

The Yogurt Factory NY, Inc. v S.G.M. Holding Corp.
2014 NY Slip Op 30599(U)
March 3, 2014
Supreme Court, Suffolk County
Docket Number: 24772/2013
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX NO. 24772/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
 Supreme Court Justice

 THE YOGURT FACTORY NY, INC.,

Plaintiff,

-against-

S.G.M. HOLDING CORPORATION,

Defendant.

ORIG. RETURN DATE: 11/27/2013
 FINAL SUBMISSION DATE: 2/19/2013
 MOTION SEQ#001
 MOTION: MOTNDECD

PLAINTIFF'S ATTORNEY:

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DEFENDANT'S ATTORNEY:

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The Defendant, S.G.M. Holding Corporation, petitions the Court by way of motion for an order pursuant to CPLR § 3211(a)(1)(5) and (7) dismissing the Complaint. The Plaintiff opposes the Petition. In rendering its determination, the Court has considered Defendant's moving papers, an Affidavit In Support, counsel's Affirmation In Support with Exhibits A through E; the Plaintiff's Affirmation In Opposition, an Affidavit In Opposition with Exhibit A; Defendant's Memorandum of Law and an Affirmation In Reply.

The underlying action stems from a commercial landlord-tenant relationship. The Plaintiff's store occupies space owned by the Defendant. The trade name of Plaintiff's store is The Yogurt Factory. The parties entered into a ten (10) year written lease agreement dated June 26, 2011. Pursuant to that agreement, the Plaintiff's store was to be used for the sale of frozen yogurt, juices, candy, smoothies and shakes. During September of 2011, the Plaintiff was charged with violating sections of the Suffolk County Department of Health Services, including operating a "food establishment" business without a valid permit and operating its business without a "sewer disposal system" approved by the health department. Thereafter, the Plaintiff voluntarily suspended operation until such time as an appropriate permit was obtained. Thereafter, the Plaintiff filed a FOIL request with the health

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department to obtain a copy of the most recent waste water application for the premises as well as adjoining businesses in this strip mall, also known as the Greenlawn Shopping Center. The FOIL request revealed that a "Subway" store adjoining the Plaintiff's store had installed a grease trap and obtained approval from the health department on or about July 1, 2005. Plaintiff claims that the Defendant-Landlord subsequently installed its own additional line into this "Subway" grease trap to service its own store known as the "Green Market" without first obtaining approval from the health department and before Plaintiff took possession of the space previously occupied by the Defendant's business (The Green Market).

Plaintiff claims that upon further investigation it was learned that the Defendant failed to seek approval for the waste water and septic system "which implicated the same potential deficiencies throughout the entire Greenlawn Shopping Center owned and leased by this Defendant." Accordingly, these deficiencies required inspection and correction before the Plaintiff's application for a permit to open and continue its business would be considered and granted.

The Plaintiff alleges that prior to executing the lease agreement, the Defendant made representations concerning the septic systems and cesspools claiming the same had been previously approved by the appropriate municipal entities concerning all of food establishments located within the shopping center. This included the establishment that was previously owned and operated by the Defendant.

Plaintiff claims that upon reviewing an additional engineering study, it was ascertained that not only was the existing waste water and sanitary systems for its store (The Yogurt Factory) unapproved and inadequate, most of these pre-existing systems were inadequate throughout the entire shopping center inclusive of five (5) other retail food establishments and a dry cleaner.

Plaintiff also alleges that despite an "as is" clause in its lease agreement, the Defendant was advised by officials employed at the health department, that the landlord had a primary and independent duty to timely notify and advise the health department of any proposed change, use and occupancy by a new tenant. Furthermore, Plaintiff alleges, that the Defendant-Landlord was also duty bound to advise all prospective tenants about potential deficiencies in the sewer and water systems existing at the premises. The Plaintiff claims that in reliance on false representations it incurred damages.

The Plaintiff's Amended Verified Complaint recites two (2) causes of action. The

first cause of action sounds in fraud and the second cause of action seeks a judicial determination that certain lease provisions or clauses are unconscionable.

The Defendant provides the Court with a copy of the leasehold agreement between the parties. In essence, the Defendant claims that the leasehold agreement is bullet proof. More specifically, the lease contains the following provisions:

- 1) ¶8(c) Landlord makes no representation that the demised premises may be used for any particular purpose, including, without limitation, any use herein authorized. Tenant shall procure, at its own cost and expense, all licenses, permits and certificates required for the lawful operation of Tenant's business in the demised premises. Tenant has inspected the demised premises and deems them suitable for the type of business to be conducted by Tenant during the term of the Lease.
- 2) ¶10(a) In executing this Lease, Tenant has not relied upon or been induced by any statements or representations other than those expressly set forth herein, whether relating to the physical condition of the demised premises, the use to which the demised premises may be put or otherwise. Tenant acknowledges that Tenant's use and occupancy of the demised premises must comply with all applicable governmental laws, regulations, rules and ordinances, including, without limitation, all the use, discharge and disposal of any chemicals, utilized by Tenant in its business operations, whether or not toxic. Landlord is delivering to Tenant, and Tenant is accepting the demised premises "as is." Landlord has no obligation to make any repairs, alterations, additions or improvements to the demised premises, except as specifically set forth herein. Landlord makes no representation as to the physical condition of the demises premises and its improvements and systems, or the uses to which the Demised Premises may be put.
- 3) ¶34 Tenant has inspected the building and the demised premises and is thoroughly acquainted with their condition and agrees to take the same, including without limitation all

electrical, plumbing, ventilation, fire and other building systems, if any existing, in their “as-is” condition on the date possession is tendered, and acknowledges that the taking of possession of the demised premises by Tenant shall be conclusive evidence that the said premises, and the building of which the same form a part, were in satisfactory condition at the time such possession was so taken, except as to latent defects (emphasis added).

4) ¶61 Any claim, demand, right or defense by Tenant that arises out of this Lease or the negotiations that preceded this Lease shall be barred unless Tenant commences an action thereon, or interposes a defense by reason thereof, within six (6) months after the date of the inaction, omission, event or action that gave rise to such claim, demand, right or defense.

Tenant acknowledges and understands, after having consulted with its legal counsel, that the purpose of Section 61 is to shorten the period within which Tenant would otherwise have to raise such claims, demands, rights or defenses under applicable laws.

A review of the Lease in general and the cited provisions in particular raises the issue as to whether or not the deficiencies in the water system are in fact, “latent” defects.

Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (*Chan Ming v. Chui Pak Hoi*, 163 A.D.2d 268, 558 N.Y.S.2d 546 (1st Dept. 1990)).

The Plaintiff alleges that the Defendant was duty bound to advise it regarding any potential deficiencies in the sewer and water systems. The courts of the State have consistently held that, in addition to establishing the elements of a cause of action for fraud, in order to recover damages sounding in fraudulent concealment, the Plaintiff must also establish the existence of a fiduciary or confidential relationship between the parties which would impose a duty upon the Defendant to disclose; and the Defendant failed to do so. *See Consolidated Bus Tr., Inc. v. Treiber Group, LLC.*, 97 A.D.3d 778, 948 N.Y.S.2d 679 (2nd Dept. 2012). It is clear that no such relationship existed between these parties. As such, the Defendant’s Petition is **GRANTED** as concerns the first cause of action, fraud.

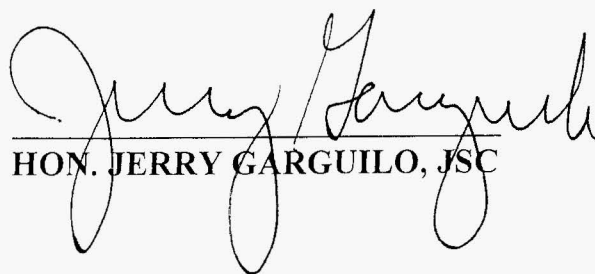
Furthermore, the Court cannot accept the deficiency in the water-septic system as a "latent defect." A latent defect is one that is hidden or concealed which a reasonable customer inspection would not reveal. *See Luttenberger v. All State Insurance*, 122 Misc.2d 365, 470 N.Y.S.2d 988. Accepting the Plaintiff's allegation as true, it is clear that the deficiency was identifiable independently on appropriate inquiry with the municipal agencies.

Lastly, the Court finds no merit in the claim that certain contractual terms are unenforceable as same are unconscionable.

The Complaint is ***DISMISSED***.

The foregoing constitutes the decision and Order of this Court.

Dated: March 3, 2014


HON. JERRY GARGUILO, JSC