

SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
Justice

PART 58

CRP/CAPSTONE 14W PROPERTY OWNER, LLC

INDEX NO. 114140/11

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 001

GIBSON & BEHMAN, BEHMAN HAMBELTON  
LLP,

Defendants.

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1

Answering Affidavits - Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3

CROSS-MOTION: YES ☒ NO

Upon the foregoing papers, it is ordered that this motion is:

**FILED**

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

MAY 11 2012

Dated:

5/2/12

Donna M. Mills  
J.S.C.  
**DONNA M. MILLS, J.S.C.**

Check one: FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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CRP/CAPSTONE 14W PROPERTY OWNER,  
LLC

Plaintiff,

- against -

GIBSON & BEHMAN, BEHMAN HAMBELTON  
LLP,

Defendants.  
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INDEX NO.  
114140/11

DECISION/ORDER

DONNA M. MILLS, J:

This case involves a claim by Plaintiff, CRP/Capstone 14W Property Owner, LLC, that it suffered damages from non-payment of rent in the amount of \$68,921.05, plus interest. In a second cause of action Plaintiff is claiming additional base rent in the sum of \$1,038,204.70, said sum representing the full amount of rent that would be allegedly due through the term of the lease that would have ended on February 28, 2015.

It is undisputed that Plaintiff entered into the subject contract with Defendant Gibson & Behman P.C. ("Gibson") on or about May 6, 2009 for the property located at 14 Wall Street, Suite 5C, New York, NY for a term of five years and seven months commencing on August 1, 2009. Gibson has since dissolved effective June 30, 2011. Defendant Behman Hambelton LLP ("Behman") now makes this Pre Answer Motion to Dismiss Plaintiff's Complaint for its failure to state a cause of action as against Behman.

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a) (7), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & McRae, 243 AD2d 168, 176 (1<sup>st</sup> Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163

AD2d 46, 48 (1<sup>st</sup> Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). However, where the allegation in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V., 258 AD2d 349 (1<sup>st</sup> Dept 1999).

In support of the motion to dismiss, Behman relies on the subject lease which was not signed or entered into by Behman. Behman also provides documentary evidence which shows that Gibson was dissolved and Behman created sometime thereafter. Behman claims that plaintiff has no recourse against it and must seek its remedy against the assets of Gibson as there was no lease between Behman and Plaintiff, nor they argue, was there an assignment of the lease to Behman.

In opposition, Plaintiff admits that the lease upon which this action is based was entered into between itself and Gibson, not Behman. However, Plaintiff contends that Behman is responsible for the lease obligations because Behman has functioned and operates as essentially the same business as Gibson. Plaintiff maintains that the two entities share the same ownership except for one partner, and have the same corporate purpose, and merely changed names to avoid liability under the lease. Plaintiff points to a June 17, 2011 letter from Attorney Bella Pevzner to Mr. Sullivan of plaintiff's office, written on Behman letterhead, in which reference is made to "our firm (Gibson & Behman, P.C.)." The letter goes on to discuss the pending dissolution of Gibson and the effort to negotiate a new lease for the new entity, Behman, that was in the process of being formed.

In reply, Behman argues hat Plaintiff relies on mere conclusion, expressions of hope and unsubstantiated allegations in opposing the motion to dismiss. Behman reiterates that

it is an entity organized under the laws of the Commonwealth of Massachusetts tat is separate and distinct from and has no legal or other relationship to Gibson.

Being mindful of the legal standards applicable to a motion to dismiss, this Court accepts the facts alleged in the complaint as true and find that the cause of action can be sustained, since at this early stage of the proceeding, this Court cannot determine that Plaintiff's claim that Behman is the same entity as Gibson, is inherently incredible or flatly contradicted by documentary evidence.

Accordingly it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on June 29, 2012, at 10:00AM.

Dated: 5/2/12

ENTER:



J.S.C.

**DONNA M. MILLE, J.S.C.**