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| <b>Wilcon-Derby, Inc. v L&amp;M, LLC</b>                                                                                                                                                                                       |
| 2025 NY Slip Op 35529(U)                                                                                                                                                                                                       |
| January 15, 2025                                                                                                                                                                                                               |
| Supreme Court, Erie County                                                                                                                                                                                                     |
| Docket Number: Index No. 812661/2024                                                                                                                                                                                           |
| Judge: Deborah A. Chimes                                                                                                                                                                                                       |
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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WILCON-DERBY, INC.,  
BUFFALO SCALE AND SUPPLY CO., INC.,

Plaintiffs,

v.

DECISION  
Index No. 812661/2024

L&M, LLC,  
LALM, LLC,  
CHEF'S RESTAURANT OF BUFFALO, INC.,  
LOUIS J. BILLITTIER,  
MARY BETH BILLITTIER,

Defendants.

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Defendants, L&M LLC, LALM LLC, Chef's Restaurant Of Buffalo Inc., Louis J. Billittier, Mary Beth Billittier, moved for an Order, pursuant to CPLR 3211(a)(1) and (7), dismissing each and every cause of action asserted by plaintiff, Buffalo Scale and Supply Co, Inc.; dismissing each and every cause of action asserted by plaintiff, Wilcon-Derby, Inc., as against defendants, LALM LLC, Chef's Restaurant of Buffalo Inc., Louis J. Billittier, Jr., and Mary Beth Billittier; and dismissing the second and third causes of action asserted by plaintiff, Wilcon-Derby, Inc., as against defendant, L&M LLC, (NYSCEF motion 001). Plaintiffs opposed the motion.

Plaintiff Wilcon-Derby owns property located at 264 Seneca Street in Buffalo. Plaintiff Buffalo Scale operated a business from that location. Wilcon-Derby entered into a purchase contract for the sale of the premises with defendant, L&M. A down payment was made and a closing date scheduled. Buffalo Scale moved out of the premises. Closing on the property was not completed due to L&M's inability to obtain financing, which was not a condition of the

purchase contract. Buffalo Scale moved back to the premises. It is alleged that LALM is a successor of L&M and that Louis J. Billittier, Mary Beth Billittier are principals of defendant corporations and that defendant Chef's intended to use the premises to manufacture jarred Italian sauces.

### **First Cause of Action/Breach of Contract**

Defendants moved to dismiss the breach of contract claim of plaintiff, Buffalo Supply, arguing that Buffalo Supply was not a party to the purchase contract. In opposition, Buffalo Supply argues that it was a third-party beneficiary to the contract.

"In the context of a third-party beneficiary claim, the plaintiff must establish: '1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost'" (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 181-182 [2011] citing to *Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]). Here, the contract makes no mention of an intent to benefit Buffalo Supply or for that matter, any third-party. Moreover, it is difficult to discern how Buffalo Supply as tenant, benefitted from the sale of the property. Defendants' motion to dismiss the breach of contract claim of Buffalo Supply is granted.

Additionally, as defendants, LALM LLC, Chef's Restaurant of Buffalo Inc., Louis J. Billittier and Mary Beth Billittier, were not parties to the contract, the breach of contract claim is dismissed against them.

### **Second Cause of Action/Fraud**

To allege a cause of action based on fraud, plaintiff must assert "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421, [1996] citations omitted).

Here, the fraud claim is based on the misrepresentation that purchase of the premises was not contingent on financing. The contract indicates that the purchaser would close without financing, as the allegations pertain to plaintiff, Wilcon-Derby, the fraud claim is duplicative of the breach of contract cause of action and dismissed. (*See generally, Contacare, Inc. v. Ciba-Geigy Corp.*, 49 A.D.3d 1215, 1216 [4th Dept. 2008]).

As to the fraud claim of Buffalo Scale, there is no allegation of misrepresentation made for the purpose of inducing the tenant to vacate the property. Therefore, the Complaint fails to state a cause of action for fraud as it relates to Buffalo Scale. The motion to dismiss the second cause of action is granted.

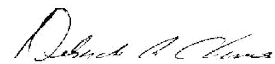
### **Third Cause of Action/Detrimental Reliance**

"The elements pertaining to the party asserting estoppel are (1) lack of knowledge of the true facts; (2) good faith reliance; and (3) a change of position. These are commonly termed the elements of detrimental reliance" (*Holm v. C.M.P. Sheet Metal, Inc.*, 89 A.D.2d 229, 235 [4th Dept. 1982] citations omitted). As to plaintiff, Wilcon-Derby, the estoppel cause of action is duplicative of the cause of action for breach of contract and is dismissed. However, the Complaint states a cause of action for equitable estoppel on the part of plaintiff, Buffalo Scale

against Louis Billittier and L&M. The motion to dismiss the third cause of action as asserted on behalf of Buffalo Scale against to Louis Billittier and L&M, is denied, but granted as it is asserted against LALM LLC, Chef's Restaurant of Buffalo Inc., and Mary Beth Billittier.

Counsel for defendant is to prepare and e-file an Order on approval of counsel for plaintiffs. The Order shall attach and refer to the Court's Decision and be submitted in 30 days.

DATED: January 15, 2025  
Buffalo, New York

  
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Hon. Deborah A. Chimes, J.S.C.