

Clementine Co., LLC v Eco-Life Holdings Corp.

2016 NY Slip Op 31260(U)

July 5, 2016

Supreme Court, New York County

Docket Number: 154069/14

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

-----X
The Clementine Company, LLC,

Plaintiff,

-against-

Eco-Life Holdings Corporation, Yuxiang Jiang and
Gemstone Assets Management, LLC,

Defendants.
-----X

Eco-Life Holdings Corporation,

Third-Party Plaintiff,

-against-

Cathy Russell, Andrew Hyatt, William Q. Brothers III,
and Interactive Development Association,

Third-Party Defendants.
-----X

ELLEN M. COIN, J.:

Motion sequence Nos. 005 and 007 are consolidated for disposition.

Plaintiff, The Clementine Company, LLC (Clementine), seeks compensation for unpaid rent for the lease of billboard space in the Times Square area of Manhattan. Defendants assert a counterclaim against Clementine, and defendant Eco-Life Holdings Corporation (Eco-Life) asserts a third-party claim against Clementine’s managing member, Catherine Russell (Russell), alleging that Eco-Life was fraudulently induced to enter into the lease.

In motion sequence No. 005, Clementine moves for an order granting partial summary judgment, in its favor, against defendant Eco-Life only. Defendants cross-move to amend the

answer pursuant to CPLR 3025 (b). In motion sequence No. 007, Clementine moves to dismiss the counterclaim and Russell seeks dismissal of the third-party complaint (CPLR 3211 [a] [7]).

Background

Eco-Life sought billboard space to use to obtain income from third parties desiring to advertise thereon in 3D, using Eco-Life's technology, which permitted 3D viewing without glasses. Eco-Life and Clementine engaged in negotiations that culminated in the execution of a document concerning the leasing of billboard space from Clementine. The document was signed by defendant Yuxiang Jiang (Jiang) and Russell. After execution, Eco-Life paid a portion of the deposit with its own checks and with checks from defendant Gemstone Assets Management, LLC (Gemstone), but did not pay additional rent. This suit followed.

Discussion

Defendants argue that their cross-motion to amend their answer should be granted because there is no prejudice. While the absence of prejudice may be a determinative factor, the First Department has held that a party seeking leave to amend must make a showing that the proposed amendment is not "palpably insufficient" or "clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500 [1st Dept 2010]). In addition, CPLR 3025 (b) requires that the proposed amended pleading "clearly show [] the changes or additions to be made to the pleading." Defendants have not attempted to demonstrate that the proposed amendments are not palpably insufficient or devoid of merit and disregard the requirements of CPLR 3025 (b). Consequently, the cross-motion is denied without prejudice.

Turning to Clementine's summary judgment motion against Eco-Life on its breach of contract claim, "[t]he elements of such a claim include the existence of a contract, the plaintiff's

performance thereunder, the defendant's breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1st Dept 2010] [internal quotation marks and citation omitted]). Once the proponent of the motion meets this requirement, “the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]).

In support of its motion, Clementine provides a copy of a leasing document (the lease), written in Mandarin and English and signed by Jiang and Russell. The English portion of the document states that it is an agreement by which Clementine would provide signage to Eco-Life or its sole-member subsidiary, 1627 Broadway Signage LLC. The translation of the lease’s Mandarin text differs from the English copy, as the Mandarin provides that the agreement was entered into by Clementine and U.S. Jia Bei Fund Management Holding Group Company (U.S. Jia Bei) and/or its sole-member subsidiary, 1627 Broadway Signage LLC (Russell aff [motion sequence 005], exhibit D at 1). The agreement then lists the signage that would be provided, the price, and other terms.

Immediately before the document’s signature line, the lease provides, in English: “Each signatory below represents and warrants that he/she has due authority to enter into this binding agreement on behalf of the respective entity named as a party” (*id.*, exhibit C at 9). The Mandarin writing adjacent to this sentence translates as: “Each signature [sic] below represents

and warrants that he/she has obtained authorization to enter [sic] this binding agreement on behalf of said entity” (*id.*, exhibit D at 3). Russell signed as managing member of Clementine. Above Jiang’s signature, the entity listed, in English, is “ECO-LIFE HOLDINGS CORPORATION” (*id.*, exhibit C at 9). However, the Mandarin describes the signatory entity as U.S. Jia Bei, not Eco-Life (*id.*, exhibit D at 3).

Plaintiff also submits Russell’s affidavit in which she avers that Clementine was the lessor of a theater complex upon which the billboard is located. Russell further avers that in summer 2013, she began discussing the possibility of Eco-Life subletting the space with Tracy Zhao of Eco-Life and William Q. Brothers III.¹ Russell states that Brothers was presented to her as the operator of a company that Eco-Life had hired to help it procure billboard space, and that she sent him a draft sublease providing for Eco-Life to sublease the space from Clementine for a term ending in March 2015. Russell further states that Zhao used the title “General Manager,” and that another person, Xiuhan Hu, appeared to act as translator for Eco-Life’s principal, Jiang.

Russell avers that on October 15, 2013, Hu sent her an email explaining that if Russell would visit Jiang’s New York apartment the next day, Jiang would decide whether to sign the lease on behalf of Eco-Life. Russell further avers that she met Jiang, Zhao and Hu the following day, and was surprised to find that they had prepared a translation of the lease into Mandarin, and printed copies that contained English and Mandarin. Russell states that she relied on Zhao and Hu’s representation that the Mandarin text was an accurate translation of the English, learning only in 2014 that the document was executed on behalf of U.S. Jia Bei, even though Eco-Life’s

¹ Eco-Life and Brothers are arbitrating their dispute pursuant to an arbitration clause in a contract that Eco-Life signed with Interactive Development Association (IDA).

representatives continuously acted as though Eco-Life was the entity that entered into the lease.

Russell asserts that after execution of the lease, Zhao emailed to assure her that the rent deposit due was ready, stating that it “just needs to be sent to Eco-Life Holdings Corp.’s company account first before it can be sent to you” (Russell aff, exhibit E). Russell states that Clementine was paid nothing through November 2013, despite Russell’s strong objection to Eco-Life’s breach by its failure to pay the \$440,000 advance (*id.*, ¶ 9). Russell avers that on December 3, 2013, after she had repeatedly requested payment, she received a request from Jiang’s team to meet. At the meeting, Jiang presented her with two checks, drawn on an account bearing the name “Eco-Life Holdings Corp General Account,” one in the amount of \$110,000 dated December 3, 2013, and a second in the sum of \$330,000 dated December 18, 2013 (*see* Dogramaci affirmation, exhibit 1 [exhibit 6 to Second Amended Complaint]). Russell further avers that on December 17, 2013, she received a telephone call from Steve Guy, whom Zhao had called the “CEO of Eco-Life,” asking that Clementine wait to deposit the \$330,000 check until December 25, 2013. Russell contends that she went to a bank to deposit the check on December 26, 2013, and was advised by the teller not to do so, as the account had insufficient funds.

Russell asserts that on January 8, 2014, she met with Jiang and Eco-Life’s real estate broker, Andy Chen, to seek a resolution to the situation. Russell asserts that at the meeting, Jiang stated that Eco-Life would pay another \$110,000 towards the lease deposit in installments, \$55,000 by January 14, 2014 and \$55,000 by January 24, 2014. Russell avers that the January 14, 2014 installment was paid, but only \$30,000 of the second installment was paid on January 26, 2014, with another payment of \$25,000 on January 30, 2014. All of the checks were drawn on Gemstone’s account. Russell states that Eco-Life never made another payment, and appears

to have abandoned the billboard space without taking occupancy, although it was available to Eco-Life until the March 2015 lease expiration. Russell avers that on March 25, 2014, Eco-life asserted through counsel that it wished to “walk away” from the lease, warning that a judgment against Eco-Life would be uncollectible.

Clementine addresses defendants’ fraud counterclaim and unconscionability defenses.² Clementine argues that the fraud claim is not viable because: (1) defendants do not state facts that demonstrate that any representation made was false, or the element of scienter; (2) there was no justifiable reliance; (3) the words allegedly spoken by any of plaintiff’s representatives or agents were not stated in the counterclaim; and (4) the representations alleged are puffery. Clementine also argues that an unconscionability defense is not viable.

There is no dispute that Jiang signed the lease, which has been submitted here with a copy of Eco-Life’s checks and Russell’s affidavit stating that the rent on the lease was paid only in part, with Eco-Life checks, despite that the space was made available to Eco-Life for the entire lease term. This is sufficient to demonstrate the prima facie elements of a breach of contract claim, and shifts the burden to Eco-Life to demonstrate a fact issue in order to defeat summary judgment.

In opposition to summary judgment, Eco-Life submits Jiang’s affidavit, in which he avers that he believed that he was one of several shareholders in Eco-Life, a start-up company formed to market 3D technology that would work without glasses. Jiang further avers that when the lease transaction went bad, he did not receive Eco-Life shares and learned that they were never legally issued.

² Eco-Life concedes that its personal jurisdiction defense is inapplicable.

Jiang states that Eco-Life entered into a contract with Interactive Development Associates LLC (IDA) and its president, Brothers, in which Eco-Life agreed to pay IDA \$5,000 per month to act as Eco-Life's consultant in the New York area and to assist Eco-Life in procuring a location for the placement and demonstration of its 3D technology. Jiang further states that he was not familiar with the New York market, and so relied on Brothers. Jiang avers that after the contract with IDA was signed, Brothers presented Eco-Life with an opportunity to lease the billboard space, urging Jiang to sign the lease and representing that the \$110,000 monthly rent was a bargain compared to other locations in the area and that the lease duration, of 17 months, was the longest lease term available for comparable space. Jiang stated that he signed the lease because he trusted Brothers, who represented that he had experience and expertise in the area, and who stated that it would not be necessary to hire counsel, as he would handle negotiations.

Jiang states that on October 11, 2013, Russell represented that JetBlue was prepared to lease the premises, and that at 4 p.m. on October 16, 2013, she stated that Clementine had over 100 corporations ready to purchase advertising from Eco-Life at the lease location, once Eco-Life signed the lease. Jiang states that these representations were also made to him by email and orally, and were false and designed to induce Eco-Life into signing the lease, the meaning of which he did not fully comprehend due to his unfamiliarity with the English language. Jiang avers that his reliance on the misrepresentations caused him to sign the lease, and led to Eco-Life's loss of \$220,000, plus the costs associated with getting the project ready for delivery to market. He also avers that the caption of the lease, in Mandarin, translates as "memorandum of understanding,"³ and that he thought it was a less formal document than a final contract.

³ Defendants do not dispute that Eco-Life added the Mandarin to the lease.

Jiang avers that he later discovered that Brothers would be receiving compensation from Clementine, in the form of a commission, for Eco-Life's signing of the lease. Jiang avers that Brothers conceded this on December 3, 2013, in the presence of others at a meeting when Jiang confronted him. Jiang states that prior to signing the lease, neither Brothers nor anyone who worked for Clementine ever disclosed Brothers' arrangement with Clementine, and that he had no idea that Clementine had corrupted his consultant, Brothers. Jiang further states that he also discovered that Brothers' representations to him were false, as there were comparable premises available at one fifth the price of the lease, with terms of fifteen years and longer.

Eco-Life argues: (1) that IDA and Brothers violated the duty of loyalty to Eco-Life by secretly arranging to be compensated by plaintiff for execution of the lease, resulting in an unconscionable lease with unfair terms; (2) that the failure by Clementine and Brothers to disclose their arrangement constituted fraud sufficient to vitiate the lease; and (3) that plaintiff's motion is premature, as no disclosure has been exchanged, despite Eco-Life's prior demand, rendering Eco-Life unable to prepare its defense.

Eco-Life contends that in October 2013, Brothers encouraged and persuaded Jiang "presumably on behalf of Eco-Life" to sign what Jiang mistakenly thought was a memorandum of understanding with Clementine (Biaggi affirmation [motion sequence No. 005], ¶ 7). Eco-Life argues that non-English speaking Jiang was taken advantage of, in being represented by Brothers, who is not an attorney, and who had arranged to be compensated by Clementine, which had the benefit of an attorney's legal experience in drafting the lease and negotiating the deal. Eco-Life argues that Brothers eventually admitted his conflict of interest in arranging for compensation from Clementine, which had caused him to make material misrepresentations to

Eco-Life regarding the terms of the deal in order to induce Jiang to sign the lease. Eco-Life argues that Russell's assertions about JetBlue and the companies she claimed were willing to purchase advertising space from Eco-Life, constitute misrepresentations. Eco-Life asserts that all of these circumstances caused it to enter into a lease with an unconscionably inflated price and unfair terms, and to give Clementine \$220,000, which Clementine unjustly retains, in a scam deal.

Eco-Life contends that summary judgment is premature because plaintiff has refused to respond meaningfully to Eco-Life's discovery demands, and that the discovery that Eco-Life seeks is central to its defenses and to challenge plaintiff's allegations. Eco-Life states that almost all of its document demands seek documents related to specific complaint allegations, and that the lack of discovery, including depositions, at this early stage of the proceeding, has prevented Eco-Life and Jiang from challenging the complaint and formulating a defense, including a fraudulent inducement defense. For example, Eco-Life challenges what it states is Clementine's improper objection to demands concerning whether Brothers was being paid by Clementine, and notes that Clementine is the only source of some documents.⁴

Eco-Life also argues that it questions whether or not Clementine had authority to sublease the premises, as Clementine has not produced its lease with its own landlord, even though this relates to Clementine's complaint allegations that it had authority to enter into the lease with Eco-Life. Eco-Life challenges Clementine's assertion that Eco-Life has admitted that it was a signatory to the lease. Eco-Life states that this is not clear, as there are denials in the answer, and

⁴ Eco-Life argues that it has not had discovery, and challenges Clementine's objections to document demands. As this is not a motion to compel, it is unnecessary to render a determination concerning these issues.

that while Jiang may have believed that he was signing on behalf of Eco-Life, the lease reflects that U.S. Jia Bei may be the obligated entity. Eco-Life contends that while it may ultimately be held as the responsible party, discovery is needed to clarify, with certainty, the identity of the legally bound party under the lease.

In reply, Clementine argues that defendants have declined to respond to discovery requests, with Eco-Life wilfully disregarding its discovery obligations for months while Clementine has complied with every discovery deadline. Clementine states that Eco-life did not previously complain about Clementine's discovery responses.

Clementine also argues that it has demonstrated a prima facie case, and that defendants admitted in their answer that Eco-Life is the other party to the lease. Clementine contends that Eco-Life has not offered evidentiary proof in support of its fraud claim or its unconscionability defense, as Jiang cannot offer personal knowledge or expert opinion regarding the alleged misrepresentations or omission. Clementine asserts that Jiang has no personal knowledge of: (1) whether Clementine had spoken with third parties who expressed interest in purchasing advertising on Eco-Life's sign; (2) whether or when Clementine engaged in any negotiations with JetBlue; or (3) the promise Clementine allegedly made to Eco-Life's consultant, Brothers/IDA.

Regarding Eco-Life's contention that Clementine was going to compensate Brothers/IDA, Clementine notes that while Jiang claims to have been present at the meeting at which he avers that Brothers conceded that he would be receiving compensation from Clementine, he also swears that he does not write, read or understand English. Therefore, Clementine contends, Jiang cannot report what Brothers said, and his allegation of Brothers' confession is conclusory, not alleged with particularity, and is hearsay, inadmissible to defeat summary judgment.

“To make a prima facie claim of fraud, the [pleading] must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury” (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 131 AD3d 427, 428 [1st Dept 2015] [internal quotation marks and citation omitted]). “[P]roof of intent [to commit fraud] is to be determined from surrounding circumstances” (*id.* at 428-429). It is well known that CPLR 3016 requires that fraud claims be stated with particularity, but this requirement is not so stringent “as to require specificity where it may be impossible to state in detail the circumstances constituting a fraud thus prevent[ing] an otherwise valid cause of action” (*Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d 366, 368 [1st Dept 2007] *aff’d* 10 NY3d 486 [2008] [internal quotation marks and citations omitted]).

There is no dispute that Eco-Life hired IDA, or that IDA’s executive, Brothers, had a role in presenting the lease to Eco-Life and negotiating its terms on Eco-Life’s behalf. Jiang states that he does not know English, or the local area, and that he relied on Brothers, who claimed expertise. Jiang avers that unbeknownst to Eco-Life, Clementine promised to make a payment to Brothers if the lease was executed, and that he later learned that the rental price for the lease Brothers recommended to Eco-Life was greatly inflated above market. At this early juncture, these assertions sufficiently demonstrate a defense of fraud, in that defendants claim that Clementine had knowledge of a special fact, concerning the compensation of Brothers, that rendered the transaction inherently unfair (*see e.g. Pramer S.C.A. v Abapulus Intl. Corp.*, 76 AD3d 89 [1st Dept 2010])[fraud claim stated by allegations that without corporation’s knowledge, payment was made to its corporate officer by other contracting party, in exchange for turning blind eye to contract terms and contract application that did not favor corporation]).

Assuming, as Clementine argues, that Jiang's affidavit is not admissible to prove the truth of Brothers' alleged statement that he was going to receive or was promised compensation from Clementine, at this juncture in the case, where discovery has not been conducted, it is admissible to demonstrate that Brothers made the statement (*Levbarg v City of New York*, 282 AD2d 239 [1st Dept 2001][where declarant may be available to testify, hearsay statement admissible to defeat summary judgment]).⁵ Deposition testimony concerning a financial relationship or promise about compensation between Clementine and IDA/Brothers may reveal additional facts that would not otherwise be available to Eco-Life (CPLR 3212 [f] [court may deny motion should it appear from evidence submitted that facts necessary to justify opposition exist]). Therefore, summary judgment is denied on this basis. It is also unnecessary to reach Eco-Life's unconscionability argument.

Concerning Clementine and Russell's motion to dismiss the counterclaim and the third-party claims, in deciding such a motion, "the court must accept the allegations of the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory" (*Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 167 [1st Dept 2015]). The elements of fraudulent inducement are addressed above. Defendants' fraud claims are based on the omission about Brothers' compensation and on the following two alleged misrepresentations: (1) that Clementine had numerous and substantial clients with whom Clementine had spoken that were going to purchase advertising from Eco-Life, if Eco-Life signed the lease; and (2) that Clementine was in ongoing

⁵ Moreover, while plaintiff argues that Jiang claims not to understand English, and, thus, could not himself have been a witness to statements made in English, whether or not there was an interpreter present has not been established. 13 of 19

discussions with JetBlue. Regarding the misrepresentations, Clementine and Russell argue that they are not adequately stated, as: (1) the pleading contains only conclusory allegations of falsity, scienter, and reliance; (2) the words used to make the statements were not provided in the complaint; and (3) the allegations are nonactionable puffery or expressions of confidence that a venture will prove profitable.

As Clementine and Russell note, courts have dismissed misrepresentation cases where the pleading does not contain sufficient information concerning the representations allegedly made (*Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480 [1st Dept 2015] [dismissal where pleading contained only general allegations and virtually no information as to when and by whom these representations were made]; see e.g. *Gregor v Rossi*, 120 AD3d 447, 447 [1st Dept 2014] [upholding trial court dismissal of pleading that lacked factual allegations describing alleged misrepresentation, and stating that words of alleged misrepresentation were not provided]). Defendants are not required to quote alleged misrepresentations, and their allegations about the particular representations allegedly made are sufficiently particularized. However, defendants' allegations that the statements were false, and knowingly false when made, lack supporting facts, are conclusory and do not sufficiently state these elements.⁶

In addition, while justifiable reliance generally is a fact issue, reliance on a statement that there were numerous, substantial clients with which Clementine had spoken, that were going to purchase advertising from Eco-Life or, as Jiang asserted, that there were over 100 companies

⁶ In their pleadings, Eco-Life and Jiang appear to plead each alleged misrepresentation and omission as a separate claim. To the extent that they do so, a cause of action based solely on either misrepresentation is not viable.

ready to purchase advertising on the billboard, is not actionable under the circumstances alleged.⁷

Without additional supporting allegations that Clementine represented anything about specific terms of a deal with any third party, such as an acceptable price point, Eco-Life could only have speculated that any such party would be willing to advertise at a price that would have been acceptable, or financially advantageous for Eco-Life. Undoubtedly, if offered at an inexpensive enough cost, the number of companies that would be willing to purchase advertising space, in 3D, in Times Square might be great. However, reliance by a commercial actor on the representation by another that there are customers waiting to sign on the dotted line, without more in terms of specifics as to the circumstances under which any third party might be willing to do so, is not reasonable.⁸ Such a representation could only be based on speculation or prediction that a third party would come to an agreement on terms with Eco-Life in the future, and does not contain sufficient detail to take the representation out of the realm of puffery (*Northern Group Inc. v Merrill Lynch, Pierce, Fenner & Smith*, 135 AD3d 414, 422 [1st Dept 2016]; *Sidamonidze v Kay*, 304 AD2d 415, 416 [1st Dept 2003]). Consequently, Eco-Life does not state a claim based solely on the alleged misrepresentations.

Clementine argues that Eco-Life's allegation that Clementine failed to disclose that Clementine had offered to pay compensation to IDA/Brothers is fabricated. Clementine also argues that Eco-Life fails to allege the nature or amount of the promised compensation, or Clementine's deceptive intent in failing to disclose the arrangement, or to articulate what

⁷ While Eco-Life contends that an inference may be drawn that Russell represented the existence of commitments from advertisers, this is not what Eco-Life alleges.

⁸ If Clementine made additional representations to Eco-Life about discussions with any third party, this would be within Eco-Life's knowledge.

Brothers said when he allegedly disclosed the alleged omission to Jiang.

Clementine contends that the inadequacy of Eco-Life's allegations is shown by an email chain that Clementine offers to illustrate the shortcomings of Eco-Life's pleading, and not as evidence (Ex. 10 to the Dogramaci Aff dated September 9, 2015). The email suggests that Brothers or IDA may have had a "cobroke agreement" with Clementine's real estate broker. Clementine contends that defendants' allegations are so vague that it appears that the alleged fraudulent omission claim is based on this agreement. Clementine further contends that there is no reason to infer that Clementine knew about such an agreement, or anything about what its broker might have independently promised to IDA. Hence, plaintiff argues, Eco-Life's pleading lacks sufficient allegations that Clementine or Russell had deceptive intent, that is, scienter. Clementine argues that there is also no basis for a claim that Clementine had a duty to discover what Eco-Life's advisor had arranged with "another broker," as everything alleged about Clementine and Eco-Life's relationship indicates that it was arm's-length. Clementine contends that fraud based on a material omission requires a confidential or fiduciary relationship, which Eco-Life does not allege.

In opposition, defendants submit Jiang's affidavit, discussed above, and argue that Jiang was bamboozled out of \$220,000, when, without disclosure to Eco-Life, Russell arranged to "bribe" Brothers, by agreeing to compensate him if he persuaded Jiang to execute the lease. Eco-Life claims that this omission, coupled with the representations about available advertisers and JetBlue waiting in the wings to sign the lease if Eco-Life did not, created a business climate which caused the signing of a lease containing grossly unconscionable terms, including inflated prices, when comparable locations were available for one fifth of the price. Eco-Life argues that

plaintiff also created this environment by having an attorney when Jiang had no legal representation, presumably on Brothers' advice.

Defendants assert that they are unable to provide specifics, such as the amount of compensation that Brothers was to receive, because they have not had the opportunity to depose Russell or Brothers. They also contends that Clementine owed a duty to disclose because it had superior knowledge concerning its payments to IDA/Brothers, information unavailable to defendants. Defendants dispute plaintiff's assertion that they do not articulate what Brothers stated to Jiang about Clementine compensating him.

In reply, Clementine argues that the claim allegations are conclusory, not sufficiently particularized, and too vague to sustain a claim of a co-broker arrangement between Clementine's broker and IDA. Clementine contends that the claim does not contain nonconclusory, particularized allegations that Clementine knew or could have known of IDA's hoped-for commission or that Clementine had a duty to inform Eco-Life of IDA's dealings with a broker.

Based on Jiang's affidavit and the allegations of the counterclaim and the third-party claim, a claim of fraudulent inducement is stated (*see Pramer S.C.A.*, 76 AD3d 89 [plaintiff corporation stated claim for fraud where plaintiff alleged that defendant had bribed its executive to influence his conduct, to detriment of plaintiff, and that executive and defendant had superior knowledge of essential facts that rendered contract unfair to plaintiff]). The pleadings are sufficiently particularized to put plaintiff on notice of the claim, the requirement under CPLR 3016. Plaintiff's argument that there is nothing but a conclusory allegation that Clementine either knew or could have known about the alleged payment to IDA/Brothers is unpersuasive, as

Eco-Life alleges that Clementine promised to compensate Brothers. Clementine's reply argument relies on the court adopting its unsupported assertions that a co-broker agreement existed, or was of a certain nature, and/or about the independence of those involved, none of which has been established. The email chain Clementine submitted about the agreement was not submitted as evidence, but for illustration purposes. For purposes of a CPLR 3211 (a) (7) motion, it is not unreasonable to draw an inference favorable to defendants concerning Clementine's knowledge about what may have been its agent's arrangement to pay Brothers.⁹ That Eco-Life's allegations may also support an alternative explanation, or more than one explanation, as Clementine argues, is not dispositive.

Furthermore, reliance, generally a fact issue (*Segal v Cooper*, 49 AD3d 467 [1st Dept 2008]), is present, as Eco-Life claims that it did not know of the alleged arrangement with Brothers until after execution of the lease, and states that it was relying on Brothers, who was possibly misstating the value of the consideration, due to the alleged promised compensation. Finally, Eco-Life points to the lack of discovery concerning this issue, as Clementine has not been deposed. The information defendants seek may rest peculiarly within the knowledge of Clementine and Brothers (CPLR 3211 [d]). Therefore, the parties will be directed to enter into a brisk discovery schedule that may resolve the issues here.

Conclusion

In light of the foregoing, it is,

ORDERED that the motion for summary judgment and the cross-motion to amend (motion sequence No. 005) are denied; and it is further

⁹ Russell avers that Eco-Life's broker was Andy Chen (Russell Aff. ¶ 15 at 5).

ORDERED that the motion to dismiss the counterclaim in the Answer to Second Amended Complaint and the Third-Party Complaint (motion sequence No. 007) is granted in part to the extent that defendant's claim of fraudulent inducement based on alleged misrepresentations is dismissed, and the motion is otherwise denied.

Dated: July 5, 2016

ENTER:



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