SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 651538/2012
GELITA, LLC
vs
113 SECOND AVENUE, LLC
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE 5/30/13
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). 31-35
Answering Affidavits — Exhibits _____ | No(s). 77
Replying Affidavits _____ | No(s). 78

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: 6/10/13

SHIRLEY WERNER KORNREICH, 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

----------X

GELITA, LLC and GIAN LUCA GIOVANETTI,

Index No.: 651538/2012

Plaintiffs,

DECISION & ORDER

-against-

133 SECOND AVENUE, LLC, WALSAM 133 LLC, WALTER & SAMUELS, LLC., VINNY MORA a/k/a VINCENT MORA a/k/a VINCE MORA, ENKO CONSTRUCTION CORP., THE BOARD OF DIRECTORS OF THE THEATRE CONDOMINIUM, and THOMAS C. TUNG P.C.,

Defendants,

-and-

THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Nominal Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 002, 003, 004 and 005 are consolidated for disposition.

This action arises from a commercial landlord-tenant dispute. Defendant The Board of Directors of the Theatre Condominium (the Board) moves to dismiss the Complaint pursuant to CPLR 3211(a)(7). Seq. No. 002. Defendants 133 Second Avenue, LLC (the Owner) and Walsam 133 LLC (Walsam) (collectively, the Landlord Defendants) move to dismiss the Complaint pursuant to CPLR 3211(a)(1) & (7) and 3016(b). Seq. No. 003. Defendant Walter & Samuels, LLC (W&S) moves to dismiss the Complaint pursuant to CPLR 3211(a)(1) &(7) and 3016(b).

Seq. No. 004. Motion Sequence Number 005 was granted on the record.[1] The motions are granted for the reasons that follow, albeit without prejudice and leave to replead.

I. Factual Background & Procedural History

As this decision involves a motion to dismiss, the facts recited are taken from the Complaint.

On March 15, 2010, plaintiff Gelita, LLC (Gelita) and Walsam entered into a 15-year lease (the Lease) for the first and part of the second floor (the Premises) of a building located at 37 St. Marks Place in Manhattan (the Building). Complaint ¶ 12. Owner, a subsidiary of Walsam, became the landlord when the lease was assigned to it by Walsam. *Id.* Gelita intended to open a gelato café at the Premises. ¶ 20.

The Building is a five story multiple dwelling. ¶ 13. In 1998, the DOB issued a certificate of occupancy (the CO) to the Building, which provides for commercial use on the first two floors and residential use on the upper three floors. ¶ 14. A Declaration of Condominium (the Declaration) was filed with the Department of Finance (the DOF), dated July 2, 2008, pursuant to which the Building was converted into a condominium (the Condominium). ¶ 15. The Declaration sets forth that the top four floors are for residential use and only the ground floor is for commercial use. ¶ 18. Owner is the sponsor of the Condominium, the Board is the

[1] In Seq. No. 005, The New York City Department of Buildings (the DOB), which was improperly sued herein as a nominal defendant, also moved to dismiss the Complaint pursuant to CPLR 3211(a)(2) & (7). The DOB's motion was granted on the record at oral arguments held on May 23, 2013. On May 24, 2013, an order was entered reflecting the dismissal (NYSCEF Doc. No. 91), but was erroneously applied to Seq. No. 004 (W&S's motion) instead of Seq. No. 005. That order is hereby withdrawn, and the instant order shall constitute the decision on Seq. No. 005 and the dismissal of the claims against the DOB.

governing body of the Residential Condominium, and W&S is the managing agent of the Condominium and the Building. ¶¶ 9, 16-17.

In January 2010, Gelita was shown the Premises by defendant Vinny Mora, who, purportedly, was an agent of Owner and W&S. ¶¶ 19, 22. In February 2010, Mora informed plaintiffs that in order to lease the ground floor of the Building, Gelita also would have to lease the rear portion of the second floor. ¶ 22. Plaintiffs contend that "it was always understood by [the parties] that the interior of [the Premises] would have to be constructed or 'built out' in order to facilitate its use as a café." ¶ 24. Plaintiffs further contend that during the lease negotiations, Mora, "acting on his own behalf and on behalf of [W&S]," made the following representations to them: (1) that the first two floors of the Building "could easily be combined" by installing an internal stairwell and second set of stairs; (2) that the Owner "was in the process of resolving" the conflict between the CO and the Declaration regarding the use of the second floor; (3) that "there would exist no legal and/or construction impediments and/or problems in combining" the first two floors, and that if there were, Mora and the Owner would take care of it and ensure that plaintiffs could legally operate the café; and (4) that the second floor, which had recently been divided in order that the majority of that floor's space could be leased to a video store, could be used by two commercial entities. ¶¶ 25-28. Additionally, Mora advised plaintiffs that Gelita must hire defendant Enko Construction Corp. (Enko), a company owned and operated by Mora, to perform the work on the first two floors because Enko "had a special relationship with Owner and W&S." ¶¶ 30-31.

Gelita did not hire its own architect to do any due diligence. ¶ 31. Instead, on March 22, 2010, Gelita and Enko entered into a contract (the Construction Contract), whereby Enko would receive $160,000 for completing the construction work, including the architectural drawings,

necessary to operate the café by June 30, 2010. ¶¶ 32-37. Enko did not complete the work on time and is alleged to have committed numerous breaches of the Construction Contract, discussed further below. ¶ 38.

The Lease provides that Gelita is obligated to perform the construction work that it subcontracted to Enko. For example, section 3.07 provides that Gelita must "install a staircase between the [first two floors]." ¶ 47. Section 15.01 further provides that Gelita "will not ... use or occupy ... [the Premises] in violation of any 'CO'." ¶ 49. Section 22.01 sets forth that Gelia may "peaceably and quietly enjoy [the Premises]." ¶ 51. As a condition of the Lease, plaintiff Gian Luca Giovanetti, a principle of Gelita, executed a personal guarantee of the Lease (the Guarantee). ¶ 52.

Enko hired defendant Thomas C. Tung P.C. (Tung) to draft architectural plans and drawings for the construction on the Premises. ¶ 53. In April 2010, Mora informed plaintiffs that Enko's plans, which were prepared by Tung and approved by Owner, were rejected by the DOB because of the conflicting residential/commercial designations of the second floor in the CO and the Declaration. ¶ 54. With the consent of all the involved parties, Tung prepared a new set of plans, which were submitted to the DOB on May 2, 2010 (the New Plans). ¶ 58. Plaintiffs contend that the New Plans contained myriad inaccuracies, such as a non-existent stairwell. ¶¶ 59-64. Nonetheless, on June 30, 2010, the DOB accepted the New Plans. ¶ 65.

Gelita opened the café for business on October 20, 2010.[2] ¶ 73. Shortly thereafter, Gelita began receiving noise complaints from its neighbors. ¶ 74. Plaintiffs discovered that the noise

[2] Though the Complaint indicates that the café opened in October 2011, this must be a typo because, as discussed below, the Complaint later states that Gelita vacated the Premises in September 2011.

was caused by the lack of insulation in the Premises, which Enko was supposed to have installed pursuant to the Construction Contract. ¶ 75. Additionally, plaintiff discovered that Enko committed numerous breaches of the Construction Contract, such as improper installation of an air conditioning unit and failure to make the store counter handicapped accessible. ¶ 77. Gelita also had to pay Enko's sub-contractors directly because Enko did not pay them. ¶ 78. Enko's breaches delayed the opening of the café, although the Owner agreed to give Gelita rent reductions in a Lease Modification entered into in November 2010. ¶¶ 79-80. Moreover, Mora and Owner gave plaintiffs assurances that the inaccuracies in the New Plans, the CO, and the Declaration would be corrected. ¶ 84.

Plaintiffs contend that Mora and the Owner never fixed these problems. ¶ 85. As a result, on June 19, 2011, Gelita received a real estate tax bill from the DOF for an amount computed as if the second floor was a residential apartment (which was supposedly higher than it would have been if the space was listed as commercial). ¶ 86. On September 21, 2011, Gelita also lost its insurance coverage because of the second floor's classification as residential. ¶ 88. Due to these problems, which plaintiffs contend constituted a constructive eviction, Gelita vacated the entire premises on September 20, 2011. ¶ 97. On April 9, 2012, plaintiffs notified the DOB that there were illegal and unsafe conditions at the Premises. ¶ 98. On April 30, 2012, Gelita formally offered its surrender of the Premises to the Owner, which the Owner refused. ¶ 100. This action followed.

Plaintiffs filed the Complaint on May 4, 2012, asserting 13 causes of action:[3] (1) fraudulent inducement of the Construction Contract; (2) fraudulent inducement of the Lease; (3)

[3] The Complaint fails to specifically explain which causes of action apply to which defendants (e.g. which causes of action apply to the Board).

fraudulent inducement of the Guarantee; (4) rescission of the Lease due to illegality; (5) rescission of the Lease due to mistake and/or impossibility; (6) breach of the Lease; (7) breach of the Construction Contract; (8) constructive eviction; (9) a declaratory judgment regarding the validity of the Lease; (10) a declaratory judgment regarding the validity of the Guarantee; (11) a declaratory judgment regarding the validity of the CO; (12) injunctive relief again the DOB; and (13) return of Gelita's security deposit. As discussed above, this court has already dismissed the eleventh and twelfth causes of action pled again the DOB.

II. Motions to Dismiss

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a

matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. The Board's Motion (Seq. No. 002)

The Complaint is dismissed against the Board of the top three floors of the building, its residential portion, because the Complaint does not allege wrongdoing by the Board. In opposition, plaintiffs merely contend that the Board "played some role" in the wrongdoing alleged in the Complaint. This conclusory contention is insufficient to withstand dismissal.

B. The Landlord Defendants' Motion (Seq. No. 003)

Fraudulent Inducement

At the outset, plaintiffs' claims for fraudulent inducement of the Lease and the Guarantee must be dismissed. To properly plead a cause of action for fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance, and injury. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999). Pursuant to CPLR 3016(b), the circumstances constituting the fraud must be stated in detail. *Id.* To maintain a claim of fraudulent inducement, a complaint must allege "a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged." *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 (1st Dept 2011), citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996).

Plaintiffs allege that the Landlord Defendants made a single false representation to induce Gelita to enter into the Lease and Giovanetti to enter into the Guarantee -- that the Premises "was legal and fit for the commercial use intended under the [Lease], which was a known impossibility under the circumstances." Complaint ¶¶ 112, 119. However, every fact about the Premises was

discoverable by plaintiffs before they executed the Lease and the Guarantee. The CO and the Declaration are public records, plaintiffs were free to inspect the Premises, and any alleged impossibility (whether physical or legal), if one existed, could have been discovered by hiring an architect or consulting with an attorney. Where, as here, plaintiffs entered into an arms' length commercial transaction, they cannot maintain a fraudulent inducement claim because they are precluded from asserting "justifiable reliance on alleged misrepresentations if [those plaintiffs] failed to make use of the means of verification that were available to [them]." *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 (1st Dept 2001); *see also Fariello v Checkmate Holdings, LLC*, 82 AD3d 437, 438 (1st Dept 2011) (when "information was readily verifiable through public records[,] there could be no justifiable reliance on the misrepresentations."); *Urstadt Biddle Props, Inc. v Excelsior Realty Corp.*, 65 AD3d 1135, 1136-7 (2d 2009) (alleged misrepresentations about real estate taxes and zoning insufficient to show reasonable reliance since could have been discovered prior to signing lease).

In opposition, plaintiffs seeks to save their claims by identifying promises the defendants made about their future performance under the subject contracts, such as the promise to resolve the conflict between the CO and the Declaration. However, it is well established that a fraud claim cannot be based on promises to perform one's contractual obligations. *See Linea Nuova, S.A. v Slowchowsky*, 62 AD3d 473 (1st Dept 2009). Instead, plaintiffs' redress is limited to their breach of contract claims. Therefore, the fraudulent inducement claims are dismissed against the Landlord Defendants.

Mistake, Impossibility & Illegality

> Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make

> performance burdensome; until the late nineteenth century even impossibility of performance ordinarily did not provide a defense (Calamari and Perillo, Contracts § 13-1, at 477 [2d ed 1977]). While such defenses have been recognized in the common law, they have been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances. Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.

Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 902 (1987).

Plaintiffs are not entitled to rescission based on impossibility or illegality because the supposed impossibility (the inability to legally build out the Premises in accordance with the Lease) was, as described further below, a risk that was contractually placed onto plaintiffs. The doctrine of unilateral mistake, however, is equitable in nature and not as harsh.

A court "can rescind a contract for unilateral mistake if failure to rescind would unjustly enrich one party at the other's expense, and the parties can be returned to the status quo ante without prejudice." *Gessin Elec. Contractors, Inc. v 95 Wall Assocs., LLC*, 74 AD3d 516, 520 (1st Dept 2010). Moreover, it is well established that "the court may rescind the apparent contract for the mistake of one party only, without a finding of fraud or inequitable conduct in the other." *Abner M. Harper, Inc., v City of Newburgh*, 159 AD 685, 697 (2d Dept 1913).[4] The gravamen of plaintiffs' claims is that they were duped into leasing and signing a personal guarantee for a commercial property that could not be used for its intended purpose. The Landlord Defendants' contend that this claim is not viable because, as discussed further below, the terms of the Lease explicitly place the burden on ensuring that the Premises is suitable for its

[4] This case is still good law. *See Frederick v Meighan*, 75 AD3d 528, 532 (2d Dept 2010).

use on the plaintiffs. By signing the Lease and the Guarantee, the Landlord Defendants aver, plaintiffs assumed the risk of regulatory problems (which they admittedly knew of from the start). If plaintiffs did not wish to take this risk or accede to any of defendants' terms, such as the insistence on hiring Enko, they could have chosen not to sign the contracts.

The Landlord Defendants are technically correct that they did not contravene the express terms of the Lease. Section 12 of the Lease states that Gelita accepts possession of the Premises "as is" and section 6.01 obligates Gelita comply with all legal requirements at its sole cost and expense. Thus, the allegation that the Landlord Defendants should be liable for extra tax paid due to the classification of the second floor as residential fails because plaintiffs knew that the second floor was classified as residential before they executed the Lease. In the Complaint, the only stated grounds for the Landlord Defendants' supposed obligation to change the status of the second floor are the purported oral promises made before the Lease was entered into. Such obligations, however, were not included in the Lease. Indeed, section 20.01 sets forth that the "Lease contains the entire agreement between the parties and all prior negotiations and agreements are merged in this Lease. Neither Owner nor Owner's agents have made any representations ... with respect to the [Premises] ... except as set for in this Lease ... [and] this Lease may not be [amended] orally." This provision expressly precludes all of plaintiffs' claims relating to the Landlord Defendants' oral promises both before and after the Lease was executed, including promises with respect to the CO and the Declaration.

Nonetheless, fixing the conflict between the CO and the Declaration was something capable of being done only by the Landlord Defendants. Their continued refusal to do so, notwithstanding the express terms of the Lease, might constitute a frustration of purpose or beach

of the duty of good faith and fair dealing. Now, the Landlord Defendants contend that the problem has been fixed. Regardless, plaintiffs have already vacated the premises. The reason they did so, however, was primarily due to the construction problems allegedly caused by Enko, Mora, and Tung (who have not moved to dismiss), not the Landlord Defendants' negligence with respect to the tax status of the second floor.[5] That being said, there are still issues that may implicate the Landlord Defendants in this case.

The first issue is whether the Premises can legally be used for its intended purpose. For instance, plaintiffs contend that the portion of the second floor leased to Gelita cannot legally be used because there is no way of creating a secondary means of egress. This problem might constitute a frustration of purpose possibly entitling Gelita to terminate the Lease. *See Elkar Realty Corp. v Kamada*, 6 AD2d 155, 158 (1st Dept 1958); *see also Two Catherine St. Mgmt. Co. v Yeung*, 153 AD2d 678 (2d Dept 1989) ("Since the intended purpose of the lease may have become impossible to effectuate through no fault of the defendant tenant, he may have been entitled to terminate the lease.")

"[T]o invoke frustration of purpose as a defense for nonperformance, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 (1st Dept 2011) (quotation marks omitted); *see also Rockland Dev. Assocs. v Richlou Auto Body, Inc.*, 173 AD2d 690, 691 (2d Dept 1991) (the doctrine of frustration of purpose applies when the frustration is substantial). However, unlike the doctrine of unilateral mistake, the remedy for frustration of purpose of a commercial lease is termination, not

[5] The insurance issue, unlike a mere increase in taxes, may stand on different footing.

rescission. Additionally, even if plaintiffs are entitled to termination, Gelita is still liable to pay rent for the time it occupied the Premises. *See Phillips & Huyler Assocs. v Flynn*, 225 AD2d 475 (1st Dept 1996), citing *Elkar Realty, supra.*

The Complaint begs for clarity. While the fraud claims against the defendants are not viable (and thus are dismissed with prejudice), the Complaint contains sufficient factual detail to warrant an opportunity to amend. The amended complaint must specify the specific grounds for relief (mistake, frustration of purpose, etc.), the appropriate remedy for each ground (rescission, termination, etc.), and the basis for asserting each ground against each defendant. Furthermore, in the Complaint, the plaintiffs indirectly suggest some sort of nefarious connection between the Landlord Defendants and Enko. These suggestions are not pled with any clarity. Plaintiffs have leave to replead a more precise relationship and explain its legal relevance (e.g. why the Landlord Defendants' supposed involvement with Enko or Mora's shoddy construction might constitute a frustration of purpose, breach of the duty of good faith and fair dealing, or possibly tortious interference with contract). Given the troubling circumstances presented in the Complaint, leave to replead these specified amendments is granted in the interest of justice. *See* CPLR 3025(b).

C. W&S's Motion (Seq. No. 004)

The claims against W&S are dismissed because it was not a party to the subject contracts and the fraud claims are no more viable against it than against the other defendants. W&S is not liable for the acts of its purported agents (Mora, Enko, and Tung) because such acts allege breaches of contracts (the Construction Contract and Tung's subcontract) that were entered into

on the contracting parties' behalf, not on behalf of any agent. Moreover, plaintiffs do not state a veil piercing claim. Hence, the claims against W&S are dismissed. Accordingly, it is

ORDERED that the motions to dismiss the Complaint by defendants The Board of Directors of the Theatre Condominium, Walter & Samuels, LLC, and The New York City Department of Buildings are granted, and the Clerk is directed to enter judgment dismissing the Complaint against said defendants with prejudice, the fraud claims against 133 Second Avenue, LLC, Walsam 133 LLC, also are dismissed with prejudice, and the non-fraud claims against 133 Second Avenue, LLC and Walsam 133 LLC, are dismissed without prejudice; and it is further

ORDERED that plaintiffs Gelita, LLC and Gian Luca Giovanetti may file an amended complaint in accordance with this decision within 20 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, N.Y., for a preliminary conference on July 30, 2013 at 10:00 in the forenoon.

Dated: June 10, 2013

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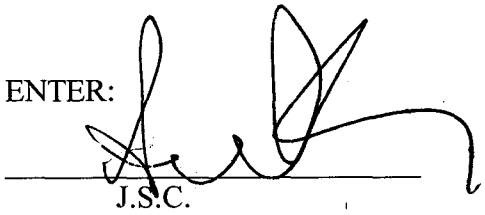

J.S.C.