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United States District Court, S.D. New York.

Arthur B. SOBERMAN, Plaintiff,
v.
GROFF STUDIOS CORP., General Property Management Associates, Inc., Jeffrey Brown, Individually, Lederer & Levine, P.C., Kennety J. Lederer, CPA, Individually, Stephen J. Levine, CPA, Individually, Jonathan Rose, Eli Israel, John Doe 1, John Doe 2, and John Doe 3, Defendants.

No. 99 Civ. 1005(DLC).
|
March 28, 2000.

Attorneys and Law Firms

Richard R. Leff, Law Office of Richard R. Leff, Kew Gardens, New York, for plaintiff.

Kevin J. Philbin, Mendes & Mount, LLP, New York, NY, for defendants Lederer & Levine, P.C., Kenneth J. Lederer and Steven J. Levine.

John T. Van Der Tuin, Balber Pickard Battistoni Maldonado & Van Der Tuin, P.C., New York, NY, for all other defendants.

OPINION and ORDER

COTE, J.

***1** This diversity suit arises out of a disagreement regarding the terms of a long-term commercial lease. The plaintiff Arthur B. Soberman ("Soberman") filed this action on February 9, 1999, asserting claims for violations of RICO under 18 U.S.C. § 1962(a) and 18 U.S.C. § 1962(b), breach of contract, fraud and misrepresentation, conversion, duress, and an accounting. In an Opinion and Order dated May 28, 1999, this Court determined diversity jurisdiction, dismissed Soberman's first and second claims as against defendants other than Lederer & Levine, P.C. ("Lederer & Levine"), and disqualified Soberman's son as his attorney. The crossclaim of defendants Lederer & Levine, Kenneth J. Lederer and Stephen J. Levine was withdrawn by Stipulation dated June 15, 1999. Soberman's first and second claims as against Lederer & Levine were withdrawn by Stipulation dated June 16, 1999. Consequently, what remains to be tried are the claims for breach of contract, fraud and misrepresentation, conversion, duress, and an accounting.

THE TRIAL

In accordance with the Individual Practices of this Court in civil bench trials, the parties submitted the direct testimony of their witnesses by affidavit and deposition designations in advance of trial. The plaintiff submitted the affidavit of Alan R. Soberman. Alan Soberman is the plaintiff's son, and is an attorney admitted to practice in New York, New Jersey, and Florida, with an LLM in taxation, who has specialized in tax law for twenty-seven years. He was formerly employed by the Internal Revenue Service and has represented companies whose principal business is ownership of real estate. He has not represented cooperative buildings. The defendants submitted affidavits from Jeffrey Brown ("Brown"), the president and sole stockholder of defendant General Property Management Associates, Inc. ("GPM"), Thomas Bradford, a stockholder of defendant Groff Studios Corporation ("Groff"), and Matthew DiPasquale ("DiPasquale"), a certified public accountant employed by defendant Lederer & Levine.

The plaintiff also relied on excerpts from the deposition testimony of Brown and DiPasquale, as well as Jonathan Rose and Eli Israel, both of whom are stockholders of Groff. The defendants relied on excerpts from the deposition testimony of Alan Soberman and Aaron Gelbwaks, who was an attorney for the sponsors of the cooperative conversion.

At the final pretrial conference held on the record on February 11, 2000, all parties consented to trial based solely on the written record. All parties waived their rights to present opening and closing arguments and to cross-examine witnesses. Based on this record, the Court now delivers these findings of fact and conclusions of law.

FINDINGS OF FACT

A. *The Parties*
Plaintiff Soberman is an 82 year-old individual residing in Florida. Defendant Groff is a New York cooperative corporation that owns the building located at and known as 151 West 28th Street, New York, New York (the "Building"). Defendant GPM is a New York corporation that has been the managing agent of Groff since 1991. GPM's duties include keeping all financial records of the cooperative, collecting all rents and maintenance, and meeting with and advising the members of the cooperative, its Board of Directors and other professionals such as attorneys, architects, engineers and accountants.

***2** Defendant Lederer & Levine is a New York professional corporation that has been Groff's accountant since 1984. Defendants Jonathan Rose and Eli Israel are stockholders of Groff and were, at the time of the filing of the complaint in this case, Groff's President and Treasurer, respectively. Defendant Brown is the owner and President of defendant GPM. Defendants Kenneth J. Lederer and Steven J. Levine are principals of defendant Lederer & Levine.

B. *1978: The Building is Converted to Cooperative Ownership*
The Building consists of sixteen cooperative units and three ground floor rental stores that are leased out. The Building was converted to cooperative ownership by Offering Plan dated August 15, 1978, pursuant to which title passed to Groff on October 12, 1978. The Sponsor of the cooperative offering was Groff Building Associates, whose two general partners were Gary Tannenbaum and Helen Mills. Aaron Gelbwaks, an attorney for Tannenbaum and Mills, prepared the Offering Plan. He also prepared the preprinted form of the leases for the three stores. Tannenbaum or Mills or someone acting on their behalf prepared the leases' accompanying riders. The leases for all three stores were executed by Tannenbaum on behalf of Groff, as Landlord, and by Mills on behalf of Groff Building Associates, as tenant. By retaining long-term, ninety-nine year leases for the stores, the Sponsor was able to retain the economic value of the difference between the rents owed Groff under the leases and the market rents that could be obtained from subtenants.

Groff has no assets or business other than the Building, an operating checking account and a reserve account. As it relates to the commercial rental stores, Groff acts in the capacity of commercial landlord.

C. *Soberman, Groff and the Building: 1982-1997*
On October 12, 1978, Groff, as landlord, and Groff Building Associates, as tenant, entered into a commercial lease for Store E (the "Lease"). Soberman became the Tenant of Store E by assignment from Groff Building Associates dated April 19, 1982. Soberman occupied Store E for business purposes during the period 1982-1985 and thereafter subleased it.

The Lease
The Lease is a Standard form of Store Lease printed for the Real Estate Board of New York, Inc., and is modified and supplemented by attached Riders. It was made and commenced on October 12, 1978, concurrently with the conversion of the Building from rental to cooperative ownership, and continues for ninety-nine years until October 11, 2077. Groff is the "party of the first part" and defined as "Landlord," and Groff Building Associates is the party of the second part, defined as "Tenant." The Lease requires the Tenant to pay 9.5% of the net expenses of the Building, which are principally defined as "accrued expenses related to the operation of the building for a calendar year." The relevant portions of the Lease provide:
Landlord hereby leases to Tenant and Tenant hereby hires from Landlord Store E and part of basement in the building known as 151 West 28th Street....

***3** at an annual rental rate of $7548 for the first year and *9.5% of the net expenses of the building, on an accrual basis, as defined in paragraph 47D,* for each subsequent year....

46. The annual rental rate after the first year of the lease will be *9.5% of the net expenses,* as defined in paragraph 47D, of the most recent calendar year for which an accounting of *the Corporation's expenses* has been delivered to the Tenant.

47. A. The actual rent due after the first year of the lease will be [blank] of *the Corporation's net expenses, as defined in paragraph 47D,* during the current calendar

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year.

B. In the event the rental rate exceeds the actual rent due, all monies paid to the Landlord in excess of the actual rent due must be returned to the Tenant within 30 days after receipt by the Tenant from the Landlord of an accounting of said expenses.

C. For years two through ninety-nine of the lease, in the event the actual rent due exceeds the annual rental rate, any difference between actual payments made in accordance with the rental rate in paragraph 46 and the actual rate due calculated in accordance with paragraph 47A, will be paid to the Landlord within 30 days after receipt by the Tenant from the Landlord of an accounting for said expenses.

D. *Net expenses are accrued expenses related to the operation of the building for a calendar year, including depreciation of capital assets. Accrued expenses do not include* expenditures during the year for goods and services benefitting other calendar years or *expenditures for capital improvements. Capital improvements* are those which have the effect of improving the physical structure of the building but which *are not considered repairs or maintenance. Capital improvements shall be further defined according to the regulations of the Internal Revenue Service* .

(Emphasis added). Except as to the percentage of expenses due as rent, with Store W's being 4.75% and Store C's being 5.55%, and the first year's rental rates, the leases for the other two stores are identical to Soberman's lease.

The Offering Plan includes a "Projected Schedule of Expenses For First Year of Operation" of Groff and recites the rents to be received from the stores. Store E's first-year rent of $7,548 is approximately 9.5% of the total projected expenses for the first year as set forth in the Offering Plan, and the total of the combined rents to be received from the stores in the first year is 19.9% of the total projected expenses, approximately equal to the total of their respective percentages of expenses due as rent under the three leases (19.8%). It appears, therefore, that the expenses listed in the Offering Plan were expected to be the type of expenses upon which rent calculations would be based.[1]

The parties agree that the manner in which Soberman's rent has been calculated and billed has not varied in any material way during the period from 1992 to the present, GPM's period of management. Until this dispute arose in 1998, Soberman paid a nominal monthly rent of $1,010.27 and then, after the close of the calendar year, was billed for and paid the balance of the rent claimed by Groff as owed for the preceding year. After the close of the calendar year, Groff's accountant, Lederer & Levine, by its employee, DiPasquale, performed an audit of the financial books and records of Groff, maintained by GPM, including review of the income and expense files maintained in GPM's office. Lederer & Levine then prepared an annual audited financial statement for Groff based upon, *inter alia,* the accounting guidelines for Common Interest Realty Associations established by the American Institute of Certified Public Accountants ("AICPA"). Prior to 1994, Groff's treasurer would calculate the tenants' Excess Rent, based upon DiPasquale's audit of expenses, and transmit it to DiPasquale and the tenants. Commencing with 1994, after preparing the annual audited financial statement, DiPasquale calculated the amount owed by the store tenants pursuant to paragraphs 46 and 47D of their leases, the so-called "Excess Rent" above and beyond the monthly payments made during the course of the year by Soberman and the other store tenants, making such adjustments as were required to add in depreciation and certain amortized expenses. DiPasquale would then transmit this calculation, together with his worksheet, either to GPM or Groff's treasurer, a bill would be prepared for the additional "Excess Rent" due for the prior calendar year and the bill would then be transmitted to the store tenants, including Soberman. Together with the bill, Groff sent Soberman the rent computation worksheet, the schedules of amortized expenses included in the rent bill, and the Groff-audited financial statement, titled "Groff Studios Corporation Financial Statements." The bills were typically transmitted between May and September of the following year. The audited financial statements sent to Soberman have been in the same format each year since 1992. The categories and dollar amounts of expenses included in the "Operating Expenses" were expressly set out and included "Real Estate Taxes," "Mortgage Interest," "Fuel and Utilities," and "Management Fees."

***4** Until 1991, when GPM was hired, the Building was mostly self-managed by the stockholders and the day-to-day financial affairs of Groff were handled principally by Chester Pikiel, now deceased, an accountant who was a stockholder of Groff and resident of the Building. There has been no material change in the manner in which the Excess Rents are calculated and billed to the three store tenants since at least 1984, when Lederer & Levine became Groff's accountants.

Soberman or his son paid the Excess Rent billed for every year from 1983 through 1996 without questioning the

categories of expenses that were being included. The Excess Rent billed for 1997, transmitted to Soberman on September 28, 1998, has not been paid and is in dispute.[2] Although Soberman and his son occasionally paid late, complained about the amount of rent owed, or requested additional information about specific expenses, they did not withhold payment or question whether the categories or types of expenses included in the rent were proper under the Lease. Prior to 1998, Soberman's son made only two written complaints on his father's behalf regarding the Excess Rent calculation. On July 6, 1988, he wrote to Chester Pikiel to express his belief that the restoration of the Building's facade amounted to a capital improvement and not a repair, and therefore should not have been included in the Excess Rent calculation. He described this as the "only ... area with which [he took] exception." On July 12, 1996, he wrote to Tom Bradford, the President of Groff, to express his view that a resolution instituting a penalty commencing ten days from the date of billing would violate the Lease and requesting clarification as to an increase in professional fees paid by the Corporation during the 1995 fiscal year.

D. *The Dispute Arises: Fall 1998*

Soberman's son first questioned whether the expenses included in the financial statements and charged to his father were proper under the Lease in October and November 1998, after receiving the Excess Rent bill for 1997. Soberman was billed on September 28, 1998, for the Excess Rent owed for 1997 in the amount of $20,053.27. This was an increase of over $7,000 from the $12,700.92 billed the prior year.

In a November 17, 1998 letter to Brown, Soberman's son stated that

> [t]he dramatic increases in the 1997 legal; [sic] repairs and maintenance and interest expenses, have for the first time caused me to consider what part of these expenses properly constitute expenses related to the operation of the building.

(Emphasis in original). He then complained that numerous expenses were being passed through as building operating expenses in violation of the lease, including "legal fees ... for actions between the Corporation and shareholders and for potentially restructuring the Co-op Corporation," "significant improvements to common elements including the elevators, plumbing and heating systems," and "certain mortgage interest expenses ... related to loans used to finance non-operating expenses." Soberman's son again wrote to Brown on December 3, 1998, to "summarize what [he believed] to be a fair and reasonable definition of 'building operating expenses' as that phrase was intended in [the] lease." As "clearly 'operating expenses'," he listed "water, sewer, real estate taxes (unless there has been a tax certiori proceeding), fuel and utilities, insurance and corporate income taxes." The items he contested as "operating expenses" were professional fees, capital expenses, mortgage interest, and some management fees.

CONCLUSIONS OF LAW

***5** The parties agree that New York law governs this action. In such circumstances, the Court need conduct no further choice of law analysis. *See American Fuel Corp. v. Utah Energy Dev. Co.,* 122 F.3d 130, 134 (2d Cir.1997). The only real dispute in this case is as to the interpretation of the Lease. Soberman maintains that under the Lease, he is not liable for any amounts set forth on the financial statements as "Mortgage Interest," items of "Maintenance and Repairs" to the extent they benefit other calendar years or are actually capital improvements, "Professional Fees" to the extent they do not arise in the ordinary course of operating the Building, "Insurance" to the extent of expenditures for insurance that is not for the Building itself and corporate income taxes. Without further detail, Soberman maintains that over the period in question, the amount of overcharges for these items exceeds $75,000.

The defendants maintain that the language of the Lease is unambiguous, but that even if it contains any ambiguity, that ambiguity must be resolved against the plaintiff, who has paid in accordance with the Lease's terms for sixteen years-from 1982 until 1998. In its counterclaims, Groff seeks $20,053.27 in Excess Rent due for 1997, as billed on September 28, 1998, as well as attorney's fees and costs pursuant to a provision of the Lease allowing for their recovery in actions such as this.

A. *Breach of Contract*

1. *Interpretation of the Lease*

The dispute centers on the phrases "net expenses of the building" and "[n]et expenses ... related to the operation of the building." Both parties assert that this language is unambiguous. Focusing on the preamble and paragraph 47D, Soberman argues that Groff has breached the Lease by 1) equating the net expenses of the Building with those of Groff, and 2) by including as expenses in the Excess Rent calculation certain items not properly classified as "operating expenses" as that term is used in the commercial real estate context.[3] The defendants contend that the Lease clearly requires Soberman to pay 9.5% of the corporation's annual operating expenses, excluding only capital expenditures and expenses that were accrued in other calendar years.

In paragraphs 46 through 47D, the Lease sets forth a method of calculating rent payments that is similar, but not identical to the method by which the parties have calculated the Excess Rent since at least 1992.[4] The Lease requires the tenant to pay an "annual rental rate" of 9.5% of the net expenses ... of the most recent calendar year for which an accounting of the Corporation's expenses has been delivered to the Tenant." Paragraph 47A provides that the "actual rent due" shall be a percentage "of the Corporation's net expenses ... during the current calendar year." Paragraphs 47B and 47C require the landlord to refund or the tenant to pay any difference between this amount and the annual rent already paid by the tenant. The only difference between the calculation of the Excess Rent in the Lease and the method used by the parties is that at least since 1992, Soberman has paid a rental rate $1,010.27 per month, or approximately $12,000 per year, rather than a percentage of the net expenses of the last year for which the rent has been calculated.[5]

***6** The method of rent calculation prescribed by the Lease may be summarized as follows: during the year, the tenant pays an approximation of that year's expenses based on the most recently calculated year's expenses. Once the actual expenses for that year are calculated, the correct rent amount is determined and the landlord or the tenant makes the appropriate refund or payment. Thus, if the net expenses related to the operation of the Building did not change from year to year, no amount would be due to either party. Because paragraph 46 provides for an annual rate that is an approximation of the actual rent due under paragraph 47A, the terms of those paragraphs must be read together. Paragraphs 46 and 47A both provide that the rent is to be based on the "net expenses" of "the *Corporation"* (emphasis added). The Lease therefore establishes that the Excess Rent is to be calculated based on the expenses of the Corporation. Moreover, because Groff's sole purpose is essentially the operation of the Building, "expenses related to the operation of the building" may reasonably be equated with the expenses of the Corporation. Based on the language of the Lease, the Court concludes that the Lease does not distinguish between the expenses of the Corporation and the expenses of the Building and does not require Groff to make any such distinction in the calculation of the rent or the provision of financial statements.[6]

This interpretation of the Lease is consistent with the evidence that the first-year rents for the three stores were calculated based on the projected first-year expenses as listed in the Offering Plan. The Offering Plan includes all of the expenses of the cooperative corporation. It does not distinguish between the expenses of the corporation and the expenses of the Building. Groff and Groff Building Associates were the parties both to the Offering Plan and to the three store leases and executed those documents at approximately the same time. Accordingly, the Offering Plan provides evidence of their intent as to the Lease.[7]

Turning to the meaning of "accrued expenses related to the operation of the building," because the Lease provides no further clarification of the phrase,[8] the Court finds that reasonable people could differ as to the particular items of expenses that are encompassed by it. It is therefore necessary to examine extrinsic evidence to determine the intended meaning of the Lease. *See Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London,* 136 F.3d 82, 86 (2d Cir.1998) (applying New York law). In this case, it is determinative that the parties conducted themselves according to the same understanding of the Lease for sixteen years, as "the parties' course of performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties." *Fed. Ins. Co. v. America's Home Ins. Co.,* 691 N.Y.S.2d 508, 512 (1st Dep't 1999) (internal quotation marks and citation omitted). *See also IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.,* 26 F.3d 370, 374 (2d Cir.1994) ("Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.") (quoting *Old Colony Trust Co. v. Omaha,* 230 U.S. 100, 118 (1913)). *See also Time Warner Cable v. City of New York,* 943 F.Supp. 1357, 1390 (S.D.N.Y.1996) (DLC) ("The 'parties' interpretation of the contract in practice, prior to litigation, is compelling evidence of the parties' intent." ') (quoting *Ocean Transp. Line, Inc. v. American Philippine Fiber Indus.,* 743 F.2d 85, 91 (2d Cir.1984)).

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***7** During the period from 1982 until this dispute arose in 1998, Soberman's rent was calculated, billed and paid in the same manner each year. Audited financial statements of Groff were sent with the Excess Rent Bill to Soberman, plainly indicating what expenses were included in the calculation. Despite the availability of this information, until 1998, neither Soberman nor his son questioned the items included as operating expenses. After receiving the bills and financial statements, Soberman and/or his son regularly paid in full, demonstrating that they understood and acquiesced in the terms of the Lease as applied by Groff. *Compare Prudential Lines, Inc. v. American Steamship Owners Mutual Protection and Indemnity Ass'n, Inc.,* 158 F.3d 65, 78 (2d Cir.1998). This acquiescence is further illustrated by Soberman's son's letters. In his 1988 letter, Soberman's son wrote that the facade repair expense was the only area of the Excess Rent billing to which he took exception, and in his December 1998 letter, written after this dispute had arisen, he expressly stated that he considered real estate taxes, insurance and corporate income taxes-items that are now disputed-to be "clearly 'operating expenses." ' After adhering to one understanding of the Lease for sixteen years, Soberman may not now reconstrue the Lease merely because its terms have become unfavorable to him.

2. *Allegedly Improperly Included Repairs*

Soberman argues that certain items included in the rent calculation should have been excluded under the terms of paragraph 47D of the Lease either because they were actually expenses for capital improvements or because they benefitted other calendar years. Although Soberman listed only three disputed expenses in his complaint, in his memorandum of law he disputes almost every claimed maintenance or repair expense for 1997: the purchase of what he contends was a new water heater, the upgrade and partial replacement of the security system, the rebuilding of the sprinkler system, a major repair of the elevators, and the rebuilding of the boiler and a portion of its supporting plumbing. Because the interpretation of the Lease will continue to be relevant to the parties, the Court addresses Soberman's new arguments in addition to those alleged in the complaint.

Relying on the language in paragraph 47D of the Lease providing that "[a]ccrued expenses do not include expenditures during the year for goods and services benefitting other calendar years," Soberman argues that the contested items of maintenance and repairs necessarily benefit additional calendar years and must therefore be excluded from the Excess Rent calculation. The Court concludes that this language merely prescribes a method of accounting, known as the accrual method, according to which expenses for goods and services are included as net expenses for the year in which the liability arises. The language does not mean that goods and services that may have a benefit lasting more than one year are not to be considered that year's expenses when they are related to the operation of the Building.

***8** Paragraph 47D of the Lease provides that expenditures for capital improvements are not to be included as net expenses in the rent calculation. Capital improvements are defined as "those which have the effect of improving the physical structure of the building but which are not considered repairs or maintenance." The Lease provides that capital improvements "shall be further defined according to the regulations of the Internal Revenue Service." In describing the standard that the Internal Revenue Service applies to determine whether expense items constitute capital expenditures, the parties use identical language. The Court therefore adopts this standard as set forth below:

> In determining whether an expenditure is a capital one or is chargeable against operating income, it is necessary to bear in mind the purpose for which the expenditure was made. *To repair is to restore to a sound state or to mend,* while a replacement connotes a substitution. A repair is an expenditure *for the purpose of keeping the property in an ordinarily efficient operating condition.* It does not add to the value of the property, nor does it appreciably prolong its life. It merely keeps the property in an operating condition over its probable useful life for the uses for which it was acquired. Expenditures for that purpose are distinguishable from those for replacements, alterations, improvements or additions which prolong the life of the property, increase its value, or make it adaptable to a different use.

Illinois Merchants Trust Co., 4 B.T.A. 103, 106 (1926)

(emphasis added). After examining the documents relating to the disputed expenses and applying this standard, as stated in further detail below, the Court concludes that none of these expenses were improperly classified as operating expenses for purposes of the Excess Rent calculation. Instead, the expenses were all either for maintenance or inspection, or for repairs the purpose of which was to keep the property in an efficient operating condition.

a. *Elevator Repairs and Maintenance*

In 1997, Groff accrued an expense of $11,636.87 for elevator repair. This repair involved the "dismantl[ing] of the Mian [sic] machine" and the removal and replacement of "the worm and gear." The replacement of the entire elevator would cost approximately $150,000. Applying the above standard, the Court finds that the expense for the elevator was for a repair and not for a capital improvement.

In addition, Groff paid $7,616.51 in seventeen separate payments over the course of 1997 for elevator maintenance. These amounts were for regular maintenance and plainly do not constitute capital expenditures.

b. *Sprinkler Maintenance*

Groff accrued an expense of $2,071.61 in 1997 for sprinkler system maintenance. Buckmiller Automatic Sprinkler Corporation "scrape[d], clean[ed] and wire brush[ed] the interior surface of 1 Automatic Sprinkler Pressure Tank ... and appl[ied] 2 coats of ... tank [e]poxy to same," "dismantle[d] the main check valve, cleaned out the interior and reassemble[d] the check valves and furnish[ed] the new gaskets for the manhole plate." In addition, they "replaced the internal seats of ... two 1″ air valves, onle [sic]½″ water valve and two 3/4″ column valves." Applying the above standard, the Court concludes that these were expenses for maintenance and repair and not for capital improvements.

c. *Alarm and Security Maintenance*

***9** Groff accrued expenses of $2,893.26 for alarm and security maintenance over the course of 1997 for inspections and regular service. The Court concludes that these are maintenance expenses and not capital expenses.

d. *Boiler Repairs and Maintenance*

Groff accrued expenses of $2,114.81 over the course of 1997 for boiler repairs and maintenance. The expenses were for maintenance, inspections, and a variety of repairs, including replacement of minor parts.[9] A new boiler would cost approximately $55,000, at a minimum. The Court concludes that these are expenses for maintenance and repair and not for capital improvements.

e. *Plumbing Expenses*

The most significant accrued expenses for 1997 were plumbing expenses, which totaled $16,609.25. Although the total is high, the documents show that the accrued expenses were for numerous repairs, maintenance, and the replacement of existing but defective parts. The Court concludes that these are expenses for maintenance and repair and not for capital improvements.

C. *Fraud and Misrepresentation*

Soberman's remaining claims all rely on the assertion that the Lease was improperly construed by the defendants. Because the Court has concluded that the defendants' construction was proper, the following claims will be addressed only briefly. In what amounts to a reformulation of the breach of contract claim, Soberman argues that the defendants deliberately included amounts in the Groff Financial Statements that are not properly considered "operating expenses." The elements of a fraud claim under New York law are as follows:

> (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance.

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Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 19 (2d Cir.1996) (quotation marks and citation omitted). To avoid converting every breach of contract action into a fraud claim, however, a fraud claim may only proceed alongside a breach of contract claim where the plaintiff (1) demonstrates a legal duty separate from the duty to perform under the contract, (2) demonstrates a fraudulent misrepresentation collateral or extraneous to the contract, or (3) seeks special damages that are caused by the misrepresentation and unrecoverable as contract damages. *Id.* at 20. Soberman's fraud claim is based on the same facts as his contract claim. In an attempt to state a claim for fraud, Soberman merely characterizes the defendants' alleged misconstruction of the Lease as a deliberate misrepresentation. Because it "merely appends allegations about [the defendants'] state of mind to the claim for breach of contract," *Bridgestone/Firestone,* 98 F.3d at 20 (quotation omitted), Soberman's fraud claim must be denied.

D. *Conversion*

Under New York law, a "denial or violation of the plaintiff's dominion, rights, or possession, is the basis of an action for conversion." *Chateaugay Corp. v. LTV Steel Co.,* 10 F.3d 944, 957 (2d Cir.1993) (quoting *Sporn v. MCA Records, Inc.,* 462 N.Y.S.2d 413, 415 (1983)). Furthermore, "[a] conversion implies a wrongful act, a misdelivery, a wrongful disposition, or withholding of the property." *Chateaugay,* 10 F.3d at 957 (quoting *Magnin v. Dinsmore,* 70 N.Y. 410, 417 (1877)). Because the Excess Rent was properly billed, and there has been neither a violation of Soberman's rights nor a wrongful act on the part of the defendants, the claim for conversion must be denied.

E. *Economic Duress*

***10** New York law establishes the following elements of economic duress:

> (1) a threat, (2) which was unlawfully made, and (3) caused involuntary acceptance of contract terms, (4) because the circumstances permitted no other alternative.

Kamerman v. Steinberg, 891 F.2d 424, 431 (2d Cir.1989) (internal quotation omitted). Soberman's claim for economic duress is based only on the defendants' demands for overdue Excess Rent payments and its threats to take legal action to collect those payments. This is not sufficient to state a claim for duress and accordingly, the claim must be denied.

F. *Accounting*

Under New York law, to establish a right to an accounting, the plaintiff must show, among other things, "that the defendant has been entrusted with money or property of the plaintiff." *Pressman v. Estate of Steinvorth,* 860 F.Supp. 171, 179 (S.D.N.Y.1994). *See also Rodgers v. Roulette Records, Inc.,* 677 F.Supp. 731, 738 (S.D.N.Y.1988) (holding that a "plaintiff must demonstrate the existence of a fiduciary relationship between himself and defendant"). There is no fiduciary relationship between Soberman and the defendants. Groff owed Soberman no special duty distinct from its obligations under the Lease. *See also S.O. Textiles Co. v. A & E Prods. Group,* 18 F.Supp.2d 232, 242 (S.D.N.Y.1998) (" 'Where the relationship is purely commercial ... no fiduciary relationship exists." '). Soberman's claim for an accounting must therefore be denied.

G. *Groff's Counterclaims*

1. *Unpaid Rent*

In its first counterclaim, Groff seeks recovery of the unpaid Excess Rent for 1997, billed in September 1998, in the amount of $20,053.27. Having concluded that the defendants correctly billed Soberman for the Excess Rent due for 1997 under the terms of the Lease, Groff is entitled to recover this unpaid amount.

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2. *Attorney's Fees and Disbursements*

In its second counterclaim, Groff seeks to recover attorney's fees and disbursements incurred in its litigation of this action. Paragraph 19 of the Lease provides for recovery of these amounts

> *if landlord, ..., in connection with any default by tenant* in the covenant *to pay rent* hereunder, *makes any expenditures* or incurs any obligations for the payment of money, *including* but not limited to *attorney's fees, in* instituting, prosecuting or *defending any action* or proceeding, such sums so paid or obligations incurred with interest and costs *shall be deemed to be additional rent* hereunder.

(Emphasis added). Soberman has offered no reason why this provision should not be enforced. The Court therefore finds that defendant Groff is entitled to reimbursement for all attorney's fees and costs incurred in prosecuting its counterclaims and in defending against Soberman's claims to avoid payment of rent.

CONCLUSION

For the reasons stated above, as to the plaintiff's claims, the Court finds for the defendants. As to the first counterclaim, the Court finds for the defendant Groff in the amount of $20,053.27 plus prejudgment interest since September 28, 1998. As to the second counterclaim, the Court finds for the defendant Groff. A scheduling order issued with this Opinion shall govern the submissions on this issue.

***11** SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2000 WL 328781

Footnotes

1 These expenses were as follows: fuel oil, sprinkler maintenance, insurance, electricity for public areas, elevator maintenance, accounting, refuse pick-up, management, corporate franchise tax, real estate taxes, water and sewer rents, first mortgage indebtedness, and general reserve fund.

2 In June 1999, following commencement of this action, the Excess Rent for 1998 was calculated and billed. The 1998 rent that remains unpaid is $15,556.81, but it has not been the subject of any amended pleading in this case.

3 Although Soberman places much emphasis on the term "operating expenses," the Lease does not use that term, but instead refers only to "expenses related to the operation of the building."

4 The parties, however, do not attempt to harmonize the current billing practice with the provisions of the Lease. Indeed the parties do not even cite paragraphs 47B and 47C of the Lease, which describe the calculation of the Excess Rent.

5 It must be inferred that at some point prior to GPM's tenure, the parties agreed to alter the method prescribed in paragraph 46 of the Lease. Indeed, cover letters accompanying the Excess Rent billing statements for 1995, 1996 and 1997 refer to an amendment to the Lease dated November 1981. No such amendment has been included as an exhibit and no party has otherwise referred to it in their submissions.
One further discrepancy should be noted. The parties have stipulated to the monthly amount paid by Soberman as $1,010.27 and the method of calculating the Excess Rent. The Excess Rent bills, however, show that a "Base Rent" of $12,128.28 per year is deducted, which works out to $1,010.69 per month.

6 In his complaint, Soberman alleged that certain legal expenses related to a litigation between Groff and a shareholder were improperly included as operating expenses. Soberman has not elaborated on this argument in his memorandum of law, although it is clear from the evidence that a large amount of expenses for legal fees were incurred in 1997. The litigation concerns the permissible uses of the Building. Assuming that Soberman had adequately preserved this issue, the Court finds that under the above Lease interpretation, these expenses were properly included in the Excess Rent calculation.

7 Even if the Lease were ambiguous on this point, the above interpretation is consistent with the practice of the parties, which was unchallenged until 1998. As discussed below, this course of conduct is determinative of the Lease's meaning.

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8 The Court does not find persuasive the defendants' argument that paragraph 47D's exclusion of capital improvements and expenditures for goods and services benefitting other years necessarily implies that all other items are included as net expenses.

9 Soberman alleges that the water heater was replaced, but it is unclear what he means by "water heater." On two occasions when there was no hot water, in September and October 1997, the "thermocouple," which is apparently part of the water heater, was replaced, at a labor cost of $129.90 in September, and a cost of $20 for the part alone in October.

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