To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with Notice of entry upon all parties.

SUPREME COURT-STATE OF NEW YORK
IAS PART: ROCKLAND COUNTY
Present: HON. ROBERT M. BERLINER
Justice of the Supreme Court

K.A.M.M. GROUP and ADAM ORECCHIO,

Plaintiff(s),

Index No.: 033476/2013

-against-

ORDER

161 LAFAYETTE REALTY, INC. and CLIFFORD STEINBERG,

Motion Date: 10/18/13

Defendant(s).

The following papers, numbered 1-7, were read on this motion by the defendants for an Order, pre answer, dismissing the complaint pursuant to CPLR §3211(a)(1) and (a)(7):

Notice of Motion/Memo of Law/Affidavit (Exhibits A-V)-1-3
Affidavit/Affirmation/Memo of Law in Opposition-4-6
Reply Memo of Law-7

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

Sometime in the early part of 2013, the parties herein entered into negotiations wherein the defendants, as landlord, would lease to the plaintiffs a certain premises located at 161 Lafayette Street, New York, New York, (hereafter the "Premises") which were owned by the corporate defendant. On or about March 23, 2013, the parties executed an agreement wherein the tenant paid the landlord a $10,000.00 non refundable deposit, subject to the plaintiffs paying an additional $55,792.00 no later then April, 25,2013. On or about April 11, 2013, the parties executed a lease for the premises in question. The plaintiff paid the rest of the money due, as evidenced by an agreement executed by the parties on April 13, 2013, which obligated the plaintiffs to make application for a liquor license by a certain date, the failure of which would result in the money being forfeited and the lease terminated. The agreement also provided that if the plaintiffs, having timely made

said application, were denied a license, all monies would be returned. It appears that all the agreements and leases referred to were prepared by the parties themselves, perhaps the defendants, as they are somewhat inartfully drafted and ambiguous. It must be noted that the lease provided for a commencement date of October 1, 2013.

At this point, what happened becomes somewhat less clear. The plaintiffs applied for their license, and were scheduled for a hearing before the local Community Board on May 14, 2013, well within the parameters of the lease. However, the plaintiffs allege that the current tenants of the premises appeared at said meeting, and advised the local board that his lease did not expire until December 31, 2013, and thus the plaintiffs' lease could not possibly start on October 1, 2013. Based on this statement, the plaintiffs requested that their application be "laid over" until a future date, though the complaint alleges that they withdrew their application, a fact belied by the exhibit submitted by the defendants.

The plaintiffs contacted the defendants the day after the meeting, and relayed what had happened and what was said. The tenant also told the plaintiffs that he was removing the fixtures from the premises, fixtures that according to the lease would be left at the premises, and that the plaintiffs could not use their trade name, something the plaintiffs said were "promised" to them by the defendants, but does not appear any place in writing. In response to this conversation, defendants advised the current tenant that they had no right to remove the fixtures. More importantly, the defendants acknowledged that, in fact, the current tenants' lease did not expire until December 31, 2013, three months after the lease with the plaintiffs was to start. By their own admission, defendant Steinberg advised the plaintiffs that he forgotten that he had given the tenants an extension. The defendants then advised the plaintiffs that the plaintiffs could terminate the lease, if they wished, and receive a full refund of all monies paid. As an alternative, the defendants indicated they would be willing to amend the lease to a January 1, 2014 start date and give the plaintiffs a rent concession. Steinberg also avers that he told the plaintiffs he would be willing to try and buy the current tenant out of his lease three months early.

According to the defendants, the plaintiffs agreed to the lease starting three months later in exchange for a one month rent concession. As "proof" of this, defendants prepared a lease modification confirming those terms. Said modification was never signed, even though the defendants state that the plaintiff said he had, a fact that the plaintiff Orecchio denies. He attaches e mails which allegedly establish that the modification has been signed, but in the court's opinion they say no such thing. Thus, the existence of this modification proves nothing, particularly in light of the fact that the lease that was signed provides it can only be modified in writing. Thus, after Orecchio allegedly admitted he lied

about having signed this addendum, the defendants then negotiated a buy out with the current tenant wherein they would vacate the premises by September 30, thus allowing the plaintiffs to take possession as promised in the original lease.[1] This fact was communicated to the plaintiffs, and thus the landlord seeks to invoke the basketball axiom of "no harm, no foul". The question is, can they?

The complaint contains three causes of action; breach of contract, fraud and attorney's fees. The defendants move to dismiss all three due to failure to state a cause of action, and based upon documentary evidence. They also aver that there are no causes of action that can lie against the individual defendant. They particularly aver that with respect to the fraud cause of action CPLR §3016 (b) would further mandate dismissal, since the complaint fails to plead the fraud with specificity.

Quite frankly, the plaintiffs' opposition to the motion fails to address many of these points. In reading the defendants' submissions, the court agrees that the second and third causes of action should be dismissed, and the first cause of action against the individual defendant Steinberg should likewise be dismissed.

The first cause of action is somewhat different. The court does not agree with the defendants' position that it was at all times ready willing and able to perform under the lease (Defendant's Memo of Law, p.11). In fact, just the opposite is true. Regardless of how the plaintiffs or defendants found out about it, Steinberg admitted that he had made contractual obligations to both the plaintiffs and the current tenant to be in possession of the premises on October 31, 2013, a fact he conveyed to the plaintiffs. In fact, it was he who offered to terminate the lease and return all funds to the plaintiffs, hardly the actions of someone who now claims he was at all times ready willing and able to perform. He certainly was not in such a position in or about May 16, 2013, and one could certainly argue it was he who was, in fact, in breach. Thus, there are issues as to whether he timely cured the breach, or whether or not the plaintiff accepted his offer to terminate the lease before the defendants could "unring the bell". Defendants' memorandum of law is silent on this point.

Therefore, the application to dismiss the first cause of action, as to the corporate defendant, is denied. If it has not already done so, the corporate defendant shall file and

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[1]This puported agreement, attached to the moving papers as Exhibit M, is both undated and unsigned by the defendants. This is important, since the defendants allege that on June 7, 2013 the plaintiff ssupposedly told him that they, the plantiffs, had executed the modification. Then, on June 18, 2013, plaintiffs' lawyer wrote to defendants and "confirmed" the lease had been terminated, and demanded a return of all monies paid. Thus, the fact that this agreement is undated and unsigned by the defendants is somewhat troubling. Furthermore, there is no writing to indicate that the plaintiffs knew of the alleged buyout with the current tenant. Thus, for purposes of this motion, it is of no probative value.

serve an answer within 20 days. The application to treat this motion as a summary judgment motion is denied.

The matter is scheduled for a preliminary conference on January 28, 2014, at 9:30 AM.

This constitutes the decision and order of the court.

Dated: New City, New York
December 10, 2013

ENTER:

Robert M. Berliner

ROBERT M. BERLINER, J.S.C.

To:

Daniel E. Bertolino, P.C.
Law Office of Donald R. Dunn