

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Justice of the Supreme Court

MOTION DATE 12/19/12  
ADJ. DATE 2/15/13  
Mot. Seq. #006 - MG

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TWO TWELVE MANAGEMENT, LLC, and JOSEPH MELI,	: EDWARD BURKE JR. & ASSOCIATES
	: Attorney for Plaintiffs
	: 62 Main Street, P.O. Box 3319
	: Sag Harbor, New York 11963
	: :
	: ESSEKS, HEFTER & ANGEL, LLP
	: Attorney for Defendants Chris Connor &
	: Steven Gambrel
	: 108 East Main Street, P.O. Box 279
	: Riverhead, New York 11901
	: :
	: MARGOLIN & PIERCE, LLP
	: Attorney for Defendant NRT New York, LLC
	: d/b/a The Corcoran Group
	: 111 West 57 <sup>th</sup> Street, Suite 410
	: New York, New York 10019
	: :
	: -----X

- against -

CHRIS CONNOR, STEVEN GAMBREL, and  
NRT NEW YORK, LLC d/b/a THE CORCORAN  
GROUP,  
  
Defendants.

Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-16; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 17-27; Replying Affidavits and supporting papers 28-29; Other defendants' memorandum of law; (and after hearing counsel in support and opposed to the motion) it is,

*ORDERED* that the motion by defendants Chris Connor and Steven Gambrel for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint against them, is granted.

This is an action to recover damages for fraud and breach of contract relative to a lease agreement dated February 18, 2008 between Chris Connor and Steven Gambrel, as landlord, and Two Twelve Management LLC, as tenant, for the residential property located at 53 Glover Street, Sag Harbor, New York. The plaintiffs claim, generally, that they were prevented from making the commercial use of the premises authorized by the lease and which was represented by Chris Connor and Steven Gambrel ("the defendants") to be a permitted use. The plaintiffs seek to recover rent paid as well as damages for economic and reputational losses allegedly suffered by reason of the defendants' conduct.



According to the complaint, sometime during the winter of 2008, the plaintiffs decided to enter into a joint commercial venture whereby they would lease a high-end dwelling in the Town of Southampton for the summer of 2008 in order to hold events (including a private concert series), entertain clients and their guests, and provide a venue for their advertisers. In order to locate and secure such a dwelling, the plaintiffs retained the services of defendant The Corcoran Group ("Corcoran"), a residential real estate firm.<sup>1</sup> On or about February 16, 2008, a Corcoran representative introduced the plaintiffs to the property and to the defendants. The plaintiffs allege that while showing the property, the defendants demonstrated their awareness of the commercial use to be made by "enthusiastically" discussing the many commercial events they had personally held at the property, and by describing how the property had been altered to maximize the "flow" of an event. The plaintiffs also allege that the defendants indicated their willingness to be available as resources to assist in matters such as parking and assured that there would be no problem with the Village or the neighbors because they routinely entertained upwards of 100 people at the property.

Based on their tour of the property and on the defendants' representations, on or about February 18, 2008, the plaintiffs executed a lease agreement for the term commencing May 23, 2008 and ending September 1, 2008 at a rental of \$330,000.00.<sup>2</sup> Paragraph 2 of the lease agreement provides as follows:

The Premises shall be used for residential purposes only by the Tenant, Tenant's family, and for select weekends during the lease term the tenant may use the location for food shows (with a maximum of four filmed) or other approved events including, but not limited to outdoor music, dinner parties, cocktail parties or similar events. Tenant agrees to limit access to guests, film crews etc. to the grounds of 53 Glover St and not allow loitering in front of the premises. Tenant shall comply with all laws, ordinances, and regulations of Federal, State and Local governments, applicable to the Premises and Tenant's use thereof. Any violation of said laws, ordinances or regulations shall be deemed a substantial breach of this Lease. Landlord agrees that if Tenant pays the said rent and performs according to the terms of this Lease, the Tenant may peaceably have, hold and enjoy the Premises for the term of this Lease. Tenant recognizes that the property is in a Village setting and agrees to act in a manner that will ensure the goodwill of the neighbors. Occasional complaints will not violate the terms of the lease, but continued major written violations may constitute action for violation of the lease terms.

The plaintiffs allege, however, that despite the defendants' assurances and the relevant terms of

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<sup>1</sup> In his supporting affidavit, the defendants' attorney represents that the plaintiffs settled their claim against Corcoran. It does not appear, however, that a valid stipulation of discontinuance, signed by the attorneys of record for all parties, was ever filed. Irrespective of whether the plaintiffs' claims against Corcoran are still viable, Corcoran remains an active party in this action by reason of the defendants' pending cross claim for contractual indemnification. By order dated September 26, 2011, the court granted only so much of Corcoran's motion to dismiss as pertained to the defendants' cross claim for contribution.

<sup>2</sup> Notwithstanding the allegation in the complaint, it appears that Scott R. Feldman, the president and CEO of Two Twelve Management, LLC, signed the lease agreement on March 19, 2008.

the lease agreement, they were effectively prevented from using the property for their desired purposes. Prior to their first event, an outdoor concert and dinner party to be held on July 5, 2008, the plaintiffs were informed by Gregory N. Ferraris, the Mayor of the Village of Sag Harbor, that if they proceeded with the event, he would authorize the Village Attorney to seek a court injunction. As a result, the plaintiffs claim that they were forced at the last minute to find another venue for the event and, consequently, that they lost sponsors and ticket sales and that they incurred costs associated with the relocation. The plaintiffs further allege that their subsequent attempts to have small dinner parties at the property were interrupted and ultimately thwarted by baseless noise complaints to the Village of Sag Harbor Police Department. By letter dated July 28, 2008, the plaintiffs advised the defendants that they had vacated the property as of July 15, 2008 and demanded the return of the rent paid. This action followed.

As set forth in their complaint, the plaintiffs' theory of recovery is that they would not have entered into the lease agreement "[b]ut for the misrepresentations and false warrants made by [the defendants] that a commercial use could be made at the subject premises, has been made at the subject premises, and does not violate the Village Code."

By order dated September 7, 2010, the court denied the defendants' pre-answer motion to dismiss the complaint for failure to state a cause of action, without prejudice to renewal upon the completion of discovery.

Now, issue having been joined and discovery having been completed, the defendants move for summary judgment on the ground that the plaintiffs have failed to state a cause of action.

To prevail on a cause of action for fraud, a plaintiff must plead and prove a misrepresentation or an omission of material fact which was false and known to be false when made, for the purpose of inducing the plaintiff to rely upon it, justifiable reliance of the plaintiff on the misrepresentation or material omission, and injury (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 646 NYS2d 76 [1996]). To establish a cause of action for breach of contract, a plaintiff must demonstrate the existence of an agreement between the parties, consideration, performance by the plaintiff, the defendant's failure to perform, and resulting damage (*Furia v Furia*, 116 AD2d 694, 498 NYS2d 12 [1986]).

The defendants' motion is granted. To the extent that the plaintiffs' cause of action is premised on the defendants' representations regarding their prior use of the property, the plaintiffs have not alleged that those statements were false. There is nothing in the record to rebut the evidence that the defendants frequently rented the property for fundraisers, charity events, large parties, and photo shoots, and were as surprised as the plaintiffs at the Village's refusal to permit the planned events.

As to the claim that the defendants misrepresented that the property could be used for a commercial purpose, the plaintiffs cannot demonstrate that they reasonably relied on those misrepresentations to their detriment. A plaintiff cannot claim reliance where, as here, it is a sophisticated business person or entity with the means of ascertaining the truth of a representation, but fails to take reasonable steps to protect itself against the alleged deception (*DDJ Mgt. v Rhone Group*, 15 NY3d 147, 905 NYS2d 118 [2010]). Despite their concerns that the Village might not permit the

uses which the defendants had approved, it appears the plaintiffs made only a vague attempt to ascertain the relevant zoning restrictions or to resolve their concerns with Village officials, did not obtain a written representation or warranty as to the legality of the proposed uses, and did not insist on making the payment of rent contingent on obtaining the required permits (*see id.*; *cf. Lunal Realty v DiSanto Realty*, 88 AD3d 661, 930 NYS2d 619 [2011]).

As to the alleged misrepresentation that the Village "would not have a problem" with the proposed uses, this is merely a statement of future expectation which is not actionable in fraud (*see Goldman v Strough Real Estate*, 2 AD3d 677, 770 NYS2d 94 [2003]). Insofar as the plaintiffs seek recovery on a breach of contract theory, it is evident that the plaintiffs failed to plead or otherwise identify any contractual duty or warranty which the defendants may be said to have breached. As the defendants correctly note, the lease agreement did not guarantee that the plaintiffs would be able to use the property for the desired purposes but only approved the use of the property for those purposes. To the extent that the Village allegedly took it upon itself to prevent the property from being so used, such action would not translate into a breach on the part of the defendants.

The court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims (*see n 1, supra*) shall continue (*see CPLR 3212 [e] [1]*).

Dated:

June 6, 2013

  
A.J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION