

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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GERARD FOX LAW, P.C.

Plaintiff,

- V -

THE VORTEX GROUP, LLC,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for

INDEX NO. 654794/2018

MOTION DATE 07/10/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

DISMISS

This is an action for breach of fiduciary duty, fraud, negligent misrepresentation, and professional negligence brought by Gerard Fox Law, P.C. (**Gerard Fox**) against its former real estate broker, the Vortex Group, LLC (**Vortex**). Vortex asserts counterclaims for fraud and violation of Judiciary Law § 487. Gerard Fox moves pursuant to CPLR §§ 3016 and 3211 (a) (7) to dismiss Vortex’s counterclaims in their entirety. For the reasons set forth below, the motion is granted.

FACTS RELEVANT TO THE MOTION

Gerard Fox is a Los Angeles-based law firm that was looking to expand into New York City when, in the Fall of 2015, it engaged the services of Vortex to assist with its search for suitable office space (Complaint, ¶¶ 1-2). Vortex is a commercial real estate advisory firm with a particular expertise in helping law firms lease office space (*id.*, ¶ 1). Gerard Fox enlisted Vortex’s services to find “a small starter office in Mid-town with five or six offices, a conference room and one or two secretarial bays” (*id.*, ¶ 9). When Gerard Fox initially hired Vortex for this

purpose, it informed Vortex that its budget was \$28,000 per month (*id.*). Shortly thereafter, Gerard Fox indicated to Vortex that it had increased its budget to \$30,000 per month (*id.*). Gerard Fox alleges that Vortex produced an initial report on September 24, 2015 presenting only properties that were outside of Gerard Fox's budget (*id.*, ¶ 11).

In its answer and counterclaims, Vortex alleges that, of the twelve spaces that it presented to Gerard Fox in its initial report, only two were outside of its budget (Counterclaim, ¶¶ 110-111). And for one of those properties, Tower 49 (where Gerard Fox eventually leased a larger space), Vortex's initial report included a budget-friendly "starter office" option of 3,000 square feet for \$23,500 per month (*id.*, ¶ 112). Vortex asserts that Gerard Fox rejected all options initially presented that were within its budget in pursuit of something bigger and more expensive (*id.*, ¶ 113).

In response to its request, Vortex presented Gerard Fox with a proposal for a larger space at the Tower 49 property (*id.*, ¶ 119). Vortex ultimately negotiated a deal with Kato International LLC (**Kato**), the Tower 49 landlord, on behalf of Gerard Fox, and Kato sent Gerard Fox a proposed lease. Vortex alleges that Gerard Fox asked Vortex to review the proposed Tower 49 lease, but Vortex expressly declined to do so and indicated that Gerard Fox should seek legal counsel before entering into the lease (*id.*, ¶ 126-127). One of Gerard Fox's partners, Ed Altabet, conducted the legal review of the lease and represented Gerard Fox in the lease transaction (*id.*, ¶ 128). Gerard Fox entered into an Original Lease Agreement (the **Original Lease**), dated October 28, 2015, by and between Gerard Fox and Kato, as amended by a First Amended Lease, (the **Lease Amendment**, the Lease Amendment, together with the Original Lease, collectively,

the **Lease**), dated October 11, 2016, by and between Gerard Fox and Kato, pursuant to which Gerard fox agreed to rent office space on the 26th floor of Tower 49 (Complaint, ¶¶ 14, 17). Under the Original Lease, Gerard Fox rented a portion of the 26th floor at an initial base rent of \$59,000 per month (*id.*, ¶ 14). Pursuant to the Lease Amendment, Gerard Fox took the remaining portion of the 26th floor for a total base rent of \$110,000 per month, increasing to \$120,000 per month beginning in 2021, with the lease term expiring in 2027 (*id.*, ¶ 17).

Gerard Fox alleges that, from the very beginning, the leased office space had several issues, including loud noises, unsatisfactory construction, a poorly-functioning HVAC system, and a lack of an electricity submeter, resulting in overcharges for electricity (*id.*, ¶ 19). It also alleges that, despite assurances from Vortex that it would be able to sublease any unused space, it was unable to do so, even at a steep discount (*id.*, ¶ 20). Gerard Fox asserts that Vortex failed to assist it in dealing with these issues (*id.*, ¶ 19). Following failed attempts to sublease the space, Gerard Fox vacated the property on May 7, 2018 (*id.*, ¶ 23). After Gerard Fox surrendered possession of the office space, Kato sued Gerard Fox for back rent (*id.*). Gerard Fox remains liable for future rent payments (*id.*).

Gerard Fox commenced this action by filing a summons with notice on September 27, 2018. Vortex served a demand for complaint on October 9, 2018, and Gerard Fox filed a complaint on December 13, 2018, asserting causes of action for breach of fiduciary duty, fraud, negligent misrepresentation, and professional negligence against Vortex. Vortex filed an answer on January 24, 2019 and asserted counterclaims for fraud and violation of Judiciary Law § 487. Gerard Fox now moves to dismiss Vortex's counterclaims.

DISCUSSION

On a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), the Court must accept every allegation in the complaint as true afford the pleadings a liberal construction (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court allows the plaintiff the benefit of every favorable inference in determining whether the facts alleged in the complaint fit within any cognizable legal theory (*id.*, at 87-88). Bare legal conclusions are not accorded favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

First Counterclaim: Fraud

To state a cause of action for fraud, a plaintiff must allege (i) a misrepresentation or material omission of fact known to be false by the defendant, (ii) made for the purpose of inducing the plaintiff to rely on it, (iii) justifiable reliance by the plaintiff, (iv) and injury (*Rather v CBS Corp.*, 68 AD3d 49, 57 [1st Dept 2009]). A cause of action for fraud must be pled with particularity to meet the heightened pleading standard under CPLR § 3016 (b)] (*Manda Intern. Corp. v Yager*, 139 AD3d 594, 594 [1st Dept 2016]). The measure of damages in a cause of action for fraud is governed by the “out-of-pocket” rule, which dictates that the plaintiff is entitled to the actual pecuniary loss incurred as a direct result of the fraudulent conduct (*Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 538 [1st Dept 2016]).

“Undeterminable and speculative” claims for damages with regard to causes of action for fraud are not compensable, (*id.*, at 540, citing *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 422 [1996]), nor are theoretical or conclusory allegations of reputational harm resulting from the defendant’s alleged fraud (*Connaughton*, 135 AD3d at 538-40). Mere puffery or statements of

future expectations of performance are insufficient to support of a cause of action for fraud (*Sidamonidze v Kay*, 304 AD2d 415, 416 [1st Dept 2003]).

Here, the facts alleged in the answer in support of the counterclaims, even when viewed in the light most favorable to Vortex, do not support the inference that Vortex suffered any calculable damages based on Gerard Fox's alleged fraudulent conduct. The only allegation regarding damages set forth in the answer merely states that when Gerard Fox defaulted on the Lease, Vortex's reputation with other commercial real estate firms was damaged because Vortex had advocated on behalf of Gerard Fox in helping it secure the office space (Answer, ¶ 195). Vortex does not, however, allege that it suffered any monetary harm or that its relationships with any specific entities, such as the bank or the landlord involved in this matter, were adversely impacted. Without more, this conclusory allegation does not support the inference that Vortex suffered any cognizable injury as a result of Gerard Fox's alleged conduct. Vortex's failure to adequately plead compensable damages is fatal to its counterclaim for fraud (*Connaughton*, 135 AD3d at 540). Further, Gerard Fox's alleged misrepresentations regarding expected future income growth fall into the category of mere puffery or expectations of future performance, which cannot sustain a cause of action for fraud (*Sidamonidze*, 304 AD2d at 416).

Second Counterclaim: Judiciary Law § 487

To state a cause of action for violation of Judiciary Law § 487, a party must plead intentional deceit and damages proximately caused by the deceit (Judiciary Law § 487; *Jean v Chinitz*, 163 AD3d 497, 497 [1st Dept 2018]). To be actionable, the alleged deceit must have occurred during a pending judicial proceeding (*US Suite LLC v Baratta, Baratta & Aidala LLP*, 171 AD3d 551,

551 [1st Dept 2019]). Allegations of deceit or an intent to deceive must be stated with particularity (CPLR § 3016 [b]; *Facebook v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015]). Where a cause of action under Judiciary Law § 487 is based on allegations of false statements in pleadings, a party may prevail by establishing that “the lawsuit could not have gone forward in the absence of the material misrepresentation, [and] that party’s legal expenses . . . may be treated as the proximate result of the misrepresentation” (*Amaltifano v Rosenberg*, 12 NY3d 8, 15 [2009]).

This counterclaim is based on Gerard Fox’s statements made in its complaint and in its opposition to Kato’s motion for summary judgment in a related action (Answer, ¶ 196). Vortex asserts that Gerard Fox knowingly made several false statements concerning the underlying events in this matter as contrived predicates for its claims with the intent to deceive the Court. For example, Paragraph 2 of the Complaint provides:

Specifically, in the Fall of 2015, [Gerard Fox] sought to lease space with room for five to six offices and a conference room, within its monthly budget of \$28,000-\$30,000. [Gerard Fox] spelled out its needs and budget in writing, and reinforced those points during lengthy face-to-face meetings. Vortex, however, had a difference agenda. Viewing [Gerard Fox] as an out-of-town “yokel” it could work for a fat commission, Vortex upsold [Gerard Fox] from the get-go. Vortex exclusively presented options far outside of [Gerard Fox’s] price range, including a space in “Tower 49,” located at 12 East 49th Street, New York, New York. To encourage [Gerard Fox] to rent office space beyond its budget, Vortex represented falsely that the rent was below-market and a great deal.

The documentary evidence reveals that these statements, which reflect the gravamen of Gerard Fox’s allegations, are not only misleading, but also demonstrably false. Vortex’s space report, which sets forth the properties that Vortex presented to Gerard Fox, illustrates that 10 of the 12 properties were within Gerard Fox’s stated budget (NYSCEF Doc. Nos. 28, 29). Therefore, this

lawsuit is premised on material misrepresentations of fact and, as a proximate result of those misrepresentations, Vortex was compelled to defend the action and incur legal fees. Assuming Vortex's allegations to be true and affording Vortex every favorable inference, the counterclaim for violation of § 487 is adequately pled to survive dismissal.

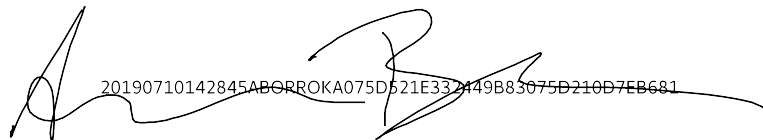
Accordingly, it is

ORDERED that the motion is granted in part to the extent that the first counterclaim for fraud is dismissed and is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference forthwith.

7/9/2019

DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE