

Bakakos v Kakouros

2011 NY Slip Op 31690(U)

May 26, 2011

Supreme Court, New York County

Docket Number: 103855/2010

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

Index Number : 103855/2010
BAKAKOS, CONSTANTIN
vs.
KAKOUROS, KIRIAKOS
SEQUENCE NUMBER : 001
DISMISS ACTION

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

n this motion to/for _____

PAPERS NUMBERED	
_____	1
_____	2
_____	3

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~~ :

The court grants defendant's motion to dismiss the complaint to the extent set forth and otherwise denies his motion, pursuant to the accompanying decision. C.P.L.R. § 3211(a)(7).

FILED

JUN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/26/11

Lucy Billings
LUCY BILLINGS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 46

-----x

CONSTANTINE BAKAKOS, LISA WU, and
SYMPHONIA RESTAURANT, INC.,

Index No. 103855/2010

Plaintiffs

- against -

DECISION AND ORDER

KIRIAKOS KAKOYROS,

Defendant

FILED

-----x

LUCY BILLINGS, J.S.C.:

JUN 24 2011

I. BACKGROUND

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs sue to recover damages based on claims arising from a commercial lease dated March 22, 2007, between defendant owner of the leased premises and the tenants, plaintiff Bakakos and nonparty Dimitrios Skretas, who assigned his interest in the premises to plaintiff Wu. Bakakos operated a restaurant on the premises through plaintiff Symphonia Restaurant, Inc. Defendant moves to dismiss plaintiffs' complaint on the grounds that it fails to state a claim. C.P.L.R. § 3211(a)(7). The court grants defendant's motion to the extent set forth and for the reasons explained below.

II. APPLICABLE STANDARD

Upon defendant's motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), the court may not rely on facts alleged by defendant to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against defendant. Lawrence

v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiffs' favor. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002); Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001).

III. DEFENDANT'S MOTION TO DISMISS EACH OF PLAINTIFFS' CLAIMS

Defendant contends that the parties contemplated a lease of only the first floor, as expressly stated in the lease. Plaintiffs, on the other hand, maintain that the parties intended the lease to include the basement as well. The complaint alleges that plaintiffs used the basement for food preparation, storage, and office space with defendant's knowledge, but that defendant installed locks preventing entry to the basement in November 2007 and further locked the door to the basement storage and office area in September 2008. Once defendant barred access to the

basement, he obstructed plaintiffs' restaurant operations so as to cause their abandonment of the premises in December 2008.

A. First Claim: Breach of Contract

To establish breach of a contract, plaintiffs must show a contract, that plaintiffs performed and defendant breached it, and that defendant's breach caused plaintiffs to sustain damages. Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010). See Tutora v. Siegel, 40 A.D.3d 227, 228 (1st Dep't 2007). Plaintiffs must plead the specific terms of the agreement that defendant breached. Marino v. Vunk, 39 A.D.3d 339, 340 (1st Dep't 2007); Giant Group v. Arthur Andersen LLP, 2 A.D.3d 189, 190 (1st Dep't 2003); Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408 (1st Dep't 2003).

Plaintiffs, however, maintain that the lease, executed only by defendant as well as by Bakakos and Skretas, is invalid, because defendant owned the premises as a tenant in common with Anna Kakouros, and is unenforceable except for terms Bakakos consented to and ratified, "by accepted performance," and through agreements before and after the lease. Aff. in Opp'n of Jacob Rabinowitz Ex. A ¶ 29. The lease's invalidity is merely a defense to its enforcement, not a basis for its breach. In any event, since plaintiffs allege that they paid the security deposit and one month's rent pursuant to the lease, they are estopped from raising its invalidity. Townhouse Co. v. Williams, 307 A.D.2d 223, 224 (1st Dep't 2003); Storico Dev., LLC v. Battle, 9 A.D.3d 908, 909 (4th Dep't 2004).

Without identifying the terms Bakakos consented to or ratified, plaintiffs contend that defendant breached the lease by prohibiting plaintiffs' use of the basement, failing to give formal consent to Skretas's assignment of his lease interest to plaintiff Wu, failing to repair the premises, and interfering with their quiet enjoyment. Plaintiffs further claim that defendant failed to turn over personal property of plaintiffs according to a court order, but nowhere present or describe the order.

In addition to making claims based on the lease, plaintiffs contend that defendant breached oral agreements allowing the tenants access to the basement and waiving rent for September 2007 if they could not open the restaurant in three months. The lease provisions merging all agreements and prohibiting oral modification bar these claims. N.Y. Gen. Oblig. Law § 15-301(1); Rose v. Spa Realty Assoc., 42 N.Y.2d 338, 343 (1977); Eujoy Realty Corp. v. Van Wagner Communications, LLC, 73 A.D.3d 546, 548 (1st Dep't 2010); Teri-Nichols Inst. Food Merchants, LLC v. Elk Horn Holding Corp., 64 A.D.3d 424 (1st Dep't 2009); Richardson & Lucas, Inc. v. New York Athletic Club of City of N.Y., 304 A.D.2d 462, 463 (1st Dep't 2003).

While partial performance or promissory estoppel unequivocally referable to the new agreement may overcome the bar against oral modification, Rose v. Spa Realty Assoc., 42 N.Y.2d at 343-44; Richardson & Lucas, Inc. v. New York Athletic Club of City of N.Y., 304 A.D.2d at 463, plaintiffs do not claim an oral

modification that included the basement in the leasehold, but instead insist that the lease so provides. The undisputed express terms of the lease, bolstered by its merger provision, preclude such an interpretation. Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d 420, 424 (1st Dep't 2010); Clark Constr. Corp. v. BLF Realty Holding Co., 28 A.D.3d 367, 368 (1st Dep't 2006); Gottlieb v. Newton, 253 A.D.2d 383, 384 (1st Dep't 1998).

Plaintiffs' contention that defendant unreasonably withheld consent to assign the lease to Wu, in violation of the second rider, states a claim for breach of that contractual provision, because plaintiffs allege that defendant was aware of Wu and Symphonia Restaurant and acquiesced in their conducting restaurant operations. Neither Wu nor Symphonia Restaurant may claim, however, that defendant unreasonably withheld permission for Skretas to assign the lease because these plaintiffs are not parties to the lease. 85 Fifth Ave. 4th Floor, LLC v. I.A. Selig, LLC, 45 A.D.3d 349 (1st Dep't 2007).

Finally, plaintiffs claim defendant breached the lease by: (1) refusing rent checks from Symphonia Restaurant, (2) failing to cooperate with the State Liquor Authority regarding Bakakos's application for a liquor license, (3) violating the certificate of occupancy, and (4) retaining his security deposit. Plaintiffs neither identify the lease provision these acts or omissions breached, nor indicate they breached an oral agreement.

In fact, no lease provision requires defendant to accept rent checks from a nonparty to the lease, to cooperate with

plaintiffs' attempt to obtain a liquor license, or to comply with the certificate of occupancy. The landlord specifically "does not warrant that any governmental license or permit which may be required for the business to be carried in the demised Premises will be granted." Rabinowitz Aff. Ex. A, Rider, art. VII, § C. More broadly, he makes no representations regarding "the physical condition of the building, . . . the demised premises, the rents, leases, expenses of operation, or any other matter or thing affecting or related to the demised premises." Id. Ex. A, Lease ¶ 20.

Defendant's duties to return the security deposit at the end of the lease term and to allow quiet enjoyment of the premises depend on the tenants' compliance with the lease. Id. ¶¶ 22, 31. While plaintiffs allege payment of the security deposit and one month's rent, they also admit they voluntarily abandoned the premises in December 2008, before the lease's expiration. They attribute their departure to constructive eviction, but due to defendant having barred their use of the basement. Thus, even though plaintiffs allege eviction, whether actual or constructive, to plead breach of the covenant of quiet enjoyment, the lease permitted defendant to bar plaintiffs' use of the basement. Duane Reade v. Reva Holding Corp., 30 A.D.3d 229, 237 (1st Dep't 2006). See NYC Goetz Realty Corp. v. Martha Graham Ctr. of Contemporary Dance, 39 A.D.3d 356 (1st Dep't 2007). Therefore defendant's exclusion of plaintiffs from an area not leased to them, just as his other actions permitted by the lease,

such as refusing Symphonia Restaurant's checks and failing to cooperate with the liquor license application or comply with the certificate of occupancy, did not breach the covenant of quiet enjoyment. Parker v. Marglin, 56 A.D.3d 374 (1st Dep't 2008); Jackson v. Westminster House Owners Inc., 24 A.D.3d 249, 250 (1st Dep't 2005); Caldwell v. American Package Co., Inc., 57 A.D.3d 15, 26 (2d Dep't 2008). See Ghadamian v. Channing, 295 A.D.2d 127, 129 (1st Dep't 2002).

Although at oral argument plaintiffs urged that their exclusion from the basement prevented access to the first floor through the basement by their employees or for deliveries, neither the complaint nor any affidavit contains such an allegation. Nor have plaintiffs explained why access through the basement, rather than directly to the first floor, was necessary.

Plaintiffs' failure to demonstrate their compliance with the lease, particularly payment of rent until their abandonment, is fatal to their quiet enjoyment claim in any event, just as nonpayment undermines their claim regarding their security deposit. Parker v. Marglin, 56 A.D.3d 374; 85 John St. Partnership v. Kaye Ins. Assoc., 261 A.D.2d 104, 105 (1st Dep't 1999); Phoenix Garden Rest. v. Chu, 245 A.D.2d 164, 166 (1st Dep't 1997). Any breach of the covenant founded on a violation of the lease, on the other hand, only duplicates the underlying breach of the lease. Phoenix Garden Rest. v. Chu, 245 A.D.2d at 166. In this regard, plaintiffs' allegations of defendant's failure to repair the premises adequately plead a breach of the

lease, but again on behalf of Bakakos only, as neither Wu nor Symphonia Restaurant ever became parties to the lease.

B. Second Claim: Fraud Upon Bakakos and Symphonia Restaurant

Fraudulent misrepresentation requires defendant to misrepresent or omit a material fact, knowing the misstatement or omission is false, to induce plaintiffs to rely on it; plaintiffs' justifiable reliance on the misrepresentation or omission; and damages to plaintiffs from their reliance. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 178 (2011); Gosmile, Inc. v. Levine, 81 A.D.3d 77, 81 (1st Dep't 2011). Fraud must be pleaded with specificity. C.P.L.R. § 3016(b); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 178; Giant Group v. Arthur Andersen LLP, 2 A.D.3d at 190; Non-Linear Trading Co. v. Braddis Assoc., 243 A.D.2d 107, 116 (1st Dep't 1998). A fraudulent omission must be based on defendant's duty to disclose the omitted information to plaintiffs, Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 179, a duty that must arise independently of the parties' contract. Gosmile, Inc. v. Levine, 81 A.D.3d at 81; Non-Linear Trading Co. v. Braddis Assoc., 243 A.D.2d at 118. The damages plaintiffs claim from the fraud must be separate from the damages recoverable for breach of a contract. Mañas v. VMS Assoc., LLC, 53 A.D.3d 451, 454 (1st Dep't 2008); Teachers Ins. Annuity Assn. of Am. v. Cohen's Fashion Opt. of 485 Lexington Ave., Inc., 45 A.D.3d 317, 319 (1st Dep't 2007). See Gosmile, Inc. v. Levine, 81 A.D.3d at 81.

Plaintiffs' fraud claim duplicates their breach of contract

claims insofar as plaintiffs claim defendant represented he would not enforce the lease's limitation to the first floor, would cooperate with plaintiffs' procurement of a liquor license, and would not unreasonably withhold consent to assign the lease.

Mañas v. VMS Assoc., LLC, 53 A.D.3d at 453. Defendant's assurances that defendant shared a common heritage with Bakakos and that defendant's word was "good as gold" are merely statements of intent to perform that are too vague to support a fraud claim. Aff. of James I. Williams Ex. A ¶ 90. See Mañas v. VMS Assoc., LLC, 53 A.D.3d at 454; Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d 221, 225 (1st Dep't 2007).

Specifically regarding the lease's limitation to the first floor, plaintiffs allege that defendant included that limitation simply to avoid governmental interference based on the lease's inconsistency with the certificate of occupancy. See Rabinowitz Aff. Ex. A ¶ 27. Plaintiffs allege that Bakakos and Skretas objected to the lease limiting the leasehold to the first floor, but then signed the lease based on defendant's oral promise not to enforce that provision. Defendant's representations that he would not enforce the first floor limitation and would afford plaintiffs a rent concession, on which plaintiffs relied, constitute misrepresentation of his intended future actions, which supports a fraud claim because plaintiffs also allege that defendant in fact intended not to perform that promise. See Fletcher v. Boies, Schiller & Flexner, LLP, 75 A.D.3d 469, 470 (1st Dep't 2010); Schulman v. Greenwich Assoc., LLC, 52 A.D.3d

234 (1st Dep't 2008); Papp v. Debbane, 16 A.D.3d 128 (1st Dep't 2005); Phillips & Huyler Assoc. v. Flynn, 225 A.D.2d 475 (1st Dep't 1996). Signing the lease in reliance on those representations was unreasonable, however, because they contradict the lease's express terms, Meyercord v. Curry, 38 A.D.3d 315, 316 (1st Dep't 2007); see Rivera v. JRJ Land Prop. Corp., 27 A.D.3d 361, 364 (1st Dep't 2006), and raise warning signs requiring heightened diligence, Global Mins. & Metals Corp. v. Holme, 35 A.D.3d 93, 100-101 (1st Dep't 2006), particularly since the lease governs the parties' relationship and contains a merger provision. Pine Equity NY v. Manhattan Real Estate Equities Group, 2 A.D.3d 248 (1st Dep't 2003); Skillgames, LLC v. Brody, 1 A.D.3d 247, 250 (1st Dep't 2003).

In relation to plaintiffs' use of the basement, Bakakos and Symphonia Restaurant allege that defendant concealed the certificate of occupancy's prohibition against using the basement for food preparation, restaurant storage, office space, and restaurant employees. Since the certificate of occupancy is a public record, Jordache Enters v. Gettinger Assoc., 176 A.D.2d 616, 617 (1st Dep't 1991), and plaintiffs do not allege defendant's exclusive possession of the record, plaintiffs' reliance on this representation is also unreasonable. DDJ Mgt., LLC v. Rhone Group L.L.C., 15 N.Y.3d 147, 154 (2010); Joseph v. NRT Inc., 43 A.D.3d 312, 313 (1st Dep't 2007). See Progressive Image Gruppe v. 162 Charles St. Owners, 272 A.D.2d 66 (1st Dep't 2000). Their claimed reliance on defendant's misrepresentation

that the basement fixtures needed minimal work likewise fails because plaintiffs admit that defendant showed them the basement, providing the opportunity to assess the work required for themselves. Pitt St., LLC v. 85-87 Pitt St. Realty Corp., ___ A.D.3d ___, 921 N.Y.S.2d 40, 41 (1st Dep't Apr. 7, 2011); Graham Packaging Co., L.P. v. Owens-Illinois, Inc., 67 A.D.3d 465 (1st Dep't 2009); 1537 Assoc. v. Kaprielian Enters., 259 A.D.2d 447, 448 (1st Dep't 1999). See Joseph v. NRT Inc., 43 A.D.3d at 313; IFD Constr. Corp. v. Corddry Carpenter Dietz & Zack, 253 A.D.2d 89, 94 (1st Dep't 1999).

Plaintiffs further claim that between September 2006 and January 2007 defendant orally represented that he had authority by himself to act as the landlord. This claim does not arise from the lease and, if true, establishes fraudulent inducement to enter the lease through misrepresentations of current facts. Gosmile, Inc. v. Levine, 81 A.D.3d at 81; Mañas v. VMS Assoc., LLC, 53 A.D.3d at 453. Since only Bakakos entered the lease, however, once again only he may maintain this claim.

C. Third Claim: Unjust Enrichment

Bakakos claims unjust enrichment against defendant through his collection of higher rent from a new tenant after plaintiffs improved the premises and then abandoned them. To prevail on an unjust enrichment claim, Bakakos must establish that defendant was enriched at plaintiffs' expense, and it is inequitable and unconscionable to allow him to retain the enrichment. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 182; Abacus Fed. Sav.

Bank v. Lim, 75 A.D.3d 472, 473 (1st Dep't 2010). See Sterlacchi v. Gurfein, 18 A.D.3d 229, 230 (1st Dep't 2005); Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 119 (1st Dep't 1998).

Where, as here, the dispute arises from a lease between Bakakos and defendant, Bakakos may not maintain an unjust enrichment claim. Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388 (1987); Accurate Copy Serv. of Am., Inc. v. Fisk Bldg. Assoc. L.L.C., 72 A.D.3d 456 (1st Dep't 2010); Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d at 225; Theatre Row Phase II Assoc. v. National Rec. Studios, 291 A.D.2d 172, 175 (1st Dep't 2002). See Cox v. NAP Constr. Co., Inc., 10 N.Y.3d 592, 607 (2008); Russo v. Heller, 80 A.D.3d 531, 532 (1st Dep't 2011). Bakakos bases his unjust enrichment claim on the same allegations of defendant's wrongful acts supporting the claims for breach of the lease or its oral modifications or for fraudulent inducement. Insofar as these alleged wrongful acts prevented assigning the lease, obtaining a liquor license, or using the basement, however, defendant achieved no benefit from plaintiffs' plight. I.G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d 206, 208-209 (1st Dep't 2005). Although the lease would not bar an unjust enrichment claim arising from defendant's failure to return supplies to plaintiffs, Sergeants Benevolent Assn. Annuity Fund v. Renck, 19 A.D.3d 107, 112 (1st Dep't 2005), they base their claim regarding the supplies on defendant's unspecified stipulation, not on unjust enrichment.

D. Fourth Claim; Fraudulent Concealment From Wu

Plaintiff Wu claims defendant fraudulently concealed his intent not to cooperate in her acquisition of Skretas's half interest in the premises and her operation of a restaurant and instead induced her to incur expenses in improving the premises. To establish fraudulent concealment, Wu must demonstrate that defendant made a material factual misrepresentation intended to mislead plaintiffs; that she reasonably relied on the misrepresentation and sustained damages from it, Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 178; and that defendant breached a duty to disclose the true facts. Id. at 179; IDT Corp. v. Morgan Stanley Dean Witter & Co., 63 A.D.3d 583, 586 (1st Dep't 2009); SNS Bank v. Citibank, 7 A.D.3d 352, 256 (1st Dep't 2004); P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V., 301 A.D.2d 373, 376 (1st Dep't 2003). This fraud must be pleaded with specificity as well. C.P.L.R. § 3016(b); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 178; P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V., 301 A.D.2d at 376. Since Wu fails to allege that defendant owed a duty to disclose any information to her or owed her any fiduciary duty, her fraudulent concealment claim fails. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 279; Sebastian Holdings, Inc. v. Deutsche Bank AG., 78 A.D.3d 446, 447 (1st Dep't 2010); Sehera Food Servs. Inc. v. Empire State Bldg. Co. L.L.C., 74 A.D.3d 542, 543 (1st Dep't 2010).

E. Fifth Claim: Tortious Interference With Wu's Contract

Plaintiff Wu further claims that defendant tortiously interfered with her agreement with Bakakos and Skretas to purchase Skretas's half interest in the lease. The complaint alleges that Wu paid Skretas \$69,000.00 on May 8, 2008, to purchase his interest in the lease, in the Symphonia Restaurant corporation, and in the restaurant, after discussing with defendant her intention to acquire Skretas's interest in the premises and improve the restaurant.

A claim of tortious interference with a contract requires (1) a valid contract to which plaintiff was a party, (2) an actual breach of that contract by another party to it, (3) defendant's knowledge of the contract, (4) his intentional procurement of the breach, and (5) damages to plaintiff from that interference. White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 426 (2007); Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996); Foster v. Churchill, 87 N.Y.2d 744, 749-50 (1996); Burrowes v. Combs, 25 A.D.3d 370, 373 (1st Dep't 2006). Here, Wu fails to allege that Skretas breached his agreement with her.

Plaintiffs do not label any of their claims as tortious interference with business relations. For Wu to plead that related claim, however, she must show that (1) she had business relations with a third party, (2) defendant knew of the relationship and interfered with it, (3) defendant's interference resulted solely from malice or from conduct constituting a crime

or an independent tort, and (4) defendant's interference injured the business relations. Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d 40, 47 (1st Dep't 2009); Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 108 (1st Dep't 2009). A claim for interference with non-binding or prospective business relations requires defendant to have engaged in more culpable conduct than for interference with contract. Carvel Corp. v. Noonan, 3 N.Y.3d 182, 189-90 (2004); NBT Bancorp v. Fleet/Norstar Fin. Group, 87 N.Y.2d 614, 621 (1996); Leonard v. Gateway II, LLC, 68 A.D.3d 408, 409-10 (1st Dep't 2009); Lobel v. Maimonides Med. Ctr., 39 A.D.3d 275, 277 (1st Dep't 2007). See Schorr v. Guardian Life Ins. Co. of Am., 44 A.D.3d 319 (1st Dep't 2007).

Here, the complaint alleges defendant's awareness of Wu's contract with Skretas, but nowhere mentions defendant's interference with it, injury to any relationship between Wu and Skretas, or any dealings between them after May 8, 2008, when Wu purchased Skretas's half interest in the lease and restaurant. Plaintiffs' pleading of a contract, moreover, is inconsistent with a claim of interference with prospective business relations. Nicosia v. Board of Mgrs. of the Weber House Condominium, 77 A.D.3d at 457.

F. Sixth Claim: Breach of Contract on Behalf of a Third Party Beneficiary

Finally, Wu claims that, as a third party beneficiary of the lease, she may recover for defendant's breach of the lease. To recover for breach of a contract as a third party beneficiary, Wu must establish that the lease between Bakakos and defendant or

one of its provisions was intended for her benefit and that it was sufficiently immediate for the contracting parties to assume an obligation to compensate Wu if she lost it. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 181-82; LaSalle Natl. Bank v. Ernst & Young, 285 A.D.2d 101, 108 (1st Dep't 2001). The benefit to Wu must be apparent from the face of the contract. LaSalle Natl. Bank v. Ernst & Young, 285 A.D.2d at 108. See Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d at 226.

Wu claims she was a third party beneficiary of the lease simply because defendant was aware of her use of the premises as a restaurant. Defendant's mere awareness of her use falls short of indicating that the lease was intended for her benefit. See Mendel v. Henry Phipps Plaza W., Inc., 6 N.Y.3d 783, 786 (2006); State of Cal. Pub. Employees' Retirement Sys. v. Shearman & Sterling, 95 N.Y.2d 427, 435 (2000). Even if that awareness were sufficient, Wu fails to allege any immediacy in the benefit to her, having first discussed her intentions with defendant over a year after the lease's execution.

IV. CONCLUSION

For the reasons delineated above, the court denies defendant's motion insofar as it seeks to dismiss:

(1) the first claim, by plaintiff Bakakos only, for breach of contract, only on the theories that defendant

(a) unreasonably withheld consent to Skretas to assign his interest in the lease to plaintiffs Wu and Symphonia Restaurant, Inc., and

(b) failed to make repairs, and
(2) the second claim, by Bakakos only, for fraudulent inducement, only on the theory that defendant represented he had authority alone to rent the premises.

The court otherwise grants defendant's motion and dismisses the remainder of the first and second claims and the third, fourth, fifth, and sixth claims in their entirety, including all claims by plaintiffs Symphonia Restaurant, Inc., and Wu.

DATED: May 26, 2011

Lucy Billings

LUCY BILLINGS, J.S.C.

**LUCY BILLINGS
J.S.C.**

FILED

JUN 24 2011

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