

Dumann Realty LLC v 1375 Mgt. Group, LLC

2012 NY Slip Op 30002(U)

January 3, 2012

Supreme Court, New York County

Docket Number: 106001/2009

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Judge

PART 36

Index Number : 106001/2009
DUMANN REALTY LLC
VS.
1375 MANAGEMENT GROUP, LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

this motion to/for Summary Judgment

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

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 for summary judgment
by defendant Statecart Enterprises, Inc., is granted
in accordance with the attached memorandum
decision.

(consolidated for disposition with motion
sequence number 003)

FILED

JAN 04 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/3/12

[Signature]
JUDGE DORIS LING-COHAN 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: IAS PART 36

-----X
DUMANN REALTY LLC,

Plaintiff,

Index No.: 106001/09
DECISION/ORDER

-against-

Motion Sequence No.:
002 & 003

1375 MANAGEMENT GROUP, LLC, HARRY
ASHKENAZI, BISTRO NEW YORK
INTERNATIONAL, INC., BISTRO MARKETPLACE
1375, INC., and STATECOURT ENTERPRISES, INC.,
Defendants.

FILED

-----X
HON. DORIS LING-COHAN, J.S.C.:

JAN 04 2012

In this commercial contract action, defendant Statecourt Enterprises, Inc. (Statecourt) ^{NEW YORK} COUNTY CLERK'S OFFICE
moves for summary judgment to dismiss the complaint as against it and for sanctions. Plaintiff
Dumann Realty LLC (Dumann) moves separately for leave to amend the complaint to assert new
causes of action against defendant Statecourt. For the following reasons, Statecourt's motion is
granted in part and denied in part, and plaintiff's motion is denied.

BACKGROUND

Dumann is a New York State licensed limited liability corporation that engages in
business as a real estate agency. See Notice of Motion, Exhibit D (complaint), ¶¶ 1-2, 17-18.
Defendant Statecourt, another New York corporation, was the net lessee and landlord of a
building (the building) located at 1375 Broadway in the County, City and State of New York.¹
Id., ¶¶ 9, 12. Defendant 1375 Management Group, LLC (1375 Management), another New York
State licensed limited liability corporation, is the commercial tenant of the building's ground

¹ Statecourt sold its interest in the building on December 9, 2010. See Notice of
Motion, Lindenberg Affirmation, ¶ 12.

floor space, and defendant Harry Ashkenazi (Ashkenazi) is a principal of 1375 Management. *Id.*, ¶¶ 3-4, 11, 13, 16. Defendant Bistro Marketplace 1375, Inc. (Bistro) is the subtenant of 1375 Management’s commercial space in the building, and defendant Bistro New York International, Inc. (Bistro International) is Bistro’s corporate parent. *Id.*, ¶¶ 14-15. Both of the Bistro defendants are New York State licensed corporations. *Id.*, ¶¶ 5-8.

1375 Management acquired its leasehold on the building’s ground-floor commercial space via a lease assignment and assumption (the 1375 assignment), dated February 6, 2007, from non-party Pizza Adinah of Broadway, LLC. *See* Notice of Motion, Exhibit B. Bistro acquired its leasehold on the building’s ground-floor commercial space via a sublease (the Bistro sublease), dated January 13, 2009, from 1375 Management. *Id.*; Exhibit C. The terms of those agreements are not relevant to the instant motions.

Instead, this action centers on a contract, entitled “leasing agency agreement” (the leasing agreement) that Dumann executed on November 7, 2007 with Ashkenazi, in his capacity as principal of 1375 Management. *See* Notice of Motion, Exhibit D-1. Dumann alleges that 1375 Management breached the leasing agreement in connection with the Bistro sublease. *Id.*; Exhibit D (complaint), ¶¶ 17-33. Statecourt points out, however, that it was not a party to the leasing agreement. *Id.*; Lindenberg Affirmation, ¶¶ 3-9.

Dumann commenced this action, on April 28, 2009, by filing a summons and complaint that sets forth causes of action for: 1) breach of contract; 2) quantum meruit; 3) an account stated; and 4) unjust enrichment. *See* Notice of Motion, Exhibit D. On or about June 25, 2009, Statecourt filed an answer with affirmative defenses. *Id.*; Exhibit E. Shortly thereafter, Dumann filed a motion seeking an order: 1) to strike the answers and affirmative defenses of all

* 4]

defendants; and 2) for leave to amend the complaint; and Statecourt cross-moved therein for summary judgment to dismiss the complaint as against it (motion sequence number 001). The court disposed of those motions in a decision, dated July 9, 2010, that denied Statecourt's cross motion without prejudice, on the ground that it had been improperly noticed. *Id.*; Exhibit K.

With respect to Dumann's motion to amend, the court stated, in relevant part, as follows:

As to defendant Statecourt, the motion to amend the complaint is denied. With regard to the sixth cause of action for tortious interference with a contract, plaintiff has failed to allege facts that would support such a cause of action. "Active and intentional procurement of a breach is an essential elements of a cause of action alleging tortious interference with contract." Plaintiff has not alleged such "active and intentional procurement of a breach," but, instead, only alleged, in a conclusory fashion, that defendant Statecourt tortiously interfered with its contract with 1375 Management.

The seventh and eighth causes of action against Statecourt also lack merit. Plaintiff alleges in its seventh cause of action for misrepresentation that "[u]pon information and belief, all defendants deliberately misrepresented to the Plaintiff that the original sublease could not be completed because the tenant Bistro did not have the funds to complete the deal." Yet, plaintiff has not asserted what statements or in what manner defendant Statecourt, in particular, made misrepresentations to it, as it appears these two parties had little, if any, communications with each other. Further, the only evidentiary proof submitted by plaintiff is not any correspondence between it and defendant Statecourt directly, but merely inquiries between the parties into whether Statecourt had approved the lease, since as the landlord, Statecourt was required to give approval, although it could not unreasonably withhold its consent. Lastly, as to the eighth cause of action for breach of covenant of good faith and fair dealing, plaintiff bases this cause of action on the alleged fact that "all defendants deliberately avoided their obligation to pay the brokerage fee by conspiring to misinform the Plaintiff." However, as plaintiff has admitted that there was no contract between it and Statecourt, there was no obligation for Statecourt to pay plaintiff any brokerage fee. Thus, the pleading as to Statecourt fails to state a breach of covenant of good faith and fair dealing as to defendant Statecourt [internal citations omitted].

Id.

Now before the court are Statecourt's new motion for summary judgment to dismiss the

complaint as against it (motion sequence number 002), and Dumann's new motion for leave to amend the complaint, (motion sequence number 003).

DISCUSSION

Statecourt's Motion

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Here, as previously mentioned, the first branch of Statecourt's motion seeks summary judgment to dismiss the complaint as against it.

Dumann's second cause of action seeks recovery in quantum meruit.² *See* Notice of Motion (motion sequence number 002), Exhibit D, ¶¶ 39-42. Statecourt argues that this claim is barred, as a matter of law, because there is an express contract (i.e., the leasing agreement) that governs the subject matter of Dumann's claims, and the existence of this contract renders equitable claims against third-party non-signatories such as Statecourt improper. *See* Notice of Motion, Lindenberg Affirmation, ¶¶ 31-43. Statecourt's reading of the law is correct. In *Bellino*

² As previously mentioned, the first cause of action in Dumann's complaint alleges breach of contract, however Statecourt is not named as a defendant as to such cause of action, since it was not a party to the leasing agreement. Thus, Statecourt's current motion is directed to Dumann's second, third and fourth causes of action.

Schwartz Padob Adv. v Solaris Mktg. Group (222 AD2d 313 [1st Dept 1995]), the Appellate Division, First Department, plainly stated that “the existence of an express contract ... governing the subject matter of the plaintiff’s claims ... bars any quasi contractual claims against [the] defendant.” *Id.* at 313; citing *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 (1987); *Feigen v Advance Capital Mgt.*, 150 AD2d 281, 283 (1st Dept 1989). Nevertheless, Dumann responds that its’ claim may survive because a clause in the leasing agreement permitted Statecourt - as landlord - to approve or disapprove of any sublease that Dumann procured, and Statecourt did, in fact, disapprove of the first sublease that Dumann proposed for Bistro. See Sarno Affirmation in Opposition to Defendants’ Motion and in Support of Plaintiff’s Motion, ¶ 32. However, Dumann does not cite to any case law to support this argument. Nor does it explain why the mere presence of a clause in a contract should mandate that a non-party to that contract be accorded the same legal obligations as a party to the contract. Therefore, Dumann’s argument is rejected. Plaintiff’s quantum meruit claim against Statecourt is dismissed.

Dumann’s third cause of action alleges an account stated. Under New York State law, a defendant’s receipt and retention of a plaintiff’s invoices seeking payment for services rendered, without objection within a reasonable time, gives rise to an actionable account stated. See e.g. *Cook & Associates Realty, Inc. v Chestnut*, 65 AD3d 937 (1st Dept 2009); *Manhattan Telecommunications Corp. v Best Payphones, Inc.*, 299 A.D.2d 178 (1st Dept 2002). Statecourt argues that this claim too must fail as a matter of law because Dumann never made any demands for payment from it. See Notice of Motion, Lindenberg Affirmation, ¶ 51. Again, Statecourt’s reading of the law is correct. See e.g. *Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412 (1st Dept 1995). In its opposition papers, Dumann unaccountably “admits not sending invoices to the

defendant Statecourt,” and “admits the case law as stated, [but] does not agree [that] it is applicable to this matter.” *See* Sarno Affirmation in Opposition to Defendants’ Motion and in Support of Plaintiff’s Motion, ¶¶ 51, 53. Dumann does not offer any argument or legal support as to why it should be exempt from this account stated claim. Therefore, Dumann’s claim for an account stated must fail, as a matter of law.

Dumann’s fourth cause of action seeks recovery on a theory of unjust enrichment. Statecourt cites the same precedent that it raised against Dumann’s quantum meruit claim, which also holds that unjust enrichment claims must fail, as a matter of law, where there is an express contract that governs the subject matter of a plaintiff’s claims. *See* Notice of Motion, Lindenberg Affirmation, ¶¶ 31-43. Again, Dumann asserts that its claim does not fail as a matter of law, but does not cite any contrary to support its position. However, it is clear that “the existence of ... an express contract governing the subject matter of plaintiff’s claims, also bars the unjust enrichment cause of action as against the individual defendants, notwithstanding the fact that they were not signatories to that agreement.” *Vitale v Steinberg*, 307 AD2d 107, 111 (1st Dept 2003); citing *Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d at 313 *supra*; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d at 283, *supra* . Therefore, the court rejects Dumann’s argument and the unjust enrichment claim asserted against Statecourt is dismissed. Accordingly, the first branch of Statecourt’s motion is granted to the extent of awarding Statecourt summary judgment dismissing the complaint as against it.

The balance of Statecourt’s motion seeks sanctions against Dumann for “frivolous conduct,” pursuant to 22 NYCRR § 130-1.1 (c). In full, that statute provides that :

- (a) The court, in its discretion, may award to any party or attorney in any civil

action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Here, Statecourt specifically alleges two instances of frivolous conduct by Dumann: 1) refusing to discontinue this action as against Statecourt despite having knowledge that Statecourt was not a party to the leasing agreement; and 2) seeking to amend the complaint to assert

additional groundless causes of action against Statecourt. *See* Notice of Motion, Lindenberg Affirmation, ¶¶ 58-62. With respect to the former, counsel for Statecourt avers that he explained Statecourt's lack of involvement with the leasing agreement to Dumann's counsel on several occasions at the commencement of this action, and that Dumann's counsel had four months in which to review the law and consider the matter. *Id.*, ¶ 59. Dumann responds that, during that time, counsel for Statecourt refused to respond to Dumann's discovery requests, so that he was unable to confirm Statecourt's allegations. *See* Sarno Affirmation in Opposition to Defendants' Motion and in Support of Plaintiff's Motion, ¶ 56. Statecourt's reply papers contain no response to this allegation. Since it appears that Dumann's delay in determining whether to continue its suit against Statecourt was not "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure" Statecourt, but was due to attenuated discovery compliance for which both parties may have been at fault, Dumann's conduct was not "frivolous," within the statute's meaning. Therefore, the court declines to impose sanctions on this ground.

With respect to Dumann's motion to amend, as will be discussed, Statecourt is correct to note that Dumann's proposed claims lack merit. However, at least with respect to Dumann's proposed claim for tortious interference, it cannot be said that this claim "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." Thus, the court cannot find that Dumann's request to impose such claim also fails to amount to "frivolous conduct". Therefore, the court declines to impose sanctions on this ground. Accordingly, the second branch of Statecourt's motion is denied.

Plaintiff's Motion

Dumann's motion seeks leave to serve an amended complaint with new causes of action against Statecourt. "It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action ... or is palpably insufficient as a matter of law." *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 (1st Dept 2001). Here, Dumann specifically requests permission to assert causes of action for: 5) breach of promise; 6) tortious interference with existing contractual relations; 7) misrepresentation; and 8) breach of the implied covenant of good faith and fair dealing.

Dumann's first proposed claim asserts breach of promise. *See* Notice of Motion (motion sequence number 003), Exhibit 7 (proposed second amended complaint), ¶¶ 55-61. However, Statecourt is not mentioned in the proposed pleadings of this cause of action, which refers only to 1375 Management. *Id.* In its July 9, 2010 decision, the court noted that 1375 Management raised no objection to Dumann's earlier motion for leave to amend the complaint to include a breach of promise claim against it, and, therefore, granted that request. *Id.*; Exhibit 5. There is, thus, no reason to grant a duplicate request at this juncture, especially since Statecourt is not implicated in said request. Therefore, Dumann's motion is denied with respect to its fifth proposed cause of action.

Dumann's next proposed claim alleges tortious interference with preexisting contractual relations - i.e., the leasing agreement. *See* Notice of Motion, Exhibit 7, ¶¶ 62-69. To demonstrate a claim of "[t]ortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract,

defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996).

Here, Dumann focuses on the facts that Statecourt withheld its consent to the first proposed sublease for Bistro that Dumann negotiated with 1375 Management, but granted its approval to the second proposed sublease, which 1375 Management and Bistro negotiated between themselves, without any input from Dumann. *Id.*; Sarno Affirmation, ¶¶ 32-34. Dumann also cites to the language of this court's July 9, 2010 decision that acknowledged that "as the landlord, Statecourt was required to give approval [to any proposed sublease], although it could not unreasonably withhold its consent." *Id.*; Exhibit 5. Dumann then argues that the presence in the second Bistro sublease of a clause that states that "the parties hereto represent that they have not had any dealings, either direct or indirect, with any other real estate broker in connection with this transaction" affords "ample factual foundation ... to allege a tortious interference with the [leasing agreement] both as to Bistro and as to [Statecourt]." *Id.*; Exhibit 7, ¶ 66. Statecourt denies ever having interfered with the Leasing agreement, and asserts that plaintiff [has failed] to offer anything to demonstrate an active or intentional procurement of a breach of [the leasing agreement]. *See Levine Affirmation in opposition*, ¶ 11. The court agrees. At best, Statecourt's rejection of the first Bistro sublease and its approval of the second constitutes proof that it was aware that Dumann had been engaged as a real estate broker. However, such awareness, alone, does not justify the inference that Dumann seeks to draw, that Statecourt intentionally interfered with the brokerage arrangement. Dumann simply does not allege any facts that would support such an attenuated inference. Further, Statecourt is not

alleged to have played any part in the drafting of the second Bistro sublease, which contains the clause that Dumann objects to. This is not to say that Dumann may have had no right to be suspicious, however, or that its attempt to raise a tortious interference claim against Statecourt was made in bad faith. Nonetheless, it remains the case that Dumann has failed to present the court with any evidence to support the “intentional interference” element of such a claim. Therefore, Dumann’s motion is denied with respect to its sixth proposed cause of action.

Dumann’s next proposed claim alleges misrepresentation. *See* Notice of Motion, Exhibit 7, ¶¶ 70-74. However, this claim is worded identically to the one that the court denied in its July 9, 2010 decision on the ground that it did not “assert[] what statements or in what manner defendant Statecourt ... made misrepresentations to it.” *Id.*; Exhibit 5. Therefore, the court denies Dumann’s current request for leave to include this claim for the same reasons as were stated in its earlier decision.

Dumann’s final proposed claim alleges breach of the implied covenant of good faith and fair dealing. *See* Notice of Motion, Exhibit 7, ¶¶ 75-79. However, this claim is also worded identically to the one that the court denied in its July 9, 2010 decision on the ground that there was no contract between Statecourt and Dumann, and, consequently, no covenant of good faith and fair dealing to breach. *Id.*; Exhibit 5. Thus, the court also denies Dumann’s current request for leave to include this claim, for the same reasons as were stated in its earlier decision. Accordingly, the court finds that Dumann’s proposed second amended complaint motion is palpably insufficient as a matter of law, and that Dumann’s motion for leave to amend is denied.

DECISION

Accordingly, it is

ORDERED that the motion, pursuant to CPLR 3212, of defendant Statecourt Enterprises, Inc. (motion sequence number 002) is granted solely to the extent that the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, but is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion, pursuant to CPLR 3025 (b), of plaintiff Dumann Realty LLC (motion sequence number 003) is in all respects denied; and it is further

ORDERED that the balance of this action shall continue.

Dated: New York, New York
January 5, 2012

FILED

JAN 04 2012



Doris Ling-Cohan, J.S.C.

FILED

JAN 04 2012

NEW YORK
COUNTY CLERK'S OFFICE

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