Hearing Date: No hearing scheduled
Location: <<CourtRoomNumber>>
Judge: Calendar, Y

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IRIS Y. MARTINEZ
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

30 DEGREE DESIGN, LLC, an Illinois limited liability company, BRAD BEHMER, an individual, and KENNETH MAYLE, an individual Plaintiffs, v. GP OPPORTUNITY FUND, LLC, an Illinois Limited Liability Company. Defendants.	)	No. 22 L 10246 Room 1906 Calendar I

RESPONSE TO COUNTER-DEFENDANTS' 2-615 MOTION TO DISMISS COUNTERCLAIM

Now comes Defendant Counter-Plaintiff, GP OPPORTUNITY FUND, LLC, and in response to Counter-Defendants 2-615 Motion to Dismiss Counterclaim states as follows:

Counter-Defendants Motion to Dismiss Counts I and II of the Counterclaim pursuant to 2-615, should be denied. In considering whether to grant a motion to dismiss pursuant to 2-615, this Court will consider whether the allegations in the complaint, viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Dvorkin v. Soderquist*, 2022 Ill. App. 1st 201368, ¶75 (1st Dist. 2022).

. Here, Counter-Plaintiff has alleged sufficient facts to maintain both Count I and II of its Counterclaim. As more fully addressed below, Counter-Defendants improperly seek to have the breach of contract claim in Count I dismissed based on the false assertion that Counter-Plaintiffs' allegation that "all of its obligations under the lease were fulfilled" is untrue. *See.* Counter-Defendants' Motion to Dismiss at 3. Similarly, Counter-Defendants seek to have Count

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II dismissed on the grounds that Counter-Plaintiff has not specified which statements were fraudulent, (*Id.* at 4), while at the same time arguing that the specific statements Counter-Plaintiff did alleged were fraudulent were true (*Id.* at 7). Counter-Defendants not only misconstrue Exhibit H of the Counterclaim in its entirety but also improperly assert facts not contained in the pleadings in support of their motion. *See. Id.* at 3, 4 (Counter-Defendants make additional claims about their inability to obtain renters insurance). Even if these additional facts were properly raised as part of a Motion for Summary Judgement and supported by affidavit, when considering all allegations in the light most favorable to the non-moving party, dismissal would be improper. Therefore, Counter-Defendants Motion to Dismiss the Counterclaim should be denied.

I. COUNTER-PLAINTIFF BREACH OF CONTRACT CLAIM IS PROPER.

Counter-Defendants seek to have Count I dismissed on the grounds that Counter-Plaintiff has not properly alleged all elements of a breach of contract claim. Specifically, they attach the allegation that Counter-Plaintiff had satisfied its obligations under the lease. In so doing, Counter-Defendants argue that Exhibit H to the counterclaim somehow negates Counter Plaintiff's allegation that it had satisfied its obligations under the lease. *Id.* at 3. Exhibit H, is a copy of the Circuit Court of Cook Counties order in Case Number 2022-M1-401400. According to Counter-Defendants this order demonstrates that Counter-Plaintiff could not have fulfilled its obligations under the lease. In jumping to this conclusion, Counter-Defendants make several erroneous assumptions claims regarding Exhibit H. First, Counter-Defendants falsely assert that Counter-Plaintiff could not have satisfied its obligations unless the building was free from alleged building code violation. Second, Counter-Defendants claim that Exhibit H demonstrates (1) that there were building code violations, and (2) those violations were in

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existence when the lease was commenced. Both of these assertions are false because; (1) there is no finding on Exhibit H as to the existence of any building code violations, and (2) a review of the Circuit Court records indicates that case number 2022-M1-401400 was initiated ***after*** the lease had commenced and Counter-Defendants were in possession of the property. Third, Exhibit H does not include a finding that there were any building code violations on the property, but does not even list the alleged violations. *See. Counterclaim* Exhibit H. Had Counter-Defendants actually reviewed the *allegations* related to the Circuit Court building case they would discover that all but one of the cited code violations were pertaining to the illegal conduct of Counter-Defendants in operating an unlicensed public place of amusement on the premises. *See. Verified Complaint* 2022-M1-401400.

Lastly, Counter-Defendants, appear to assert the affirmative defense of recession based on mistake of fact. "The motion does not raise affirmative factual defenses, but rather alleges only defects on the face of the complaint." *Vernon v. Schuster*, 179 Ill.2d 338, 344 (1997). In addition to being improper grounds for a 2-615 motion, for the reasons discussed above, this is factually inaccurate. Not only were Counter-Defendants given an opportunity to discover any defects in the property prior to leasing, but the particular building code violations cited were caused by Counter-Defendants after taking possession. Accordingly, Counter-Defendants motion to dismiss count I should be denied.

II. COUNTER DEFENDANTS MOTION TO DISMISS COUNT II SHOULD BE DENIED.

Dismissal is proper under Section 2-615, where allegations, "when construed in a the light most favorable to the plaintiff, are [in]sufficient to establish a cause of action upon which relief may be granted." *Blumenthal v. Brewer, 2016 IL 119781,* ¶19. Such motions challenge the

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legal sufficiency of a pleading based on defects apparent on its face. *Id.* In this case, Counter-Plaintiff has alleged that Counter-Defendants committed fraud by (1) making false statements that they had obtained sufficient insurance coverage to satisfy the condition precedent to execute the lease, and (2) that Counter Defendants fraudulently concealed that they would be using the premises as a personal residence and illegal nightclub. In moving to dismiss the fraud claims Counter-Defendants ignore the allegations regarding the false certificate of insurance they provided and attempt to sidestep their fraudulent concealment of their intent to use the premises for an illegal nightclub because they occasionally used the premises for their stated purpose of a workshop. In each instance, Counter-Plaintiff has plead fraud with sufficient particularity to put Counter-Defendants on notice of which claims it is being called to defend. Accordingly, for the reasons more fully set forth below, Counter-Defendants Motion to Dismiss should be denied as to Count II.

A. USE OF THE PREMISES AS A WORKSHOP DOES NOT NEGATE THE FRAUDULENT CONCEALMENT OF THE INTENDED ILLEGAL USE

As to the first allegation regarding the use of the premises, Counter-Defendants argue in their Motion to dismiss that any use of the premises for the purported purpose negates their concealment of the fact that they intended to use the premises for an illegal nightclub and/or personal residence. In support Counter-Defendants rely on *Hirsch v. Feuer,* 299 Ill. App. 3d 1076, 1086-87, 702 N.E.2d 265, 273 (1st Dist. 1998).

. *In Hirsch,* the Court found the complaint facially insufficient because it "does not point to specific false representations so as to fairly apprise defendants of what they would be called upon to answer." *Id.* Unlike the present case, the plaintiff in *Hirsch* only alleged that defendant failed to make disclosures regarding the condition of the property, however, they did

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not specify which disclosures were allegedly false. *Id.* As a result of the ambiguity of the plaintiffs allegations in *Hirsch*, the court concluded that the complaint was not sufficient to put defendant on notice of which claims it was called upon to defend. *Id.* Unlike *Hirsch*, in this case Counter-Defendants do have sufficient notice of the specific statements Counter-Plaintiff alleges to be fraudulent. Namely, the representation (1) that Counter-Defendants had obtained the necessary insurance coverage, and (2) the concealment of their intended use of the premises for an illegal night club and personal residence when they indicated how they intended to use the premises. While Counter-Defendant asserts that silence in a transaction does not rise to the level of fraud. Silence accompanied by deceptive conduct or suppression of material facts, however, can give rise to concealment and "it is then the duty of the party which has concealed information to speak." *Heider*, 245 Ill. App.3d at 269; see also *Mitchell v. Skubiak*, 248 Ill. App.3d 1000, 1005 (1993). Here, Counter-Defendants specifically asserted their intended use of the property prior during negotiations prior to executing the lease and further affirmed in the lease agreement that the intended use was lawful. Counterclaim Exhibit A ¶2. Counter-Defendants in so asserting fraudulently concealed the material facts that they would be using the property as a personal residence and illegal night club.

B. COUNTER DEFENDANTS FRAUD WAS NOT LIMITED TO FUTURE CONDUCT

The fraudulent misrepresentation of Counter-Defendants regarding insurance coverage and the concealment of their intended illegal use of the property is actionable because; (1) it was referring to conditions in existence at the time the statements were made or concealed, and (2) because they were made as part of an overall scheme to induce Counter-Plaintiff to lease them the space. Therefore, Counter-Defendants argument that their statements are not actionable as

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fraud because they refer to future conduct fails.

First as to the use of the property, the pleadings indicates that it was Counter-Defendants intent to illegally use the premises as a personal residence and an illegal nightclub. Counter-Defendant Behmer's own statements to fire investigators just 14 months after the lease commenced that he "has lived in the building for over one year" indicates that Counter-Defendants had the intent to reside in the premises from the outset and fraudulently concealed that fact from Counter-Plaintiff in order to induce him to enter the lease. *See.* Counterclaim Exhibit I.

As to the certificate of insurance, in ¶28 of its Counterclaim, Counter-Plaintiff alleges that "Prior to signing the lease agreement, Counter-Defendants presented GP with a certificate of insurance dated 9/30/2021 and attached hereto as Exhibit F." *Id.* This insurance policy purports to provide the requisite umbrella coverage for the property required under the lease. *Id.* Counter-Plaintiff clearly alleges that statement of coverage was provided to induce it to believe that the building was properly insured. Counter-Defendants argue in their motion to dismiss that "due to the numerous safety and health issues present on the property prior to Counter-Defendant's occupation of the property, Counter-Defendants were not able to obtain renters insurance". Counter-Defendants 2-615 Motion at 3. Relying on Counter-Defendants own assertion, the "Certificate of Insurance" they provided indicating the building was insured would necessarily be false if they were "unable to obtain" insurance. Accordingly, Counter-Defendants argument fails.

C. COUNTER PLAINTIFF HAS PROPERLY PLEAD DAMAGES AS A RESULT OF COUNTER DEFENDANTS CONDUCT.

As to damages, Counter-Plaintiff alleges in ¶35 that the fire which destroyed the unit was

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a direct result of the Counter-Defendants' illegal occupancy and that it has incurred costs of defending a building code case as a result of Counter-Defendants' violations of the Chicago Municipal Code, extensive cost of repairs, and lost rent. As to the fraudulent statements of Counter-Defendants regarding insurance coverage, Counter-Defendant has been forced to cover the cost of repairing the unit after the fire instead of the damage being covered by insurance. Counterclaim at 55. Accordingly, Counter-Plaintiff has sufficiently alleged damages related to the fraudulent concealment and misrepresentations by Counter-Defendant which induced him to lease them the property.

WHEREFORE, for the reasons set forth above, Counter-Plaintiff respectfully request that this Court DENIES the Motion to Dismiss Counts I and II of its Counterclaim.

Dated: November 27, 2023

Respectfully submitted,

GP OPPORTUNITY FUND, LLC

By: _____
One of its Attorneys

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30 DEGREE DESIGN, LLC, an Illinois limited liability company, BRAD BEHMER, an individual, and KENNETH MAYLE, an individual	)	
Plaintiffs,	)	No. 22 L 10246
v.	)	
GP OPPORTUNITY FUND, LLC	)	
Defendants.	)	

NOTICE OF FILING

TO: WEISS ORTIZ P.C.
Attorney for Plaintiffs
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La Grange Park, Illinois 60526
Info@weissortizlaw.com
Firm No. 40058

PLEASE TAKE NOTICE that on November 28, 2023 there was filed with the Clerk of the Law Division of the Circuit Court of Cook County Counter Plaintiffs Response to Counter Defendant's 2-615 Motion to Dismiss Counterclaim, a copy of which is included herewith and served upon you.

Respectfully submitted,

GP Opportunity Fund, LLC

By: _____
One of its Attorneys

CERTIFICATE OF SERVICE

On November 28, 2023, I, Zachary D. Limbaugh, an attorney, caused to be served via email and US Mail the foregoing Notice of Filing/Notice of Motion to the persons or firms listed above:

_____
Zachary D. Limbaugh

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