SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 110536/2010
501 5TH AVE CO LLC
vs.
YOGA SUTRA LLC
SEQUENCE NUMBER : 004
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE 5/14/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 74-92
Answering Affidavits — Exhibits _____ | No(s). 110-112
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____
FOR THE FOLLOWING REASON(S): _____

Dated: 6/6/13

SHIRLEY WERNER KORNREICH J.S.C.

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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501 FIFTH AVENUE COMPANY LLC,

Index No.: 110536/2010

DECISION & ORDER

Plaintiff,

-against-

YOGA SUTRA, LLC, ANDY M. SCHWARTZ, LISA BRIDGE, GORDON BRIDGE, DAVID KELMAN, and YOGA SUTRA NYC, LLC a/k/a/ ABC, LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 004 and 005 are consolidated for disposition.

This is an action brought to collect rent on a commercial lease. Plaintiff 501 Fifth Avenue Company LLC moves for leave to amend its complaint pursuant to CPLR 3025. Seq. No. 004. The two remaining defendants, Lisa Bridge (Lisa) and Gordon Bridge (Gordon) (collectively, the Bridge Defendants), move for summary judgment pursuant to CPLR 3212. Seq. No. 005. Plaintiff's motion is denied and defendants' motion is granted for the reasons that follow.

I. Procedural History & Factual Background

Plaintiff commenced this action on August 9, 2010, asserting five causes of action: (1) breach of contract (for rent due under the lease) against Yoga Sutra (YS); (2) tortious interference with contract against the Bridge Defendants; (3) fraudulent conveyance under DCL §§ 273 & 274 against Schwartz and the Bridge Defendants; (4) fraudulent conveyance under DCL § 278 against YS, Schwartz, the Bridge Defendants, and Yoga Sutra NYC, LLC; and (5) enforcement of a

guarantee agreement (for rent due under the lease) against Schwartz and David Kelman. In an order dated January 20, 2012, the court denied defendants' motion to dismiss.[1] Plaintiff then withdrew its claim against Kelman. Also, in a Settlement Agreement dated June 27, 2012, plaintiff settled its claims against YS and Schwartz for $325,000. The Bridge Defendants now seek dismissal. Plaintiff asks to amend its pleadings to: (1) add Bridge Enterprises, LLC (Enterprises) as a defendant; (2) assert new claims under DCL §§ 276 & 276-a; and (3) assert a claim for punitive damages.

In 2004, plaintiff and Skillful Living, Inc. (Skillful) entered into a lease for the second floor of a building, located at 501 Fifth Avenue, to be used as a yoga studio. The lease had an expiration date of February 28, 2015. Former defendant Yoga Sutra, LLC (YS) became the tenant when it merged with Skillful in 2006. Lisa was an employee of YS. Former defendant Schwartz was the owner of YS at the time the underlying events occurred.

In 2009, YS was not profitable and was losing money. Schwartz decided to close the business unless Lisa, who had been running the business for some time, would agree to buy it. In order to effectuate the purchase, Gordon, Lisa's father, got involved. He attempted to negotiate a lower rent with plaintiff due to the studio's desperate need to cut expenses. Plaintiff, however, refused to renegotiate the rent. Gordon and Lisa then decided that they would purchase the studio only if they could operate it at another location with a lower rent. In the interim, however, Schwartz informed Gordon that he would not continue the business unless Gordon funded YS's

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[1] Though this should go without saying, plaintiff's counsel is reminded that this court's denial of a motion to dismiss is not an invitation to repeatedly argue that this court has found any merit in plaintiff's claims. Rather, all that a CPLR 3211 motion decides is whether the pleadings are sufficient. Relying on the language of the decision on the motion to dismiss is not a valid substitute for submitting evidence on a summary judgment motion.

operating expenses until the sale closed. To that end, on November 1, 2009, YS and non-party Bridge Enterprises, LLC (Enterprises), a company partially owned by Gordon, entered into an Interim Funding Agreement, whereby Enterprises would fund YS's operating expenses until the studio was sold. Consequently, for seven months, between the execution of the Interim Funding Agreement and the closing of the sale, Enterprises caused YS's rent to be paid to plaintiff.

In May 2010, Schwartz notified plaintiff that YS would be vacating the premises by the end of June. On June 30, 2010, non-party Bridge & Bridge Yoga, Inc. (BBY), a new company formed to operate the studio, and YS entered into an Asset Purchase Agreement (the APA). Under the APA, YS received $18,750 for its assets (the lease was not assigned and was retained by YS) and Schwartz received $56,250 as a "consulting fee". It is undisputed that Schwartz did not provide any consulting services. Gordon personally loaned $350,000 to BBY to pay the amounts due under the APA and to fund the studio at its new location, approximately two blocks south at 6 East 39th Street, where it began operating in July 2010. However, the studio continued to struggle financially, and BBY eventually filed for bankruptcy on December 14, 2011.[2] The space formerly occupied by YS remained vacant for approximately seven months until plaintiff entered into a lease with another tenant on February 1, 2011

II. The Bridge Defendants' Motion for Summary Judgment (Seq. No. 005)

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, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc.*

[2] BBY was not sued in this action because the § 362 stay is still in effect.

v Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A. *Tortious Interference With Contract*

"The elements of a tortious interference with contract claim are … the existence of a valid contract, the tortfeasor's knowledge of the contract and intentional interference with it, the resulting breach and damages." *Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 (1st Dept 1998). "An essential element of such a claim is that the breach of contract would not have occurred but for the activities of the defendant." *Cantor Fitzgerald Assocs., L.P. v Tradition N. Am., Inc.*, 299 AD2d 204 (1st Dept 2002); *see also Lana & Samer, Inc. v Goldfine*, 7 AD3d 300, 301 (1st Dept 2004) ("it must be proven … that the contract would not have been breached but for the defendant's conduct").

Here, the "but for" element of the tortious interference claim is lacking. The Bridge Defendants did not cause the lease contract's breach.

Plaintiff's claim that the Bridge Defendants caused YS to breach the lease is belied by the facts (or, to borrow from plaintiff's lexicon, the claim is balderdash). Based on the documents produced in discovery and the parties' deposition testimony, there is no question of fact about why YS breached the lease -- the yoga studio's business was a failure and Schwartz was about to close the business. Plaintiff's speculation about how YS might not have breached the lease but for the Bridge Defendants' actions is wholly unsupported by the record and such conjecture is insufficient to warrant the denial of summary judgment. Indeed, even after the Bridge Defendants managed to obtain a cheaper rent at a new location, the business still ended up in bankruptcy, causing Gordon to lose virtually all of his $350,000 investment. In truth, plaintiff is the only party that has come out of these events in relatively good shape. The Interim Funding Agreement provided plaintiff with more than half a year's rent, rent it would not have received had Schwartz not sold to Lisa and closed the studio. Consequently, plaintiff's claim for tortious interference with contract is dismissed because the Bridge Defendants were not the cause of YS's breach.

B. Fraudulent Conveyance

To state a claim under DCL §§ 273, 274, & 278, the plaintiff must establish that the defendant: (1) made a conveyance; (2) without fair consideration; (3) by a party who is insolvent or who becomes insolvent as a consequence of the transfer. *Zanani v Meisels*, 78 AD3d 823, 824 (2d Dept 2010). The value received must be "'disproportionately small' as compared to the value of the transferred property." *Lippe v Bairnco Corp.*, 249 F Supp 2d 357, 377 (SDNY 2003).

The court dismissed plaintiff's fraudulent conveyance claims on the May 2, 2013 record at oral arguments, because plaintiff did not submit any evidence that the consideration for the APA was not fair or the value of YS, either through fact discovery or expert testimony. *See* Trans., p.10. This is unsurprising because, as discussed above, YS was a failing business that would have ceased

operating if not for the sale to Lisa. If anything, the consideration paid under the APA was excessive and turned out to be an unfortunate case of throwing good money after bad. No reasonable fact finder could conclude the consideration was unfair.

III. Plaintiff's Motion to Amend

Pursuant to CPLR 3025(b), leave to amend a pleading should be freely given unless it would result in prejudice or surprise or the amendment is palpably improper or insufficient. *McCaskey, Davies & Assocs., Inc. v N.Y.C. Health & Hosps. Corp.*, 59 NY2d 755, 757 (1983). This court has discretion to determine, on a case by case basis, whether to grant leave. *Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 (1983). The plaintiff "need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 (1st Dept 2010) (internal citations omitted). Nevertheless, leave to amend should be denied if the plaintiff waited an unreasonable time to bring its motion, such that the amendment would cause "significant prejudice" to the defendant. *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22 (1st Dept 2003). After the note of issue is filed, leave to amend should not be granted if "the proposed amendment contains a number of previously unpleaded factual allegations and new theories ... [requiring] additional discovery and depositions" because such a result would unduly prejudice defendants. *Moon v Clear Channel Communications, Inc.*, 307 AD2d 628, 630 (3d Dept 2003).

Here, plaintiff knew about Enterprises throughout discovery, yet waited approximately two months *after* the note of issue was filed to attempt to add Enterprises as a defendant in this 2010 case. Such a dilatory litigation tactic is improper, especially where, as here, further discovery would be necessary. That being said, plaintiff may not add Enterprises as a defendant because the

claims plaintiffs seeks to assert against it are clearly devoid of merit. As discussed *supra*, part II, neither plaintiff's tortious interference nor its fraudulent conveyance claims are viable. The claims are even less viable as against Enterprises because it was not a party to the APA.

Next, the record establishes that the DCL § 276 claim that plaintiff seeks to assert is not viable because there is no question of fact about defendants' intent with respect to the sale of the studio, which was to save it, not to "hinder, delay, or defraud" plaintiff. *See ABN AMRO Bank, N.V. v MBIA Inc.*, 81 AD3d 237, 247 (1st Dept 2011). Also, as discussed, *supra*, part II, plaintiff actually benefitted from the Interim Funding Agreement. It follows, therefore, that plaintiff cannot obtain punitive damages. Such remedy is unavailable in the absence of a viable claim. Nor is such egregious conduct alleged here sufficient to warrant punitive damages. *See Hylan Elec. Contr., Inc. v MasTec N. Am., Inc.*, 74 AD3d 1148, 1150 (2d Dept 2010). Thus, as leave to amend is denied and plaintiff's remaining claims are dismissed, this action is disposed. Accordingly, it is

ORDERED that the motion by plaintiff 501 Fifth Avenue Company LLC for leave to amend its complaint is denied; and it is further

ORDERED that the motion by defendants Lisa Bridge and Gordon Bridge for summary judgment against plaintiff 501 Fifth Avenue Company LLC is granted, and the Clerk is directed to enter judgment dismissing the Complaint against said defendants with prejudice.

Dated: June 6, 2013

ENTER:

J.S.C.