

<b>32 W. 39th Midtown Props. v Zee Co. Apparel Corp.</b>
2020 NY Slip Op 30129(U)
January 14, 2020
Supreme Court, New York County
Docket Number: 651861/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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32 W. 39TH MIDTOWN PROPERTIES INDEX NO. 651861/2019
Plaintiff, MOTION DATE 01/14/20
- v - MOTION SEQ. NO. 001 002
ZEE CO. APPAREL CORP.,
Defendant. DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17
were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26
were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL

Upon the foregoing documents and for the reasons set forth on the record (01.14.20), (i) Zee Co. Apparel Corp.'s (Zee Co.) motion to dismiss the complaint (Mtn. Seq. No. 1) filed by 23 W. 39th Midtown Properties (Midtown Properties) in this action pursuant to CPLR §§ 3211 (a) (4) and (7) is granted and (ii) Midtown Properties' motion to consolidate (Mtn. Seq. No. 2) this action with the previously filed action Michael Rosenberg v Aron Rosenberg, et. al., Index No. 655144/2018 (the Michael Rosenberg Action), pending in this court, pursuant to CPLR § 602, is denied as moot.

This action arises from an alleged oral agreement pursuant to which Midtown Properties agreed to lease certain space on the sixth floor of the building owned by Midtown Properties located at

32 West 39<sup>th</sup> Street in New York City (the **Premises**). The following facts are alleged in the complaint and are taken as true for the purposes of the instant motion (*Morone v Morone*, 50 NY2d 481, 484 [1980]). Michael Rosenberg, the owner of Zee Co., approached Midtown Properties in June 2016 and “requested” to lease the Premises from Midtown Properties for a term of five years with an option to renew the lease for an additional five-year term (compl ¶ 6). The existing tenant, Miss Elaine, Inc., had been timely in its rent payments and had recently requested a four-year extension of its lease at an annual rent of approximately \$200,000 per year (*id.* ¶ 5). Based on Michael Rosenberg’s representations that Zee Co. would occupy the Premises for the agreed-upon term and that either he or Zee Co. would timely pay rent when due, Midtown Properties agreed to lease the Premises to Zee Co. and did not renew the lease of Miss Elaine, Inc. (*id.* ¶ 7). After the first two months, however, Zee Co. ceased paying rent to Midtown Properties (*id.* ¶ 8).

Midtown Properties commenced this action by filing a summons and complaint on March 29, 2019. The complaint asserts causes of action for promissory estoppel and fraudulent misrepresentation (*id.* ¶¶ 11-14, 15-19).

### **Prior Pending Action**

Pursuant to CPLR § 3211 (a) (4), the court may dismiss an action where “there is another action pending between the same parties for the same cause of action.” To warrant dismissal, there must be “substantial” identity of parties (*Sprecher v Thibodeau*, 148 AD3d 654, 656 [1st Dept 2017]). For the purposes of a CPLR § 3211 (a) (4) motion to dismiss, there is not substantial identity of parties between an individual principal of a corporation in one matter and the

corporation itself in another (*id.*). In this case, the defendant is Zee Co. Michael Rosenberg is the principal of Zee Co. and is the defendant in the Michael Rosenberg Action. Because Michael Rosenberg is legally distinguishable from Zee Co., there is not the requisite substantial identity of parties to warrant dismissal pursuant to CPLR § 3211 (a) (4). Accordingly, the motion to dismiss based on the prior action pending is denied.

### **Promissory Estoppel**

The elements of a claim of promissory estoppel are: “(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance” (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-42 [1st Dept 2011]). In this case, the complaint alleges that Michael Rosenberg informed Midtown Properties that he wanted his company, Zee Co., to take over the lease for the Premises when Miss Elaine, Inc.’s lease expired, and that he or Zee Co. would timely make all required rent payments (compl ¶¶ 6-9). At oral argument the plaintiff conceded that the alleged promise was not as set forth in the papers. To wit, to the extent that the papers indicate a proposed term of five years with a five year extension, the plaintiff indicated that it might have been three years. More importantly, the papers don’t in any way identify how much the defendant is alleged to have promised to pay or to whom the promise was allegedly made. Put another way, the complaint fails to plead a clear and unambiguous promise. In sum and substance, the complaint merely alleges that Michael Rosenberg *represented* to Midtown Properties that Zee Co. wanted to take over the lease for the sixth floor. In addition, there does not seem to be any reasonable reliance which has been plead. To be sure, the complaint does allege that prospective tenants were turned away, but merely expressing representing an interest in space does not sufficiently allege a basis

for promissory estoppel. Accordingly, the cause of action for promissory estoppel is dismissed without prejudice.

### **Fraudulent Misrepresentation**

To state cause of action for fraudulent misrepresentation, “a plaintiff must allege ‘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 on the misrepresentation or material omission, and injury’” (*Mandarin Trading Ltd.*, 16 NY3d at 178, quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Where a complaint alleges fraud, “the circumstances constituting the wrong shall be stated in detail” (CPLR § 3016 [b]). Simply put, the complaint fails to meet the requirements of CPLR § 3016 in that it fails to identify a statement made by Michael Rosenberg which was false which he knew to be false when he made it which the plaintiffs relied on. In sum and substance, the complaint merely provides that Michael Rosenberg represented he was interested in taking the space and he paid for it for two months. Put another way, the complaint fails to allege the words spoken by Michael Rosenberg, to whom such words were spoken, what was actually said which was known to be false at the time it was said, or how the plaintiffs reasonably relief on such false promise. Accordingly, the cause of action for fraudulent inducement is dismissed without prejudice.

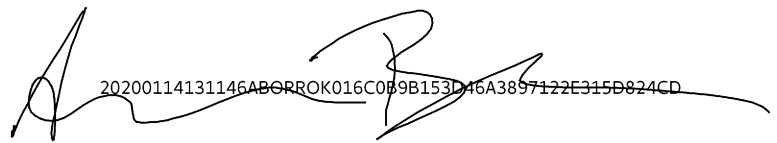
### **Consolidation**

In light of the foregoing, Midtown Properties' motion to consolidate this action with the action *Michael Rosenberg v Aron Rosenberg, et. al.*, Index No. 655144/2018 (the **Michael Rosenberg Action**) is denied as moot.

Accordingly, it is

ORDERED that Midtown Properties' motion for consolidation is denied; and it is further

ORDERED that Zee Co.'s motion to dismiss is granted and the complaint is dismissed in its entirety without prejudice, and the Clerk is directed to enter judgment accordingly.



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1/14/2020  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: