SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 156717/2013
MANHATTAN HOLDING USA
vs.
TORRE, MARK
SEQUENCE NUMBER : 001
DISMISS ACTION

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). 1,2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). 5

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/30/14

HON. EILEEN A. RAKOWER 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 15

----------X

MANHATTAN HOLDING USA LTD,

Plaintiff,

- v -

MARK TORRE, JOHN AND JANE DOES, 500 EIGHTH AVENUE LIMITED LIABILITY COMPANY, WALTER & SAMUELS INC. AND DAVID I. BERLEY,

Defendants.

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Index No. 156717/2013

DECISION and ORDER

Mot. Seq. 1, 3

HON. EILEEN A. RAKOWER, J.S.C.

On or about July 3, 2013, plaintiff Manhattan Holding USA Ltd. ("Plaintiff" or "Manhattan Holding") commenced an action against the individual defendant Mark Torre ("Torre"), the property manager for the building located at 500 Eighth Avenue, New York, New York ("Building") alleging breach of contract, fraudulent misrepresentation, tortious interference, and discrimination.

Thereafter, on August 29, 2013, Torre moved to dismiss the plaintiff's Complaint, (see Motion Seq. # 001). Plaintiff served opposition papers, dated October 2, 2013, and Torre followed with service of a reply affirmation, dated October 14, 2013. Torre's motion was fully submitted on October 17, 2013.

Plaintiff served a supplemental summons and verified amended complaint, dated September 17, 2013, naming as additional defendants Walter & Samuels Inc. ("WSI"), the management company for the Building, 500 Eighth Avenue Limited Liability Company ("500 Eighth Avenue"), the landlord of the Building, and David I. Berley ("Berley"). Torre is also named. In addition, Plaintiff has

served numerous subpoenas and discovery demands directed at Torre and the other defendants.

On October 15, 2013, defendants Torre, 500 Eighth Avenue, WSI, and Berley moved to dismiss the amended complaint pursuant to CPLR §3211(a)(1) and (7), to quash the plaintiff's subpoenas and discovery demands issued to certain named defendants pursuant to CPLR §3103, and for fees and costs ("Mot. Seq. #3). Torre joins in moving to dismiss the Amended Complaint.[1] Plaintiff opposes.

This court , in the interest of efficiency, will review the motions to dismiss as they relate to the Amended Complaint.

By way of Amended Complaint, Plaintiff alleges that it entered into a lease agreement with 500 Eighth Avenue on or about February 27, 2013, by which it leased premises located at Suites 800-801 in the Building. WSI is alleged to be the management company for the Building, Torre is alleged to be the property manager for the Building, and Berley is alleged to be the Chairman of WSI and a signatory to the lease agreement executed on behalf of 500 Eighth Avenue, as the landlord.

In the Amended Complaint, Plaintiff alleges various oral representations made by Torre regarding the installation of a door and lighting in the leased premises, charges for two months of electricity, and the filing of a Certificate of Occupancy.

More specifically, Plaintiff alleges that Defendants were aware that Plaintiff, as tenant, intended to do extensive renovation work to the Premises after

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[1]On or about October 25, 2013, via an order to show cause motion, Plaintiff petitioned this Court for a temporary restraining order ("TRO") seeking to immediately stay an eviction proceeding commenced by 500 Eighth against Plaintiff in the Civil Court, New York County, bearing Index No. L&T 084314/13. On October 25, 2013, a hearing was held before this Court on the TRO, at which time the Court denied the TRO and plaintiff withdrew the order to show cause.

signing the lease and certain terms were agreed upon. Plaintiff alleges that Torre agreed to permit Plaintiff to make certain renovations to the Demised Premises, such as the installation of certain lighting on the leased premises and installation of a door separating a portion of bathroom area and common area on the 8th Floor, that Plaintiff relied on these promises and purchased the materials, and that on or around March 2013, Torre "retracted his statement agreeing to the installations and told Plaintiff that it was not allowed to install the lights or the additional door." Plaintiff contends that "as stated under the terms of the lease agreement, it was agreed that Defendant would apply for a Certificate of Occupancy for school use so that Plaintiff could operate a school on the eighth (8^{th}) floor," that "Defendants further expressly warranted and orally agreed that they would apply for a Certificate of Occupancy for school use immediately after the lease was signed."

Plaintiff alleges that Plaintiff began submitting necessary documents in its application for the Premises to the government departments and that Defendants failed to obtain the agreed upon Certificate of Occupancy providing for school use. Plaintiff contends that 500 Eighth Avenue's (landlord) failure to do so was a breach of the parties' lease agreement.

In addition, Plaintiff also contends that 500 Eighth Avenue, through its agent, agreed to permit Plaintiff to make certain renovations to the Demised Premises, that Plaintiff relied on these promises and changed its position by entering into a construction contract with a third party and purchasing materials required to do to the work.

Defendants submit the attorney affirmation of Robert H. Hellner, which provides a copy of the Summons and Verified Complaint, and Supplemental Summons and Verified Amended Complaint, and Subpoenas propounded by Plaintiff and directed to WSI, 500 Eighth Avenue, Bookkeeper of 500 Eighth, and Berley.

Defendants also submit the affidavit of Mark Torre which annexes a copy of the Lease and Rider.

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (1) a defense is founded upon documentary evidence;
>
> (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

The first cause of action is for breach of contract. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dept. 2009]).

Parties to an agreement may fashion their own remedies for breach of contract. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y. 2d 398, 403 [1968]. "[I]n a strictly commercial context, a provision limiting recovery is enforceable according to its terms unless the special relationship between the parties, a statute or public policy imposes liability." *Metropolitan Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 192 A.D.2d 83, 89 [1st Dept.1993]. "Freedom of contract prevails in an arm's length transaction between sophisticated parties such as these, and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain." *Oppenheimer Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y. 2d 685, 695 [1995].

Here, the allegations in the Amended Complaint assert that there were delays in obtaining the C/O for use of the leased premises as a school, and Defendants made misrepresentations regarding Tenant's proposed renovations to the leased premises. More specifically, the first cause of action for breach of contract is based upon the following allegations:

> 32. Plaintiff entered into a lease agreement where it was understood that Plaintiff would be renovating the Premises immediately after the signing of the lease.
>
> 33. Certain renovations were agreed upon by representatives of the Plaintiff and Defendants, and Plaintiff reasonably relied upon the agreement in proceeding with its renovation plans.
>
> 34. Plaintiff, relying on Defendant Torre's agreement to the installation of additional lighting and a door separating the hallway from the rest of the restroom area, began to purchase the necessary materials, take measurements and draw plans for these two projects. They also paid a contractor fee upfront.
>
> 35. When signing the lease on February 27, 2013, Defendants promised to immediately file for an amended Certificate of Occupancy to allow the Premises for school use on the 8th floor. At the time of filing this Amended Complaint, an amended Certificate of Occupancy for school use has not been obtained Plaintiff.
>
> 36. Defendants did not file for an amended Certificate of Occupancy until on or about July 26, 2013, which was five (5) months after signing of the lease.
>
> 37. Defendants failed to timely file an application for an amended Certificate of Occupancy when it was clearly known to both parties that it was a material element of the lease agreement because of Plaintiff's intended use of the Premises as a school, and Defendants intentionally concealed information of the Certificate of Occupancy's disapproval from Plaintiff.

> 38. Defendants' intentional delay of the renovation work and relevant applications, retraction of the agreement to install lights and the additional door, and delay in submitting the application for a Certificate of Occupancy for school use has drastically interfered with Plaintiff's ability to use the Premises. Further, Plaintiff is unable to receive any mail, which has caused harm to Plaintiff's business.
>
> 39. Defendants' willful violation has caused a delay of inspection by the Fire Department.

The lease, however, contemplates a timeframe within which application for the new certificate of occupancy must be made and sets forth provisions governing "Tenant's Work."

The relevant terms of the parties' Lease Agreement are as follows:

Paragraph 3 of the Lease provides in relevant part:

> Tenant Alterations: 3. Tenant shall make no changes in or to the demised premises of any nature without Owner's prior written consent . . .

Paragraph 21 of the Lease provides in relevant part:

> No Representations by Owner: 21. Neither Owner nor Owner's agents have made any physical representations or promises with respect to the physical condition of the building, the land upon which it is erected or the demised premises, the rents, the leases, expenses of operation or any other matter or thing affecting or related to the premises . . . All understandings and agreements heretofore made between the parties hereto are merged into in this contract, which alone fully and completely expresses the agreement between the Owner and Tenant and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge of abandonment is sought.

Paragraph 39 of the Rider to the Lease provides in relevant part:

> 39. LIMITATION OF LIABILITY
>
> ***
>
> B. With respect to any provision of this Lease which provides, in effect, that Landlord shall not unreasonably withhold or unreasonably delay any consent or any approval, Tenant in no event, shall be entitled to make, nor shall Tenant make any claim and Tenant hereby waives any claim for money damages ...

Paragraph 44 of the Rider to the Lease provides in relevant part:

> TENANT'S WORK: The provisions of this Article 44 shall pertain to all work to be done in, at or upon the Demised Premises throughout the term of this Lease, whether such work is (i) to be done in order to prepare the Demised Premises for Tenant's opening for business; or (ii) to make additional improvements, at any time thereafter, . . .
> (a) Prior to Tenant's commencing any work, at or upon the Demised Premises (both prior to and subsequent to the Lease Commencement Date), Tenant shall submit to Landlord for Landlord's written approval, which approval shall not be unreasonably withheld or delayed, professional drawings, or professional prepared plans and specifications (herein collectively referred to as "Tenant's Plan") for or in connection with the improvements and installations to be made by Tenant (herein collectively referred to as "Tenant's Work"), which shall include Tenant's Initial Work, as hereinafter defined . . .
> Tenant's Plain for Tenant's Work shall be fully detailed, shall show complete dimensions, shall not require any changes in the structure of the building and shall not be in violation of any laws, orders, rules or regulations of any governmental department or bureau having jurisdiction over the Demised Premises. Subject to the foregoing and the terms of this Lease, Tenant may, at its own cost and expense, install two (2) entrance doors to the Demised Premises.
> Notwithstanding the foregoing, if Tenant's Work consists solely of installing dry-wall partitions, no plans shall be required.

entitled "Tenant's Work," provides:

* * *

(i) All work done by Tenant shall, in addition to the provisions of this Article 44, be subject to the provisions of Article 3 hereof unless otherwise specifically provided for elsewhere herein.

Paragraph 51 of the Rider to the Lease provides:

51. PERMITS AND LICENSES. A. Landlord, shall at its own cost and expense, apply for and obtain a temporary or permanent Certificate of Occupancy for the Demised Premises entitling it to be used as a school. Landlord warrants and represents that it presently has a Certificate of Occupancy permitting other floors in the building in which the Demised Premises are a part to operate as a school.

B. Tenant shall, at its own cost and expense, and Landlord shall assist Tenant therein, take all necessary actions and submit all necessary applications and/or paperwork in order for the Demised Premises to be in compliance with all applicable laws, codes, regulations and requirements to the applicable federal and state agencies, including but not limited to the New York State Education Department, Fire Department, Department of Buildings, such that Tenant would be able to operate a school in the Demised Premises in accordance with the applicable laws, codes, regulations and requirements.

C. If Landlord has not obtained a temporary or permanent Certificate of Occupancy by August 31, 2013, which allows for "School Use", and by reason therefor Tenant is precluded by governmental authority from operating a school in the Demised Premises then, at any time thereafter until Landlord has obtained the temporary or permanent Certificate of Occupancy allowing a School Use, Tenant may, at its option, cancel the Lease and upon such cancellation Landlord will pay to Tenant the sum of Ten Thousand ($10,000) Dollars in consideration therefore and the parties thereafter shall have no claim against each other arising from the inability to obtain such temporary or permanent Certificate of Occupancy. Notwithstanding the

> foregoing, Tenant may elect to continue the Lease in full force and effect and change the "Use" of the Demised Premises to one permitted to the existing Certificate of Occupancy for the Demised Premises. If Tenant elects to change its Use to a conforming Use, Tenant shall have no right to cancel the Lease.

Paragraph 52 of the Rider to the Lease provides:

> 52. "AS IS" CONDITION: Tenant hereunder agrees that it has inspected the Demised Premises and by doing so shall accept the same in its present "as is" condition including, but not limited to, its acknowledgment that it is not relying upon any verbal or written statements, representations, real estate brokers "set-ups" or flyers pertaining to the layout or size of the Demised Premises. Landlord agrees that the Demised Premises shall be delivered to Tenant in a vacant and broom clean condition.

Paragraph 54 provides, "Tenant shall, throughout the term of this Lease, be responsible for the cost of all utilities being provided to the Demised Premises ..."

These provisions of the Lease and Rider flatly contradict the legal conclusions and factual allegations of the complaint. As to Plaintiff's allegations that Torre made representations concerning improvements, the Lease expressly provides that "Tenant shall make no changes in or to the demised premises of any nature without Owner's prior written consent ..." (Paragraph 3), that "[n]either Owner nor Owner's agents have made any physical representations or promises with respect to the physical condition of the building, the land upon which it is erected or the demised premises, the rents, the leases, expenses of operation or any other matter or thing affecting or related to the premises ..." (Paragraph 21), that "[p]rior to Tenant's commencing any work, at or upon the Demised Premises (both prior to and subsequent to the Lease Commencement Date), Tenant shall submit to Landlord for Landlord's written approval, which approval shall not be unreasonably withheld or delayed" (Paragraph 44[a]), and Tenant accepts the premises "as is." The Lease provides that the lease cannot be modified orally or by representations of Plaintiff's agents.

As to Plaintiff's allegations concerning its responsibility to make payment for electricity, the Lease provides that Plaintiff is responsible for utilities during the Lease term.

Finally, as to Plaintiff's allegations that the Landlord delayed application for the school C/O, the Lease gives 500 Eighth Avenue, the landlord, until August 31, 2013 to obtain the C/O and further enumerates the specific remedies for Defendants' failure to obtain a C/O for use and of the premises as a "School." That provision provides that upon Defendant's failure to obtain the C/O, Plaintiff may cancel the lease and receive a payment of $10,000 from the Landlord. Nowhere in the written agreement is there language suggesting Landlord would "immediately" submit the required application.

Upon review of the four corners of the Amended Complaint and even accepting all allegations as true, the second cause of action for fraudulent misrepresentation, the third cause of action for tortious interference, and the fourth cause of action for discrimination fail to state a claim.

The second cause of action of the Amended Complaint is for fraudulent misrepresentation. In an action to recover for fraud, Plaintiffs must allege (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; and (5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 919 NYS2d 465, 944 NE2d 1104 [2011]). CPLR §3016(b) provides that where a cause of action or defense is based on misrepresentation, it must be stated in detail. Plaintiff alleges that:

> 41. Defendants, upon disallowing Plaintiff to install an additional door on the eighth (8th) floor of the Building, informed Plaintiff that it would violate the "Code." However, Defendants clearly showed Plaintiff's representatives, the same kind of door at the same location on the 9th floor of the Building. Defendants willfully deceived Plaintiff by showing them the same door in the same location on the 9th floor of the Building which implied that such a door was not in violation of the Code, which Plaintiff reasonably relied upon in pursuing the projects.

42. Furthermore, Defendants intentionally and willfully failed to timely disclose the information regarding the disapproval of the Certificate of Occupancy for school use.

43. Defendants not only failed to timely file for amendment but they also did not timely inform Plaintiff of the disapproval, nor did they inform Plaintiff that it was mitigating the situation.

44. The five months between the signing of the lease and Defendants' application for the amended Certificate of Occupancy for school use, and the one month between the disapproval and Plaintiff's learning of the information was a significant time for Plaintiff, as it continued to enter into contract and agreements with other third parties with respect to completing and furnishing the Premise.

45. The renovation and investor contracts Plaintiff made were made due and payable; indeed, Plaintiff has paid out for work completed on the premises already. This has caused Plaintiff further damages.
46. Defendants maliciously did not notify Plaintiff of the disapproval until such information was requested by Plaintiff. If Plaintiff did not request this information, Defendant would not have disclosed the information, to the continued detriment of Plaintiff.

47. Because of Defendants' representation, Plaintiff suffered loss and damages in a final amount to be determined at trial ...

The third cause of action is for tortious interference against Defendants. "Tortious 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" (*Havana Cent. NY2 LLC v. Lunney's Pub, Inc.*, 2007 NY Slip Op 10509, *5 [1st Dept. 2007], *citing Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413, 424 [1996]). Plaintiff alleges:

49. Upon agreement with Defendants for the construction of the lighting and additional door, Plaintiff entered into an additional contract with its contractor for the work and purchase of materials.

> 50. Defendants knew or should have known that a contractual relationship existed between the contractor and Plaintiff, and that all projects would be part of this contract.
>
> 51. Because of the Defendants unreasonable delay in the renovation work and their breach of contract regarding the installation of the additional lighting and doors, Plaintiff's contract with its contractor has been strained.
>
> 52. Further, Plaintiff paid electricity on a space that was not utilized for the time period charged, resulting from Defendant Torre's interference.
>
> 53. Defendant Torre's breach of contract regarding the installation of the additional lighting and doors caused Plaintiff to breach its contract with its contractor, and result in monetary damages for payments already made for these two projects.
>
> 54. Plaintiff suffered loss and damages in a final amount to be determined at trial ....

While plaintiff alleges that it engaged a construction contractor in reliance upon Torre's representations, and that Torre's change in position "strained" the construction contract, the lease sets forth specific provisions for "Tenant's Work," and disavows any oral representations by Landlord's agents. Here, even accepting all allegations as true, Plaintiff fails to state a claim for fraud and tortious interference.

The fourth cause of action is for discrimination, based on the following allegations:

> 56. Upon information and belief, Plaintiff alleges that its representatives were discriminated because Defendants thought Plaintiff was a minority and owned by a female. In actuality, Plaintiff is a multi-ethnic group.
>
> 57. Plaintiff's contractor is of Korean ethnicity and also speaks with an accent.

58. Plaintiff alleges that both it and its contractor have been discriminated against, which led to the aforementioned actions against them by Defendants including the unreasonable delay of renovation work.

59. Upon information and belief, Defendant Torre has taken advantage of Plaintiff and its representatives' lack of English proficiency to retract his agreement to certain work being performed by the Plaintiff's contractor. Plaintiff's fourth cause of action fails to state a claim.

This cause of action fails to state a claim.

Wherefore, it is hereby,

ORDERED that Defendants' motion to dismiss is granted and the Complaint is dismissed as against defendants Mark Torre, 500 Eighth Avenue Limited Liability Company, Walter & Samuels Inc., and David I. Berley and the Court shall enter judgment dismissing the action in its entirety; and it is further

ORDERED that Defendants' motion to quash the plaintiff's subpoenas and discovery demands issued by Plaintiff upon Defendants is denied as moot.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JANUARY 30, 2014

EILEEN A. RAKOWER, J.S.C.