

Jefferson Acquisition Corp. v 450 Vil. Co., LLC

2013 NY Slip Op 32496(U)

September 27, 2013

Supreme Court, Westchester County

Docket Number: 106191/2011

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

Index Number : 106191/2011
JEFFERSON ACQUISITION
vs
450 VILLAGE COMPANY, LLC.
Sequence Number : 003
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to ~~for~~ *join a defendant*

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court denies plaintiff's motion to join Manhattan Skyline Management Corp., as a defendant and to amend the complaint pursuant to the accompanying decision. C.P.L.R. §§ 1002(b), 3025(b). The parties are to appear for a pretrial conference 11/21/13 at 3:30 p.m. in Part 46.

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

FILED

OCT 17 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/27/13

Lucy Billings, J.S.C.
LUCY BILLINGS

- 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 46

-----x

JEFFERSON ACQUISITION CORP. d/b/a
Jefferson Market,

Index No. 106191/2011

Plaintiff

- against -

DECISION AND ORDER

450 VILLAGE COMPANY, LLC,

Defendant

LUCY BILLINGS, J.S.C.:

FILED

OCT 17 2013

NEW YORK
COUNTY CLERK'S OFFICE

I. BACKGROUND

Plaintiff moves to join Metropolitan Management, Corp. (MSM), as a defendant and to amend the complaint to add claims for fraud, negligent misrepresentation, and tortious interference with a contract against MSM. C.P.L.R. §§ 1002(b), 3025(b).

Plaintiff claims MSM, through its Director of Property Management Eschmann, interfered with plaintiff tenant's rights under its lease with defendant landlord 450 Village Company, LLC, by conveying the landlord's denial of plaintiff's right to remodel the leased premises because the premises had not been operational for the past few months and plaintiff owed rent arrears.

In a stipulation dated October 20, 2011, plaintiff discontinued its claims against defendant landlord, converted its original breach of contract claim to a set-off against defendant's counterclaims, and limited this action to defendant's counterclaims. Under this rubric, plaintiff's proposed claims at best would be third party claims against MSM.

II. PLAINTIFF'S PROPOSED CLAIMS

The allegations in the proposed second amended complaint, however, even if considered a third party complaint, support only a claim that defendant 450 Village breached its lease with plaintiff through MSM, which the second amended complaint admits was defendant's managing agent. In fact, plaintiff cites to the deposition testimony that defendant hired MSM to deal with the daily management of the leased premises and that MSM maintained its office within defendant's office. Aff. in Supp. of Emily Pankow Ex. G, at 15. If MSM's communications to plaintiff denying plaintiff permission to remodel were unauthorized by defendant landlord, then such facts may support a claim by defendant, not by plaintiff, against MSM. Plaintiff's allegations also do not set forth the elements of fraud, negligent misrepresentation, or tortious interference with a contract by MSM toward plaintiff.

A. Fraud and Negligent Misrepresentation

A fraud claim requires plaintiff to allege that MSM misrepresented or omitted a material fact, knowing the misstatement or omission was false, to induce plaintiff to rely on it, and that plaintiff justifiably relied on the misrepresentation or omission and incurred damages from that reliance. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 178 (2011); Gosmile, Inc. v. Levine, 81 A.D.3d 77, 81 (1st Dep't 2011); Nicosia v. Board of Mgrs. of the Weber House Condominium, 77 A.D.3d 455, 456 (1st Dep't 2010); Meyercord v. Curry, 38

A.D.3d 315, 316 (1st Dep't 2007). A claim of negligent misrepresentation requires allegations that (1) plaintiff justifiably relied on MSM's false statement, and (2) MSM possessed unique or special expertise or maintained a special relationship of trust or confidence with plaintiff, (3) knew how plaintiff intended to use the information, and (4) provided it for that purpose. Greenberg, Trager & Herbst, LLP v. HSBC Bank USA, 17 N.Y.3d 565, 578 (2011); Kimmell v. Schaefer, 89 N.Y.2d 257, 264 (1996); MatlinPatterson ATA Holdings LLC v. Federal Express Corp., 87 A.D.3d 836, 840 (1st Dep't 2011); Federal Ins. Co. v. North Am. Specialty Ins. Co., 47 A.D.3d 52, 61 (1st Dep't 2007).

The fraud and negligent misrepresentation claims fail because any reliance by plaintiff on Eschmann's misrepresentation of lease requirements as alleged would be unjustifiable. As a sophisticated business entity, plaintiff was obligated to protect itself from misrepresentation by looking at whether Eschmann's statement found any support in the lease. See Churchill Fin. Cayman, Ltd. v. BNP Paribas, 95 A.D.3d 614, 615 (1st Dep't 2012); HSH Nordbank AG v. UBS AG, 95 A.D.3d 185, 195 (1st Dep't 2012); Port Parties, Ltd. v. ENK Intl. LLC, 84 A.D.3d 685, 686 (1st Dep't 2011); Global Mins. & Metals Corp. v. Holme, 35 A.D.3d 93, 100 (1st Dep't 2006). Plaintiff easily could and in fact did ascertain its rights under the lease by simply reading it. See Churchill Fin. Cayman, Ltd. v. BNP Paribas, 95 A.D.3d 614; JP Morgan Chase Bank v. Orleans, 50 A.D.3d 590 (1st Dep't 2008).

Plaintiff alleges no special relationship with MSM or Eschmann based on trust or expertise, to support the negligent representation claim. HSH Nordbank AG v. UBS AG, 95 A.D.3d at 208; MatlinPatterson ATA Holdings LLC v. Federal Express Corp., 87 A.D.3d at 841.

Plaintiff's claimed damages, moreover, due to its removal from the premises through a holdover proceeding, may result from 450 Village's refusal to allow plaintiff's proposed remodeling, conveyed through Eschmann, but not from plaintiff's reliance on any misinterpretation of the lease by 450 Village or Eschmann. Instead, plaintiff's damages, as alleged, result from its choice, when confronted with the refusal, not to return to its former operations at the premises and to continue to default under the lease. See Northern Stamping, Inc. v. Monomoy Capital Partners, L.P., 107 A.D.3d 427, 428 (1st Dep't 2013).

B. Tortious Interference With a Contract

A claim of tortious interference with a contract requires (1) a valid contract to which plaintiff was a party, (2) MSM's knowledge of the contract, (3) an actual breach of that contract by another party to the contract, (4) MSM's intentional procurement of the breach, and (5) damages to plaintiff from that interference. White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 426 (2007); Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996); Foster v. Churchill, 87 N.Y.2d 744, 749-50 (1996); Burrowes v. Combs, 25 A.D.3d 370, 373 (1st Dep't 2006). Plaintiff alleges its lease with 450 Village, which

MSM knew about, and 450 Village's breach of the lease by unreasonably refusing consent to the remodeling on grounds not authorized by the lease. Plaintiff nowhere alleges, however, that MSM procured that breach or that, but for MSM's actions, 450 Village would not have breached the lease as alleged. Burrowes v. Combs, 25 A.D.3d at 373. Plaintiff does not allege, for example, that MSM persuaded its principal to refuse the consent, rather than MSM simply carrying out its principal's instructions. 57th St. Arts, LLC v. Calvary Baptist Church, 52 A.D.3d 425, 426 (1st Dep't 2008).

Instead, plaintiff quotes from Eschmann's deposition, where his recorded voicemail message was played communicating the refusal:

I'm calling regarding the Jefferson Market at 450 Sixth Avenue that has been dark [non-operational] for a few months now. There is 135,000 in arrears. The owner is not going to agree to anything.

Pankow Aff. in Supp. Ex. G, at .72-73 (emphasis added). Plaintiff alleges neither that Eschmann's communication of the owner's refusal was a false representation, to support plaintiff's misrepresentation claims, nor that Eschmann or MSM caused that refusal, to support plaintiff's tortious interference claim.

III. PERMITTING JOINDER OF THE PROPOSED ADDITIONAL DEFENDANT AND THE PROPOSED AMENDMENTS TO THE COMPLAINT

C.P.L.R. § 3025(b) permits amendments to a complaint as long as the proposed claims for relief, as alleged, are meritorious. Humphreys & Harding, Inc. v. Universal Bonding Ins. Co., 52 A.D.3d 324, 326 (1st Dep't 2008); Sabo v. Alan B. Brill, P.C., 25

A.D.3d 420, 421 (1st Dep't 2006); Thompson v. Cooper, 24 A.D.3d 203, 205 (1st Dep't 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 355 (1st Dep't 2005). See Sepulveda v. Dayal, 70 A.D.3d 420, 421 (1st Dep't 2010). Plaintiff bears the burden to demonstrate the merits of the proposed claims for relief through admissible evidence. Greentech Research LLC v. Wissman, 104 A.D.3d 540, 541 (1st Dep't 2013); MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 500 (1st Dep't 2010); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Pacheco v. Fifteen Twenty Seven Assoc., 275 A.D.2d 282, 284 (1st Dep't 2000). While plaintiff need not prove its proposed claims at this stage, plaintiff still must show the viability of its proposed claims, by alleging their elements in a proposed verified second amended complaint or supporting them with other admissible evidence. MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d at 499-500; Humphreys & Harding, Inc. v. Universal Bonding Ins. Co., 52 A.D.3d at 326; Pier 59 Studios, L.P v. Chelsea Piers, L.P., 40 A.D.3d 363, 366 (1st Dep't 2007); Sabo v. Alan B. Brill, P.C., 25 A.D.3d at 421.

As set forth above, the proposed second amended complaint, on its face, fails to meet this minimal standard of sufficiency or merit. Plaintiff ascribes no actions independent of defendant's breach of the lease to defendant's agent MSM, which was not a party to the lease, let alone independent tortious conduct. Hoppe v. Board of Directors of 51-78 Owners Corp., 49 A.D.3d 477 (1st Dep't 2008); American Theatre for the Performing

Arts, Inc. v. Consolidated Credit Corp., 45 A.D.3d 506 (1st Dep't 2007); Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc., 27 A.D.3d 323 (2006). The deposition testimony plaintiff relies on negates any claim that MSM acted independently of defendant and specifically negates plaintiff's claim for MSM's tortious interference with the lease. See MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d at 500; Jacobson v. McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 654 (1st Dep't 2009).

IV. CONCLUSION

Since plaintiff fails to show a prima facie basis for its claims against Manhattan Skyline Management, Corp. (MSM), the court denies plaintiff's motion to join MSM as a defendant and to amend the complaint to include the alleged fraud, negligent misrepresentation, and tortious interference claims against MSM. C.P.L.R. §§ 1002(b), 3025(b); Humphreys & Harding, Inc. v. Universal Bonding Ins. Co., 52 A.D.3d at 326; Hoppe v. Board of Directors of 51-78 Owners Corp., 49 A.D.3d 477; American Theatre for the Performing Arts, Inc. v. consolidated Credit Corp., 45 A.D.3d 506; Sabo v. Alan B. Brill, P.C., 25 A.D.3d at 421. Plaintiff and defendant 450 Village Company, LLC, shall appear for a pretrial conference relating to plaintiff's breach of contract claim and defendant's counterclaims on November 21, 2013, at 3:30 p.m., in Part 46.

FILED

OCT 17 2013

DATED: September 27, 2013

NEW YORK *Lucy Billings*
 COUNTY CLERKS OFFICE
 LUCY BILLINGS, J.S.C.