

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA PART 13
Justice

	x	Index Number <u>8034</u> 2005
CFR MANAGEMENT CORP.		Motion Date <u>March 19,</u> 2008
-against-		Motion Cal. Number <u>10</u>
FITCO INC.		Motion Seq. No. <u>3</u>
	x	

The following papers numbered 1 to 19 read on this motion by plaintiff CFR Management Corp. for an order granting summary judgment on its cause of action for breach of a lease, and awarding damages in the sum of \$78,589.91. Defendant Fitco Inc. cross-moves in opposition and seeks an order (a) granting summary judgment dismissing plaintiff's amended complaint pursuant to CPLR 3212, or in the alternative, vacating the prior orders of June 6, 2006 and June 11, 2007 on the grounds that said orders were procured by fraud, pursuant to CPLR 5015(a)(3) and 2221(e)(2); (b) granting defendant leave to serve a supplemental summons and amended counterclaim against CFR Management Corp.'s stockholders Herman Kahan and Tobias Gross, individually, and amending the caption accordingly, pursuant to CPLR 305(a), 1003, 1017 and 3025(b); and (c) compelling plaintiff to provide complete, correct and properly-sworn interrogatory answers and to produce all remaining documents requested by defendant in its second interrogatories and second notice to produce, pursuant to CPLR 3124.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Affidavit - Exhibits (A-F).....	1-5
Notice of Cross Motion - Affirmation - Affidavits - Exhibits (1-17).....	6-12
Opposing Affirmation - Affidavit - Exhibits (A-F) ..	13-16
Reply Affidavit - Affirmation.....	17-19

Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiff CFR Management Corp. alleges in the complaint dated April 11, 2005 that it was and still is the owner of the real property located at 48-05 Metropolitan Avenue, Ridgewood, New York. The complaint alleges that it leased the real property located at 48-05 Metropolitan Avenue, Brooklyn, New York to defendant Fitco Inc., pursuant to a seven-year written lease commencing on March 1, 1999. In the first cause of action, plaintiff alleges that on May 31, 2004, the parties entered into a surrender agreement, whereby Fitco agreed to vacate the premises on August 15, 2004, and plaintiff agreed to pay Fitco the sum of \$45,000.00, against which the defendant's rent for July and a portion of August would be credited. It is further alleged that Fitco would pay the sum of \$100.00 a day, if it failed to vacate the premises on August 15, 2004. Plaintiff alleges that the defendant did not vacate the premises until August 20, 2005, and, therefore, seeks to recover the sum of \$33,589.91. In the second cause of action plaintiff seeks to recover attorney's fees and costs, pursuant to the lease agreement.

This court, in an order dated June 6, 2006, granted plaintiff leave to serve and file an amended complaint to reflect an increase in the ad damnum clause from \$33,589.91 to \$ 75,589.91. Plaintiff was to serve and file the amended complaint, together with a copy of said order and notice of entry, within 30 days of the date of the order. This court, pursuant to a so-ordered stipulation dated January 8, 2007, extended the plaintiff's time in which to serve and file the amended complaint to and through February 5, 2007. An examination of the court files reveals that the amended complaint was filed with the court on January 30, 2007. The amended complaint, dated January 18, 2007, amended the first cause of action in order to allege that the defendant was in default in the amount of \$75,589.91, and also amended the ad damnum clause, increasing the sum sought on the first cause of action to \$75,589.91. Defendant's counsel rejected service of the amended complaint as untimely, and returned it to plaintiff's counsel on February 15, 2007, stating that "Your envelope is postmarked February 12, 2007, (even though the enclosed affidavit of service asserts that these documents were mailed on January 25, 2007.)." Defendant's counsel further stated that it did not appear that the amended summons and amended complaint had been filed with the court; that the amended complaint did more than just amend the ad damnum clause; that neither the amended summons nor the amended complaint were signed as required by 22 NYCRR 130-1.1-a.; and that the entry date on the notice of entry was wrong.

The court, in an order dated June 11, 2007, granted plaintiff's motion to compel the defendant to accept service of the amended summons and complaint; granted plaintiff an additional 30 days to serve the defendant with a copy of the June 6, 2006 order with notice of entry; and granted the defendant's cross motion to the extent that the note of issue was vacated and the matter was stricken from the trial calendar.

On June 20, 2007, plaintiff served a copy of the June 6, 2006 order, together with notice of entry stating that said order was entered on June 6, 2006. The January 18, 2007 amended complaint was served on defendant's counsel on July 19, 2007.

Defendant's counsel, in a letter dated July 24, 2007, advised plaintiff's counsel that CFR had neglected to serve an amended summons, that the date of entry of the June 6, 2006 order was still incorrect, and that CFR had failed to effect the additional service contemplated by the July 11, 2007 order. Defendant, however, served a verified answer dated August 15, 2007 in which it asserted a counterclaim to recover a security deposit pursuant to the terms of the lease and surrender agreement and, overcharges for tax rent, as well as attorney's fees incurred in this action. Plaintiff has served an answer to the counterclaim.

An examination of the original complaint and the amended complaint reveals the following erroneous or contradictory statements:

(1) the real property is described as being located, alternatively, in Ridgewood (a Queens County postal address), New York and Brooklyn, New York;

(2) the per day amount to be paid in the event of a failure to surrender the premises on August 15, 2004 is set forth in the complaint as \$100.00 per day, while the surrender agreement states that it is \$1,000.00 a day. However, the damages are calculated in the pleadings at \$1,000.00 a day, and plaintiff's affidavit and affirmation submitted here and in support of other prior motions, state that the amount is \$1,000.00 a day;

(3) the date that defendant surrendered the premises is recited in the pleadings as August 30, 2005, while plaintiff states in various affidavits and affirmations that the date was August 31, 2004, and that defendant failed to surrender the premises until 16 days after the agreed date of August 15, 2004.

Although the above may constitute harmless typographical errors, the complaint and amended complaint contain other more serious and fatal statements.

Plaintiff CFR Management Corp., in both the original complaint and amended complaint, states that it is the owner and lessor of the subject property. Plaintiff also held itself out as the owner of the subject real property in both the lease and surrender agreements it entered into with Fitco Inc. Herman Kahan, a shareholder of CFR Management Corp., states, in an affidavit dated December 19, 2007, that 4805 Metropolitan Avenue Corp. was the owner of the subject premises and that CFR Management Corp. was the prime tenant. Counsel for plaintiff, in support of the motion for summary judgment, asserts that no triable issues of fact exist.

Defendant, in support of its cross motion, has submitted a copy of plaintiff's sworn response to defendant's interrogatories and demand for documents, dated December 19, 2007, in which plaintiff states that CFR is the tenant of the premises and that 4805 Metropolitan Avenue Realty Corp. was the owner, and that the premises were sold in January 2006. Defendant has submitted a copy of a condominium unit deed, dated January 10, 2006, which lists 4805 Metropolitan Realty LLC and Metropolitan 48th Holdings LLC as the grantors of the subject real property. The names of these grantors differ from that of the alleged owner, 48-05 Metropolitan Avenue Corp. Defendant has also submitted documentary evidence which establishes that CFR Management Corp. was dissolved by proclamation on March 30, 2005 for the failure to pay taxes and that it has not been reinstated. Defendant asserts that as a dissolved corporation, CFR Management Corp. lacks standing to sue, and as it was neither the owner nor the tenant of the subject property, it cannot seek to enforce the surrender agreement. In addition, defendant's president, James Barnes, states in an affidavit that Fitco vacated the premises prior to August 15, 2004, that he sought to conduct a walk through on Friday, August 13, 2004, but that Mr. Kahan was not available until Monday, August 16, 2004, at which time the walk through was conducted and Fitco's warehouse manager gave the keys to padlocks that Fitco had installed to Mr. Kahan's son. Mr. Casiano, the warehouse manager, has also submitted an affidavit stating that the premises were vacated on August 13, 2004, that the walk though occurred on August 16, 2004 as Mr. Kahan was not available earlier, and the padlock keys were returned on that day.

In response to the cross motion, plaintiff's counsel states in an affirmation that he did not learn that Metropolitan Avenue Realty Corp. was the owner of the premises until his client responded to defendant's discovery demands in December 2007. In an

affidavit, dated December 19, 2007, Herman Kahan states that he was the sole shareholder of 4805 Metropolitan Avenue Realty Corp., and that this entity was the owner of the subject premises which were sold in January 2006. Mr. Kahan further states that he is a shareholder of CFR Management Corp., that he and his son-in-law, Tobias Gross, are owners of CFR Management Corp., and that CFR was the prime tenant of the subject premises. As regards the affidavit submitted in support of the motion to dismiss, Mr. Kahan, now states that he "misstated facts in my affidavit unintentionally. The confusion is that although 48-05 Metropolitan Avenue Corp. was the owner of the premises, I misstated that CFR was the owner because I am also a part owner of CFR Management Corp. I never intended to misstate these facts to the Court or to my attorney. To me I did not think I was misstating the facts because I am a shareholder of both 48-05 Metropolitan Avenue Corp. and CFR Management Corp." Mr. Kahan claims that CFR was Fitco's landlord, and that "[w]hether that relationship was a result of ownership of the building or by a lease for the building with sublease to Fitco is a distinction that has no legal significance." Mr. Kahan also asserts that he was unaware of the fact that CFR Management was a dissolved corporation. Mr. Kahan, however, offers no explanation for the discrepancies in the name of the owners of the subject property at the time of the January 2006 sale of the property, and the name of the alleged owner of the property at the time of Fitco's lease and surrender agreement.

Counsel for Fitco, in a letter dated January 7, 2008, listed certain deficiencies in CFR's response to the interrogatories and document demand, and requested a copy of the lease between CFR and the owner of the property. Plaintiff's counsel, in his affidavit in opposition to the cross motion, states that he did not respond to this letter, as his client believes that he has responded to all of the discovery requests. Mr. Kahan states in his affidavit that he has provided the documents in his possession. Notably, CFR has failed to produce a written lease agreement between itself and the then owner of the subject real property.

It is undisputed that CFR was dissolved by proclamation pursuant to the tax law and no evidence has been presented to the court establishing that it has been reinstated. Corporations so dissolved are subject to the provisions of Business Corporation Law § 1006, and, thus, even after dissolution, continue to have a de jure existence for the purposes of winding up their affairs, inclusive of any suits brought or defended (Bowditch v 57 Laight Street Corporation, 111 Misc 2d 255 [1981]). Any claims arising after dissolution, but based on contracts or events prior to dissolution, are enforceable (Expomotion, Ltd. v Heidepriem-Santandrea, Inc., 101 Misc 2d 593 [1979]). Therefore,

that branch of defendant's motion which seeks to dismiss the complaint on the grounds that CFR lacks standing as it is a dissolved corporation, is denied.

Defendant, however, has established prima facie, that CFR Management Corp., which inaccurately represented itself to be the owner of the subject real property, was, in fact, neither the owner of the subject property nor an agent of the owner. CFR, thus, could not, as an owner or an agent of the owner, have created a lease interest in the subject real property. Furthermore, in order to create a seven-year sublease with Fitco, CFR would have had to have had a written lease with the property owner. CFR has failed to establish the existence of a written lease agreement with the property owner. Therefore, in the absence of such a written lease, no valid sublease or surrender agreement exists between CFR and Fitco (see General Obligations Law § 5-703[2]; see generally Lipman v Vebeliunas, 39 AD3d 488 [2007]). Therefore that branch of defendant's cross motion which seeks to dismiss the complaint, is granted.

Since defendant's counterclaim is also based upon the unenforceable lease and surrender agreements, the counterclaim must also be dismissed (CPLR 3212[b]). Therefore, that branch of defendant's cross motion which seeks leave to serve a supplemental summons and amended counterclaim in order to assert a second cause of action against Herman Kahan and Tobias Gross, is denied. Defendant, however, may commence a new action for unjust enrichment and fraud.

That branch of defendant's cross motion which seeks to compel plaintiff to provide outstanding discovery is denied as moot.

Accordingly, plaintiff's motion for summary judgment is denied, and defendant's motion to dismiss the complaint is granted, for the reasons stated above. Defendant's request for leave to serve a supplemental summons and amended counterclaim in order to assert a second cause of action against Herman Kahan and Tobias Gross, is denied. Defendant's request for an order compelling plaintiff to provide outstanding discovery is denied as moot.

Dated: July 22, 2008

J.S.C.