, defendants' motion for summary judgment on its counterclaim seeking rent and additional rent is denied.

Accordingly, it is

ORDERED that plaintiff's cross motion (motion sequence number 005) for partial summary judgment dismissing paragraph 51 (c) of defendants' counterclaims is denied; and it is further

ORDERED that the portion of defendants' motion (motion sequence number 003) seeking to dismiss plaintiff's claims for lost profits is granted; and it is further

ORDERED that the remainder of defendants' motion (motion sequence number 003)seeking to dismiss the complaint is denied; and it is further

ORDERED that defendants' motion for partial summary judgment seeking rent and additional rent for the period ending in February 2009 is denied.

Dated: 10/26/2010

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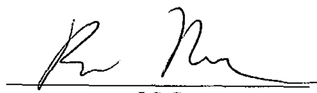

J.S.C.

HON. BERNARD J. FRIED