

<b>192 Lexington Ave., LLC v Turkel Forman LLP</b>
2022 NY Slip Op 31280(U)
April 7, 2022
Supreme Court, New York County
Docket Number: Index No. 655804/2020
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. VERNA L. SAUNDERS, JSC PART 36

*Justice*

-----X  
192 LEXINGTON AVENUE, LLC,  
Plaintiff, INDEX NO. 655804/2020  
MOTION SEQ. NO. 001

- v -

TURKEL FORMAN LLP, JUDITH E. TURKEL and  
HOWARD M. FORMAN,  
Defendants.

**DECISION + ORDER ON  
MOTION**

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42  
were read on this motion to/for DISMISS.

Plaintiff, the owner of the building located at 192 Lexington Avenue, New York, New York 10016 (“the premises”), commenced this action by summons and complaint against its former tenant, a law firm, TURKEL FORMAN LLP (formerly known as Turkel Forman & De La Vega LLP) (“firm”), which entered into a commercial lease on October 15, 2012 with Cres Incorporated, as predecessor-in-interest to plaintiff, with respect to Suite 1002 at the premises. Plaintiff also sued defendants JUDITH E. TURKEL (“Turkel”) and HOWARD M. FORMAN (“Forman”) (collectively “the partners”), in their individual capacities, whom are alleged to be members and/or partners of the firm. In its verified complaint, plaintiff asserts causes of action based on breach of contract/lease (first cause of action); declaratory judgment (second cause of action); successor firm liability (third cause of action); tortious interference (fourth cause of action); unjust enrichment (fifth cause of action); accounting (sixth cause of action); “breach of contract damages” (seventh cause of action); and attorney’s fees, costs and disbursements (eighth cause of action) (NYSCEF Doc. No. 1, *summons and verified complaint*).

On November 30, 2020, defendants interposed a joint answer, raising numerous affirmative defenses: the partners are not parties to the lease (first affirmative defense); plaintiff lacks standing to sue under the lease (second affirmative defense); plaintiff may not sue for a declaratory judgment (third affirmative defense); failure to state a cause of action (fourth affirmative defense); one cannot tortiously interfere with one’s self (fifth affirmative defense); unjust enrichment is duplicative and partners never occupied the premises (sixth affirmative defense); application of security deposit; accord and satisfaction (seventh affirmative defense), surrender by operation of law; estoppel (eighth affirmative defense); impossibility and frustration of purpose due to the Covid-19 Pandemic (ninth affirmative defense); plaintiff is suing for rent not yet due (tenth affirmative defense); plaintiff breached Article 4 and 23 of the lease (eleventh affirmative defense); and commercial tenant harassment (twelfth affirmative defense and first counterclaim). (NYSCEF Doc. No. 5, *answer*).

Defendants now move, pursuant to CPLR 3211(a)(7), for dismissal of the first, seventh and eighth causes of action against the partners. They also seek an order dismissing the second, third, fourth, fifth and sixth causes of action as against all defendants. (NYSCEF Doc. No. 12, *notice of motion*).

Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3211, for an order denying defendants' motion to dismiss; an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment on its first, seventh and eighth causes of action as against the firm, in the sum of \$126,823.25, plus interest; pursuant to CPLR 3212, dismissing the second, seventh, eighth, ninth, tenth, eleventh and twelfth affirmative defenses and the counterclaim alleged in the answer; and pursuant to CPLR 3124 and 3126, requiring defendants to provide responses to plaintiff's discovery demands and imposing penalties for failing to comply with said order. (NYSCEF Doc. No. 22, *notice of cross motion*).

Defendants argue, *inter alia*, that the claims premised on breach of contract (first, seventh and eighth causes of action) must be dismissed as against Turkel and Forman because they were not parties to the lease. The declaratory judgment claim (second cause of action) must be dismissed as against all defendants insofar as plaintiff has an adequate remedy at law, such as a cause of action for breach of contract. Defendants contend that plaintiff fails to correctly plead "Successor Firm Liability" (third cause of action) nor can it prove it. They further argue that, insofar as the law firm is a partnership comprised of only two individuals, Turkel and Forman, and, one cannot be found liable for tortiously interfering with oneself, the tortious interference claim (fourth cause of action) fails. The unjust enrichment claim (fifth cause of action) is precluded by the existence of a contract governing the subject matter of this action. As to the claim for accounting (sixth cause of action), defendants argue that plaintiff fails to allege the existence of a fiduciary duty. (NYSCEF Doc. No. 13, *memorandum of law*).

In opposition to the motion and in support of its cross-motion, plaintiff argues that the allegations in the complaint establish that judgment is warranted in favor of plaintiff on its first, seventh and eighth causes of action against the firm. It further claims that judgment should be entered pursuant to CPLR 3211(b) dismissing the second, seventh, eighth, ninth, tenth, eleventh and twelfth affirmative defenses and the first counterclaim alleged in defendants' answer.

Specifically, plaintiff contends that, contrary to defendants' argument, the partners may be liable for the firm's debt because, "[t]o the extent that the transferred assets are necessary to enable the [f]irm to satisfy its obligations to creditors, including [p]laintiff, the distribution of the [f]irm's assets to the [p]artners would be a voidable transaction under the Uniform Voidable Transaction Act ('UVTA'), NY DCL §§270-281(a), and said assets or the value thereof would be recovered directly from the [p]artners." Plaintiff also argues that, since the firm has transferred its clients, cases and goodwill to their individual capacities c/o the Law Office of Nicholas E. Bowers, PLLC, where the partners now serve as counsel, sufficient facts are pleaded to establish successor firm liability. As to the claim for declaratory relief, plaintiff maintains that it has asserted a justiciable controversy involving substantial legal interests and, thus, states a cognizable claim for declaratory relief. There is a valid claim for tortious interference, claims plaintiff, because the partners, who control but are legally distinct entities from the firm, caused the firm to breach the lease. There is also a cognizable claim for unjust enrichment, asserts

plaintiff, because the partners knowingly obtained the benefit of the occupancy of the premises by deriving income and profit from the firm. The claim for accounting, argues plaintiff, is premised, not pursuant to an equitable accounting, but rather, pursuant to Article 31 of the CPLR. Plaintiff also seeks an order directing defendants to respond to a December 7, 2020, demand for discovery and inspection and imposing penalties pursuant to CPLR 3126 if defendants fail to comply with said directive. (NYSCEF Doc. No. 39, *memorandum of law in opposition to motion and in support of cross-motion*).

In opposition to the cross-motion and in reply to their dismissal motion, defendants argue that there is no cognizable legal theory to hold the partners individually liable and that plaintiff has committed commercial tenant harassment. Furthermore, defendants contend that this court should dismiss the cross-motion seeking summary judgment against the firm insofar as the firm has a colorable defense premised on frustration of purpose (ninth cause of action) (NYSCEF Doc. No. 40, *memorandum of law in opposition to cross-motion and in further support of motion*).

In reply in further support of its cross-motion, plaintiff argues that defendants have failed to raise a bona fide dispute regarding the material allegations with respect to the claims asserted against the firm. Plaintiff also argues that the purported defense premised on frustration of purpose lacks merit and that dismissal of the twelfth affirmative defense and first counterclaim for commercial tenant harassment is warranted insofar as defendants have failed to advance any meritorious argument to sustain their affirmative defense and counterclaim for commercial tenant harassment. Additionally, plaintiff maintains that the opposition fails to establish dismissal against the partners. (NYSCEF Doc. No. 42, *memorandum of law in reply*).

Turning first to the dismissal motion, in determining a motion to dismiss pursuant to CPLR 3211, “the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs 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, 87-88 [1994] [internal citations omitted].) A pleading may be dismissed, pursuant to CPLR 3211(a)(7) if plaintiff fails to identify a claim cognizable at law or where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (See CPLR 3211[a][7]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].)

Here, insofar as the partners were not parties to the lease agreement, the claims premised on breach of contract — the first, seventh and eighth causes of action — cannot survive against them. (See e.g., *Black Car & Livery Ins., Inc. v H & W Brokerage, Inc.*, 28 AD3d 595, 595 [2nd Dept. 2006] [“breach of contract cause of action was properly dismissed as to the respondent, since he was not a party to the agreement in question”]; *Walz v Todd & Honeywell, Inc.*, 195 AD2d 455, 455 [2nd Dept. 1993] [“no action could stand against [individual defendant] since he was not a party to the contract.”].)

Furthermore, NY Partnership Law § 26(b) states that:

“Except as provided by subdivisions (c) and (d) of this section, no partner of a partnership which is a registered limited liability partnership is liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership or each other, whether arising in tort, contract or otherwise, which are incurred, created or assumed by such partnership while such partnership is a registered limited liability partnership, solely by reason of being such a partner or acting (or omitting to act) in such capacity or rendering professional services or otherwise participating (as an employee, consultant, contractor or otherwise) in the conduct of the other business or activities of the registered limited liability partnership.”

Insofar as plaintiff has failed to establish that liability should be imputed based on NY Partnership Law § 26(c) or (d) — referring to professional services rendered by the limited liability partners and the waiver of liability protection by agreement — that branch of the motion seeking dismissal of the first, seventh and eighth causes of action as against the partners is granted.

Addressing the “successor firm liability” claim, generally, “a corporation which acquires the assets of another corporation is not liable for the torts of its predecessor.” (*Nationwide Mutual Fire Ins. Co. v Long Island Air Conditioning, Inc.*, 78 A.D3d 801, 912 [2d Dept. 2010], citing *Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983].) However, “[a] corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor’s tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations.” (*Schumacher v Richards Shear Co.*, 59 NY2d at 245.) This claim is dismissed. It is only in a memorandum of law in opposition to the motion that plaintiff mentions the Law Office of Nicholas E. Bowers, PLLC, for which the partners are of counsel, as a purported successor firm. The allegations in the complaint are that the partners, *as individuals*, have “successor firm liability” to the firm. Notably, the Law Office of Nicholas E. Bowers, PLLC is not a party to this action. Thus, this court finds the pleadings with respect to this cause of action to be fatally deficient.

A claim for tortious interference with business relations does not lie. This court agrees with defendants that the partners cannot be held liable for allegedly inducing the firm to breach its contract. (see *Recovery Racing LLC v Sunrise Motors LLC*, 2005 NYLJ LEXIS 1202, \*13-14 [Supreme Court, Nassau County 2005].) Moreover, the claim for unjust enrichment is also precluded by the lease agreement which governs the subject matter of this action. (see *Pappas v Tzolis*, 20 NY3d 228, 234 [2012]; *Rashid v B. Taxi Mgt. Inc.*, 107 AD3d 555, 556 [1st Dept 2013].) Although plaintiff maintains that “[it] is entitled to an accounting of the books and records of the [f]irm and the [p]artners in connection with its acquisition of the assets of the [f]irm including but not limited to its partners, clients, staff, real estate holdings, furniture and fixtures and its status as a [s]uccessor [f]irm” (NYSCEF Doc. No. 1 ¶ 61), there is no fiduciary relationship giving rise to such a right. Thus, the accounting claim cannot stand. (see *Castellotti v Free*, 138 AD3d 198, 210 [1st Dept 2016]; *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997] [(t)he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property

in which the party seeking the accounting has an interest”).) This court also finds that the declaratory judgment duplicates plaintiff’s cause of action for breach of contract, and that he has an adequate remedy at law. (see *Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 [1st Dept 2016].) Thus, defendants’ motion is granted.

This court now turns to the cross-motion seeking summary judgment against the firm on its first, seventh and eighth causes of action. To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact. (See *Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). However, “[t]his burden is a heavy one”, requiring that the “facts . . . be viewed in the light most favorable to the non-moving party.” (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). Thus, it “should only be granted where there is no doubt as to the existence of a triable issue of fact.” (*Advanced Aerofoil Tech., AG v MissionPoint Capital Partners LLC*, 170 AD3d 460, 461 [1st Dept 2019], quoting *Ellenberg Morgan Corp. v Hard Rock Café Assoc.*, 116 AD2d 266, 269-270 [1st Dept 1986]).

Here, upon this court’s review of, among other things, the deed, a copy of the lease, the assignment of leases, the tenant ledger, and the affidavit of Justin Gorjian, a member of plaintiff, who affirms that the firm breached the lease and that a balance of \$126,823.25, plus interest, remains outstanding, this court finds that plaintiff has established its *prima facie* entitlement to summary judgment on liability on its first, seventh and eighth causes of action against the firm. Notably, in opposition to the cross-motion, defendants do not dispute the subject lease, the breach, or the amount in dispute. Instead, defendants maintain that there is a colorable defense due to impossibility and/or frustration of purpose occasioned by the global COVID-19 pandemic. However, similar arguments have already been found to be unavailing (see *Gap, Inc. v 170 Broadway Retail Owner*, 195 AD3d 575 [1st Dept 2021].) All other affirmative defenses not referenced in this decision and order are deemed abandoned (see *Strathspey Crown Holdings, LLC v Tower 570 Co., L.P.*, 2018 NY Slip Op 33213[U], \*4-5 [Sup Ct, NY County 2018], citing *Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014].) This court also rejects defendants’ contention that the initiation of this action against the partners during a pandemic constitutes commercial tenant harassment in violation of NYC Admin. Code § 22-902(a)(5), especially since defendants maintain the partners are not commercial tenants at the premises. Therefore, the counterclaim is dismissed. All other relief not expressly addressed herein has been considered and is denied. Accordingly, it is hereby

**ORDERED** that defendants’ motion is granted to the extent that the first, seventh and eighth causes of action asserted against defendants JUDITH E. TURKEL and HOWARD M. FORMAN, as well as, the second, third, fourth, fifth and sixth causes of action as against all defendants, are dismissed; and it is further

**ORDERED** that plaintiff’s cross-motion seeking dismissal of the affirmative defenses and counterclaim is granted in accordance with this decision and order; and it is further

**ORDERED** that the cross motion is granted to the extent the Clerk of the Court is directed to enter judgment against TURKEL FORMAN LLP in favor of plaintiff on its first,


seventh and eighth causes of action, as to liability; however, the matter shall be referred to a special referee for computation of damages; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this order, with notice of entry, on defendants, as well as, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall enter judgment accordingly; and it is further

**ORDERED** that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

**ORDERED** that service upon the Clerk of the Court and the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/suptmanh](http://www.nycourts.gov/suptmanh)).

April 7, 2022

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER