

<b>Retailing Enters., LLC v New WTC Retail Owner LLC</b>
2021 NY Slip Op 31849(U)
June 1, 2021
Supreme Court, New York County
Docket Number: 160641/2019
Judge: Phillip Hom
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. PHILLIP HOM **PART** **IAS MOTION 2**

*Justice*

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RETAILING ENTERPRISES, LLC D/B/A INVICTA STORE  
AT WESTFIELD

Plaintiff,

**INDEX NO.** 160641/2019

**MOTION DATE** May 21, 2021

**MOTION SEQ. NO.** 001

- v -

NEW WTC RETAIL OWNER LLC D/B/A WESTFIELD  
WORLD TRADE CENTER,

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23

were read on this motion to/for DISMISS.

Defendant New WTC Retail Owner LLC d/b/a Westfield World Trade Center moves to dismiss the First Amended Complaint (“FAC”) of Plaintiff Retailing Enterprises, LLC d/b/a Invicta Store at Westfield and for attorneys’ fees, costs and disbursements. Upon the foregoing documents, and after having heard oral argument on the record on May 21, 2021, it is ORDERED that the motion is granted and the FAC is dismissed, with prejudice.

*Background<sup>1</sup>*

Plaintiff Retailing Enterprises, LLC d/b/a Invicta Store at Westfield (“Invicta”) is suing Defendant New WTC Retail Owner LLC d/b/a Westfield World Trade Center (“Westfield”) for breach of contract, nuisance and fraudulent inducement related to the leasing of a retail storefront

<sup>1</sup> All facts and allegations in this section are from the First Amended Complaint, NYSCEF Doc. No. 5.

in the Westfield Mall located in the Oculus Transportation Hub in the rebuilt World Trade Center. Westfield holds the master ground lease for the mall property from the Port Authority.

Invicta alleges that in late 2013, Westfield representatives met with Invicta representatives to show them the available retail space at the then unfinished mall and to persuade Invicta to enter into a lease agreement. Westfield representatives showed Invicta representatives the underground, lower-level retail space which Invicta eventually leased (the “Premises”), which Westfield allegedly said was a premier corner location allowing glass windows on two sides to provide enhanced visibility, and located close to planned PATH train and subway entrances, generating foot traffic, making that space valuable and warranting premium rents.

However, Invicta states the PATH and subway entrances did not open and it was not allowed to install glass windows on two sides of the Premises. Invicta states visibility was further hampered when a security booth was installed directly in front of the Premises blocking visibility and access.

### *The Lease<sup>2</sup>*

The parties executed the Lease on June 20, 2014. Among some relevant provisions of the Lease are:

- Section 5.03 entitled “Condition of Premises,” provides that “[t]enant hereby agrees that upon delivery of possession of the Premises to tenant, tenant shall accept such delivery of possession of the Premises in its then existing ‘AS IS’ condition, and Tenant acknowledges (i) that tenant shall have inspected the premises and shall be fully aware of the condition of the Premises as of delivery of possession” and that “[t]enant irrevocably waives any claim based upon or related to any such claimed representation by Landlord or any claimed

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<sup>2</sup> The information for this section is from the Lease executed by Invicta and Westfield, NYSCEF Doc. No. 10.

representation by Landlord as to traffic to be expected at the Premises or sales to be expected at the Premises.”

- Section 6.04 provides that ongoing construction related to expansion work at the Mall may cause annoyances such as noise, construction, vibration, dust and debris, but that these annoyances would not constitute constructive or actual eviction or create liability for Westfield.
- Section 8.01 provides Westfield would not be liable or responsible to Invicta for any omission or act of the Port Authority or other third-party.

*Motion to Dismiss a Complaint under CPLR §3211(a)(1) and (7)*

When a party moves to dismiss a complaint under CPLR §3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1<sup>st</sup> Dept 2013]). Although bare legal conclusions are not presumed to be true on a motion to dismiss under CPLR §3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]).

Whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss (*Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 [1<sup>st</sup> Dept 2008]; *African Diaspora Mar. Corp. v Golden Gate Yacht Club*, *supra* at 211). On a motion to dismiss the complaint, “the pleading is to be afforded liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, CPLR §3211(a)(1) warrants dismissal of a cause of action where the court finds that the documentary evidence presented conclusively establishes a defense to the asserted claims as a matter of law (*150 Broadway N.Y. Assocs. L.P. v Bodner*, 14 AD3d 1, 5 [1<sup>st</sup> Dept 2004]).

*Breach of Contract Cause of Action*

Invicta alleges that Westfield breached the Lease, by failing to ensure the opening of the Path and subway entrances, failing to provide a promised level of foot traffic, failing to provide a first-class, luxury shopping environment, and failing to provide unfettered consumer access to the Premises and hindering and interrupting Invicta's quiet enjoyment of the Premises. Invicta's breach of contract cause of action must be dismissed for two reasons.

The Court finds that Invicta has failed to allege the breach of any particular Lease provision (*Feld v Apple Bank for Sav.* 116 AD3d 549, 550 [1<sup>st</sup> Dept 2014]). Invicta does not cite to any Lease provisions where Westfield promised there would be PATH train and subway entrances near the Premises, to provide a certain level of foot traffic, to provide a first-class, luxury shopping environment, and to provide unfettered consumer access to the Premises, and not hinder and interrupt Invicta's quiet enjoyment of the Premises.

Invicta's claim is also barred by documentary evidence. The Lease's merger clause specifically "supersedes all prior agreements between the parties" and provides "there are no actual or implied covenants, promises, agreements, conditions or understandings, either oral or written, between them other than as are set forth herein" (NYSCEF Doc. No. 1 page 85; *Ashwood Capital Inc. v OTG Mgmt., Inc.*, 99 AD3d 1, 9 [1<sup>st</sup> Dept 2012]). Article 25 of the Lease does provide that the landlord or its agents will not hinder or interrupt Invicta's quiet enjoyment, however it was third parties that did the construction and caused the soot and smoke and the parties agreed Westfield would not be held responsible for the actions of third parties.

For these two reasons, Invicta's breach of contract cause of action is dismissed.

### *Nuisance and Beach of Quiet Enjoyment*

The FAC alleges under section 25.01 of the Lease, Westfield was required to provide quiet enjoyment of the Premises, but this was violated when Westfield permitted nuisances including smoke and particulate matter to enter the Premises through an improperly sealed floor, water leaks and unsightly construction, breaching Invicta's quiet enjoyment. While attempting to label these as separate claims, they are related to the Lease. As stated above, the Lease provisions provide that Westfield "shall not be responsible or liable to [Invicta] for any loss or damage" as a result of "the acts or omissions" of persons occupying property "adjacent to or connected with the Premises or any part of the Retail Component, or any other area in the World Trade Center"(NYSCEF Doc. No. 10, page 80).

Similarly, Invicta alleges that the concrete floor slab was not sealed properly, which allowed smoke and soot to seep into its store. The Lease charged Invicta with the responsibility of making sure the floors in the Premises were properly sealed (*id* Exhibit B page 7). Also, in a breach of the covenant of quiet enjoyment "a tenant must show an ouster, or if the eviction is claimed to be constructive... an abandonment of the premises" (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 237 [1<sup>st</sup> Dept 2006]). Invicta does not allege an ouster or that it abandoned the Premises. The Court finds that the second cause of action for nuisance and breach of quiet enjoyment are duplicative of the breach of contract claim and thus are similarly dismissed (*70 Pinehurst Ave. LLC v RPN Mgt. Co. Inc.*, 123 AD3d 621 [1<sup>st</sup> Dept 2014] *citations* omitted).

### *Fraudulent Inducement*

Invicta's third cause of action for fraudulent inducement alleges Westfield misrepresented to Invicta that the premises would be a corner location with visibility on two

sides, be near a PATH and subway entrance and that Westfield had authority and control sufficient to make these representations. The third cause of action for fraudulent inducement is also dismissed. A claim for fraudulent inducement must be set forth with particularity (CPLR §3016 [b]). Statements reflecting puffery, hope and opinion cannot support a claim for fraudulent inducement (*Elghanian v Harvey*, 249 AD2d 206 [1<sup>st</sup> Dept 1998]). The disclaimers in the Lease once again bar Plaintiff's claim for fraudulent misrepresentation (*Dannan Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]).

#### *Attorneys' Fees*

Generally, a prevailing party may not collect attorneys' fees from the losing party unless there is an agreement between the parties, statute or court rule authorizing it. (*Congel v.*

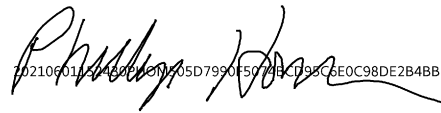
*Malfitano*, 31 NY3d 272 [2018]). Section 27.22 of the Lease provides:

If at any time after the date that this Lease has been executed by Landlord and Tenant, either Landlord or Tenant institutes any action or proceeding against the other relating to the provisions of this Lease or any default hereunder, the non-prevailing party in such action or proceeding shall reimburse the prevailing party for the reasonable expenses of attorneys' fees and all costs and disbursements incurred therein by the prevailing party, including, without limitation, any such fees, costs or disbursements incurred on any appeal from such action or proceeding. Subject to the provisions of local law, the prevailing party shall recover all such fees, costs or disbursements as costs taxable by the court or arbiter in the action or proceeding itself without the necessity for a cross-action by the prevailing party.

This provision awards attorneys' fees, costs and disbursements to the prevailing party in any action between the Invicta and Westfield relating to the lease. Accordingly, the Court sets a hearing on attorneys' fees, costs and disbursements for June 30, 2021. Westfield shall file an affirmation of services rendered, costs and disbursements by June 16, 2021. Invicta shall file objections, if any, by June 23, 2021.

*Conclusion*

Accordingly, the motion is granted, the complaint is dismissed in its entirety and a hearing on attorneys' fees, costs and disbursements is scheduled for June 30, 2021.



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<u>6/1/2021</u> DATE					<u>PHILLIP HOM, J.S.C.</u>			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT		<input type="checkbox"/>	REFERENCE