

Short Form Order

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

**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

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FIESTA MCALLEN MOTORS, INC.

Plaintiff,

-against-

RON ADZIMA, BARRY A GUTTERMAN, KN  
PROPERTIES EAST HAMPTON), LLC, NIMIT  
SABHARWAL and KYONG RHEE,

Defendants.  
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INDEX NO.: 600330/2020  
MOTION DATE: 8/27/2020  
MOTION SEQ. NO.: 001MG

**PLAINTIFF'S ATTORNEYS:**

RAIMONDI LAW, P.C.  
552 BROADWAY  
MASSAPEQUA, NY 11758

**DEFENDANTS' ATTORNEYS:**

RIVKIN, RADLER & KREMER  
477 MADISON AVENUE, 20TH FLR  
NEW YORK, NY 10016

**ORDERED** that defendants' motion (motion sequence no. 001) to dismiss the third, fourth, and fifth causes of action pursuant to CPLR R 3211(a)(7) is granted.

Plaintiff commenced this action on January 7, 2020 by the electronic filing of a summons and complaint. Plaintiff's complaint alleges five causes of action: (1) breach of contract; (2) breach of implied warranty; (3) fraudulent inducement; (4) fraudulent misrepresentation; and (5) unjust enrichment. Plaintiff signed a one-month lease for the rental of a luxury residential property located in East Hampton, New York for the month of July 2019. Plaintiff signed the lease, paid the rent and a security deposit. Two weeks before the start of the lease term, the plaintiff demanded that the lease be rescinded and rent returned in full due to a "tick epidemic" in the area. Defendants returned the security deposit but have not returned the rental money in the amount of \$80,000.00. Defendants now move to dismiss the third, fourth, and fifth causes of action pursuant to CPLR R 3211 contending that plaintiff has failed to properly allege causes of action for fraudulent inducement, fraudulent misrepresentation, and unjust enrichment. In support of their application, defendants submit an affirmation of Mark N. Antar, Esq. and a memorandum of law.

"In assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Cordell Marble Falls, LLC v. Kelly*, 191 AD3d 760, - - -NYS3d- - -[2<sup>nd</sup> Dept. 2021]). However, bare "legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Cordell Marble Falls, LLC v. Kelly, supra*).

In order to state a claim for fraudulent inducement, a plaintiff must allege "a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*Tsinias Enters. Ltd. v. Taza Grocery, Inc.*, 172 AD3d

*Fiesta McAllen Motors v Adzima, et al.*

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1271, 1273, 101 NYS3d 138[2nd Dept. 2019]). Moreover, CPLR R 3016(b) provides that where the cause of action is grounded in misrepresentation or fraud, the circumstances constituting the wrong shall be stated in detail. If the plaintiff fails to sufficiently allege “even a single element...then the cause of action must be dismissed” (*Shea v. Hambros PLC*, 244 AD2d 39, 46, 673 NYS2d 369 [1<sup>st</sup> Dept. 1998]). Here, plaintiff’s complaint alleges that “[d]efendants falsely misrepresented that the [p]remises was clean, safe, and inhabitable and omitted the fact that the [p]remises was in the center of a tick infestation.” However, the allegation fails to provide any requisite detail as to when lease negotiations took place, which defendant made which statement, or any details about a purported exchange with the plaintiff. Accordingly, plaintiff’s third cause of action for fraudulent inducement is dismissed.

To properly state a claim for fraudulent misrepresentation, a plaintiff must satisfy the same elements required for fraudulent inducement. Specifically, fraudulent misrepresentation requires “a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Berland v. Chi*, 142 AD3d 1121, 1123, 38 NYS3d 57 [2<sup>nd</sup> Dept. 2016]). Moreover, a claim for fraudulent misrepresentation must meet the same heightened pleading requirements pursuant to CPLR 3016(b). The fourth cause of action alleges verbatim the language contained in the third cause of action, *to wit*, that the defendants “falsely misrepresented that the [p]remises was clean, safe, and inhabitable and omitted the fact that the [p]remises was in the center of a tick infestation.” As the complaint fails to assert a cause of action for fraudulent misrepresentation with the required specificity, the fourth cause of action for fraudulent misrepresentation is dismissed.

Plaintiff’s fifth cause of action for unjust enrichment alleges that “to the extent that any of the [d]efendants are found to not be in privity of contract with [p]laintiff, [d]efendants have been enriched by receiving and retaining [p]laintiff’s [r]ent without consideration.” “Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded” (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142, 879 NYS2d 355 [2009]). As the subject lease governs plaintiff’s dispute, and plaintiff concedes the validity and enforceability of the lease, plaintiff’s fifth cause of action for unjust enrichment must be dismissed.

As plaintiff’s first and second causes of action for breach of contract and breach of implied warranty remain viable, the parties are directed to conduct a preliminary conference on May 17, 2021 in accordance with the rules set forth on the Supreme Court, Suffolk County DCM website.

The foregoing constitutes the order of the court.

Dated: April 19, 2021

  
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J.S.C.