

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,  
Justice.**

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**HAKIMIAN GROUP, LLC,**

**Plaintiff,**

**- against -**

**PHILIPS CUTTER MILL OWNER, LLC,**

**Defendant.**

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**TRIAL/IAS PART 14**

**Index No.: 603755-18**

**Motion Date: 6/7/18**

**Sequence No.: 001**

**DECISION AND ORDER**

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits.....	1
Memorandum of Law in Support.....	2
Affidavit of Peter Hakimian.....	3
Memorandum of Law in Opposition.....	4
Reply Memorandum of Law.....	5

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**PRELIMINARY STATEMENT**

Defendant brings this application for order pursuant to CPLR § 3211(a)(1) and (a)(7) dismissing, with prejudice, plaintiff's complaint in its entirety, along with such other and further relief in favor of defendant as this Court may deem just and proper under the circumstances, including, but not limited to, an award of reasonable attorneys' fees and the costs of this application. Opposition to this application has been submitted by plaintiff.

**BACKGROUND**

This action involves a commercial lease between Hakimian Group, LLC ("Hakimian") as lessee, and Philips Cutter Mill Owner, LLC ("Philips") as lessor. The lease was entered into on June 30, 2017 (Exh. "B") to motion). The Demised Premises are described as Suite 504, as depicted in a sketch as Exh. "A" to the lease, on which it is stated that "all areas, conditions and dimensions are approximate. This plan is intended for identification purposes only and is not

deemed to be a representation by Landlord as to accuracy of square footage.”

On March 21, 2018 Hakimian commenced this action against Philips by filing a Summons and Complaint. The Nature of the Action, as alleged in the Complaint, is that it arises out of Landlord/Defendant Philips either mistakenly, or intentionally and fraudulently with malice, overcharging Hakimian rent, electric charges and additional rent by calculating such sums upon an incorrect square footage, which is nearly 60% larger than the space provided to Hakimian for use and occupancy of Suite 540 in the demised premises. Despite bringing the discrepancy to the attention of Philips, it continues to charge commercially unreasonable and inflated rent for the leased space.

Plaintiff alleges that when Domenic Maltempi, on behalf of Philips, showed plaintiff Suite 504, he advised plaintiff that the rentable square footage of Suite 504 was 1,069 square feet. It was then agreed that the subject premises would be leased to plaintiff at the rate of \$33.00 per square foot, with base year taxes included, and electric usage charged to plaintiff at the rate of \$3.35 per square foot. Plaintiff alleges that at all times it was the understanding of plaintiff and defendant that plaintiff was leasing 1,069 square feet. After occupying the premises, plaintiff determined that the reconfigured Suite 504 did not contain 1,069 square feet, but rather 681.8 sq. ft., not counting the surrounding walls. Even if the surrounding walls were included, the leased area was 749.2 sq. ft.

The fixed annual rent was calculated on the basis of \$33.12 per sq. ft. for 1,069 sq. ft. but amounts to \$51.92 if 681.8 sq. ft. is utilized. Therefore, plaintiff claims it is being charged 56.76% more in rent per annum than was agreed by the parties, since Suite 504 contains 387.2 sq. ft. less than was represented by defendant to plaintiff. Plaintiff asserts Five Causes of Action as follows:

The First Cause of Action alleges that defendant has mischarged and overcharged plaintiff for “Fixed Annual Rent”, “electric energy usage” and “Plaintiff’s Proportionate Share”, and plaintiff is entitled to reformation of the lease to accurately reflect these three items, and for monetary damages in the amount overcharged by defendant.

In the Second Cause of Action, plaintiff alleges that in presenting inaccurate measurements in the lease, overcharging plaintiff, and refusing to enter into a correction of the lease, defendant has breached the covenant of good faith and fair dealing. Plaintiff claims damages in an amount not less than \$100,000.

In the Third Cause of Action, plaintiff claims entitlement to a declaration that the lease contains inaccurate "Fixed Annual Rent", "electric energy usage", and "Plaintiff's Proportionate Share", and that correct figures are based upon the use of 682.8 square feet, multiplied by the respective rent and additional base figures as agreed to by the parties.

The Fourth Cause of Action alleges fraudulent misrepresentation with intent to deceive plaintiff by defendant. Plaintiff was unaware that the representation as to the size of Suite 504 was false, and relied upon false representations made by defendant's agents. Plaintiff seeks damages of not less than \$100,000, and punitive damages of \$120,000.

Plaintiff alleges in the Fifth Cause of Action that defendant has engaged in deceptive practices in violation of General Business Law § 349, including but not limited to marketing to the general public and plaintiff, in particular, commercial office space leased upon a rent and additional rent based on a computation of a negotiated price to be multiplied by the actual rental square footage. Plaintiff claims entitlement to an award of damages as authorized by General Business Law § 349 and the award of counsel fees.

Defendant moves to dismiss the Complaint pursuant to CPLR § 3211 (1) and (7). They contend that all Causes of Action arise from a written commercial lease between the parties for Suite 504 at 60 Cutter Mill Road, Great Neck, New York. The causes of action assert that defendant, through its broker orally misrepresented, either negligently or fraudulently, the square footage of the premises, resulting in a miscalculation of the rent and additional rent for the premises.

Defendant argues that no expression of square footage is included in the lease. Neither is there any basis in the written lease to the effect that the amount of rent based upon square footage. The only description of Suite 504 is set forth as Exh. "A" to the lease, which specifically provides that the plan is intended for identification only, and is not representative by landlord as to the accuracy of square footage.

In addition, defendant points to the disclaimer in the lease, which states that "no oral statements or representations or prior written matter in respect thereof not contained in this lease shall have any force and effect." The lease also contains a specific representation by plaintiff that it is leasing the premises " . . . after a full and complete examination thereof and Tenant is accepting same "as is" in their condition as of the date of this Lease without any representation or warranty (express or implied) by Landlord or its agents and without recourse to Landlord or its

agents as to the condition, title, usability, zoning . . .”.

Defendant argues that the Complaint must be dismissed in accordance with § 3211 (a)(1) sine the claims by plaintiff as to the reliance upon square footage to calculate basic rent, and that the lease contains specific disclaimers with respect to oral representations not contained in the lease are to have no force or effect, and specific representations by plaintiff that it had opportunity to examine the premises prior to executing the lease, and that the lease was executed after a full and complete examination of the premises, which were accepted “as is”. Moreover, the representation as to the square footage was not a fact peculiarly within defendant’s knowledge, and plaintiff had the means to ascertain the square footage of the premises by executing due diligence prior to executing the lease.

#### DISCUSSION

CPLR § 3211 (a)(1) provides as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence;

In order to succeed in a claim based upon documentary evidence, “. . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim”. (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine*, 2010 WL 3583424 (N.Y.A.D. 2d Dept.)).

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Reformation of a contract is available where there is a mutual mistake of fact, or a

unilateral mistake, coupled with fraud. A party resisting pretrial dismissal of a reformation claim is required to tender " 'a very high order' " of evidence in evidentiary form to overcome the " 'heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties' " (*Mantek Services, Inc. v. Rye Office Associates*, 149 A.D.2d 671 [2d Dept. 1989], quoting *Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219 [1978]). *Mantek* involved a claim for a reformation of a written lease on the ground of mutual mistake, or, alternatively, unilateral mistake accompanied by fraud. Plaintiff complained that defendants misrepresented the measurement of the actual square footage of the leased premises, based upon which there were additional rental payments for escalated real estate taxes, wages, and other expenses. The Court there determined that plaintiff failed in its proof to demonstrate that the lease was at variance with the intention of either party, or that defendants fraudulently misrepresented the square-footage computations in the lease.

In the present case the lease, between sophisticated entities makes no mention of the square footage of the demised premises. Plaintiff alleges that the lease was agreed upon in considering a rental per square foot of \$33.13, but applying the rent to the actual square footage produces a rent per square foot of some \$56, which plaintiff contends is economically unreasonable. But nowhere in the lease is the square feet of the demised premises mentioned. The diagram annexed to the lease specifically disclaims that it is representative of the actual square footage, and is included solely for the purpose of location.

The lease is clear and unambiguous on its face. There is no reason to look to extrinsic evidence, as is suggested by the plaintiff. The basis for the claim of an area of 1,069 square feet is an alleged oral representation by a real estate broker acting on behalf of the landlord. But the lease specifically provides that tenant has not relied on any oral representation in signing the lease. Neither should plaintiff be entitled to a claim of ignorance, since the actual square footage of the premises is not solely within the knowledge of landlord, but readily ascertainable by the exercise of inquiry and due diligence (*609 Corporation v. Park Tower South Company, LLC*, 2004 WL 6040032 [Sup. Ct. NY County, 2004]). In that case the Court dismissed Causes of Action for breach of contract, fraud, unjust enrichment and unconscionability. In dismissing all four causes of action the Court, quoting *George Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211 (1978) stated that

" ' although the result of this construction of the escalation clause is economically harsh, parties

are free to make their own contracts, and courts do not serve as business arbiters between parties in approximately equal stances' ”.

Plaintiff also includes a Cause of Action under General Business Law § 349, often referred to as the Consumer Protection from Deceptive Acts and Practices Law. It provides that “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.” It grants a right of action to the Attorney General, and also permits an individual who has been aggrieved by a violation thereof to bring a private action, in which three times the actual damage, up to \$1,000 may be awarded, together with reasonable counsel fees.

As a threshold matter, a plaintiff claiming the benefit of the statute must charge conduct of defendant which is consumer oriented (*De Guaman v. American Hope Group*, 2018 WL 3559188 [2d Dept. 2018]). Private contract disputes do not fall within the ambit of the statute (*Id.* at 349; *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20 [1995]).

Plaintiffs allegations against defendant in the Fifth Cause of Action relate to an individual contract, and are not consumer related. The Fifth Cause of Action, as are the First through Fourth Causes of Action, are dismissed.

To the extent requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
August 21, 2018

**ENTER:**

  
JEROME C. MURPHY  
J.S.C.