SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

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NEWPORT CENTRE, LLC, a Delaware Limited Liability Company,

Plaintiff,

-against-

PATTYWORLD, INC. d/b/a GOLDEN KRUST CARIBBEAN BAKERY & GRILL,

Defendant.

_____X

DECISION/ORDER

Index No.: 310288/10

The following papers numbered 1 to read on the below motions noticed on **March 11, 2011** and duly submitted on the Part IA15 Motion calendar of _____, 2011:

Papers Submitted	Numbered
Pl.'s Affirmation in support of motion, exhibits	1,2
Def.'s cross-motion, exhibits	3,4
Pl.'s Affirmation in Reply, exhibits	5,6
Def. Affirmation in Reply, exhibits	7,8

In an action for damages arising from an alleged breach of lease agreement, the plaintiff, Newport Centre, LLC. (hereinafter "Plaintiff"), moves to dismiss the counterclaims of the defendant, Pattyworld, Inc., d/b/a Golden Krust Caribbean Bakery & Grill (hereinafter "Defendant") and for sanctions pursuant to *CPLR* 3211(a)(1) and (7) and 22 *NYCRR* 130-1, respectively. Defendant opposes and cross-moves for summary judgment, dismissing Plaintiff's complaint

I. Factual History

Plaintiff is the commercial landowner of a shopping mall located in Jersey City, New Jersey. Defendant is a leasing company associated with a restaurant chain headquartered in the Bronx, New York. On January 24, 2007, the parties entered into a written commercial lease for

space in the mall, commencing on or about April 1, 2007 and continuing for 10 years thereafter. On the same date, Defendant subleased the property to Baral Cuisine, LLC. The base rent during the 10 year period began at $5,000 per month for the first three years, rising in gradations over the lease term to $6,250 per month. Plaintiff alleges in its complaint that Defendant failed to make rent payments on July 1, 2008 and every month thereafter. The franchisee then filed for bankruptcy and surrendered the premises on November 21, 2008. By virtue of its verified complaint, Plaintiff is now seeking (1) the amount for past due rental obligations under the terms of the lease due to Defendant's default, (2) interest, late fees, attorney's fees, and (3) the net present value of the lease. Plaintiff alleges that it is entitled to the net present value of the lease under the discrete terms of the parties' lease agreement, and despite whether or not the area was re-let following Defendant's vacatur of the rental space.

Defendant's verified answer asserts counterclaims alleging (1) fraud in the inducement, (2) breach of lease, (3) constructive eviction, (4) breach of covenant of quiet enjoyment, and (5) civil RICO violations. Defendants allege that Plaintiff is not entitled to the "net present value" of the lease, as the property was re-leased shortly after Defendant's vacated, and further the parties' lease terms do not warrant accelerated collection of the entire lease term. Defendant further alleges that Plaintiff and its co-conspirators have concocted a fraudulent collection scheme wherein they induce parties to enter into lease agreements and pursue large settlements when a breach occurs.

Plaintiff moves to dismiss the counterclaims and seeks sanctions against Defendant's counsel for filing of allegedly frivolous pleadings. Defendant's cross-move to dismiss Plaintiff's complaint in its entirety.

II. Analysis

(1) Plaintiff's Motion to Dismiss Counterclaims

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 (1st Dept. 2002). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied

from its statements, a cause of action can be sustained. *See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 (1st Dept. 1990); *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 (1st Dept. 1997)(on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* §3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory". *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *McGill v. Parker*, 179 A.D.2d 98 (1st Dept. 1992).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211 (a)(7) may properly be negated by affidavits and documentary evidence. *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 (1st Dept. 2005). Indeed, such a motion may be granted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Id.*, citing *Leon v. Martinez., supra.* Evidentiary material may also be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint. *Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 (2nd Dept. 2001). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR* 3211(a)(7). *Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 (1st Dept. 1983).

(A) Fraud in the Inducement

In this matter, Plaintiff seeks dismissal of Defendant's first counterclaim alleging Fraud in the Inducement. A cause of action for fraud requires a plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486 (2008), citing *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009).

Nicosia v. Board of Managers of Weber House Condominium, 77 A.D.3d 455 (1st Dept. 2010). It is not necessary that the measure of damages be pleaded, provided that facts are alleged from which damages may be properly inferred. *Black v. Chittenden*, 69 N.Y.2d 665 (1986). *CPLR* 3016 (b) provides that where a cause of action or defense is based upon fraud, "the circumstances constituting the wrong shall be stated in detail." *Pludeman, supra*. The purpose of this heightened pleading requirement is to inform a defendant with respect to the incidents complained of. *Id.* This provision, however, should not be so strictly interpreted "as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud' *Pludeman, supra*, citing *Lanzi v Brooks*, 43 NY2d 778, 780 (1977), quoting *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 (1968). Thus, where concrete facts "are peculiarly within the knowledge of the party" charged with the fraud (*Jered Contr. Corp.*, 22 NY2d at 194), it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings (*see CPC Intl. v McKesson Corp.*, 70 NY2d 268, 285-286 (1987); *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 97-98 (1st Dept 2003);

In support of their fraud claim, Defendant alleges that, unbeknownst to them at lease signing, Plaintiff had in place as its practice a "fraudulent collection scheme" consisting of intentionally misrepresenting the provisions of the lease for the purpose of extorting monies from tenants if their tenancy "did not work out". Essentially, Defendant alleges that the Plaintiff knew that they had a fraudulent collection practice, and intentionally withheld this information to induce Defendant to enter into the lease and sublease, Defendant justifiably relied on this misrepresentation to its detriment.

Plaintiff states that Defendant, as a knowledgeable business entity operating with counsel, is foreclosed from asserting fraud in the negotiation of the parties' lease agreement. *See Miller v. Icon Group*, 77 A.D.3d 586 (1st Dept. 2010). However, this is not a matter wherein alleged victim is claiming that tortfeasor misrepresented the parties' lease provisions prior to entering into the agreement. Rather, Defendant here alleges that Plaintiff committed fraud by withholding the fact that they will "ignore lease provisions" and pursue amounts they are not entitled to if the tenant in any way violates the lease. Unlike in *Miller*, Defendants here can establish justifiable

reliance since they allegedly did not have the means to discover the plaintiff's fraudulent business practices before entering the lease.

In light of the above, Plaintiff's motion to dismiss Defendant's first counterclaim is denied. Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action. Although under *CPLR* 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Rather, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct. (*see Polonetsky*, 97 NY2d 46, 55 [2001] [alleged facts sufficient to permit a jury to "infer (defendant's) knowledge of or participation in the fraudulent scheme"]) Such a sufficient showing has been made in this matter. Plaintiff has not come forth with documentary evidence refuting the allegations in Defendant's first counterclaim.

(B) Civil RICO Violations

The Racketeer Influenced and Corrupt Organization ("RICO") statutes were enacted to make it unlawful for someone to earn income from a pattern of racketeering activity to be used to: (1) acquire an interest in, establish or operate an enterprise involved in interstate commerce; (2) acquire or maintain an interest in such enterprise through a pattern of racketeering activity; (3) conduct or participate in the conducting of such enterprise through racketeering activity; and (4) conspire to do any of the foregoing acts. *Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450 (1988). Accordingly, the elements of a Civil RICO cause of action are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. 18 USCA §§ 1961, 1962, 1964; *Podraza v. Carriero*, 212 A.D.2d 331 (4th Dept. 1995), lv dism 86 N.Y.2d 885 (1995).

Civil RICO violations require a heightened pleading requirement because such assertions have been found to be "an unusually potent weapon- the litigation equivalent of a thermonuclear device" *Besicorp v. Kahn*, 290 A.D.2d 147 (3rd Dept. 2002). Liability under 18 U.S.C. § 1962(b) requires a showing that a person, "through a pattern of racketeering activity acquire[s] or maintain[s], directly or indirectly, any interest in or control of any enterprise which is engaged in interstate or foreign commerce". Plaintiff's claim must plead facts showing that defendants

maintained or acquired control of plaintiff through alleged racketeering activity (*see, Discon, Inc. v. NYNEX Corp.*, 2d Cir., 93 F.3d 1055, 1062-1063 (2nd Cir. 1996), *vacated on other grounds* 525 U.S. 128, 119 S.Ct. 493. In order to establish a "pattern" there must be at least two (2) racketeering activities within a ten (10) year period. *Simpson Electric Corp. v. Leucadia, supra*; *Podraza v. Carriero, supra*. The definition of "racketeering" includes any one of a number of predicate offenses, including wire and mail fraud. An "enterprise," is a continuing operation and is closely connected to the "pattern" requirement. *Weisel v. Provident Life and Cas. Ins. Co.*, 11 Misc.3d 1062(A) (N.Y. Sup. Ct., N.Y. Cty. 2006), citing *U.S. v. Bortnovsky*, 879 F.2d 30 (CA 2nd 1989) (liberal construction of what facts establish pattern or enterprise).

Here, Defendant's counter-claims allege that Plaintiff shopping mall, through its affiliation with a commercial real estate investment corporation, perpetrated a continuing operation of extorting large settlements from commercial tenants following lease terminations. The counterclaim alleges that this "fraudulent collection scheme" spanned state lines and was perpetrated on other commercial tenants as well. Moreover, Defendant's answer states that Plaintiff utilized mail fraud in furtherance of this scheme. Defendant's pleading appears sufficient on its face. The ultimate merits of Defendant's counterclaim are not to be disposed via dismissal motion under *CPLR* 3211.

(C) Defendant's Second, Third, and Fourth Counterclaims

Plaintiff asserts that Defendant's second, third, and fourth counterclaims (alleging breach of covenant of quiet enjoyment, constructive eviction, and breach of lease) must be dismissed because Defendant, as lessee, cannot bring suit on behalf of the sub-lessee, as it has no standing to sue. However, a landlord is responsible to the tenant for wrongful interference with a sublessee. *See McGlashan v. Marvin*, 185 A.D.157 (4th Dept. 1918), *Mulliken v. Brown*, 201 A.D.860 (2nd Dept. 1922). The interference may constitute a breach of the covenant of quiet enjoyment or an eviction, as where the original lessor expels the sublessee or collects from him or her the rent that is due to the sublessor. *Id.* Notwithstanding the possible redundancy of Defendant's counterclaims for breach of covenant of quiet enjoyment as well as constructive eviction, these claims were properly asserted in the verified answer. Accordingly, Plaintiff's

motion is denied as to these counterclaims.

In light of the above, Plaintiff's motion for sanctions in accordance with 22 *NYCRR* 130-1.1 is denied.

(2) Defendant's Motion for Summary Judgment

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. *Muniz v. Bacchus*, 282 A.D.2d 387 (1st Dept. 2001). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. *Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 (2nd Dept. 1964); *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 (3rd Dept. 1988).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000).

Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960).

In this matter, there are multiple issues of fact as to whether the parties' respective claims are valid or supportable by documentary evidence. Defendant herein appears to allege that Plaintiff is not entitled to past due rent, due to alleged improper conduct during the lease term and a "fraudulent collection scheme". Plaintiff denies these allegations and thus there are

obvious issues of material fact that cannot be disposed via summary judgment. Accordingly, Defendant's cross-motion for summary judgment must be denied.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion to dismiss pursuant to *CPLR* 3211(a)(1) and (7), and for sanctions pursuant to 22 *NYCRR* 130-1.1 is hereby DENIED, and it is further,

ORDERED, that Defendant's cross-motion for summary judgment pursuant to *CPLR* 3212 is hereby DENIED.

The above constitutes the Decision and Order of this Court.

Dated: July 26, 2011

Hon. Mary Ann Brigantti-Hughes, J.S.C.