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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Eileen A. Rakower Justice

PART 15

Infor Global (Michigan) Inc.

-v-

Lex Locus 1500, Inc., + May Folkenflik

INDEX NO. 114143/11

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1, 2

Answering Affidavits — Exhibits ____ | No(s). 3

Replying Affidavits ____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is GRANTED TO THE EXTENT THAT DEFENDANTS SECOND, THIRD AND SIXTH AFFIRMATIVE DEFENSES, FIRST COUNTERCLAIM, AND ALL CLAIMS FOR PUNITIVE DAMAGES ARE DISMISSED. (SEE ATTACHED DECISION AND ORDER)

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

Dated: 8/21/12

, J.S.C.

HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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INFOR GLOBAL SOLUTIONS (MICHIGAN), INC.,

Plaintiff,

- against -

LEX LOCUS 1500, INC. AND MAX FOLKENFLIK,

Defendants.

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Index No. 114143/11

DECISION and ORDER

Mot. Seq.: 002

The instant action is brought by Infor Global Solutions (Michigan) Inc. ("Infor Michigan") to recover for the damages it allegedly suffered as a result of Lex Locus 1500, Inc. ("Lex Locus") and Max Folkenflik's ("Folkfenflik") (collectively "defendants") failure to pay monthly rental obligations. Infor Michigan brings this motion for an order pursuant to CPLR §3211(a)(7), to dismiss defendants' counterclaims and demand for punitive damages asserted in defendants' answer, dated April 16, 2012 and pursuant to CPLR §3211(b), to dismiss certain affirmative defenses asserted in defendants' Answer.

Lex Locus leases the entire 21st floor of 1500 Broadway from Infor Michigan pursuant to a sublease dated April 4, 2002 between Lex Locus and Infor Michigan's predecessor in interest. Since March 2010, Lex Locus failed to pay all of its monthly rental obligations as required by the sublease. Infor Michigan alleges that Folkenflik agreed to guaranty certain obligations of Lex Locus under the sublease, although the guaranty itself is not appended to the papers. Infor Michigan alleges that Lex Locus's failure to pay the unpaid portion of its monthly rental obligations constitutes a breach of its obligations and seek the remaining amounts pursuant to the guaranty. Defendant previously moved to dismiss for lack of standing, which was denied by this court on March 29, 2012.

Infor Michigan now seeks to dismiss defendants' affirmative defenses and counterclaims. Defendants, who answered jointly, oppose this motion.

Defendants allege that the parties negotiated an "amended Sublease" in or around 2010, which, by its terms, affected the original Sublease and the guaranty. Defendants affirmative defenses arise from the "amended Sublease," which was never reduced to writing.

The sublease itself, at paragraph XVII (C) states: "Amendments. This Sublease may not be changed or terminated orally but only by an agreement in writing signed by both Sublandlord and Subtenant."

Defendants' second affirmative defense states,

> Subleasor has waived all or a substantial part of the charges sued upon.

The written Sublease, at paragraph XVII (E) states: "No Waiver. The failure of either party to insist on strict performance of any covenant or condition hereof, or to exercise any option contained herein, shall not be construed as a waiver of such covenant, condition or option in any other instance." Thus, the documentary evidence provided precludes the second affirmative defense.

Defendants' third affirmative defense alleges,

> In taking the acts and engaging in the practices above described, the Subleasor caused Defendants to reasonably believe, and Defendants did reasonably believe, that the Subleasor had agreed to amend the Sublease on the terms agreed to amongst the parties. Defendants acted on that reasonable belief to their detriment by (a) staying in the premises; (b) paying rent pursuant to the agreement; (c)expending sums on repairs of the premises, and (d) entering into binding agreements with respect to sublicensing of the premises.
>
> As a result of the foregoing, the Subleasor is estopped from denying Defendants' leasehold in the premises under the financial and other terms agreed upon as set forth above.

As stated earlier, any modification or amendment to the sublease had to be in writing. Estoppel based upon a purported oral "amended Sublease" is

inapplicable.

Defendants sixth affirmative defense for unjust enrichment says in pertinent part,

> as a result of the foregoing, were Plaintiff seeks to collect amounts in excess of the amounts it agreed to accept, it would be unjustly enriched in equity and good conscience it cannot be allowed to keep that unjust enrichment.

Plaintiff seeks to enforce the terms of its written agreement, and to collect the sums provided for in that agreement. These amounts may indeed exceed amounts negotiated in a purported "amended Sublease," but they are the amounts originally negotiated in the writing upon which plaintiff sues.

Regarding defendants' counterclaims, in determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Defendant's first counterclaim is for breach of contract, referring to the "amended Sublease." Defendants readily admit the "amended Sublease" was not reduced to writing, and, pursuant to the terms of the sublease, it has no force and affect. Thus, the first counterclaim is dismissed.

Defendants fourth and fifth counterclaims for intentional and negligent

misrepresentation present a cognizable theory in that defendants are asserting that plaintiff misrepresented its intention to enter into a writing with the terms and conditions of the alleged "amended Sublease," and defendants reasonably relied on such misrepresentation.

Finally, to the extent defendants seek punitive damages on their second, third fourth and fifth counterclaims, it is well settled that in order to state a claim for punitive damages, a party must "allege facts demonstrating that the defendants' conduct was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations. (*Zarin v. Reid & Preist*, 184 AD2d 385, 585 NYS2d 379 [1st Dept 1992]). "Further, it is well settled that the purpose of punitive damages is not to remedy private wrongs, but to vindicate public rights. (*Fortnow v. Hughes Hubbard & Reed LLP*, 2005 WL 3506955 *4 [Sup. Ct. NY 2005]). Here, there are no allegations that Infor Michigan's conduct was so outrageous as to evince a high degree of moral turpitude nor are there any allegations that Infor Michigan's conduct was aimed also at the public generally.

Wherefore, it is hereby,

ORDERED that plaintiff's motion to dismiss is granted to the extent that defendant's second, third and sixth affirmative defenses, first counterclaim, and all claims for punitive damages are dismissed.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: August 21, 2012

EILEEN A. RAKOWER, J.S.C.