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

----------X

LITHE METHOD LLC,

Plaintiff,

- v -

YHD 18 LLC,

Defendant.

----------X

YHD 18 LLC,

Cross Claim Plaintiff,

- v -

LAUREN BOGGI GOLDENBERG,

Cross Claim Defendant.

----------X

Index No.
650759/2013

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

This is an action for rescission and damages based on, *inter alia*, a commercial lease agreement to "build out" a residential condominium building's commercial condominium unit for use as a commercial fitness studio. Plaintiff, Lithe Method LLC ("Plaintiff" or "Tenant" or "Lithe"), a commercial gym, entered into a commercial lease agreement (the "Lease Agreement"), dated May 22, 2012, as tenant, with defendant YHD 18 LLC ("Defendant" or "Landlord"), as landlord, for use of the commercial condominium unit located at 32 West 18th Street, New York, New York, Retail Condominium Unit 1 (the "Commercial Unit" or "Premises"). Plaintiff intended to use the Premises as a boutique fitness studio for Tenant''s, "innovative and proprietary blend of cardiovascular, aerobic and strength training

exercising system, using loud music and specialized equipment such as plaintiff's signature Higher Power Band System® suspended from the ceilings". Plaintiff brings this action for a declaration of rescission of the Lease Agreement, attorney's fees, and a return of all monies paid under the Lease Agreement prior to Tenant's claimed rescission.

Defendant interposed an answer on April 15, 2013, asserting various affirmative defenses and raising counter-claims against Plaintiff and cross-claims against Lauren Boggi Goldenberg as guarantor ("Goldenberg" or "Guarantor"), for default under the Lease Agreement and a good guy guaranty agreement (the "Guaranty") guaranteeing Plaintiff's obligations under the Lease Agreement, respectively.

Defendant now moves for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Defendant and against Plaintiff on Defendant's first counterclaim in the amount of $412,483.63, plus interest thereon; granting summary judgment in favor of Defendant and against Guarantor on Defendant's first cross claim in the amount of $412,483.63, plus interest thereon; awarding Defendant its reasonable attorneys' fees incurred in this action and setting this matter down for an inquest to determine the amount of attorneys' fees incurred by Defendant; and, dismissing Plaintiff's Complaint in its entirety. In support, Defendant submits a copy of Plaintiff's summons and complaint; a copy of Defendants answer; a copy of Plaintiff and Guarantor's reply to counterclaims and cross claims; a copy of the Lease Agreement, dated May 22, 2012; a copy of the Guaranty, dated May 15, 2012; a copy of an invoice for a real estate broker commission in the amount of $84,705.69; a copy of a stipulation, dated March 22, 2013 (the "Stipulation"), stipulating that Plaintiff has surrendered the Premises and that Defendant has taken possession of the same.

Plaintiff opposes. In support, Plaintiff submits a copy of Plaintiff's offer (the "Offer"), dated March 12, 2012, to lease the Premises; a copy of Landlord's term sheet counter-proposal, dated March 19, 2012 (the "Counter-Proposal"); a copy of the Lease Agreement; a copy of the Condominium Declaration; copies of various letters exchanged between Plaintiff and the Board and/or its architects discussing Plaintiff's proposed alterations to the Commercial Unit; a copy of a Tenant Alteration Agreement (the "Tenant Alteration Agreement") dated December 5, 2012; and, copies of various proposals for alterations to the Commercial Unit. Plaintiff also submits copies of various other correspondence, including a letter,

dated February 20, 2013, addressed to Landlord from Plaintiff purporting to rescind the Lease Agreement and surrender the Premises; a copy of a rent demand letter, dated March 1, 2013, addressed to Plaintiff from Landlord; and, a copy of a letter, dated March 12, 2013, withdrawing Plaintiff's application to the New York City Bureau of Standards and Appeals to authorize a physical culture or health establishment located at the Premises.

Oral argument was heard on Defendant's motion. At oral argument, Landlord argued that Tenant was in default under the Lease Agreement for failing to pay rent and additional rent. Tenant, in turn, argued that there was no default because Tenant is entitled to rescind the Lease Agreement based on Landlord's "innocent misrepresentation" [1] under Section 4.2.1 of the Lease Agreement.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dep't 1989]).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v. New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dep't 2009]). In determining whether a contract exists, "the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction. The issue is generally one of law, properly determined on a motion for summary judgment. (*Central Federal Sav., F.S.B. v. National Westminster Bank*, 176 A.D.2d 131, 132 [1st Dep't 1991]). Furthermore, on a motion for summary judgment in a contract dispute, it is the Court's responsibility, if possible, to determine the intent of the parties from the four corners of the document. (*Diversified Group Inc. v. Sahn*, 259 A.D.2d 47 [1st Dep't

[1] At oral argument, Tenant did not argue that Landlord had any intent to deceive or scienter.

1999]). "[W]hen parties set down their agreements in a clear, complete document, their writing should . . . be enforced according to its terms." (*Vermont Teddy Bear, Inc. v. 538 Madison Realty Co.*, 1 N.Y. 3d 470, 475 [2004] [citations omitted).

"If we subtract from fraud the element of *scienter*, the remainder constitutes the tort of innocent misrepresentation." (*West Side Federal Sav. & Loan Asso. v. Hirschfeld*, 101 A.D.2d 380, 384 [1st Dep't 1984]). In order to prove innocent misrepresentation, a plaintiff must demonstrate: 1) the defendant's misrepresentation of a material fact; 2) made to induce the plaintiff to enter into an agreement; and, 3) upon which the plaintiff justifiably relied. (*Id.* at 385, citing *Emerson Elec. Mfg. Co. v. Printed Motors, Inc.*, 252 N.Y.S.2d 600, 607-08 [Sup. Ct. N.Y. Cnty. 1964]). Although an "innocent misrepresentation" may, in certain circumstances, present a proper basis for rescission of a written agreement, (*Gould v. Board of Educ.*, 81 N.Y.2d 446, 453 [1993]; *Rosenblum v Manufacturers Trust Co.*, 270 NY 79, 84-85 [plaintiff may be entitled to have a court of equity rescind a contract even where the mistake is unilateral, not mutual, if failing to do so would result in unjust enrichment of defendant]), the mere contention that the parties "had in mind" a particular condition is insufficient to defeat a motion for summary judgment on a contractual obligation. (*Sutton v. E. River Sav. Bank*, 83 A.D.2d 801, 801 [1st Dep't 1981] [internal citation omitted]).

Landlord entered into the Lease Agreement, dated May 22, 2012, with Tenant, to lease the Premises to Tenant for a term of ten years. Pursuant to the Lease Agreement, Tenant took possession of the Premises on May 22, 2012 (the "Commencement Date"). Under the terms of the Lease Agreement, Tenant agreed to pay rent and additional rent on the "Rent Commencement Date" and on the first day of each and every calendar month thereafter for the entire term of the Lease Agreement.

Plaintiff leased the Premises as a "white box" space, not yet outfitted for Tenant's intended use. Plaintiff did not have an alteration[2] plan in place at the time of the Lease Agreement. However, the Lease Agreement permits Plaintiff to perform Alterations to the Premises, subject to the approval and consent of the board of managers (the "Board") for the building (the "Building") in which the

[2] The Lease Agreement defines "Alteration" to mean, "any alteration, installation, improvement, addition or other physical change in or to any portion of the Building (including the Premises), *including any initial Alteration performed by or on behalf of Tenant to prepare the Premises for Tenant's occupancy.*" (Section 6.2.1 [emphasis added]).

Commercial Unit is located. In addition, Section 4.2.1 of the Lease Agreement provides that, "nothing in the Condominium Documents[3] shall deprive Tenant of any material right granted to Tenant under this Lease nor materially increase Tenant's obligations" thereunder.

The Lease Agreement further provides:

> 4.1.1 Tenant . . . may use the Premises solely for the following use (the "Permitted Use") and for no other use or purpose: Fitness studio (i.e. yoga, Pilates and aerobics) including the sale of previously prepared foods and beverages for consumption on and off the Premises and for no other purpose. [emphasis original].

In addition, the Lease Agreement contains a merger clause that provides, in relevant part:

> This Lease represents the entire agreement of the parties, and, accordingly, all understandings and agreements heretofore had between the parties are merged in this Lease, which alone fully and completely express the agreement of the parties. Without limiting the foregoing, (i) Tenant expressly acknowledges and agrees that Landlord has not made and is not making, and Tenant, in executing and delivering this Lease, is not relying upon, any warranties, representations, promises or statements, except to the extent that the same are expressly set forth in this Lease . . . [Section 14.10].

By letter dated February 28, 2013, Tenant attempted to rescind the Lease Agreement and surrender the Premises. Guarantor's affidavit describes the events precipitating Tenant's February 28, 2013 letter as follows:

---

[3] Pursuant to the Lease Agreement, and as used herein, the term "'Condominium Documents' shall mean, collectively, (i) the Condominium Declaration and all schedules thereto, (ii) the Condominium By-Laws, (iii) Rules and Regulations that may be adopted by the Board with respect to the Commercial Unit, (iv) the Alteration Agreement promulgated by the Board and governing alterations that may be made to the Commercial Unit, and (v) any other documents relating to the Condominium (all as same may be modified or amended from time to time by the Board)." (1.1.12).

> [The Board's] required soundproofing design would have precluded Lithe from penetrating the ceiling and thus, among other problems, did not permit the suspension of the Higher Power Band System® from the studio ceiling. Lithe could not operate its fitness studio without its Higher Power Band System® suspended from the studio ceiling. On February 28, 2013, Lithe rescinded the Lease.

Here, Landlord meets its initial burden of making a prima facie showing on its claim for default under the Lease Agreement. Landlord presents evidence in admissible form demonstrating the Lease Agreement, as well as Tenant's failure to pay rent and additional rent for the month of January 2013, or for any month thereafter. Plaintiff does not dispute having entered into Lease Agreement, and, pursuant to the Stipulation, Plaintiff concedes that Tenant vacated and surrendered the Premises prior to the Expiration Date of the Lease Agreement.

In opposition, Tenant fails to present evidence in admissible form demonstrating that any question of fact remains requiring the trier of fact to determine the issue. As far as meeting of the minds is concerned, Tenant argues that, at the time of contracting, the parties "understood" that Plaintiff would be able to operate its Lithe Method fitness studio on the Premises, including the installation of the Higher Power Band System®. Although the Offer and Counter-Proposal reference Plaintiff's signature Higher Power Band System®, the four corners of the Lease Agreement do not contain any reference to Plaintiff's Higher Power Band System®. Nor does the Lease Agreement mention Plaintiff's proprietary fitness technique as a specific Permitted Use. In light of the Lease Agreement's merger clause, therefore, Tenant's pre-contractual documents are insufficient to raise a triable issue of fact and Tenant's argument that the Lease Agreement is not supported by a meeting of the minds respecting soundproofing requirements is unavailing. Furthermore, Plaintiff does not raise any claims for unreasonably withholding consent to Tenant's proposed renovations as against either Landlord or the Board. Insofar as Plaintiff makes no claim that the Board's requirements were not reasonable, Plaintiff fails to raise an issue as to whether Landlord breached any obligation to Tenant under the Lease Agreement.

Furthermore, the Lease Agreement expressly states that it is subordinate to the Condominium Documents. The Lease Agreement requires the Board's prior written approval for Alterations if and to the extent required by the Condominium Documents, (Section 6.2.2), and states that, "All Tenant Work shall be performed . . . in compliance with (x) all applicable provisions of the Condominium Documents and any and all other requirements of the Board of Managers." (Section 6.3.5). The Lease Agreement further provides: "Tenant, in connection with any Tenant Work, shall comply with and observe . . . such rules and regulations (and changes, thereto) as the Board of Managers at any time or times may make or impose with respect to the performance of Alterations (so long as such rules and regulations are communicated to Tenant)." (Section 6.3.8).

The Lease Agreement states:

> 15.1.4 In any instance during the Term where Tenant desires to take or permit an action of any nature that requires the Board of Managers' consent or approval pursuant to any provision of the Condominium Documents, (a) Landlord shall reasonably cooperate with Tenant, at Tenant's expense, in seeking such consent or approval . . . and (b) if such action also requires Landlord's consent or approval hereunder, then the Board of Managers' consent or approval shall first be obtained before the matter in question will be considered by Landlord; and if the Board of Managers does not grant its consent or approval to any such matter (or has not yet granted such consent or approval by any outside date hereunder by which Landlord must grant or deny its consent or approval to such matter), then Landlord may withhold its consent or approval to such matter, even in instances where Landlord is required to be reasonable.

Tenant entered into a Tenant Alteration Agreement with the Board, dated, December 5, 2012, which states that Tenant "shall not commence the Work unless and until . . . the Board and the Designated Engineer shall have approved in writing the Plans and the Work." The Tenant Alteration Agreement requires Tenant to "comply with any and all requirements and recommendations set forth . . . with respect to the installation of sound equipment and its acoustical impact on the

residential section of the Building". Plaintiff does not raise any claims for unreasonably withholding consent to Tenant's proposed renovations as against either Landlord or the Board. Insofar as Plaintiff makes no claim that the Board's requirements were not reasonable, Plaintiff fails to raise an issue as to whether Landlord breached any obligation to Tenant under the Lease Agreement.

Tenant also fails to demonstrate that any triable issue remains as to whether Tenant is entitled to rescind the Lease Agreement based on Landlord's alleged "innocent misrepresentation" under section 4.2.1 of the Lease Agreement. Plaintiff makes no showing that the Board's soundproofing requirements preclude Tenant's use of the Premises as a fitness studio for "yoga, Pilates, and aerobics" pursuant to Section 4.1 of the Lease Agreement. Accordingly, Tenant fails to raise a triable issue of fact as to whether these soundproofing requirements prevent Plaintiff from "using, building, and occupying" the Premises "solely for the Permitted Use" under the Lease Agreement. In addition, suspending Plaintiff's proprietary Higher Power Band System® from the Commercial Unit's ceiling does not appear to be a material right granted within the four corners of the Lease Agreement. Although the soundproofing requirements complained of might render Tenant's particular intended use of the Premises more expensive than Tenant had previously anticipated, such costs do not deprive Tenant of any material right under the Lease Agreement. As the Condominium Documents do not preclude Plaintiff's use of the Premises as a commercial gym, or even as a commercial gym featuring Plaintiff's proprietary fitness technique, Plaintiff fails to raise an issue of fact as to whether Landlord falsely represented that, "nothing in the Condominium Documents shall deprive Tenant of any material right under the Lease [Agreement]".

Nor can Tenant claim to have reasonably relied upon any such purported misrepresentation that Board would not come to impose soundproofing requirements that preclude the suspension of Tenant's Higher Power Band System®. "[A]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it." (*HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 194-95 [1st Dep't 2012] [citations omitted]). Despite leasing the Premises as a "white box" space, Plaintiff makes no showing that it conducted any "independent appraisal", (*id.* at 195), of the risk it was assuming *vis-à-vis* any potential soundproofing or construction requirements pertaining to Tenant's intended use of the Premises as a commercial gym featuring Plaintiff's proprietary Higher Power Band System® suspended from the ceilings.

Plaintiff did not enter into the Lease Agreement with an approved build out plan in place, and did not enter a Tenant Alteration Agreement until December 5, 2012, nearly seven months after executing the Lease Agreement. Accordingly, Plaintiff fails to present any evidence in admissible form that it is not Plaintiff's, "own evident lack of due care which is responsible for [Tenant's] predicament." (*Rodas v. Manitaras*, 552 N.Y.S.2d 618, 620 [1st Dep't 1990]).

Finally, with respect to Landlord's cross claim as against Guarantor, Landlord claims that, in consideration for, and as further inducement to Landlord to enter into the Lease Agreement with Tenant, Guarantor executed the Guaranty, dated May 15, 2012, guaranteeing absolutely and unconditionally the full and timely payment of all fixed rent and additional rent due from Tenant to Landlord. The Guaranty guarantees to Landlord:

> The full and timely payment, the full and prompt payment of all base rent, Additional Rent for operating expenses and taxes (collectively, the "Obligations") through and including the date that Tenant and its assigns and sublessee, if any, shall have completely performed all of the following: (i) provide written notice to Landlord (pursuant to the notice requirements in the Lease) of Tenant's intention to vacate and surrender the demised Premises to Landlord no less than six months prior to the date Tenant actually vacates and surrenders the Demised Premises; (ii) vacated and surrendered the Demised Premises to the Landlord pursuant to the terms in the Lease; (iii) delivered the keys to the Demised Premises to Landlord; (iv) paid to Landlord all Obligations through and including the date which is the later of (a) the actual receipt by Landlord of the Obligations, (b) the surrender of the Demised Premises, or (c) receipt by Landlord of the keys to the Demised Premises.

The Guaranty further provides: "Except as otherwise provided in the foregoing paragraph, this Guaranty is an absolute and unconditional guarantee of payment and performance." Guarantor does not dispute entering into the Guaranty. As Plaintiff failed to meet its obligations under the Lease Agreement, Landlord meets its burden to demonstrate entitlement to judgment as a matter of law on its

cross-claim for default under the Guaranty. Guarantor fails to raise a triable question of fact concerning Landlord's calculation of the damages owed.

Wherefore, it is hereby

ORDERED that Defendant YHD 18 LLC's motion is granted in its entirety and summary judgment is granted on Defendant's first counterclaim as against Plaintiff Lithe Method LLC and on Defendant's first cross-claim as against cross-claim defendant Lauren Boggi Goldenberg in the amount of $412,483.63, with interest at the statutory rate (from 4/15/2013), as calculated by the Clerk; and it is further

ORDERED that Plaintiff's complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that an inquest as to reasonable attorney's fees owed to Defendant as against Plaintiff Lithe Method LLC and cross-claim defendant Lauren Boggi Goldenberg is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the inquest hereinabove directed.

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

DATED: December 3 2014

EILEEN A. RAKOWER, J.S.C.