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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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KEVIN M. DOWNEY and CHRISTIANA DOWNEY

Index No.: 106006/06

Plaintiffs,

-against-

DECISION and ORDER

334 GRAND STREET REALTY CORP.,

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for fraud, conversion and breach of contract. Defendant now moves to dismiss the complaint in its entirety, pursuant to CPLR 3211(a)(1), (a)(7) and (a)(10). Although defendant's motion is addressed to plaintiffs' original complaint, plaintiffs have since served an amended complaint as of right (CPLR 3025 [a]), which differs from the original complaint as served on defendant. The court will address the sufficiency of the amended complaint.

I. ***Statement of Facts***

Plaintiffs allege the following in their opposition and amended verified complaint. On May 17, 2005, the parties executed an Agreement of Purchase and Sale, by which plaintiffs were to purchase from defendant premises located at 334 Grand Street, New York, N.Y. (the "Building"). At the time, the Building was occupied by defendant corporation and one tenant, Friedman Hosiery & Activewear (the "Tenant"). The Agreement provided that the Building "shall be delivered free of tenants and/or occupants on the Closing Date[,]" *viz.*, September 29, 2005. Agreement, paras. 4.1, 7.1.6.

Thereafter, defendant "needed more time to wind down its business affairs" and was unable to vacate the Building in time for the closing date. In light of this delay, the parties

amended the Agreement by a September 28, 2005 "Amendment to Agreement of Purchase and Sale." The Amendment allowed defendant to remain in the Building after the closing date—until October 31, 2005—and provided plaintiffs with a $25,000 credit toward the purchase price. Amendment, para. 1. Further, the parties "acknowledged" that the Tenant remained in the Building, but had been "notified of the sale and is in the process of vacating the Premises." The Amendment provided that, in the event that the Tenant did not vacate, defendant would either undertake the eviction of the Tenant, paying all costs to do so, or else defendant would reimburse plaintiffs for the costs of evicting the Tenant, up to $2,500. The closing occurred on September 29, 2005.

Subsequently, and despite the fact that it no longer owned the Building, "defendant accepted a use and occupancy payment from the Tenant for the month of October 2005[.]" Defendant also blocked the Building's entrance, so that plaintiffs were unable to access it. Plaintiffs alleged that they later learned that the Tenant "was *not* advised of the sale of the Premises by the defendant" and that the Tenant had "never advised the defendant that it was in the process of vacating the Premises."

On February 3, 2006, the plaintiffs and the Tenant executed a stipulation by which the Tenant agreed to vacate the Building by April 30, 2006. As a result of Tenant vacating at such a late date, plaintiffs were unable to begin renovation of the Building.

II. ***Conclusions of Law***

A party may move to dismiss a cause of action asserted where "a defense is founded upon documentary evidence; or . . . the pleading fails to state a cause of action[.]" CPLR 3211(a)(1), (a)(7). When addressing such a motion to dismiss, the Court must accept as true the facts as

alleged in the complaint as well as submissions in opposition to the motion, according plaintiffs the benefit of every possible favorable inference. *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001). However, allegations that consist only of bare legal conclusions are not entitled to such consideration. *Kliebert v. McKoan*, 228 A.D.2d 232 (1st Dept. 1996) (citations omitted). Dismissal obligates a defendant to demonstrate that the facts as alleged by plaintiff fit within no cognizable legal theory. *CBS Corp. v. Dumsday*, 268 A.D.2d 350, 352 (1st Dept. 2000), *citing Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The CPLR 3211 viability of plaintiffs' claims is assessed below.

A. ***Fraud in the Inducement (1st Cause of Action)***

Plaintiffs have sufficiently set forth a claim for fraud in the inducement, which requires allegations that they "reasonably relied on a material misrepresentation by defendant and that [they] suffered an injury as a result of that reliance." *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dept. 2003). Plaintiffs claim that defendant induced plaintiffs to execute the Amendment by claiming that the Tenant was notified of the sale and was in the process of vacating the Building. However, plaintiffs contend that when defendant made this assertion, it knew it to be false and did so in order to "induce plaintiffs to close [on the Building] with a tenant in occupancy." This cause of action is set forth with sufficient particularity. CPLR 3016.

B. ***Conversion (2nd Cause of Action)***

Conversion occurs when there is an unauthorized ownership over another party's goods, to the exclusion of the owner's rights. *Citibank, N.A. v. Wilson*, 101 A.D.2d 742 (1st Dept. 1984). Taking the facts in the light most favorable to plaintiffs, they have stated a viable cause of action for conversion. In the amended complaint, plaintiffs allege that defendant collected rent

from the Tenant *after* plaintiffs acquired title to the Building. Therefore, this cause of action will not be dismissed.

C. ***Breach of Contract (3rd Cause of Action)***

The subject Agreement and Amendment provided that, among other things, "defendant failed to remove its personal property and/or debris from the Premises" and neither commenced an eviction proceeding against the Tenant nor reimbursed plaintiffs for their legal costs in evicting the Tenant. Since this cause of action arises from different facts than the fraud in the inducement cause of action, it is not duplicative and is sufficiently pleaded.

Finally, defendant claims that the Tenant is a necessary party to this action. However, defendant's bald, conclusory statement is without merit. Indeed, the Tenant has since vacated the Building and this action will have no effect on its rights or obligations. Accordingly, it is

ORDERED that defendant's motion is denied in its entirety.

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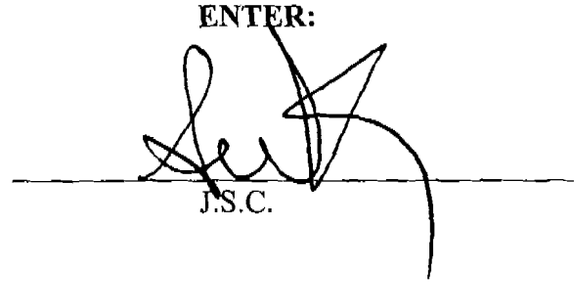

J.S.C.

Date: October 23, 2006
New York, New York