

74 A.D.3d 542, 903 N.Y.S.2d 364, 2010 N.Y. Slip Op. 04935
(Cite as: 74 A.D.3d 542, 903 N.Y.S.2d 364)

Supreme Court, Appellate Division, First Department,
New York.
SEHERA FOOD SERVICES INC. doing business
as Apple Café, Plaintiff–Appellant.

v.

EMPIRE STATE BUILDING COMPANY L.L.C.,
Defendant–Respondent.

June 10, 2010.

Background: Commercial lessee brought action against lessor. The Supreme Court, New York County, Marcy S. Friedman, J., denied plaintiff's motion for leave to amend to add fraudulent inducement claim. Plaintiff appealed.

Holding: The Supreme Court, Appellate Division, held that failure of lessor to disclose to lessee future plan to relocate tourist attraction ticket office could not support fraudulent inducement or fraudulent concealment claims against lessor.

Affirmed.

West Headnotes

[1] Fraud 184 ↪17

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k17 k. Duty to disclose facts. Most Cited Cases

Landlord and Tenant 233 ↪28(1)

233 Landlord and Tenant

233II Leases and Agreements in General

233II(A) Requisites and Validity

233k28 Fraud

233k28(1) k. In general. Most Cited Cases

Landlord and Tenant 233 ↪28(2)

233 Landlord and Tenant

233II Leases and Agreements in General

233II(A) Requisites and Validity

233k28 Fraud

233k28(2) k. Concealment. Most Cited Cases

Alleged failure of commercial lessor to disclose to lessee future plan to relocate tourist attraction ticket office, which would divert pedestrian traffic away from leased premises, could not support lessee's fraudulent inducement or fraudulent concealment claims against lessor; lease contained no provision obligating lessor to direct pedestrians past leased premises, no guarantees as to pedestrian traffic were made during the lease negotiations, and lessor had no duty to disclose any future plans to lessee, as the parties had non-fiduciary relationship.

[2] Fraud 184 ↪17

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k17 k. Duty to disclose facts. Most Cited Cases

There is no duty to disclose in a non-fiduciary, arm's length transaction between a landlord and tenant.

****364** Penn Proefriedt Schwarzfeld & Schwartz, New York (Mark I. Zelko of counsel), for appellant.

Stern Tannenbaum & Bell LLP, New York (Francine Nisim of counsel), for respondent.

TOM, J.P., ANDRIAS, CATTERSON, MOSKOWITZ, ACOSTA, JJ.

***542** Order, Supreme Court, New York County

74 A.D.3d 542, 903 N.Y.S.2d 364, 2010 N.Y. Slip Op. 04935
(Cite as: 74 A.D.3d 542, 903 N.Y.S.2d 364)

(Marcy S. Friedman, J.), entered January 22, 2010, which, inter alia, denied *543 plaintiff's motion for leave to amend its complaint to add a cause of action for fraud in the inducement, unanimously affirmed, without costs.

[1][2] Supreme Court providently exercised its discretion in denying leave to amend, since plaintiff's proposed claim of fraudulent inducement was not viable (*see e.g. Thomas Crimmins Contr. Co. v. City of New York*, 74 N.Y.2d 166, 170, 544 N.Y.S.2d 580, 542 N.E.2d 1097 [1989]), as it failed to allege a material misrepresentation made with the intention of inducing reliance (*see Rivera v. JRJ Land Prop. Corp.*, 27 A.D.3d 361, 364, 812 N.Y.S.2d 63 [2006]). Rather, plaintiff claimed that when the subject lease was executed, individuals purchasing tickets to the Empire State Building's observation deck walked directly past the subject premises, and that defendant failed to disclose a future plan to relocate the ticket office, diverting such traffic away from the premises. Plaintiff acknowledged that the lease contains no provision obligating defendant to direct ticket purchasers past the premises **365 and that during lease negotiations no guarantees were made regarding the route to be followed by such purchasers. As such, plaintiff's claim is actually one for fraudulent concealment, which is also not viable, since there is no duty to disclose in a non-fiduciary, arm's length transaction between a landlord and tenant (*see Dembeck v. 220 Cent. Park S., LLC*, 33 A.D.3d 491, 492, 823 N.Y.S.2d 45 [2006]).

N.Y.A.D. 1 Dept.,2010.

Sehera Food Services Inc. v. Empire State Bldg. Co. L.L.C.

74 A.D.3d 542, 903 N.Y.S.2d 364, 2010 N.Y. Slip Op. 04935

END OF DOCUMENT

Reprinted from Westlaw with permission of Thomson Reuters. If you wish to check the currency of this case by using KeyCite on Westlaw, then you may do so by visiting www.westlaw.com.