

**575 First Ave. Corp. v Board of Mgrs. of Kips Bay  
Towers Condominium**

2011 NY Slip Op 31895(U)

July 8, 2011

Sup Ct, NY County

Docket Number: 109295/2009

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**

**575 FIRST AVE. CORP.,**

**Plaintiff,**

**-against-**

**THE BOARD OF MANAGERS OF KIPS BAY  
TOWERS CONDOMINIUM, et al.**

**Defendants.**

**INDEX NO. 109295/2009**

**MOTION SEQ. NO. 003**

**FILED**

**JUL 12 2011**

**The following papers, numbered 1-7 were considered on this motion and cross motion for summary judgment:** **NEW YORK COUNTY CLERK'S OFFICE**

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2, 3</u>
Answering Affidavits — Exhibits _____	<u>5, 6</u>
Replying Affidavits (memo) _____	<u>7</u>
Cross-Motion: [ X ] Yes [ ] No	<u>4</u>

**Upon the foregoing papers, it is ordered that this motion and cross motion are decided as indicated below.**

Plaintiff 575 First Ave. Corp. commenced this declaratory judgment and breach of contract action, alleging nine causes of action against defendants The Board of Managers of the Kips Bay Towers Condominium a/k/a The Condominium Board of the Kips Bay Towers Condominium, Inc. ("Kips Bay"), and Cooper Square Realty Inc. ("Cooper Square"). Plaintiff is a commercial tenant operating a parking garage located at 300-303 East 33<sup>rd</sup> Street, New York, New York, in a building known as "the Kips Bay Towers", pursuant to a lease with defendant Kips Bay, expiring on December 31, 2018 (the "Lease").

Defendant Kips Bay allegedly obtained an offer from a third party seeking to take over the lease upon its expiration. The alleged offer spurred negotiations between plaintiff and defendant Kips Bay,

through their respective attorneys. An agreement was ultimately reached wherein the Lease was modified in part and the lease term extended through December 31, 2058. This agreement (the "First Modification") was signed on or about January 1, 2008. In the First Modification, plaintiff agreed to make two payments of \$2.5 million each for the 40 year lease extension, along with an increase to their yearly rental payment. On or about April 1, 2008, the Lease was modified again (the "Second Modification") to include a term, inadvertently left out of the First Modification, in which defendant Kips Bay would assist plaintiff in obtaining leasehold financing.

Plaintiff made the first payment of \$2.5 million as per the First Modification. Thereafter, obtaining leasehold financing in the failing economy became more difficult. Plaintiff allegedly obtained a verbal commitment for financing which was subsequently withdrawn as the garage did not have a separate tax parcel or a block and lot designation. Plaintiff then contacted defendant for assistance in obtaining the block and lot designation in order to obtain the leasehold financing. After several communications, defendant Kips Bay stated that obtaining a separate block and lot for the garage would require the amendment of the cooperation's declaration and by-laws. This would entail getting approval from all 1,120 shareholders of the cooperation, as well as their mortgagees, which would be impossible. Defendants claim that the Second Modification does not require them to amend the by-laws in order to assist plaintiff in obtaining leasehold financing. When plaintiff failed to make the second payment of \$2.5 million on July 1, 2009 as agreed upon in the Lease (including the First and Second Modifications [the "Lease and Modifications"]), plaintiff received a Notice of Default dated July 2, 2009. This proceeding followed.

Plaintiff's complaint raises nine causes of action which seek the following: (1) a declaratory judgment that the Notice of Default was an inadequate notice pursuant to the terms of the Lease and Modifications; (2) a declaratory judgment that defendant Kips Bay is obligated to assist plaintiff in

obtaining leasehold financing; (3) a *Yellowstone* Injunction; (4) injunctive relief restraining defendants from soliciting bids and/or accepting bids for the garage during the term of plaintiff's Lease and Modifications; (5) an award of damages and punitive damages for defendants' alleged fraud and misrepresentation with regard to the offer from a third party to take over plaintiff's original lease; (6) damages for defendant Kips Bay's alleged breach of lease by their refusal to assist plaintiff in obtaining leasehold financing; (7) damages for defendants' alleged breach of lease by soliciting bids for the garage for which plaintiff has a valid lease; (8) rescission of the First and Second Modifications as the agreements were allegedly procured through fraud and restoration of plaintiff's original lease; and (9) damages for defendant Cooper Square's alleged tortious interference with plaintiff's contractual relationship with defendant Kips Bay.

Defendants now move for summary judgment pursuant to CPLR 3212 to dismiss the amended complaint in its entirety. Defendants also move to vacate the *Yellowstone* injunction and reinstate the Notice of Default and Opportunity to Cure upon dismissing plaintiff's amended complaint. Plaintiff cross-moves for summary judgment on the first and second causes of action. Specifically, plaintiff is seeking summary judgment on the issue of whether defendants must assist plaintiff in obtaining leasehold financing by amending the Lease to include a block and lot designation for the garage and whether the Notice of Default is null and void in that it: (1) was not properly served; (2) was issued by a non-party to the original and modified leases; and (3) failed to specify which provision the plaintiff allegedly violated.

It is well settled that the proponent of a summary judgment motion, has the burden to "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." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Summary judgment is a drastic remedy and should only be granted if the moving party

has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The failure to make such a showing requires denial of the motion. *Winegrad v New York Univ. Med. Ctr.* 64 NY2d at 853 (1985). Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

As to plaintiff's cross-motion for summary judgment on the first two causes of action, triable issues of fact exist; as such, plaintiff's cross-motion for summary judgment is denied. First, plaintiff is contesting proper service of the Notice of Default and is seeking summary judgment and dismissal on this issue. While defendants' counsel has submitted an affidavit of service, plaintiff's counsel submits an affidavit stating that he was not served. When affidavits of process servers are in conflict with the sworn statements by an opposing party, a hearing is required to determine if service was properly made. *Green Point Savings Bank v Taylor*, 92 A.D.2d 910, 910 (2d Dep't 1983). The validity of service pursuant to CPLR 308(4) is to be established through a hearing when, as here, there are conflicting affidavits and the truth of the matter is not clearly evident. *First Union Mortgage Corp. v Silverman*, 242 A.D.2d 258, 539 (2d Dep't 1997). Due to the conflicting affidavits as to whether plaintiff was properly served with process, summary judgment cannot be granted on this first cause of action.

Secondly, plaintiff moves for summary judgment seeking a declaratory judgment that defendant Kips Bay must assist in obtaining leasehold financing by amending the Lease and Modifications to include a separate tax block and lot designation for the garage. Specifically, plaintiff relies on the language in the Second Modification which states, in relevant part:

1.1 *Tenant's Rights.* Notwithstanding anything in this lease to the contrary, Tenant shall have the absolute and unconditional right, without Landlord's consent, to execute and deliver one or more leasehold mortgages (referred to herein as a "Leasehold Mortgage") encumbering this Lease and the leasehold estate ("Leasehold Estate") at any time and from time to time during the Term to a leasehold mortgagee ("Leasehold Mortgagee").

1.3 *Modification Required by Leasehold Mortgagee.* If any actual or prospective Leasehold Mortgagee from time to time require any modification to this Lease, then Landlord shall, at Tenant's or such Leasehold Mortgagee's request, and at no cost to Landlord, promptly execute and deliver to Tenant such instruments in recordable form effecting such modification as such actual or prospective Leasehold Mortgagee shall reasonably require, provided that such modification does not materially adversely affect landlord's rights or materially increase Landlord's obligations. Landlord's obligations to send notices to any Leasehold Mortgagee (and giving it a reasonable time to cure any of tenant's defaults) or to provide any Leasehold Mortgagee with estoppel certificates shall not be deemed to materially increase Landlord's obligations hereunder."

Plaintiff argues that pursuant to the above provision defendant Kips Bay is obligated to assist in securing mortgage financing even if the Lease must be amended.

However, defendants state that in order to obtain a separate block and lot designation for the garage, defendants would have to amend the declaration and by-laws of the cooperative. Defendants argue that the explicit language in the Second Modification does not require them to amend the by-laws, rather the contract language requires only the amendment of the Lease, including the First and Second Modification. Defendants proffer evidence tending to show that an amendment of the declaration and by-laws of the cooperation would be necessary to alter the status of the garage. Defendants provide the relevant portion of the declaration, in Article 7(b)(vi), listing the garage as a general common element.

Pursuant to RPL § 339-e(5), common interest is the "(2) proportionate undivided leasehold interest in the common elements appertaining to each unit, as expressed in the declaration." RPL § 339-i(2) goes on to state that "[t]he common interest appurtenant to each unit as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all unit owners affected, expressed in an amended declaration." As such, an amendment of the declaration would be required to convert the status of the garage from a common element as under the declaration.

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility".

*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992). Drawing all reasonable assumptions

in favor of defendant, plaintiff's summary judgment motion as to the second cause of action must be denied. An issue of fact exists as to whether obtaining a separate block and lot designation for the garage would alter the status of the garage thus requiring an amendment of the declaration or the by-laws rather than the Lease and Modifications, and whether such would be "virtually impossible", as alleged by defendants<sup>1</sup>. As such, plaintiff's motion for summary judgment cannot be granted on the second cause of action.

Turning to defendant's motion for summary judgment on all causes of action, the motion is denied as to the first and second causes of action for the same reasons as stated above. Additionally, defendant's motion for summary judgment as to the sixth cause of action is also denied as it relates to the second cause of action. Plaintiff's sixth cause of action alleges that defendant breached the Lease and Modifications, in failing to assist plaintiff in obtaining leasehold financing. To establish a prima facie case of breach of lease the plaintiff must demonstrate the existence of a valid lease between plaintiff and defendants, performance by plaintiff, defendants' failure to perform and that damages resulted from such failure to perform. *Noise in the Attic Productions, Inc. v London Records*, 10 AD3d 303, 306 (1<sup>st</sup> Dep't 2004).

Both parties have made bald claims in their pleadings as to the amendments required to obtain a separate block and lot designation for the garage. Neither plaintiff, nor defendants, have provided sufficient evidence to prove that either the Lease and Modifications, or the declaration and by-laws must be amended to obtain a block and lot designation. In deciding a summary judgment motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As it is unclear from the papers before this Court

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<sup>1</sup> The Court notes that "virtually impossible" is different than having actually attempted and it was not possible to accomplish.

whether the Lease itself or the cooperative's by-laws must be amended in order to obtain the leasehold financing and whether, even if necessary, was "virtually impossible" (as alleged by defendant), defendant's alleged breach of lease cannot be decided on summary judgment. Accordingly, defendant's motion as to the sixth cause of action is denied.

Similarly, plaintiff claims, in its seventh cause of action, that defendants' failure to assist in obtaining leasehold financing, as well as their solicitation of bids, constituted a breach of their duties of good faith and fair dealing. Plaintiff alleges that defendants' outright refusal to attempt to assist in obtaining a tax parcel or separate block and lot designation, while soliciting bids from other garage operators evidences a breach of the implied covenant of good faith and fair dealing. However, defendants state that no evidence has been provided to show that their alleged solicitation of bids have destroyed the value of the Lease and Modifications for plaintiff. Defendants also argue that the implied covenant cannot be inconsistent with the explicit terms of the contractual relationship. As such, defendants claim that as they did not breach the contract by soliciting bids or by refusing to amend the by-laws, they have not breached the implied covenant.

The covenant of good faith and fair dealing is implicit in all contracts in the course of contract performance. *Dalton v Ed. Testing Serv.*, 87 NY2d 384, 389 (1995). The covenant "is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 (1<sup>st</sup> Dep't 1996). However, the "covenant does not extend so far as to undermine a party's 'general right to act on its own interest in a way that may incidentally lessen' the other party's anticipated fruits from the contract." *M/A-COM Sec. Corp. v Galesi*, 904 F.2d 134, 136 (2<sup>nd</sup> Cir. 1990)(internal citations omitted). Accordingly, it cannot be said that defendants breached the covenant of good faith and fair dealing by soliciting bids to protect their

interests. Additionally, as previously stated, it is unclear, on the papers alone, whether defendants breached the lease by refusing to assist in obtaining a separate block and lot designation for the garage. As “no obligation can be implied that ‘would be inconsistent with other terms of the contractual relationship’ ”, *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 (1995)(internal citations omitted), summary judgment cannot be reached on this seventh cause of action where issues of fact exist as to plaintiff’s related breach of lease claim.

Looking to the fourth cause of action, plaintiff seeks to enjoin defendants from soliciting bids for the garage pending the determination of this proceeding and to further enjoin defendants from soliciting and/or accepting bids while the contract is in full force and effect. As stated above, to establish a prima facie case of breach of lease the plaintiff must specify the existence of a valid lease, performance by plaintiff, defendants’ failure to perform and resulting damages. *Noise in the Attic Productions, Inc. v London Records*, 10 AD3d 303, 306 (1<sup>st</sup> Dep’t 2004). Plaintiff alleges that defendants breached the lease by soliciting and/or accepting bids for the garage while plaintiff’s Lease was still in effect. Plaintiff further allege that defendants’ actions have harmed them though no harm has been specified.

To grant summary judgment it must be clear that no material and triable issue of fact is presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). No issues of fact have been raised by either side as the facts are largely uncontested as to this fourth cause of action. The only issue to be determined is whether defendant breached the Lease and Modifications by soliciting bids while the Lease was still in effect. Defendants have shown that plaintiff’s pleadings fail to allege the harm resulting from defendants’ solicitation of bids. Additionally, plaintiff failed to specify any contractual provision allegedly breached by defendants’ solicitation. The moving party must specify the essential terms of the contract and include the provisions of the contract upon which liability is predicated. *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 234 (1<sup>st</sup> Dep’t

1994). As the Lease does not prohibit the solicitation of bids during the lease term and no harm has been alleged which resulted from the solicitation of bids, plaintiff's fourth cause of action is dismissed.

Plaintiff has alleged fraud and misrepresentation in its fifth cause of action. Specifically, plaintiff claims that defendants fraudulently represented that they either received or was on the verge of accepting an offer to take over plaintiff's original lease at the beginning of January 2019. Plaintiff further claims that defendants made this misrepresentation in order to induce plaintiffs into renegotiating their lease. Plaintiff submits the affidavit of Kevin R. Wolf, president and shareholder of plaintiff, to establish its claim. Plaintiff has stated that defendant Kips Bay demanded that plaintiff match the alleged offer and that defendant Kips Bay would not reveal the identity of the entity offering to take over the lease. Defendants argue that an entity was willing to take over plaintiff's lease at the time it ended in December 2018 and that the entity was willing to pay consideration to lock in that right. Defendants claim that they did not intent to defraud plaintiff, rather defendants were merely "puffing" a competing offer.

In order to make out a claim for fraudulent inducement, plaintiff must establish by clear and convincing evidence: (a) a misrepresentation or omission of material fact; (b) knowledge of its falsity; (c) an intent to defraud; (d) reasonable reliance; and (e) actual damages as a result of that reliance. *Shea v Hambros PLC.*, 244 AD2d 39, 46 (1<sup>st</sup> Dep't 1998). Drawing all reasonable inferences in favor of plaintiff, a reasonable jury could conclude that defendant Kips Bay intentionally misrepresented the facts. However, as stated above, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). As the pleadings are unclear as to whether an offer was made to defendant Kips Bay by an unknown entity and whether defendants intended to defraud plaintiff, material issues of fact have been raised sufficient to preclude summary judgment. Accordingly,

defendants' motion for summary judgment as to the fifth cause of action is denied.

Plaintiff's eighth cause of action is for rescission on the grounds that the Lease and Modifications were procured through fraud. To rescind a contract, a party must show that material facts were misrepresented and that those misrepresentations were the inducement to the contract. *Jones v Title Guarantee & Trust Co.*, 277 NY 415, 419 (1938). As this cause of action relates to the fifth cause of action, triable issues of fact exist as to whether material facts were misrepresented, sufficient to preclude summary judgment.

In plaintiff's last cause of action, plaintiff alleges that defendant Cooper Square interfered with the contractual relationship between plaintiff and defendant Kips Bay. Tortious interference with contractual relations lies "where there is an existing, enforceable contract and a [party's] deliberate interference results in a breach of that contract." *NBT Bancorp, Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 621 (1996). A party "may recover damages for tortious interference with contractual relations even if the [other party] was engaged in lawful behavior." *Id* at 621. Plaintiff's allegations of tortious interference with contractual relations are insufficient as they fail to allege defendant Cooper Square intentionally procured a breach of the contract by defendant Kips Bay. Additionally, plaintiff has failed to allege that "but for" defendant Cooper Square's conduct, the defendant Kips Bay would not have allegedly breached its contract with plaintiff. *Burrowes v Combs*, 25 AD3d 370, 373 (1<sup>st</sup> Dep't 2006). Additionally, plaintiff has not shown that defendant Kips Bay has breached the contract at all. As such, defendant's motion for summary judgment as to the ninth cause of action is granted.

Accordingly, it is

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that defendant's motion is granted to the extent that plaintiff's fourth and ninth causes of action are dismissed; and it is further

ORDERED that the *Yellowstone* Injunction remains in effect; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this decision/order upon plaintiff with notice of entry.

This is the decision and order of the court.

Dated: 7/8/11

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

NON-FINAL DISPOSITION

J:\Summary Judgment\575 First Ave - service, injunctive relief, fraud, breach of k, rescission, tortious interference with k.wpd

**FILED**

**JUL 12 2011**

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