SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 39

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THE ART FACTORY CORPORATION,

Plaintiff,

- against -

Index No.: 152273/2015

293 TENTH AVENUE CORPORATION,

Defendant.

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SCARPULLA, J.:

In this landlord/tenant action defendant 293 Tenth Avenue Corporation ("Defendant/Landlord"), moves to dismiss plaintiff The Art Factory Corporation's ("Plaintiff/Tenant") complaint, pursuant to CPLR 3211 (a) (1), (5) and (7), and CPLR 3016 (b). Plaintiff/Tenant cross-moves for an order striking certain portions of Defendant/Landlord's affidavit in support of Defendant/Landlord's motion to dismiss.

Background

This action concerns a commercial lease entered into by Defendant/Landlord and Plaintiff/Tenant for the occupancy of the first and second floors of 536-544 West 26th Street in Manhattan. Plaintiff/Tenant leased the premises for use as an art exhibition space. Plaintiff/Tenant alleges that Defendant/Landlord fraudulently induced it into signing the lease by concealing its knowledge of the plans for a disruptive nine-year demolition process by the City of New York ("the City") for the 7 subway line extension project, and its intent to demolish the building after the City project was completed. Plaintiff/Tenant further alleges that Defendant/Landlord never intended for

Plaintiff/Tenant to use the leased space as an art gallery, or to allow Plaintiff/Tenant quiet enjoyment of the space.

The lease, executed in June, 2003, specified a fifteen-year term, and contained a provision stating that, in the eleventh year of the lease and thereafter, Defendant/Landlord had the right to terminate the lease if it decided to demolish the building. If the Defendant/Landlord exercised this right, it was required to provide six months' notice of demolition, and deliver a demolition permit to Plaintiff/Tenant.

Shortly after taking possession of the premises, Plaintiff/Tenant expended $3.2 million on a gut renovation. Plaintiff/Tenant alleges that it made a good faith assumption it would be able to renew the lease after the fifteen-year term had elapsed.

Plaintiff/Tenant alleges that shortly after the gut renovation was completed, the City commenced its demolition operations, which continued for the next ten years. The demolition allegedly caused extreme noise pollution, wall cracks caused by blasting, large amounts of dust, and restricted access to the premises.

In October of 2013, Defendant/Landlord delivered to Plaintiff/Tenant a notice of termination with a vacate date of April 30, 2014. After the vacate date passed, Defendant/Landlord commenced a holdover proceeding in Civil Court of the City of New York.

On May 5, 2014, the parties entered into a "Notice of Appearance and Stipulation of Settlement." The terms of the Stipulation of Settlement included a vacate date of June 30, 2014, a payment by Defendant/Landlord to Plaintiff/Tenant of $280,000 and a release of all claims by both parties. On July 2, 2014, the parties entered into a "Modification of

Stipulation of Settlement," which extended the vacate date to August 16, 2014, and reduced the amount Defendant/Landlord was to pay Plaintiff/Tenant to a total of $227,054.53. Thereafter, Defendant/Landlord paid Plaintiff/Tenant the amount due, and Plaintiff/Tenant vacated the premises.

In this action, Plaintiff/Tenant alleges that beginning in June of 2014, Defendant/Landlord wrongfully interfered with Plaintiff/Tenant, and prevented Plaintiff/Tenant from using the premises. Defendant/Landlord's allegedly wrongful acts included the installation of a sidewalk shed that limited Plaintiff/Tenant's access to the premises on August 7, 2014. Plaintiff/Tenant also alleges that Defendant/Landlord posted a "Notice of Asbestos Abatement" sign up in bad faith, to intimidate Plaintiff/Tenant and Plaintiff/Tenant's customers. Plaintiff/Tenant claims that these alleged wrongful actions damaged it by forcing it to cancel an exhibition scheduled to take place at an unspecified date in 2014.

In its complaint, Plaintiff/Tenant asserts causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with prospective economic advantage, and fraud. Plaintiff/Tenant seeks $5,000,000 in damages for each of its four causes of action.

Discussion

In its motion, Defendant/Landlord argues that the complaint should be dismissed because the plain language of the Civil Court Stipulation of Settlement released the parties from all claims against each other with regard to the lease of the premises. I agree.

Paragraph 8 of the Stipulation of Settlement, executed on May 2, 2014, states:

> "Tenant and Landlord hereby forever release each other and discharge each other from any and all claims and liabilities each may have against the other for any reason whatsoever, except for claims and/or liabilities arising out of this Stipulation, and any obligation for which they were required to carry insurance under the Lease."

On July 2, 2014, the parties reaffirmed this language in the Modified Stipulation of Settlement. This broad, all-encompassing release includes all of the claims asserted by Plaintiff/Tenant herein.

Plaintiff/Tenant argues that the Stipulations are void because it had an unspecified, potential conflict of interest with its counsel at the time the parties entered into the Stipulations. Plaintiff/Tenant does not claim that this potential issue in any way affected the negotiation and execution of the Stipulations of Settlement. In the absence of any specific, substantial allegation of fraud, duress, or other conflict, the clear, unambiguous, and binding language of the Stipulation of Settlement and Modified Stipulation of Settlement conclusively bar Plaintiff/Tenant's claims.

Even in the absence of the Stipulations of Settlement, none of Plaintiff/Tenant's claims are viable. Plaintiff/Tenant's breach of contract claim is premised on the alleged breach of the quiet enjoyment clause of the lease, which states that "Tenant may peaceably and quietly enjoy the Premises" (complaint, exhibit A, ¶ 22). "[A]n express covenant . . . for quiet enjoyment, in effect is an agreement on the part of a landlord that for the period of the demised term the tenant shall not be disturbed in his quiet enjoyment of the demised premises by any wrongful act of the landlord . . ." (*Finkelstein v Levinson*,

74 Misc 2d 105, 107 [Civ Ct, NY County 1973] [internal quotation marks and citation omitted]). However, the disruption caused by the subway line renovation project was not the result of any wrongful act of the Defendant/Landlord, but of the actions of the City of New York.

The alleged wrongful acts engaged in by Defendant/Landlord also do not constitute a breach of the quiet enjoyment clause. With regard to the placement of the sidewalk shed, ¶ 14 (B) of the lease confers the right of the Defendant/Landlord to erect such a shed, should it be necessary to make improvements to the building. The same lease clause releases Defendant/Landlord from any liability with regard to the erection of the shed. Plaintiff/Tenant's allegation that posting the asbestos abatement sign damaged it also fails, as the sign was required to be posted by chapter 1 of title 15 of the Rules of the City of New York.

Likewise, Plaintiff/Tenant's cause of action for the breach of the covenant of good faith and fair dealing fails. A claim for breach of the implied covenant of good faith and fair dealing "may not be used as a substitute for a nonviable claim of breach of contract" (*Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept. 2014]). Additionally, this cause of action is entirely duplicative of the breach of contract claim (*Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 433-44 [1st Dept. 2013]).

Plaintiff/Tenant's third cause of action for tortious interference with prospective economic advantage is also deficient. This claim is premised upon Plaintiff/Tenant's vague allegation that it was forced to cancel an art show in the summer of 2014 because it was forced to vacate the premises. "Tortious interference with prospective economic

relations requires an allegation that Plaintiff/Tenant would have entered into an economic relationship but for the Defendant/Landlord's wrongful conduct. As Plaintiff/Tenants cannot name "the parties to any specific contract they would have obtained . . . they have failed to satisfy the 'but for' causation required by this tort" (*Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265, 266-267 [1st Dept 2002] [internal citations omitted]).

Finally, Plaintiff/Tenant's fraud cause of action concerns Defendant/Landlord's supposed concealment of its knowledge of the City's plans to do the subway renovation work, the Defendant/Landlord's alleged misrepresentations that the lease would be renewed, and alleged misrepresentations that Plaintiff/Tenant would be able to quietly enjoy the premises.

The allegation regarding Plaintiff/Tenant's subjective belief that the lease would be renewed is conclusory and insufficiently vague. To sustain a cause of action for fraud, the plaintiff must allege "specific facts with respect to the time, place, or manner in which defendants . . . made the purported misrepresentations (see CPLR 3016 [b])" (*Riverbay Corp. v Thyssenkrupp N. El. Corp.*, 116 AD3d 487, 488 [1st Dept 2014]).

Additionally, Defendant/Landlord had no duty to disclose the City's demolition plans, even if it was aware of them, "[a]bsent a confidential or fiduciary relationship, there is no duty to disclose, and mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud" (*NYCTL 1999-1 Trust v 573 Jackson Ave. Realty Corp.*, 55 AD3d 454, 454 [1st Dept 2008]). "A fiduciary relationship does not exist between parties engaged in an arm's-length business

transaction, which is normally the situation between landlord and tenant" (*Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006] [internal citations omitted]).[1]

In sum, Plaintiff/Tenant's complaint must be dismissed both because Plaintiff/Tenant released the claims it asserts here in the Stipulation of Settlement and the Modified Stipulation of Settlement, and also because the claims are either insufficiently pled or conclusively precluded by the express terms of the lease.

In the cross-motion, Plaintiff/Tenant argues that "certain portions" of the affidavit of Michael Silvermintz in support of the motion to dismiss should be stricken because it contains statements made without personal knowledge of the affiant, and because it contains improper legal opinions. Plaintiff has not specifically indicated which portions should be stricken, and thus, has provided the court with no basis to do so. The cross-motion is, therefore, denied.

In accordance with the foregoing, it is

ORDERED that plaintiff The Art Factory Corporation's cross-motion to strike portions of the affidavit in support of the motion to dismiss is denied; and it is further

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[1] Plaintiff/Tenant's allegation that Defendant/Landlord never intended to allow it to quietly enjoy the premises suffers from the additional defect that is entirely duplicative of the breach of contract claim. "A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (*First Bank of Ams. v Motor Car Funding,* 257 AD2d 287, 291 [1st Dept 1999]).

ORDERED that defendant 293 Tenth Avenue Corporation's motion to dismiss the complaint is granted, the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

Dated: October 13, 2016

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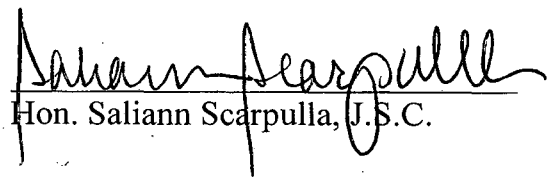

Hon. Saliann Scarpulla, J.S.C.