

NYSCF DC SUPREME COURT OF THE STATE OF NEW YORK 07/18/2018
NEW YORK COUNTY

HON. GERALD LBOVITS

PRESENT: _____ J.S.C. Justice

PART 2

Index Number : 654459/2017
FMRE LLC
vs
SMALL, BENJAMIN
Sequence Number : 001
DISMISS DEFENSE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, It is ordered that this motion is granted
~~granted with four conditions and four conditions~~
~~and four conditions~~
resolved per the attached order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/18/18 [Signature] J.S.C.
HON. GERALD LBOVITS

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

FMRE LLC,

Plaintiff,

-against-

BENJAMIN SMALL,

Defendant.

Index No.: 654459/2017

DECISION/ORDER
Motion Seq. 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion to dismiss.

Papers

NYSCEF Documents Numbered

Plaintiff's Notice of Motion.....	5
Plaintiff's Affidavit in Support of Motion.....	6
Plaintiff's Affirmation in Support of Motion.....	8
Plaintiff's Memorandum of Law in Support of Motion.....	12
Defendant's Affidavit in Opposition to Plaintiff's Motion.....	14
Defendant's Memorandum of Law in Opposition to Plaintiff's Motion.....	15
Plaintiff's Memorandum of Law in Reply.....	17

Cinotti, LLP, New York, New York (Adam Michael Levy of counsel), for plaintiff.

The Adams Law Firm, LLC, Wanaque, New Jersey (Robert M. Adams of counsel), for defendant.

Gerald Lebovits, J.

Plaintiff's motion to dismiss defendant's first and fourth counterclaims and fourteenth and sixteenth affirmative defenses is granted.

Defendant's first counterclaim is that plaintiff made false representations fraudulently to induce defendant to enter into a lease for the apartment unit at issue. Defendant's claim is based on four factual allegations: (1) that plaintiff hid that a neighboring building was scheduled to be demolished and that a hotel was to be built on that site, (2) that the management company for the apartment building is atrocious, (3) that the building's elevator and heating and hot-water system have maintenance issues, and (4) that the quality of the apartment unit was lower than plaintiff represented.

Defendant's first counterclaim is without merit. With respect to the first and second factual allegations, plaintiff did not have a fiduciary duty to disclose that information. Also, the third factual allegation is duplicative of breach of contract claim. Paragraph 29 of the lease agreement, moreover, incorporates a disclaimer that defendant relies on plaintiff's representation related to the physical condition of the apartment building. Finally, with respect to the quality of

the apartment unit, paragraph 29 of the lease agreement provides that the lease covers the apartment unit only in an "as is" condition and incorporates a specific disclaimer that defendant relies on plaintiff's representation about the physical condition of the apartment unit.

Defendant's fourth counterclaim is for unjust enrichment, which is not allowed when a written contract governs. There is no dispute that a written contract exists or that it covers the subject matter of defendant's claims. Therefore, defendant's unjust enrichment claim is barred.

Defendant's fourteenth and sixteenth affirmative defenses are fraud and misrepresentation, respectively. These duplicate defendant's first counterclaim and, therefore, must be dismissed.

Accordingly, it is

ORDERED that defendant's first and fourth counterclaims are dismissed; and it is further

ORDERED that defendant's fourteenth and sixteenth affirmative defenses are dismissed; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on defendant and on the County Clerk's Office, which shall enter judgment accordingly.

Dated: July 17, 2018

J.S.C. 
HON. GERALD LBOVITS
J.S.C.