SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN [redacted] J.S.C.
Justice

PART 63

Index Number : 150110/2012
WINNER COMMUNICATIONS, INC.
vs.
BELL, BARBARA
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
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). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER. [redacted]

This constitutes the decision and order of the Court.

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

Dated: 8/7/13

[redacted], J.S.C.
ELLEN M. COIN
[redacted] 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 63

----------X

WINNER COMMUNICATIONS, INC.,

Plaintiff,

-against-

BARBARA BELL,

Defendant.

----------X

Index Number: 150110/2012
Submission Date: May 1, 2013
Motion Sequence: 003
DECISION AND ORDER

For Plaintiff
Roger J. Bernstein, Esq.
535 Fifth Avenue, 35th Floor
New York, New York 10017
212-227-8383

For Defendants:
Sperber Denenberg & Kahan, P.C.
By Jacqueline Handel-Harbour, Esq.
48 West 37th Street, 16th Floor
New York, New York 10018
917-351-1335

Papers considered in review of this motion:

Papers	**Numbered**
Notice of Motion with Attached Exhibits	1
Affirmation in Opposition	2
Affirmation in Reply	3

ELLEN M. COIN, J.:

Defendant moves pursuant to CPLR 2221(d) for leave to reargue the Court's decision and order of January 31, 2013, dismissing defendant's counterclaim for lost profits. This litigation concerns the rights and obligations of parties to a month-to-month commercial lease and personal guaranty, with plaintiff Winner Communications, Inc. (Winner), as landlord, and defendant Barbara Bell (Bell), as tenant. The relevant facts were set forth in the January 31, 2013 decision and order. Some facts bear repeating due to their particular relevance here.

On June 30, 2009, Winner entered into a three-month lease with Bell for the entire third floor of Winner's building. The term of the lease began on July 1, 2009, and ended on September 30, 2009. During the lease negotiations, Bell allegedly indicated that she intended to form a new corporation and needed the third-floor space for a physical therapy facility she wished to open. She maintains that because she had not yet incorporated a new corporate entity, she and Winner agreed to enter into a short-term lease in her name for the benefit of the soon-to-be incorporated entity. Three days after signing the lease agreement, on July 3, 2009, Bell incorporated Gotham Physical Therapy P.C. ("Gotham"). Bell became its president and principal shareholder.

Following expiration of the three-month lease, Bell continued occupying the third floor premises on a month-to-month basis, subject to the same terms and covenants as those contained in the expired lease.

The first page of the lease rider states that the tenant is Park South Physical Therapy Group P.C. (the previous tenant, of which Bell had been a shareholder), but Bell signed the rider as "Tenant," with no indication that she was signing on behalf of Park South or Gotham.

Under Article 11 (Assignment/Mortgage, Etc.) of the lease, Bell agreed to not assign the lease without the express written consent of Winner. Article 26 (Waiver of Trial by Jury") of the lease also provides, in part, that "in the event that landlord commences any summary proceeding or other action for nonpayment of rent, tenant covenants and agrees that it will not interpose any counterclaims of whatsoever nature or description in any such proceeding." (Lease at 5).

In her answer to the instant complaint for breach of the lease and for use and occupancy, defendant asserted a counterclaim alleging that Winner's failure to maintain the site and elevator caused her damages in the amount of $250,000 due to loss of patients.

In its order of January 31, 2013, the Court dismissed the counterclaim, finding that there was no intent expressed by the parties in the lease to allow for lost profits as the basis for damages in the event of a breach. (*See Witherbee v Meyer*, 155 NY 446, 449-450 [1898]; *see also Awards. com, LLC v Kinko 's, Inc.*, 42 AD3d 178, 183 [1st Dept 2007], *affd* 14 NY 3d 791 [2010]). The Court held that a claim for lost profits is a claim for special damages. (*E.g.*, *Rose Lee Mfg., Inc. v Chemical Bank*, 186 AD2d 548, 551 [2d Dept 1992]), and that "in order to recover "special" or extraordinary damages that do not flow directly from the breach, a plaintiff is required to plead that the damages were foreseeable and within 'the contemplation of the parties at the time the contract was made'." (*Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 759 [2nd Dept 2009], quoting *American List Corp. v U.S. News & World Report*, 75 NY2d 38,43 [1989]).

Further, the Court found that when Bell signed the lease, she waived her right to assert any counterclaim. Defendant now argues that the Court misapprehended the applicable lease provision regarding the waiver of counterclaims. She contends that the relevant clause bars a counterclaim only in a "proceeding or action for possession," and that since Bell had vacated the premises prior to this proceeding, this is not an "action for possession" within the meaning of the clause, and her right to counterclaim for lost profits has therefore not been waived.

Motion for Leave to Reargue:

A motion for leave to reargue will generally be granted when it is "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." (CPLR 2221(d)). To the extent that the Court previously ruled that the counterclaim

was expressly barred under the lease, the Court acknowledges that it erred, and thus grants so much of defendant's motion as sought reargument. However, upon review the Court adheres to its prior ruling dismissing the counterclaim. The counterclaim must also be dismissed as Bell has no standing to assert the claim for lost profits in her individual capacity.

To recover lost profits in a breach of contract claim, it must be established that potential profits were "brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting... [and in so determining,] the nature, purpose and particular circumstances of the contract known by the parties should be considered." (*Kenford Co., Inc. v. County of Erie,* 73 NY2d 312, 319 [1989][citations omitted] [plaintiff not entitled to damages for lost appreciation in value of land peripheral to stadium site upon defendant's failure to timely construct stadium]; *Ashland Management Inc v. Janien*, 82 NY2d 395, 405 [1993] [future earnings not only were contemplated but also fully debated and analyzed and contract explicitly projected anticipated profits and provided for defendant's share of those profits]). Absent an explicit contract provision, "the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject." (*Kenford,* 73 NY2d at 320 [emphasis added]). "[B]are notice of special consequences which might result from a breach of contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient [to impose liability for special damages]." (*Id.* at 320 [*quoting Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 NY 487, 494 [1875]). The mere expectation and anticipation of future profits does not necessarily or logically lead to the conclusion that the parties contemplated liability for lost profits, and is an insufficient basis as a matter of law for imposition of liability. (*Id.* at 319-320).

In this case the lease contains no explicit provision for lost profits. Defendant argues that since the lease provided in several areas that plaintiff was to supply necessary maintenance and repairs to the leased premises, including elevator service, and also acknowledged the use of the premises as a physical therapy business, the lease expressed the parties' intent to allow lost profits as a basis for damages in the event that the elevators were continuously broken. However, the inclusion of these common commercial lease terms is insufficient to establish that plaintiff "fairly may be supposed to have assumed consciously" (*Kenford Co.* 73 NY2d at 319) the liability of $250,000 in lost profits should the elevator not be properly maintained. The elevator did not form the basis of the contract, but rather was incident to it. There was no concession or allusion anywhere in the lease that failure to properly maintain the elevator would impose liability on plaintiff for any resulting lost business profits.

Defendant seeks to distinguish the facts of *Awards.com, LLC v. Kinko's, Inc.* (42 AD3d 178 [1st Dept 2007]), cited in the Court's January 31, 2013 decision and order, from the instant case. In *Awards.com*, the Appellate Division, First Department, found that the parties had not contemplated lost profits in a contract involving a new business venture. The First Department held that according to a "common sense approach...it would be highly speculative and unreasonable to infer an intent to assume the risk of lost profits in what was to be a start-up venture..." (*Awards.com,* 42 AD3d at 184). Defendant argues that since she has been in business for a decade, liability for lost profits should be reflexively imposed. Defendant's isolation of this factual distinction as the determinative factor is misleading. In *Awards.com*, the First Department did not suggest that if a business is well-established, the risk of lost profits can be

fairly assumed; rather, the fact that the business was a start-up venture reinforced the court's ultimate determination that lost profits were not contemplated, given the particular nature, purpose and circumstances of the contract in that case.

Similarly, the fact that defendant had been in business for nearly a decade as a principal of Park South does not, in and of itself, give rise to an inference of plaintiff's intent to assume liability for lost profits to defendant Bell in the event of a breach. "If the parties had intended to agree to pay lost profits...they could have so specified, just as they had set forth the payment terms..." (*Awards.com, LLC* 42 AD3d at 185). Bell is "attempting to obtain through litigation what [she] failed to secure at the bargaining table." *(Awards.com,* at 185*).* Therefore, the Court adheres to its prior determination dismissing Bell's counterclaim.

Moreover, defendant lacks standing to bring this counterclaim, as it belongs to Gotham. Bell, as a shareholder, lacks standing to sue in her own name for injuries to the corporation. (*See Schaeffer v. Lipton,* 243 AD2d 969, 970 [3rd Dept. 1997] [individual shareholder lacked standing to bring legal malpractice claim in his own name for harm done to corporation]; *Quatrochi v. Citibank, N.A.,* 210 AD2d 53, 54 [1st Dept. 1994] [shareholder lacked standing to sue in own name for lost profits allegedly sustained in connection with a sale of a painting]; *General Motors Acceptance Corp. v. Kalkstein*, 101 AD2d 102 [1st Dept. 1984] [married couple lacked individual right to sue for fraud on corporation's behalf as officers of corporation]). Defendant alleges that plaintiff's failure to properly service the elevator had a negative impact *on the business* resulting in lost profits, thus alleging harm to Gotham, not to Bell individually.

In her reply to this motion, defendant argues alternatively that she is entitled to a rent abatement because of the lack of elevator service that allegedly impinged upon Gotham's ability

to effectively run its business. The request is denied because defendant failed to plead a counterclaim for rent abatement in the answer to the complaint.

In accordance with the foregoing, it is hereby

ORDERED that defendant's motion for leave to reargue the Court's decision and order of January 31, 2013 to dismiss the counterclaim for business interruption, lost profits and income pursuant to CPLR 2221(d) is granted, and upon reargument the Court adheres to its decision and order of January 31, 2013; and it is further

ORDERED that the balance of defendant's motion is denied.

This constitutes the decision and order of the Court.

Dated: August 7, 2013
New York, New York

ENTER:

Ellen M. Coin, A.J.S.C.