

S&L Metro Prop., LLC v Clear Channel Outdoor, Inc.
2011 NY Slip Op 33841(U)
July 27, 2011
Sup Ct, New York County
Docket Number: 652067/10
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 652067/2010
S&L METRO PROPERTIES, LLC
vs.
CLEAR CHANNEL OUTDOOR, INC.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 652067/10 E
MOTION DATE 05/18/11
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

Notice of Motion/ Order to Show Cause + Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED
36
8
11

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 07/20/11 JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION
Check if appropriate: [] DO NOT POST [] REFERENCE
[] SUBMIT ORDER/ JUDG. [] SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
S&L METRO PRPERTIES, LLC and
DONDI PROPERTIES, LLC,

Plaintiffs,

Index No. 652067/10

-against-

DECISION & ORDER

CLEAR CHANNEL OUTDOOR, INC.,

Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This action arises from an amendment to a long-term lease agreement (the Amendment) between plaintiffs S&L Properties, LLC (S&L) and Dondi Properties, LLC (Dondi) (collectively the lessors) and Clear Channel Outdoor, Inc. (Clear Channel or the lessee). Plaintiffs allege that they were fraudulently induced by Clear Channel to enter into the Amendment and that Clear Channel has concealed revenue to which plaintiffs are entitled under the lease. They assert causes of action for: (1) rescission induced by fraud (the First Cause of Action); (2) fraud (the Second Cause of Action); (3) fraudulent concealment (the Third Cause of Action); and (4) breach of the implied covenant of good faith and fair dealing (the Fourth Cause of Action). Clear Channel moves to dismiss Causes of Action One, Two and Three. Plaintiffs oppose the motion.

I. *Facts*

The following facts are taken from the complaint unless otherwise stated. Plaintiffs own real property located at 218 Hamilton Avenue, Brooklyn, New York, which is adjacent to arterial highway I-278. In September 1997, plaintiffs' predecessors

entered into a ten-year lease (the Lease) under which Clear Channel's predecessor would construct, operate and maintain an outdoor sign (the Sign) on the property. In June 2008, Clear Channel exercised an option to extend the Lease for another ten years. The Lease provided for monthly "base rent" of \$1,250, plus the greater of (i) \$1,000 or (ii) 50% of the "monthly cash flow," during the renewal period. *See* Levin Aff., Exh. A, §3(b)(iii). "Monthly cash flow" was defined as "the entire monthly rent that Lessee received (with or without an executed agreement) derived by the Lessee for the leasing of Lessee's Work [the Sign], less agency commission." *See id.*

Certain New York City zoning regulations were instituted which applied to plaintiffs' property, including a restriction on commercial advertising on signs within 200 feet of an "arterial highway." In 2006, Clear Channel and other outdoor sign companies commenced an action in federal court challenging, *inter alia*, this restriction, on constitutional grounds. During the pendency of this lawsuit, the City instituted a stay of enforcement of the zoning regulations. In February of 2010, Clear Channel's action was ultimately defeated in the US Court of Appeals for the Second Circuit. *See Clear Channel Outdoor, Inc. v The City of New York*, 594 F3d 94 (2d Cir 2010).

Following the Second Circuit's decision, on March 26, 2010, Clear Channel wrote plaintiffs that the stay of enforcement was ending and that, as a result, Clear Channel could no longer display commercial advertising on the Sign. *See* Levin Aff. Exh. C. The complaint alleges that Clear Channel "fraudulently misrepresented that if Plaintiffs refused to consider Clear Channel's proposal [to amend the Lease] . . . it would unilaterally exercise its right to terminate [it]." Compl. ¶ 48. Clear Channel does not dispute that it represented an intention to terminate the Lease absent an amendment but

contends that it was not a fraudulent misrepresentation. *See* Defendant MOL at 5 and 13; Levin Aff., Exh. C.

According to the complaint, Clear Channel's ultimatum was "based on the [further] misrepresentation that the [Second] Circuit Decision would have a detrimental effect on [Clear Channel's] ability to rent the advertising space on the [S]ign." Compl. ¶ 69. The complaint alleges that the Second Circuit's decision merely upheld regulations that had been in place for years and that during the lawsuit the Sign was generating substantial revenue from non-commercial entities, which were exempt from the regulations. Compl. ¶¶ 70 – 71. Plaintiffs maintain that Clear Channel's representations about the law relating to outdoor signs and its impact on the Sign's ability to generate revenue therefore were false and intended to induce the Amendment. Compl. ¶¶ 72-83. After the March 26 letter, the parties executed the Amendment, which plaintiffs entered without consulting counsel. Compl. ¶ 50.

The Amendment provided that monthly rent for the Sign would be the greater of (i) \$10 or (ii) "50% of the monthly net revenue received by [Clear Channel] for the display of non-commercial advertising copy displayed at the Premises." *See* Levin Aff., Exh. B. The amended monthly payment was to remain in effect until the end of the Lease unless the city permitted commercial advertising on the Sign. *See id.* The practical effect of the Amendment was a reduction in the minimum monthly rent from \$2,250 per month to \$10 per month, leaving plaintiffs dependent on the monthly net revenue for any additional income from the Lease. Furthermore, the Amendment reduced plaintiffs' monthly income by at least \$1,250 under *any* possible scenario.

On August 11, 2010, Clear Channel told plaintiffs that it “g[ave] away [the Sign] as a bonus unit” to the New York Lottery (“NYL”), and that Clear Channel “is not generating any income from the [S]ign which will be displayed for the next 6-8 months.” Compl. ¶¶ 54 – 55. Upon receipt of this information, plaintiffs demanded and were given a copy of Clear Channel’s contract with NYL (the “NYL Contract”). Compl. ¶¶ 56-60. The parties agree that NYL is not subject to the commercial advertising restrictions at issue in this case.

Neither party submitted a copy of the NYL Contract. The complaint, however, alleges that under this contract, dated April 23, 2010, NYL would pay Clear Channel monthly rent of \$17,657.35 to advertise on a sign located at the intersection of the Major Deegan Expressway and 144th Street (the “MDE Sign”). Compl. ¶¶ 56 - 60. The contract also included “bonus unit #21115 – to be posted at no cost to NYL.” Compl. ¶ 58. The record does not indicate whether the MDE Sign is similarly restricted by the city’s zoning laws. Clear Channel has paid plaintiffs rent of \$10 per month for the Sign since August 2010. Compl. ¶ 55.

The complaint further alleges that Clear Channel “misrepresented its intentions with respect to the payment of Percentage Rent pursuant to the Amendment” and that “[a]t no time during [sic] prior to signing the Amendment did [Clear Channel] reveal that it was planning to give the space on the Sign to NYL at no cost to NYL.” Compl. ¶¶ 95 – 96. Plaintiffs claim that Clear Channel concealed either an intention, or negotiations with NYL, to give away the Sign at no cost. Compl. ¶ 100; Oral Argument at 10.

It is also alleged in the complaint, upon information and belief, that the Sign was in fact not given away at “no cost” to NYL. The complaint claims that the monthly

\$17,657.35 Clear Channel is receiving for the MDE Sign, with which plaintiffs' Sign is bundled, is an "inflated rate." Compl. ¶ 98. Under this theory, the amount of inflation represents revenue actually generated from plaintiffs' Sign but attributed to the MDE Sign in an effort to avoid paying plaintiffs their percentage of this revenue under the Amendment.

II. *Discussion*

On a motion to dismiss the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). CPLR 3026 mandates that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Rovello*, 40 NY2d at 636. In assessing the motion, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Id.* at 635 – 36.

"However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250. When the moving party submits affidavits or other documentary evidence in support of its motion, dismissal under CPLR 3211 is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v Martinez*, 84 NY2d 83, 88 (1994). CPLR 3016(b) further provides that

“[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”

A. *Fraud*

“In an action to recover damages for fraud, the plaintiff must prove 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 . . . and injury.” *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 (1996); *see also Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 57 (1999).

“To constitute actionable fraud, the false representation relied upon must relate to a past or existing fact, or something equivalent thereto, as distinguished from a mere estimate.” *Zanani v Savad*, 217 AD2d 696, 697 (2nd Dept 1995). “[Nor will a] representation of opinion . . . sustain an action for fraud.” *Id.* “When one knows the facts, a mere statement of the law applicable thereto is taken as an opinion.” *Municipal Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313, 317 (1930).

Plaintiffs correctly assert that Clear Channel’s statement about the Second Circuit decision’s detrimental impact on the Sign’s value was a representation of both fact and law. To the extent it was a representation of fact, however, it was a prediction about the impact of the law on the Sign’s future profitability. As such, the representation cannot sustain a cause of action for fraud. *See Zanani*, 217 AD2d at 697. To the extent the statement was a representation of the law, it was an opinion and is likewise not actionable. *See id.*; *Municipal Metallic*, 253 NY at 317.

Plaintiffs’ fraud claim based on Clear Channel’s representation of intent to

terminate the Lease must fail for similar reasons. Clear Channel's representation of its right to terminate was an expression of opinion about the law, and therefore cannot sustain an action for fraud. *See Zanani*, 217 AD2d at 697; *Municipal Metallic*, 253 NY at 317. Plaintiffs now contend that Clear Channel had no such right. *See Plaintiff MOL*, Footnote 6. Both plaintiffs and Clear Channel are sophisticated business entities, and both had access to the Lease. Consequently plaintiffs had ample means, and should be expected, to make an independent determination of their rights under the Lease.

Further, "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." [internal citations omitted] *Dannan Realty Corp. v Harris*, 5 NY2d 317, 322 (1959). The complaint alleges that Clear Channel was receiving, and paying to plaintiffs, significant revenue from agreements with non-commercial advertisers who were not subject to the zoning restrictions, and therefore Clear Channel misrepresented the impact of the prohibition on commercial advertising. Compl. ¶¶ 71 – 72. The court finds that plaintiffs could not have justifiably relied on representations regarding the impact of the prohibition on commercial advertising. Plaintiffs had equal access to the Lease and the Second Circuit decision. As lessors, plaintiffs also had the means of knowing what type of entities were advertising on the Sign and how much revenue was being generated.

Finally, plaintiffs' allegation that "[Clear Channel] misrepresented its intentions with respect to the payment of Percentage Rent pursuant to the Amendment (Compl. ¶

95)” has not properly stated a claim for fraud. A misrepresentation of intent can sometimes sustain an action for fraud. *See Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 (1986); *Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112 (1995). Plaintiffs do not allege, however, what these misrepresentations were. Under CPLR 3016(b), “the circumstances constituting the wrong shall be stated in detail”; *see also Art Capital Group, LLC v Getty Images, Inc.*, 24 Misc3d 1247(A) (NY Sup 2009) (“[P]laintiffs are alleging that defendants made misrepresentations to them, and thus should know what misrepresentations were made.”). Hence, the fraud cause of action is dismissed with leave to amend the complaint, should plaintiffs choose to do so, to state the relevant specific misrepresentations.

B. *Fraudulent Concealment*

In addition to the elements of fraud, “[a] cause of action for fraudulent concealment requires . . . an allegation that the defendant had a duty to disclose material information and that it failed to do so.” *P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003). Under the “special facts” doctrine, such a duty may arise “where one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair.” *Swersky v Dreyer and Traub*, 219 AD2d 321, 327 (1st Dept 1996).

“As a threshold matter, the [‘special facts’] doctrine requires satisfaction of a two-prong test: that the material fact was information ‘peculiarly within the knowledge’ of [defendant], and that the information was not such that could have been discovered . . . through the ‘exercise of ordinary intelligence.’” *Jana L. v West 129th Street Realty Corp.*, 22 AD3d 274, 278 (1st Dept 2005). The doctrine may be successfully invoked to defeat

a motion to dismiss where “ [1] [the] complaint alleges that defendants had peculiar and superior knowledge of their ongoing negotiations with a third-party licensee, [2] that plaintiff was unable to discern such negotiations through the use of reasonable intelligence or due diligence, and [3] that defendants were aware that plaintiff sought to terminate the parties’ agreement at least in part due to its lack of knowledge about the negotiations.” *Madison Apparel Group Ltd. v Hachette Filipacchi Presse, S.A.*, 52 AD3d 385 (1st Dept 2008); *see also Williams v. Sidley Austin Brown & Wood, L.L.P.* 38 AD3d 219 (1st Dept 2007).

Clear Channel’s failure to disclose negotiations with NYL before the Amendment was executed, if indeed any took place, falls within the scope of the “special facts” doctrine. Any such negotiations would be within the “peculiar knowledge” of Clear Channel, could not have been discovered by plaintiffs through the exercise of ordinary intelligence, and nondisclosure of these negotiations would render the Amendment inherently unfair. *See Madison Apparel* 52AD3d 385; *Jana L.*, 22 AD3d 278; *Swersky*, 219 AD3d 327.

In their reply memorandum, Clear Channel argues that the “special facts” doctrine does not apply because “[p]laintiffs do not contend they were laboring under any mistaken belief that the Sign would be profitable rendering the alleged non-disclosure inherently unfair.” Defendant Reply MOL at 15. Plaintiffs, however, do allege that “[b]ecause of the substantial reduction in the base rent (from \$2,250 per month to \$10.00 per month) and based on the Sign’s location in NYC, [plaintiffs] reasonably believed that [they] would continue to receive substantial Percentage Rent / Additional Rent based on [Clear Channel]’s Net Cash Flows from NYL.” Compl. ¶ 52. These allegations are not

“inherently incredible” in so far as plaintiffs could reasonably believe that, at minimum, Clear Channel would continue to *seek* a revenue-generating advertiser and not lock the Sign into an agreement under which no revenue would be generated. In sum, the court cannot determine as a matter of law that plaintiffs did not reasonably believe the Sign might be profitable.

The court also finds that plaintiffs’ accusation of a scheme to attribute revenue to the MDE Sign that was actually generated from plaintiffs’ Sign states a claim for fraudulent concealment. Such a scheme would satisfy the three criteria listed above - it would be within the peculiar knowledge of Clear Channel, undiscoverable by plaintiffs through ordinary intelligence, and would unfairly deprive plaintiffs of revenue they were due under the Amendment.

Clear Channel argues that the allegations of pre-Amendment negotiations and of concealed revenue lack the specificity required by 3016(b). Clear Channel also contends that allegations based solely upon information and belief cannot invoke the “special facts” doctrine. The court disagrees. Contrary to Clear Channel’s contention, “neither CPLR 3016(b) nor any other rule of law requires a plaintiff to allege the details of the asserted fraud that it may not know or that may be peculiarly within the defendant’s knowledge at the pleading stage.” *P.T. Bank Central Asia*, 301 AD2d at 377; *see also Jered Contracting Corp. v New York Transit Authority*, 22 NY2d 187 (1968); *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486 (2008); *M & T Bank Corp. v Gemstone CDO VII, Ltd.*, 23 Misc2d 1105(A) (Sup Ct, NY County, 2009).

Discovery might fail to establish that Clear Channel negotiated before the Amendment to “give away” the Sign to NYL or that it entered into the NYL Contract at

an inflated rate to conceal revenue from plaintiffs. However, these claims, which depend on facts uniquely within Clear Channel's knowledge, should not be dismissed without giving plaintiffs access to the means of ascertaining their truth. For these reasons, the motion to dismiss the fraudulent concealment cause of action is denied.

C. *Rescission Induced by Fraud*

"To warrant the rescission of a contract or other obligation it must further be shown that the false representations complained of were the inducement to the contract, that is, that they created such an impression in the mind of the party complaining . . . as to overcome any indecision on his part and lead or influence him into giving his consent . . . A conclusive test . . . is the fact (if it be so) that the party would have refused his consent . . . had he known the truth." [internal citations omitted] *Jones v Title Guarantee & Trust Co.*, 277 NY 415, 419 (1938).

As discussed above, plaintiffs have adequately pled two theories which may sustain an action based on fraudulent concealment. First, they contend that Clear Channel concealed negotiations before the Amendment to "give away" the Sign. Second, they allege that Clear Channel concealed from plaintiffs revenue derived from the Sign.

The fraudulent concealment of revenue owed to plaintiffs under the Amendment cannot be a basis for rescission in this case because it occurred, if at all, after the parties entered into the Amendment. Comp. ¶¶ 49 & 56 (The NYL Contract was executed after the Amendment.). Any concealment of revenue was, therefore, at best, a fraud in the performance of the Amendment, not in its inducement.

Negotiations before the Amendment between Clear Channel and NYL to "bundle" the Sign "for free," however, can be a basis for rescission. As discussed,

plaintiffs have adequately alleged that they reasonably believed the Sign would continue to be profitable and would not have agreed to the Amendment had they known it would not. To that extent, any concealment of negotiations with NYL led plaintiffs to give consent they would have withheld had they known the truth. *See Jones*, 277 NY at 419.

Accordingly, it is

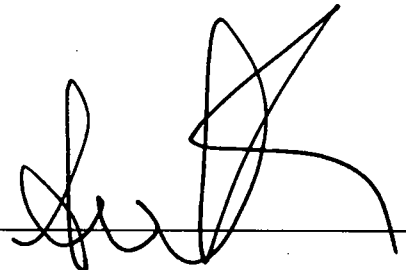
ORDERED that defendant Clear Channel's motion to dismiss the First Cause of Action is denied; and it is further

ORDERED that the Second Cause of Action is dismissed with leave to amend; and it is further

ORDERED that defendant Clear Channel's motion to dismiss the Third Cause of Action is denied.

Dated: July 27, 2011

ENTER:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

J.S.C.