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| <b>Madangsui, Inc. v Crystal Props. LLP</b>                                                                                                                                                                                    |
| 2018 NY Slip Op 33169(U)                                                                                                                                                                                                       |
| December 10, 2018                                                                                                                                                                                                              |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 160746/2016                                                                                                                                                                                                     |
| Judge: Kathryn E. Freed                                                                                                                                                                                                        |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2

*Justice*

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MADANGSUI, INC.,

Plaintiff,

- v -

CRYSTAL PROPERTIES LLP, PD PROPERTIES LLC, JOHN  
DOES 1-10, SAID FICTITIOUS DEFENDANTS BEING AND  
INTENDED TO REPRESENT UNKNOWN INDIVIDUALS AND  
ENTITIES WHO HAVE ENTERED INTO A NEW LEASE WITH  
CRYSTAL FOR THE USE AND OCCUPANCY OF THE SUBJECT  
PREMISES,

Defendants.

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Upon the foregoing documents, it is hereby ordered that the motions are denied.

**DECISION AND ORDER**

In this action by plaintiff Madangsui, Inc. seeking, inter alia, declaratory relief and damages for breach of contract, defendant PD Properties LLC (PDP) moves (mot. seq. 002), pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss plaintiff's seventh cause of action, sounding in breach of fiduciary duty, as against it. Defendant Crystal Properties LLC moves (mot. seq. 003), pursuant to CPLR 3212, for summary judgment dismissing the complaint. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motions are denied.

The facts of this matter are set forth in the decision and order of this Court dated March 20, 2017 and entered March 22nd, 2017. Doc. 66.<sup>1</sup> Additional relevant facts are provided herein.

<sup>1</sup> Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with this matter.

**PDP's Motion To Dismiss (Mot. Seq. 002)**

Madangsui asserts that, in 2013, it became interested in expanding its restaurant operations to another location at 306 Fifth Avenue (306 Fifth) and hired Tony Park, a licensed real estate broker employed by PDP, for the purpose of exploring this opportunity. Doc. 2 at pars. 111-113. As part of this process, Madangsui provided Park with confidential financial records, including its corporate tax returns, sales volume and operating expense data, and tax returns of its principal, Sang Kim. Doc. 2 at 115. It also allegedly incurred significant expense in engaging various professionals to design a proposed space at 306 Fifth. Doc. 2 at par. 114-116. Madangsui claims that its application for space at 306 Fifth was rejected and that this was due, in whole or in part, to Park's failure to ascertain whether the condominium board of that building would approve the space for a restaurant. Doc. 2 at 117-120.

Additionally, Madangsui asserts that Park, acting on behalf of PDP, secured a new lease for another of PDP's clients and that Park and PDP used the confidential financial information provided by Madangsui in order to help secure financing for the new client. Doc. 2 at 122-126. Madangsui argues that, since it had an enforceable contract with PDP and PDP nevertheless used Madangsui's confidential information to assist Madangsui's competitor, PDP breached its fiduciary duty to Madangsui, resulting in damages in an amount to be determined at trial. Doc. 2 at pars. 127-132.

"To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct. *See Pokoik v Pokoik*, 115 AD3d 428, 429, 982 NYS2d 67 (1st Dept 2014)." *Castellotti v Free*, 138 AD3d 198, 209 (1st Dept 2016). Viewing the cause of action "in the light most favorable to the pleading party" and determining "only whether the facts as alleged fit within any

cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), this Court finds that Madangsui has alleged the existence of a fiduciary relationship between it and PDP, a breach of the fiduciary relationship arising from PDP’s alleged disclosure of confidential information regarding Madangsui, and damages arising from that breach.

Although PDP correctly asserts that a claim sounding in breach of fiduciary duty must be pleaded with specificity (*see* CPLR 3016 [b]; *cf. Hermann v CohnReznick LLP*, 155 AD3d 419 [1<sup>st</sup> Dept 2017]), this Court finds that Madangsui met this burden by setting forth the dates of its transactions with PDP, the date of PDP’s alleged breach, as well as which documents were disclosed leading to the breach. Further, contrary to PDP’s claim, based on the case of *Appelberg v East 56<sup>th</sup> Plaza, Inc.*, 78 AD2d 606, 607 (1<sup>st</sup> Dept 1980), the complaint is not “almost entirely grounded ‘upon information and belief’”. Thus, this claim is not subject to dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

Nor is this claim subject to dismissal based on documentary evidence pursuant to CPLR 3211(a)(1). In moving pursuant to this section, PDP relies on Park’s affidavit. However, it is well settled that affidavits do not constitute documentary evidence within the meaning of CPLR 3211(a)(1). *See Serao v Bench-Serao*, 149 AD3d 645 (1<sup>st</sup> Dept 2017). Even assuming, *arguendo*, that the affidavit could be considered, it contradicts allegations in plaintiff’s seventh cause of action and fails to conclusively establish a defense to the breach of fiduciary duty claim as required by CPLR 3211(a)(1).

Thus, PDP’s motion to dismiss Madangsui’s seventh cause of action, sounding in breach of fiduciary duty, is denied.

**Crystal's Motion for Summary Judgment (Mot. Seq. 003)**

Crystal moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that Madangsui breached its lease by using the premises without a certificate of occupancy. This, argues Crystal, violated paragraphs 3, 6, 15, 41, 46, 53, 76, 78 and 107 of the lease, which, inter alia, required Madangsui to accept the premises "as is" and to assume responsibility for any violations of laws or regulations governing the use of the premises. Crystal further asserts that it did not waive its right to refuse Madangsui a lease extension by accepting rent payments from it because the lease between the entities contained a "no waiver" provision. Doc. 110 at par. 25.

In opposition, Madangsui argues that Crystal's failure to serve it with a notice to cure precludes the granting of summary judgment dismissing the complaint. Madangsui further asserts, inter alia, several equitable theories, including laches, which, it maintains, bar summary judgment in Crystal's favor.

In support of its motion, Crystal relies on *Jeppaul Garage Corp. v Presbyterian Hosp. in N.Y.*, 61 NY2d 442 (1984). In that case, the landlord rejected its commercial tenant's request for a lease renewal. The lease required that the tenant not be in violation of the lease at the time of the renewal but it owed back rent and taxes. The tenant asserted that, by accepting rent with knowledge of the defaults, the landlord waived any objection to them and tenant was thus entitled to renew its lease. The landlord responded that a "no-waiver" clause in the lease provided that receipt of rent by the landlord with knowledge of a breach of the lease would not be deemed a waiver of such breach and that no provision of the lease would be waived by the landlord unless landlord executed a written waiver. The Court of Appeals, reversing an order of the Appellate

Division, First Department,<sup>2</sup> which determined that plaintiff was entitled to the lease extension, and citing the no-waiver clause, held that the landlord had not waived the conditions precedent to renewal as a matter of law. *Jeppaul*, 61 NY2d at 446.

Here, although the lease contained a “no-waivers” clause, there are instances in which waiver has been found despite such a clause, including cases such as this, “which involve efforts to prevent forfeiture by preserving a leasehold or some similar interest.” (citations omitted). *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 22 AD3d 204, 216, *aff’d as modified*, 7 NY3d 96 (2006). Whether a waiver has occurred is typically an issue of fact for a jury. *Fundamental Portfolio Advisors*, 7 NY3d at 104; *Jeppaul*, 61 NY2d at 446.

Here, as noted in this Court’s order dated March 20, 2017 (Doc. 66), from 2014-2016, Crystal and Madangsui engaged in extensive negotiations regarding a lease extension, culminating in Crystal sending Madangsui a 10-year lease extension for execution. It was only when Madangsui asked Crystal where to mail the executed lease that Madangsui learned that Crystal had leased the premises to another tenant due to Madangsui’s failure to technically comply with the provision of the lease requiring it to provide Crystal with 12 months’ written notice of its intention to renew. Doc. 110 at pars. 51 and 87. Similarly, it was only after Madangsui obtained a preliminary injunction preventing Crystal from leasing the premises to the new tenant that Crystal suddenly claimed that Madangsui was in violation of the lease because its certificate of occupancy had expired in 2006. Thus, Crystal was willing to overlook technical violations of the lease, and accept rent from Madangsui, until such an arrangement was no longer in its best interests. Given this history, this Court finds that issues of fact exist regarding waiver which

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<sup>2</sup> 92 AD2d 514 (1<sup>st</sup> Dept 1983).

preclude the granting of summary judgment dismissing the complaint as against Crystal. *See Lee v Wright*, 108 AD2d 678 (1<sup>st</sup> Dept 1985).

Specifically, pursuant to paragraph 17 (1) of the lease, Crystal was obligated to provide Madangsui with a 15-day notice to cure in the event of a default other than the failure to pay rent. Despite arguing that Madangsui has been operating its restaurant with a certificate of occupancy which expired in 2006, Crystal never provided such a notice to cure. Thus, Crystal, which was engaged in negotiating a lease extension with Madangsui for 2 years, for some reason never allowed it the opportunity to cure the alleged violation. Although Crystal, relying on *Ahmed v C.D. Kobsons, Inc.*, 24 Misc3d 1208(A) (Sup Ct New York County 2009), *aff'd* 67 AD3d 467 (1<sup>st</sup> Dept 2009), asserts that the lease only required it to serve a notice to cure if it sought to terminate the lease, that is precisely what it sought to do here.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant PD Properties LLC seeking to dismiss the seventh cause of action pursuant to CPLR 3211 (a) (1) and (a) (7) (mot. seq. 002), is denied; and it is further

ORDERED that the motion by defendant Crystal Properties LLC seeking to dismiss the complaint pursuant to CPLR 3212 (mot. seq. 003) is denied; and it is further

ORDERED that the parties are to appear for a settlement conference in this matter on April 3, 2019 at 80 Centre Street, Room 280 at 11 a.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

12/10/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE