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SHORT FORM ORDER

INDEX NUMBER: 2896-2011

COPY

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:
HON. EMILY PINES
J. S. C.

Original Motion Date: 10-02-2012
Motion Submit Date: 10-30-2012
Motion Sequence No.: 002 MOTD

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SOGNO INC.,

Plaintiff,

-against-

FVJ HOLDING CORP., a/k/a F.V.J. HOLDING CORP. And JAMES W. PAUL,

Defendant.
---X

Upon the following papers numbered 1 to 28 read on this motion to dismiss and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers_____; Answering Affidavits and supporting papers 17 - 26; Replying Affidavits and supporting papers 27 - 28; Other_____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the defendants' motion (001) to dismiss the complaint pursuant to CPLR 3211 (a) (7) and for summary judgment in their favor on the counterclaims is granted to the extent that the first and second causes of action are dismissed; and it is further

ORDERED that the parties are directed to appear at a pre-trial conference in Part 46 on February 21, 2013 at 11 o'clock a.m.; and it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for plaintiff and other defendants, pursuant to CPLR 2103(b)(l), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

In this action, the plaintiff/tenant seeks damages in the amount of $244,889.49 for repairs made to a restaurant at the premises owned by the defendants/landlord, located at 493 Jericho Turnpike, Huntington Station, which sustained fire damage on June 3, 2009. The complaint alleges in the first cause of action that the defendants breached the covenant of good faith and fair dealing by violating an oral agreement to extend the lease with a reduced rent in consideration for repairs made to the damaged premises by the plaintiff in the amount of $244,889.49. In the second cause of action, the complaint alleges that the defendants were unjustly enriched by the amount spent by the plaintiff to repair the premises. In the third cause of action, the complaint alleges that the defendant James W. Paul fraudulently misrepresented to the plaintiff that he would extend the lease at a reduced rent in exchange for the repairs by the plaintiff, upon which the plaintiff detrimentally relied.

In the answer, the defendants assert general denials and three counterclaims. The first counterclaim asserts that the fire was caused by the plaintiff's negligence and seeks damages in the amount of $250,000. The second counterclaim asserts that the plaintiff failed to pay rent from November 2008 through December 2010 and seeks rent arrears in the amount of $134,094. The third counterclaim asserts that the plaintiff received insurance payments and failed to pay over the insurance proceeds to the defendant, an additional named insured, and seeks an accounting of the insurance payments made to the plaintiff.

The record reveals that in 2001, the plaintiff purchased a restaurant business from non-party Mazzi, Inc. Mazzi, Inc. assigned its lease to the plaintiff with the defendant's consent. An amendment to the lease was executed sometime in 2005, wherein the parties acknowledged that the plaintiff was the tenant. The amendment specified the amount of rent and additional rent to be paid and how the increases would be determined. The amendment provided that the tenant at its option was entitled to an additional four year extension from January 2, 2011 through December 31, 2014.
The parties agreed that the original lease and lease rider would remain in full force and effect as if fully set forth in the amendment.

The original lease provides, in pertinent part, as follows:

> 4. If the demised premises shall be partially damaged by fire or other cause without the fault or neglect of Tenant, * * * , the damages shall be repaired by and at the expense of Landlord and the rent until such repairs shall be made shall be apportioned according to the part of the demised premises which is usable by Tenant. But if such partial damage is due to the fault or neglect of Tenant, * * * , without prejudice to any other rights and remedies of Landlord and without prejudice to the rights of subrogation of Landlord's insurer, the damages shall be repaired by Landlord but there shall be no apportionment or abatement of rent. * * * If the demised premises are totally damaged or are rendered wholly untenantable by fire or other cause, and if Landlord shall decide not to restore or not to rebuild the same, or if the building shall be so damaged that Landlord shall decide to demolish it or to rebuild it, then, or in any of such events Landlord may, within 90 days after such fire or other cause, give Tenant a notice in writing of such decision, * * * and thereupon the

term of this lease shall expire by lapse of time upon the third day after such notice is given, and Tenant shall vacate the demised premises and surrender the same to Landlord. If Tenant shall not be in default under this lease, then, upon the termination of this lease under the conditions provided for in the sentence immediately preceding, Tenant's liability for rent shall cease as of the day following the casualty. Tenant hereby expressly waives the provisions of Section 227 of the Real Property Law and agrees that the foregoing provisions of this Article shall govern and control in lieu thereof. If the damage or destruction be due to the fault or neglect of Tenant the debris shall be removed by, and at the expense of, Tenant.

The Rider to the lease provides:

5. Insurance. Tenant shall provide and keep in force during the term of this lease * * *:

(a) a comprehensive policy of liability insurance covering the entire demised premises, the sidewalks, driveways, and parking areas adjoining the demised premises, in the name of, or endorsed to protect the landlord or naming the landlord as an additional named insured against any liability for injury to persons and/or property and death of any persons occurring in, on or about the demised premises or any appurtenances thereto.

(b) a comprehensive policy against loss or damage by fire and any of the casualties included in the extended coverage or supplementary contract endorsements in an amount not less than the full replacement value of all fixtures, equipment, improvements, merchandise and inventory installed in or furnished to the demised premises by the tenant. The tenant hereby releases landlord from any and all liability or responsibility caused by fire or any of the extended coverage of supplemental contract casualties, unless such fire or other casualty shall have been caused by the willful misconduct or gross negligence of the landlord or anyone for whom the landlord may be legally responsible.

45. Destruction by Fire. Supplementing Article 4th hereof, if a substantial portion of the building of which the demised premises is a part (but not the demised premises), shall be substantially destroyed by fire or other cause, (or if the damage shall be so severe as to render the buildings untenantable in landlord's judgment), and if landlord shall decide not to restore or not to rebuild or should decide to demolish it or to rebuild it, then in any of such events, landlord may elect to terminate this lease by written notice to tenant given withing 90 days after such fire or casualty. The notice shall specify a date for the expiration of the lease which is not more than 60 days after the

> giving of such notice. Upon the date specified in such notice, the term of this lease shall expire as fully and completely as if such date were the date set forth for the termination of this lease. Tenant shall forthwith quit, surrender and vacate the premises without prejudice, however, to landlord's rights and remedies against tenant under lease provisions in effect prior to such termination and any rent owing shall be paid up to such date and any payments of rent made by tenant which were on account of any period subsequent to such date, shall be returned to tenant.
>
> If the demised premises are totally damaged or rendered substantially unusable by fire or other casualty or unusable by reason of damage to the premises other than the demised premises, and landlord shall elect to make repairs and/or to restore the demised premises, but shall fail to complete same within 1 year after the casualty, either party may elect to cancel this lease on 30 days notice in writing to the other.
>
> If 25% or more of the demised premises are damaged or rendered wholly unusable during the last 1 year of the term, either party may elect to cancel this lease on 30 days notice in writing to the other.

The record reveals that after the fire occurred, neither party elected to cancel the lease. The plaintiff sought to reopen the restaurant and learned that the defendant would not undertake repairs to the premises. The plaintiff offered to repair the premises in return for a rent reduction and an extension of the lease. Although the parties exchanged two drafts of a proposed new lease for consideration, no new lease was ever executed. The plaintiff surrendered the premises to the defendant sometime in the summer of 2010. Thereafter, the original lease expired by its terms on December 31, 2010. This action was commenced by filing on January 25, 2011. The defendant now moves to dismiss the complaint pursuant to CPLR 3211 (a)(7) on the ground that the complaint fails to state a cause of action and for summary judgment pursuant to CPLR 3212 for summary judgment in its favor on the counterclaims.

"In considering a motion to dismiss a pleading for failure to state a cause of action, the court must accept the allegations of the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." CPLR 3211 [a][7]; **Munger v Board of Educ. of the Garrison Union Free School Dist.**, 85 AD3d 747, 748, 924 NYS2d 578, 580 (2d Dept 2011); accord Leon v Martinez, 84 NY2d 83, 614 NYS2d 972 (1994). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient. **Symbol Tech., Inc. v Deloitte & Touche LLP**, *69 AD3d 191, 193-195, 888 NYS2d 538 (2d Dept 2009)*. Whether a plaintiff can ultimately establish its allegations is not part of the determination. **Sokol v Leader**, 74 AD3d 1180, 904 NYS2d 153 (2d Dept 2010).

"[I]t is well settled that 'when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.'" **South Rd. Assocs., LLC v IBM**, 4 NY3d 272, 277, 793 NYS2d 835 (2005), *quoting* **Vermont Teddy Bear Co. v 538 Madison Realty Co.**, 1 NY3d 470, 475, 775 NYS2d 765 (2004). When interpreting a contract, "the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectation will be realized." **Herzfeld v Herzfeld**, 50 AD3d 851, 857 NYS2d 170 (2d Dept 2008).

Applying the law to the facts of this case, the Court finds that dismissal is warranted as to the First cause of action seeking damages for a breach of the implied covenant of good faith and fair dealing by the defendant during the oral negotiations of a new lease. Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. **Dalton v Educ. Testing Serv.**, 87 NY2d 384, 389, 639 NYS2d 977 (1995). Encompassed within the implied obligation of each promisor to exercise good faith are any promises that a reasonable person in the position of the promisee would be justified in understanding were included. *Id.* Moreover, this obligation embraces a pledge that neither shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Id.*

Here, Catanzaro stated in her affidavit that the oral agreement to reduce the rent was wholly aside and apart from the lease, and that the plaintiff was not making a claim under the lease. However, a claim of implied duty of good faith and fair dealing cannot create new duties under a contract or substitute for an insufficient contract claim. **Triton Partners LLC v Prudential Sec. Inc.**, 301 AD2d 411, 411, 752 NYS2d 870 (1st Dept 2003). It merely brings to light implicit duties to act in good faith already contained, although not necessarily specified in the contract. Clearly, in order for the implied duty of good faith and fair dealing to stand as a cause of action, there must be an underlying contractual obligation between the parties. Here, the first cause of action cannot stand inasmuch as the plaintiff seeks to enforce the oral agreement to negotiate a new lease which was not executed. Therefore, the first cause of action is dismissed.

Turning to the second cause of action alleging unjust enrichment, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the Court finds that the plaintiff has not adequately stated a cause of action. "[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." **See Clark-Fitzpatrick, Inc. v Long Island R. Co.**, 70 NY2d 382, 388, 521 NYS2d 653 (1987). Here, the original lease provided the parties with a method to proceed in the event of a fire in the premises, and was in effect at the time of the fire, rendering the remedy of unjust enrichment unavailable to the plaintiff. Therefore, the second cause of action is dismissed.

Turning to the third cause of action alleging fraudulent misrepresentation, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the Court finds that the plaintiff has adequately

stated a cause of action. To prevail on a cause of action for fraudulent misrepresentation, the plaintiff must demonstrate that the defendants made a knowing misrepresentation of fact for the purpose of inducing the plaintiff to act or refrain from acting in reliance thereon and that the plaintiff was damaged by such reliance. **Burke v Owen**, **168 AD2d 722, 563 NYS2d 869 (3d Dept. 1990)**.

Here, the plaintiff alleges that the defendant's principal, James Paul, made promises in February 2009 over the course of several conversations in the presence of five people other than Catanzaro, to extend the lease to the premises with a substantially reduced rate of rent. The plaintiff further alleges that Mr. Paul made the representations regarding the defendants' intention to renew the lease at a reduced rent were false and were known to be false by defendant Paul. The plaintiff also alleges that defendant Paul made the representations solely to induce the plaintiff to act. The plaintiff alleges that in reliance upon defendant Paul's representations, the plaintiff provided the repairs and improvements to the premises at its own cost, causing damage to the plaintiff in the amount of $244,889.49. Therefore, the branch of motion to dismiss the third cause of action is denied. Accordingly, that branch of the defendants' motion to dismiss the complaint is granted to the extent that the first and second causes of action are dismissed.

Turning to that branch of the defendants' motion for summary judgment on the counterclaims, it is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. **Alvarez v Prospect Hosp.**, 68 NY2d 320, 508 NYS2d 923 (1986). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts. **Giuffrida v Citibank Corp.**, 100 NY2d 72, 760 NYS2d 397 (2003). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue, **Stewart Title Ins. Co. v Equitable Land Servs.**, 207 AD2d 880, 616 NYS2d 650 (2d Dept 1994), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. **Alvarez v Prospect Hosp.**, *supra*.

In support of their application for summary judgment on the counterclaims, the defendants submit, *inter alia*, the pleadings, the original lease and rider to the lease, the amendment to the lease, the deposition transcripts of the James W. Paul, Katherine Catanzaro, and non-party Jackie Brandman, fire department reports, and correspondence between the parties. Ms. Catanzaro testified that she is the President of Sogno, Inc., which was incorporated in 2000. She stated that she purchased the restaurant business at Mazzi's in January, 2001, from non-party Dean DePhillippi. The purchase included the fixtures, equipment, tables, and chairs. She opened the restaurant in February, 2001 upon receipt of a liquor license. She assumed the lease between Mazzi's and the defendant, dated May 22, 1998. An amendment to the lease was executed by her and James Paul, the President of defendant FVW Holding Corp. sometime in 2005 and would expire on December 31, 2010.

Catanzaro stated that she proceeded to pay the rent and taxes as provided in the amendment to the lease. However, she conceded that she began to have difficulty paying the rent in 2008. At that time, Ms. Catanzaro spoke with the defendants about closing the restaurant in January 2009,

changing the name of the restaurant, and reopening in February, 2009. Ms. Catanzaro stated that the defendants understood and consented orally to deferring the rent and tax payments until a later time. The restaurant was in operation until June 2, 2009, the day before the fire occurred. Although the arson squad considered a Coke refrigerator as a possible cause, Ms. Catanzaro stated that there were never any problems with the electrical system in the building, and Coke's investigation of the refrigerator did not reveal a problem. With regard to insurance coverage, Ms. Catanzaro stated that she had a policy which covered the assets of the business, and business interruption, but did not cover the repair of any structural damage. She also stated that she obtained fire insurance. She began negotiated a new lease with the defendants for a reduction in the rent and taxes in exchange for repairing the restaurant at her cost, however, she and the defendants could not agree upon the terms.

Mr. James Paul testified at his deposition that he is the president of defendant FVJ Holding Corp and its sole shareholder. Defendant Paul states that the corporation owns two parcels: 493 E. Jericho Turnpike and 505 East Jericho Turnpike. He recalled leasing the premises to Mazzi, Inc. and subsequently, the lease was assigned to the plaintiff. Defendant Paul stated that there was an amendment to the lease that he and Catanzaro signed at a later date. When the fire occurred, he was told by the investigators that the fire was contained in the kitchen area. Defendant Paul stated that the plaintiff was approximately six months behind in the rent when the fire occurred and also had not paid approximately $11,000 in property taxes. Defendant Paul stated that he had no insurance on the premises.

Defendant Paul stated that he entered the premises after the fire had been contained and noticed that the ceilings had been pulled down and there was charring evidence on the wall near the entrance to the basement. Defendant Paul stated that he had no insurance on the premises. Defendant Paul stated that Catanzaro kept stating that he would be responsible for the structural repairs and he recalled making an offer to pay to fix the damage. He stated that he had a conversation with Catanzaro to offset some of the costs with reduced rent and application of the past due rents. Defendant Paul stated that he and Catanzaro spoke regarding a new lease. He drafted a new version and which he and Catanzaro reviewed several times through the summer of 2010, however, Catanzaro would not sign it. Defendant Paul conceded that he did not send notices of nonpayment to the plaintiff and stated that he was aware that she was struggling. Defendant Paul stated that he did not send a notice terminating the lease as a result of the fire.

Jacqueline Brandman testified at her deposition that she is the secretary of the defenadnt corporation since early 2010. She is employed by a title company as a title closer. Ms. Brandman stated that she knew the defendant Paul for ten to twelve years prior to becoming secretary to the corporation. She and the defendant Paul had dinner at the plaintiff restaurant on several occasions and were not required to pay. Ms. Brandman also stated that her son rents space in the building next door to the restaurant. Ms. Brandman stated that she was notified of the fire by the defendant Paul. She recalled seeing reports from the fire marshall, however, she did not see any documents which stated the cause of the fire. Ms. Brandman stated that she was aware that the defendants had no insurance on the premises at the time of the fire. Ms. Brandman stated that when discussions were had regarding a new lease, she stated that she and defendant Paul were always supportive of

Catanzaro, to see her get the restaurant up and running and paying rent. But she stated that after defendant Paul made changes to the lease, Catanzaro would not sign it.

A report, dated July 9, 2009, prepared by the Suffolk County Police Department Arson Squad reveals the following: "Conclusion: The room of origin was the kitchen, the area of origin was the refrigerator and adjacent wall. Ignition source was undetermined, although the undersigned cannot rule out an electric malfunction of the refrigerator. This fire was not an accelerant fire and no accelerants were found. Status: pending." A report by the Town of Huntington Fire Marshall revealed the following: "Fire confined to kitchen area. Smoke damage throughout building. Fire damage to kitchen area on water damage from extinguishment to kitchen, basement and adjoining rooms. Investigation for cause and origin conducted by SCPD Arson Squad."

The record reveals several emails from the plaintiff to the defendant Paul discussing a new lease and expenses that Catanzaro must pay to obtain town approvals. In a letter dated September 3, 2010, an attorney for the defendants informed the plaintiff that all past rent and taxes must be paid prior to negotiating a new lease. In a letter dated October 21, 2010, the plaintiff's attorney responded with information relating to the expenses the plaintiff paid for the repairs to the restaurant.

Turning to the defendants' counterclaims, the Court finds that the evidence submitted by the defendants in support of its motion fails to establish their entitlement to judgment as a matter of law. **Zuckerman v New York**, *supra*. In the first counterclaim, the defendants allege that the fire was caused by the plaintiff's negligence. However, the submissions do not bear out this allegation. The reports completed by the Suffolk County Police Department Arson Squad and the Town of Huntington Fire Marshall revealed no conclusive cause for the fire. In addition, the defendants' counsel concedes in his affirmation that the "although the parties explored the cause of the fire at length in the depositions, no conclusive determination was ever made as to the cause of the fire." Such evidence fails to demonstrate that the plaintiff was negligent.

With regard to the second and third counterclaims, which allege, respectively, that the plaintiff owes rent arrears and that the plaintiff failed to turn over insurance payments to the defendants, the Court finds that the defendants failed to submit sufficient admissible evidence to demonstrate, as a matter of law, that they were entitled to summary judgment. **Zuckerman v New York**, *supra*. Inasmuch as the defendants have failed to meet their burden, it is not necessary to determine whether the plaintiff has raised a triable issue of fact. **Alvarez v Prospect Hospital**, *supra*. Therefore the branch of the defendants' motion seeking summary judgment on the counterclaims is denied.

Accordingly, that branch of the defendants' motion to dismiss the complaint is granted to the extent that the first and second causes of action are dismissed.

Dated: February 4, 2013
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

[ ] FINAL DISP
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