

OKL Holdings Inc v Abercrombie & Fitch Stores Inc.

2024 NY Slip Op 31651(U)

May 10, 2024

Supreme Court, New York County

Docket Number: Index No. 651061/2023

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

-----X

OKL HOLDINGS INC

Plaintiff,

- v -

ABERCROMBIE & FITCH STORES INC.,

Defendant.

-----X

INDEX NO. 651061/2023

MOTION DATE 02/02/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this breach of contract action, plaintiff moves for leave to file an amended verified complaint. Defendant opposes and cross-moves for sanctions.

BACKGROUND

In a sublease dated May 12, 2022, plaintiff leased to defendant a storefront located at 143 Spring Street, New York, NY 10012 (NYSCEF Doc No 8). However, because the prior occupant failed to timely vacate after its lease expired, plaintiff could not tender possession in accordance with the sublease until February 27, 2023. When defendant rejected this tender, plaintiff sued it for breach of contract (NYSCEF Doc No 2). Defendant moved to dismiss plaintiff’s action on the grounds that the sublease never became effective because it was “contingent upon obtaining [] written consent [] in a form and substance mutually agreed upon [] and fully executed” by all parties but defendant never signed, and because plaintiff unreasonably delayed delivery of the premises and therefore failed to perform under the contract (NYSCEF Doc Nos 8, 5). Plaintiff

cross-moved for sanctions against defendant and its attorneys under 22 NYCRR § 130-1.1 (NYSCEF Doc No 26).

By decision and order dated June 20, 2023, defendant's motion to dismiss was denied because "defendant cannot rely on its own unreasonable failure to approve the consents in order to avoid its obligations under the contract . . . and the fact specific inquiry [] cannot be decided on a motion to dismiss" (NYSCEF Doc No 49). Plaintiff's cross-motion for sanctions was also denied on the grounds that defendant's motion was not frivolous (*id.*). Defendant appealed (NYSCEF Doc No 52). On January 11, 2024, the First Department modified the June 20, 2023 order to grant the motion to dismiss on the basis that "an express condition precedent was not satisfied, and thus plaintiff failed to state a cause of action for breach of contract," and otherwise affirmed (NYSCEF Doc No 67). Notably, the First Department rejected plaintiff's prevention doctrine argument, finding that "defendant has not prevented any other person from performing, and has violated no express or implied obligation" but rather "merely declined to execute the landlord's consent, which it had no duty to execute" (*id.*).

Plaintiff now moves for leave to file an amended verified complaint, which includes the same cause of action for breach of contract that was dismissed by the First Department and adds a second cause of action for breach of the duty to bargain in good faith (NYSCEF Doc No 72). Specifically, plaintiff asserts that defendant showed bad faith by "improperly refusing to sign the consents after all other parties had done so, and [after defendant] admitted approving them" (NYSCEF Doc No 73). Defendant argues that plaintiff's motion must be denied based on the law of the case because "the First Department found that the undisputed facts precluded plaintiff . . . from pleading any claim against defendant . . . for a breach of the contract at issue, or any

implied obligation” (NYSCEF Doc No 77). Defendant further asserts that sanctions should be imposed upon plaintiff’s counsel for “frivolously filing and pressing this Motion” (*id.*).

DISCUSSION

The First Department granted defendant’s motion to dismiss plaintiff’s complaint (NYSCEF Doc No 67). Thus, “[b]y the time plaintiff moved for leave to amend, there was no complaint left before the court to amend” (*Tanner v Stack*, 176 AD3d 429, 429 [1st Dept 2019] [internal quotation omitted]; see also *Favourite Ltd. v Cico*, 208 AD3d 99, 101 [1st Dept 2022] [“the trial court lacked discretion to grant plaintiffs leave to amend a complaint that had already been dismissed by this Court”]). Accordingly, plaintiff’s motion for leave to amend its complaint will be denied.

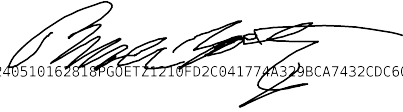
Although plaintiff’s counsel’s motion is without merit, there is insufficient support for defendant’s assertion that his conduct was so frivolous to warrant the imposition of sanctions (22 NYCRR § 130-1.1). Accordingly, defendant’s cross-motion for the imposition of sanctions will be denied.

CONCLUSION

Based on the foregoing, it is

ORDERED that plaintiff’s motion for leave to amend its complaint is denied; and it is further

ORDERED that defendant's cross-motion for sanctions is denied.


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5/10/2024
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE