Abrams, Fensterman, Fensterman, Eisman, Formato & Einiger, LLP v Preston Stutman & Partners, P.C.
2017 NY Slip Op 32503(U)
November 21, 2017
Supreme Court, New York County
Docket Number: 654993/2016
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO & EINIGER, LLP, n/k/a ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA & WOLF, LLP,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 654993/2016

PRESTON STUTMAN & PARTNERS, P.C., ROBERT M. PRESTON, GREENSPOON MARDER, P.A., and STUTMAN ADVOCATE STUTMAN & LICHTENSTEIN, LLP,

Defendants.

MELISSA A. CRANE, J.

Plaintiff Abrams, Fensterman, Fensterman, Eisman, Formato Ferrara & Wolf, LLP ("Abrams Fensterman") commenced this action for breach of contract against defendant Preston Stutman & Partners, P.C. ("Preston Stutman"), for mispresentations/breach of oral guaranty against Robert M. Preston ("Preston"), for tortious interference with contractual and business relations against defendants Greenspoon Marder, P.A. ("Greenspoon Marder") and Stutman Advocate Stutman & Lichtenstein, LLP ("Stutman Advocate"), and for breach of covenant of good faith and fair dealing against Preston Stutman and Preston (collectively "Preston Defendants").

Preston Defendants move, pursuant to CPLR 3211 (a)(1) and/or CPLR 3211 (a)(7), for an order dismissing the breach of contract, mispresentations/breach of oral guaranty and breach of covenant of good faith and fair dealings claims against them. In the alternative, Preston Defendants also move, pursuant to CPLR 3211(f), for an order

granting them leave to file an answer (docketed as NYSCEF Motion #001). Defendant Greenspoon Marder moves, pursuant CPLR 3211 (a)(1) and CPLR 3211 (a)(7), for an order dismissing the tortious interference with contractual and business relations claims against them; and Pursuant to 22 NYCRR 130-1.1, for an order granting reasonable costs and attorneys' fees (docketed as NYSCEF Motion #002). The Court consolidates the two motions for decision.

Underlying Allegations

Abrams Fensterman is a tenant of two separate office spaces, on the south side ("South Suite") and the north side ("North Suite") of the 5th Floor, in the building located at 630 Third Avenue, New York, New York 10017 pursuant to a written lease agreement between Plaintiff, as tenant, and 630 3rd Avenue Associates, as landlord. Around October 2011, Plaintiff and Preston Defendants began to discuss sharing some of the space in the North Suite. On November 3, 2011, Abrams Fensterman entered into a license agreement ("License Agreement") with Preston Stutman, that granted Preston Stutman a license to utilize portions of the North Suite consisting of offices and contiguous work stations ("Licensed Premises"). Preston Stutman agreed to pay the Plaintiff $6,250.00 per month ("License Fee") pursuant to the License Agreement.[1]

Plaintiff alleges that Preston Stutman, Preston's former law firm, has failed to make the agreed license payments and has breached the License Agreement. Plaintiff also alleges that Preston represented that it would pay all license fees and outstanding balances under the License Agreement to Plaintiff. In reliance on these representations, Abrams Fensterman permitted renewal of the License Agreement and allowed Preston's

[1] The parties could not structure the office space sharing arrangement as a sublease or a partial assignment of the lease, because the landlord required three years of financial statements from Preston Stutman, that were not available.

law firm, Preston Stutman, and other licensees, to occupy space at the Licensed Premises.

Plaintiff further alleges that defendants Greenspoon Marder, Preston's current employer, and Stutman Advocate, a law firm consisting, in part, of Preston's former partners at Preston Stutman, were aware of the existence of the License Agreement between Abrams Fensterman and Preston Stutman. Plaintiff claims that these two defendants wrongfully interfered with the License Agreement between Abrams Fensterman and Preston Stutman, and induced Preston Stutman to breach it. By virtue of their interference with the License Agreement, Plaintiff alleges that Greenspoon Marder and Stutman Advocate also tortiously interfered with Abrams Fensterman's prospective business relations.

Finally, inherent in the License Agreement and the dealings between the parties was a covenant of good faith that Plaintiff alleges the Preston Defendants breached. Plaintiff claims damages of not less than $700,000 plus interest from August 1, 2016 and attorneys' fees as compensation for defendants' actions.

More specifically, the License Agreement Plaintiff and Preston Stutman signed provided that, after the initial one-year term commencing on November 1, 2011 and ending on October 31, 2012 ("License Term"), either party could notify the other of its election not to renew. The rights under the License Agreement would then proceed on a month-to-month basis. Each party could terminate this arrangement upon not less than sixty days written notice (Preston Aff., Ex. E, p.1-2). Preston Defendants did not execute any formal sublease agreement with Plaintiff and Preston did not sign a personal guaranty with respect to Preston Stutman's obligations under the License Agreement. Preston Defendants claim that, after the expiration of the License Term, Plaintiff and Preston Stutman continued their arrangement on month-to-month basis as the License Agreement

contemplated (Preston Aff., ¶ 17). At some point, as Preston Stutman grew, Plaintiff and Preston Stutman expanded the Licensed Premises to include more office space consisting of the entire North Suite (Preston Aff., ¶ 18). Plaintiff and Preston Stutman did not enter into a written agreement with respect to the expanded License Premises. Rather, according to Plaintiff, the parties orally agreed to expand the Licensed Premises to include the entire North Suite. The License Fee Preston Stutman paid to Plaintiff increased to an amount equal to Plaintiff's monthly rent and additional rent charges due under the terms of Plaintiff's lease with the landlord (Preston Aff., ¶ 18). Both parties continued this licensor/licensee relationship without issue until June 2016 (Preston Aff., ¶ 20).

On June 7, 2016, Preston provided Plaintiff's managing partner, Howard Fensterman, with written 60-day notice of Preston Stutman's intention to terminate the License Agreement, effective as of August 5, 2016. Preston Stutman continued to pay the License Fee to Plaintiff through August 5, 2016, the 60th day following the written notice. Plaintiff does not allege that any default occurred prior to August 2016. Preston Stutman vacated the premises in July 2016 and surrendered possession back to Plaintiff as of August 5, 2016.

Discussion

A motion to dismiss under CPLR 3211(a)(1) obliges the court "to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004]). Dismissal is appropriate only if the documentary evidence conclusively establishes a defense to the claims as a matter of law

(*Leon v Martinez*, 84 NY2d 83 [1994]; *McCully v Jersey Partners, Inc.*, 60 AD3d 562 [1st Dept 2009]).

Similarly, in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]; *Wald v Graev*, 137 AD3d 573 [1st Dept 2016]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]; *TIAA Global Investments, LLC v One Astoria Square LLC*, 127 AD3d 75 [1st Dept 2015]).

The statements supporting a cause of action, however, "must be sufficiently particular to give the court and parties notice of the transactions or occurrences to be proved and must support the material elements of the cause of action" (CPLR § 3013; *High Definition MRI, P.C. v Travelers Companies, Inc.*, 137 AD3d 602 [1st Dept 2016]. Bare legal conclusions are insufficient (*Mamoon v Dot Net Inc.*, 135 AD3d 656 [1st Dept 2016]).

The main issues the motions present are: (1) what were the terms of the oral agreement between Plaintiff and Preston Stutman, and (2) did Preston Stutman properly terminate it as of August 5, 2016 or (3) did a breach occur when Preston Stutman stopped making the verbally agreed increased License Fee payments. There are five possible options to support the verbal agreement between the parties: (1) the parties orally renewed the original License Agreement after the expiration of its initial one-year term, (2) the parties modified the original License Agreement, (3) the parties created a month-to-month tenancy after the expiration of the original License Agreement, (4) the parties

entered into a sub-tenancy or assignment agreement of the underlying lease for the North Suite, or (5) the parties entered into entirely a new oral agreement. As explained *infra*, none of these options can survive dismissal.

Plaintiff first alleges that it and Preston Stutman extended and modified their existing License Agreement such that Preston Stutman would continue to occupy the space through September 2018. However, the original signed License Agreement between the parties has an "Amendments and Waivers" clause that states:

> "This Agreement may not be altered or amended except by a writing executed by the parties hereto."

Thus, the new arrangement could not be an amendment or modification of the original License Agreement unless it was in writing. As indisputably there was no writing, any theory relying on a modification or amendment of the existing license agreement must fail.

Plaintiff disclaims that the alleged oral agreement was a renewal of the original License Agreement, or a month-to-month tenancy (Plaintiff's Memo of Law in Opposition, p. 1, ¶ 1) or a partial assignment of the underlying lease (*id.*). In its complaint, Plaintiff seems to refer to the agreement that defendant Preston Stutman allegedly breached as the License Agreement. Plaintiff claims the parties renewed the License Agreement and it was in effect (Complaint, ¶ 10). However, during oral argument, Plaintiff's counsel clarified that the breached agreement in question was a "new agreement. Different agreement which had a performance" (July 21, 2017 Transcript, 6:17). Plaintiff counsel confirmed that the new agreement was an oral agreement (July 21, 2017 Transcript, 7:14-16) under which the North Suite "is [Preston Stutman's] suite until the end of the lease, September 30, 2018. That was the agreement. You are going to pay a monthly fee, it is yours, do with it as you please. That is what we

agreed on." (July 21, 2017 Transcript, 9:25-10:4).

Thus, the agreement that the parties entered into on or about June 2013 can only be a new oral agreement. Accepting Plaintiff's version of the facts as true, the parties agreed that Abrams Fensterman would turn over control of the North Suite to Preston Stutman for the balance of the term of the Lease, or September 30, 2018 (Plaintiff's Memo of Law in Opposition, p. 2, ¶ 5). Thus, the contemplated term of this new oral agreement was from June 2013 through September 2018, or over 5 years.

New York General Obligation Law, § 5-703 ("GOL § 5-703") provides that:

> "§ 5-703. Conveyances and ***contracts concerning real property*** required to be in writing. 1. An estate or ***interest in real property***, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, ***cannot be created***, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, ***thereunto authorized by writing***.
>
> ...
>
> 2. ***A contract for*** the leasing for a longer period than one year, or for the sale, ***of any real property***, or ***an interest therein***, ***is void*** unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing." (*NY Gen Oblig L § 5-703 (2012)*) (emphasis added)

The agreement between the parties was an oral contract to use office space. This correlates to an interest in a real property, that had a term of greater than one year, accordingly, under GOL § 5-703 it is void.

To circumvent this obstacle, Plaintiff points out that Preston Stutman renovated the reception area, redecorated the offices, and even sublet part of the premises to another tenant without notifying or seeking approval from Abrams Fensterman (Plaintiff's Memo of Law in Opposition, p. 1, ¶ 2). Plaintiff contends that these acts are unequivocally referable to an extension and modification of the License Agreement, and evidence

Preston Stutman intent to remain in possession for the long term (Plaintiff's Memo of Law in Opposition, p. 5, ¶ 3) Plaintiff equates these actions with partial performance sufficient to take the oral contract out of the statute of frauds.

Unequivocally referable conduct must do more than lend significance to or provide a possible motivation for a party's actions. Rather, conduct must be inconsistent with any other explanation for the actions a party takes or otherwise explainable only with reference to the oral agreement (*Wells v. Hodgkins*, 150 A.D.3d 1449 [3rd Dept 2017]). Here, Plaintiff does not allege that the renovation of the reception area, redecoration of the offices, and subletting to a third-party tenant occurred only after the original License Agreement ended and the parties entered into their extended/modified oral agreement. In fact, the original License Agreement provided that "Licensor shall permit Licensee to install signage on the fifth floor indicating the name of the Licensee in a manner agreed upon between Licensor and Licensee" (Preston Aff., Ex. E, p. 2). Moreover, the original license agreement does not forbid Preston Stutman's actions. Further, these actions are consistent with those of a party who has occupied office space for a certain period of time and who has adapted the space for its present needs. Finally, subletting space to a third-party subtenant is consistent with Plaintiffs own actions of subletting part of the available space to other parties in an attempt to maximize usage. Thus, these activities are not necessarily indicative of a future intent to remain in possession of the premises for five years, and certainly do not qualify as extraordinary conduct explainable only by reference to the alleged oral agreement.

Having eliminated all other possibilities, the only cognizable legal theory that the court can ascertain is that the parties' oral agreement was the original License Agreement with a month-to-month term. (see *Elite Gold, Inc. v. TT Jewelry Outlet Corp.*, 31 A.D.3d

338, [1st Dept 2006]) (tenant that continued in possession after termination of lease was month-to-month tenant; renewal lease, although tendered, was never executed). This is also consistent with the original License Agreement which provides that, after the initial year term, it would be "month to month" and that "either party may terminate the month to month License Agreement upon not less than sixty (60) days prior written notice" (Preston Aff., Ex. E, p.2). Here, Preston Stutman provided 60-day written notice, vacated the premises and payed all outstanding fees through the termination date. Thus, the Preston Defendants properly terminated the oral agreement and, therefore, there was no breach.

Plaintiff also alleges that defendant Preston personally guaranteed Preston Stutman's obligations under the License Agreement. However, the Statute of Frauds precludes this theory too. New York General Obligation Law, § 5-701(a)(2) provides that:

> "5-701. Agreements required to be in writing.
> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith or by his lawful agent, if such agreement, promise or undertaking:
>
> ...
>
> 2. Is a special promise to answer for the debt, default or miscarriage of another person; ..." (*NY Gen Oblig L § 5-701 (2012)*)

See also *Parma Tile Mosaic & Marble Co. v. Estate of Short*, 87 N.Y.2d 524 [1996] (dismissing claim where alleged guarantor had not subscribed a written agreement to guaranty the obligation of a third party); *Maya NY, LLC v. Hagler*, 35 Misc. 3d 1210(A), 950 N.Y.S. 2d 724 [Sup. Ct., NY Co., 2010] (granting dismissal of claims against defendant based upon an alleged oral guaranty pursuant to GOL §5-701). Because Preston did not sign a written guaranty of Preston Stutman's obligations under the

License Agreement or the subsequent oral agreement, Plaintiff's cause of action for mispresentations/breach of oral guaranty against Preston cannot stand.

It is undisputed that Defendant Preston Stutman provided written notice, on June 7, 2016 to Plaintiff's managing partner, of its election to terminate the oral agreement and vacate the premises as of August 5, 2016, Preston Stutman paid all fees through and including that date, and surrendered possession to Plaintiff. Thus, even if a personal guaranty existed, defendant Preston cannot be liable for fees that never became due and owing from Preston Stutman, given its proper termination of the oral agreement.

With regard to the last cause of action against the Preston Defendants, case law has long recognized that dismissal of a claim of breach of the covenant of good faith and fair dealing is appropriate where the claim "is intrinsically tied to the damages allegedly resulting from a breach of contract" (*Canstar v. J.A. Jones Constr. Co.*, 212 A.D.2d 452, 622 N.Y.S.2d 730 [1st Dept. 1995]); See also *Tag 380, LLC v. ComMet 380, Inc.*, 40 A.D.3d 1, 830 N.Y.S.2d 87 [1st Dept. 2007] (breach of covenant of good faith and fair dealing dismissed where alleged damages were attributable to breach of a lease). Here, the agreement was not breached and therefore there are no damages attributable to a breach. Moreover, this claim is duplicative of the breach of contract claim as both arise from the same facts and seek identical damages (*Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423 [1st Dept. 2010]).

Plaintiff alleges that defendants Greenspoon Marder and Stutman Advocate tortiously interfered with Plaintiff's agreement with Preston Defendants. Tortious Interference with a contract claim 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" (*Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 424 [1996]; *Avant Graphics, Ltd. v. United Reprographics, Inc.*, 252 A.D.2d 462, 462 [1st Dept 1998]). Tortious interference with contract requires an "actual breach of contract" (*Lama Holding Co.*, 88 N.Y.2d at 424). Because the Preston Defendants did not breach the License Agreement or their oral agreement, Plaintiff cannot sustain a claim for tortious interference with the contract. Accordingly, this claim is dismissed.

Plaintiff also alleges that Greenspoon Marder and Stutman Advocate tortiously interfered with Abrams Fensterman's business relations. This claim requires the defendant to have "acted with the sole purpose of harming the plaintiff or by using some unlawful means" (*Thome v. Alexander & Louisa Calder Foundation*, 70 A.D.3d 88, 108 [1st Dept 2009]). The complaint is devoid of any facts to support the alleged tortious interference with the business relations claim, much less that Greenspoon Marder and Stutman Advocate acted for the "sole purpose" of inflicting harm on Plaintiff, or that they used "unlawful means" to do so. Thus, the court dismisses this cause of action, as well. (see *Schoettle v. Taylor*, 282 A.D.2d 411 (1st Dept. 2001); (see also *Aramid Entertainment Fund, Ltd. v. Wimbledon Fin. Master Fund, Ltd.*, 105 A.D.3d 682 [1st Dept 2013]).

Plaintiff argues that "as it relates to the improper means or intent to inflict harm argument, this can only be further developed through discovery" (Plaintiff's Memo of Law in Opposition, p.8, ¶ 3). However, this amounts to pure speculation (*see HT Capital Advisors v. Optical Resources Group*, 276 A.D.2d 420 (1st Dept. 2000). Plaintiff's mere hope that discovery might provide some factual support for a cause of action is insufficient to avoid dismissal of a patently defective cause of action (*see Ravenna v.*

Christie's Inc., 289 A.D.2d 15, 16 [1st Dept 2001]).

Finally, Greenspoon Marder in its motion pursuant to 22 NYCRR 130-1.1 argues that it is entitled to attorneys' fees as the complaint is allegedly frivolous. Frivolous conduct has been held to mean conduct that is "completely without merit in law" or "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (*Hutter v. Citibank, N.A.*, 142 A.D.3d 1049 [2nd Dept 2016]). Here, both Abrams Fensterman and Preston Stutman agreed an oral agreement existed. Thus, the claims Plaintiff brought against defendant Greenspoon Marder for tortious interference with contractual and business relations were not completely without merit in law, or undertaken to harass or maliciously injure Greenspoon Marder.

Although Stutman Advocate has not moved to dismiss, the court *sua sponte* dismisses the two causes of action against it, for tortious interference with Plaintiff's agreement and business relations. Dismissal is appropriate for the same reasons dismissal against Greenspoon Marder is appropriate: (1) there was no breach and (2) there are no allegations this defendant acted with the "sole purpose" of inflicting harm on Plaintiff.

Accordingly,

IT IS ORDERED THAT the court grants Preston Defendants' motion seeking dismissal of the complaint with prejudice; and it is further

ORDERED THAT the court grants Greenspoon Marder's motion seeking dismissal of all causes of action against it with prejudice; and it is further

ORDERED THAT the court dismisses all causes of action against Stutman Advocate with prejudice; and it is further

ORDERED THAT the court denies Greenspoon Marder's motion seeking

attorneys' fees.

The Clerk is directed to enter judgement dismissing this action in its entirety.

Dated: November 21, 2017
New York, New York

ENTER:

Melissa A. Crane, J.S.C.