

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

	X	
PRIME 135 NYC, LLC,	:	Index No.: 651966/2017
	:	
Plaintiff,	:	
	:	VERIFIED FIRST
-against-	:	AMENDED COMPLAINT
	:	
MAJOR CONSTRUCTION CO., INC. and	:	
JOSEPH MENDLER,	:	
	:	
Defendant.	:	
	X	

Plaintiff, PRIME 135 NYC, LLC ("Plaintiff" or "Prime"), by and through its attorneys, MICHAEL J. KAPIN, P.C., as and for its First Amended Verified Complaint, alleges upon knowledge of itself and its own actions and upon information and belief as to all other matters alleged below as follows:

THE PARTIES

1. Prime is a domestic limited liability company operating and organized under the laws of the State of New York, with its primary place of business in the County of New York.
2. Defendant Major Construction Co., Inc. ("Defendant" or "Major") is a domestic business corporation operating and organized under the laws of the State of New York, with its primary place of business in the County of New York.
3. Defendant Joseph Mendler is an individual with a place of business in the County of New York ("Joseph").

FACTUAL BACKGROUND

4. In or about January of 2014, Plaintiff executed a 10-year lease (the "Lease") with 163 West 10th LLC (the "Landlord") for commercial ground floor and adjacent outdoor space located at 163 West 10th Street, New York, New York (the "Subject Premises") for the purposes of constructing and operating a restaurant therein.

5. Landlord specifically advertised the Subject Premises as suitable for restaurant space.
6. Gerry Stevens ("Gerry") at all times herein mentioned was the principal and sole member of Plaintiff.
7. Gerry negotiated the Lease for the Subject Premises with Joseph and his daughter Valerie Mendler ("Valerie").
8. On or about December 20, 2013, prior to entering into the Lease, while meeting with Joseph at the back window (facing 10th Street) of the Subject Premises, Joseph advised Gerry and Linda Stevens that 163 West 10th Street, New York, New York was owned by Joseph's father Harry Mendler ("Harry"), and that Harry was the sole principal and owner of the Subject Premises, through his membership in Landlord.
9. Joseph stated to Gerry that they were negotiating the Lease for the Subject Premises on behalf of Landlord, as Harry was out of town at his Palm Beach Florida estate.
10. It was reasonable for Gerry to believe a son would be negotiating a lease on behalf of his father who was out of the State.

The Build Out and Ownership of the Subject Premises

11. At the time the Lease was executed, the Subject Premises consisted of bare space only and was not built to accommodate a restaurant.
12. Gerry signed the Lease on behalf of his company, Prime, intending to open a fine Italian restaurant and upscale bar.
13. At the time the Lease was executed, the parties to the Lease understood and agreed that significant improvements would be required to the Subject Premises before a restaurant and bar could operate there.
14. At the time the Lease was signed, Joseph was the owner of Defendant Major.
15. Upon concluding the Lease agreement, Gerry began soliciting bids from contracting firms for the build-out of the Subject Premises.

16. Joseph advised Gerry that his company Major could do the build out, that Joseph knew the building, and that no one would have a better relationship with the Landlord (who was Joseph's father) than Joseph would.

17. The Lease, paragraph 48G of the Rider, provided that:

Tenant shall submit a detailed description of work Tenant wishes to perform for Landlord's review and, in the event the Landlord approves the work, Tenant shall submit their approved plans to Major Construction Corp. ("Major") who will supervise and/or perform under separate contract entered into between Tenant and Major, proposed alterations at Tenant's sole cost and expense. Tenant may elect to contract out any portion of the approved alterations provided Tenant complies with the terms of this lease and rider and any contractor, electrician and/or plumber shall be licensed in New York City and insured. Tenant agrees to submit for approval the names of all contractors and their insurance certificates for approval before any contracts are signed or work is performed, such approval shall not be unreasonably withheld or delayed.

18. After Gerry signed the Lease on behalf of Plaintiff, Major and Joseph wrongly interfered in the contract bidding process, and advised and exerted unfair and unreasonable influence upon the Landlord, to Prime's detriment.

19. A few weeks after signing the Lease, Joseph stated to Gerry that if he did not use Major to do the buildout of the restaurant at the Subject Premises, that Joseph would "influence" his father Harry to be uncooperative with Prime and any contractor Gerry might choose, which would cause Prime's buildout to take years instead of months.

20. In addition, Joseph prevented other contractors from gaining access to the Subject Premises, and did so for the purpose of guaranteeing that only Major, and no other contractor, would be able to perform the build-out of the Subject Premises as a restaurant.

21. As a result, Prime's ability to secure its own contractor for the build-out was frustrated, and Prime was left with no choice but to accept Major's services as general contractor.

22. Upon information and belief, Joseph was a member of Landlord, and Joseph's representations to Gerry stating that Joseph's father Harry was the sole member of Landlord were false and designed to deceive Plaintiff.
23. Had Gerry known that the Joseph was in fact a member of Landlord, he would not have agreed to, under any circumstances, having his landlord be the same entity that was building out his restaurant. It is an inherent conflict of interest.

False Representations about Cooperation from Neighbors

24. Joseph made various statements to Gerry pertaining to the anticipated cooperation of the neighbors at the Subject Premises.
25. On or about December 20, 2013, days prior to signing of the Lease, in conversations between Gerry and Joseph, Joseph stated the following:
- a. That Joseph had a longstanding good relationship with all of the residents of 163 West 10th Street, New York, New York, and the buildings neighbors at 161 West 10th Street, New York, New York, and that leveraging his longstanding good relationship, the neighbors to the Subject Premises had agreed with Joseph that they would not object to, and would in fact cooperate with any tenant at the Subject Premises who sought to build out of a restaurant, obtain a liquor license and obtain community board approval for same;
 - b. That James Hirsch was a neighbor to the Subject Premises who maintained a good relationship with Joseph and had agreed with Joseph to cooperate with any tenant at the Subject Premises who sought to build out of a restaurant, obtain a liquor license and obtain community board approval for same;
 - c. That Jill Kruskal was a neighbor to the Subject Premises who maintained a good relationship with Joseph and had agreed to cooperate with any tenant at

the Subject Premises who sought to build out of a restaurant, obtain a liquor license and obtain community board approval for same;

- d. That Elizabeth Sabo was a neighbor to the Subject Premises who maintained a good relationship with Joseph and had agreed to cooperate with any tenant at the Subject Premises who sought to build out of a restaurant, obtain a liquor license and obtain community board approval for same; and,
- e. That Robin Felsher was in charge of the Mid-West 10th Street Block Association, and maintained a good relationship with Joseph and had agreed to cooperate with any tenant at the Subject Premises who sought to build out of a restaurant, obtain a liquor license and obtain community board approval for same.

26. In fact each of these statements was false and misleading.

27. In fact, unbeknownst to Gerry, the neighbors to the Subject Premises, including those mentioned above, were opposed to the restaurant which had previously occupied the space Tanti Baci Cafe which endured a long succession of complaints by the Subject Premises' neighbors, which Joseph was aware of.

28. In fact, unbeknownst to Gerry, Joseph was involved in a potential lease for the Subject Premises a few months prior to Prime's Lease, with a company called MHA d/b/a Matty's NYC.

29. In or around November 2013, MHA d/b/a Matty's NYC sought and failed to obtain Community Board 2 State Liquor Authority Licensing Committee approval for the opening of their proposed bar/tavern at the Subject Premises.

30. Upon information and belief, Joseph was fully aware that the neighbors of the Subject Premises were vehemently opposed to the opening of MHA d/b/a Matty's NYC, and were further vehemently opposed to the opening of any bar in the Subject Premises.

31. Upon information and belief, Joseph was fully aware that any operator seeking to sell any alcohol at the Subject Premises would face stern opposition, rather than support, from the neighbors of the Subject Premises.
32. Upon information and belief, Joseph made these false and misleading statements regarding the neighbors agreement with Joseph to cooperate with
33. Joseph's statement were intentional, and designed to convince Gerry to sign the Lease with Landlord, and agree to construction services with Major, knowing full well that the Subject Premises would not be suitable for Gerry and Prime's intended use of an upscale Italian restaurant with a bar.
34. Gerry actually relied on the statements Joseph made and signed the Lease on behalf of his company, Plaintiff Prime.
35. The cooperation and support of the neighbors to the Subject Premises was important to ensuring a speedy, efficient and affordable opening of the Plaintiff's restaurant and bar.
36. Gerry and Prime's reliance on the statements were reasonable. As the son of Harry, the Landlord, Joseph held himself out as being intimately involved in the operations of 163 West 10th Street, New York, New York, stating to Gerry that his years of involvement in working with his father led to the establishment of extremely good relations with all of the tenants of 163 West 10th Street, New York, New York, along with its neighbors.

Major Breached its Construction Contract

37. Major provided an estimate of its total fees of \$210,000.00.
38. After wrongfully cornering Prime into agreeing to accept Major as the general contractor, Major thereafter engaged in a pattern of overcharges, billing for services and goods not actually provided, double-charging for materials and labor, and other fraudulent billing practices.

39. Specifically, this included extensive construction work which Prime paid for, which served the benefit of the Landlord (who Joseph secretly maintained an ownership interest in) only, and was not in any way designed to serve the necessary needs of Prime's restaurant.
40. As a result, Prime was compelled to pay Major nearly \$300,000.00 for the restaurant build-out.
41. Major agreed to source and install a kitchen exhaust extractor to be mounted on the Subject Premises' roof.
42. In fact, the exhaust extractor produced noise far in excess of New York City allowances, resulting in numerous fines and citations against Prime.
43. Despite repeated attempts to have the unit Major supplied repaired, the exhaust extractor proved impossible to fix.
44. Upon information and belief, Major and Landlord hatched a scheme whereby they would induce Prime into investing \$700,000.00 cash, and hundreds of thousands of dollars of sweat equity, to build out the Subject Premises, only to be forced into surrendering the Subject Premises and releasing the Landlord.
45. As part of this plan, Major intentionally delayed construction, complicated construction and improperly completed construction as part of an artifice and scheme to provide Landlord with repossession of the Subject Premises, with significant capital improvements, so that the Landlord and Joseph (through his direct ownership in Landlord) could profit from extraordinarily higher rents from future tenants.

Veil Piercing

46. Joseph is the alter egos of Defendant Major and as such exercised complete domination of entities with respect to the facts herein, and such domination was used to commit a wrong against Plaintiff which resulted in the Plaintiff's injuries herein.

FIRST CAUSE OF ACTION - BREACH OF CONTRACT

47. Prime entered into a construction services contract with Major.
48. Prime paid for the construction services.
49. Major both failed to provide the services as agreed and in a timely manner, and conspired with the Landlord to delay construction, complicate construction and improperly complete construction as part of an artifice and scheme to provide Landlord with repossession of the Subject Premises, with significant capital improvements, so that the Landlord could profit from extraordinarily higher rents from future tenants.
50. As a result of the foregoing, Major breached its contract with Prime.
51. Major's actions, as aforementioned, led to the demise of Prime's restaurant business.
52. As a result of the foregoing, Prime has been damaged in an amount to be proven at trial, but believed to be in excess of \$5,000,000.00.

SECOND CAUSE OF ACTION - FRAUD

53. As aforementioned, Major and Joseph made false and misleading statements to Prime concerning the ownership of Landlord.
54. As aforementioned, Major and Joseph made false and misleading statements to Prime and Gerry concerning the neighbors of the Subject Premises.
55. As aforementioned, Major and Joseph made these statements to Prime and Gerry with an intent to deceive Prime, as set forth above.
56. As aforementioned, Gerry and Prime actually relied on these statements when Gerry entered into both the Lease and the construction services contract with Major.
57. As aforementioned, Gerry and Prime's reliance was reasonable.
58. Major and Joseph's actions, as aforementioned, led to the demise of Prime's restaurant business and the loss of Gerry's life savings.

59. As a result of the foregoing, Prime suffered damages in an amount to be determined at trial but in no event less than \$5,000,000.00.

THIRD CAUSE OF ACTION – UNJUST ENRICHMENT

60. Prime paid Major for work which was not performed or was otherwise unnecessary.

61. As a result of the foregoing, Prime has been damaged in the amount of no less than \$180,000.00.

FOURTH – BREACH OF IMPLIED WARRANTY

62. Prime contracted with Major to purchase and install a kitchen exhaust extractor that met with legal and regulatory requirements for equipment of that type.

63. As a contractor, Major's work carried an implied warranty that its completed work was constructed in accordance with applicable law using sound engineering and construction standards in a workmanlike manner and free from defective materials.

64. The equipment as provided and installed by Major was defective, in that it generated noise in excess of 42 decibels and was thus not compliant with New York Administrative Code § 24-227.

65. Major failed to repair or replace the installed exhaust extractor with one that complied with applicable laws.

66. As a result, Prime was compelled to hire other contractors in an attempt to repair the defective equipment Major installed.

67. Prime thereby suffered damages in an amount to be proven at trial, but in no event less than \$80,000.00.

PRAYER FOR RELIEF

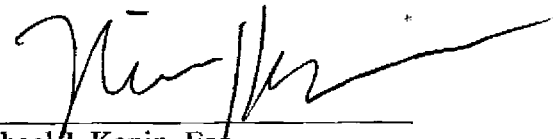
Wherefore Plaintiff respectfully pray for the following relief:

- a. A money judgment in the amount of the Plaintiffs' damage;
- b. Attorney's fees and costs;
- c. Punitive damages as a result of Defendants' fraud;
- d. Interest on the above-amounts; and,
- e. Any other relief that the Court deems just and proper.

Dated: October 4, 2018

Respectfully submitted,

MICHAEL J. KAPIN, P.C.
Attorney for Plaintiff



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VERIFICATION

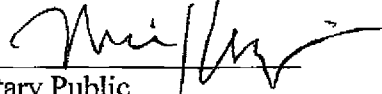
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GERRY STEVENS, being duly sworn, deposes and states under the penalties of perjury,
as follows:

1. I am the manager and sole shareholder of PRIME 135 NYC, LLC, the Plaintiff in this action.
2. The foregoing FIRST AMENDED VERIFIED COMPLAINT is true to the best of my knowledge, except as to those matters stated to be upon information and belief, and as to those matters, I believe them to be true.


GERRY STEVENS

Sworn to before me this
4th day of October, 2018


Notary Public
