IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RETAIL BRAND ALLIANCE, INC.,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	**NO. 06-01857**
	:	
v.	:	
	:	
ROCKVALE OUTLET CENTER, LP	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Stengel, J. **March 28, 2007**

On January 31, 2007, I granted plaintiff Retail Brand Alliance's motion to dismiss defendant Rockvale Outlet Center's counterclaim. See Retail Brand Alliance, Inc. v. Rockvale Outlet Ctr., No. 06-01857, 2007 U.S. Dist. LEXIS 7318 (E.D. Pa. Jan. 31, 2007). Rockvale moved for reconsideration on February 12, 2007. I will deny the motion because Rockvale does not meet–or even address–the standards for a motion for reconsideration. Instead, Rockvale merely disagrees with the court's previous opinion or attempts to clarify its previous arguments

I. BACKGROUND

This lawsuit arises out of an October 25, 2004 lease agreement for retail space in the Rockvale Outlet Center. RBA, the previous tenant, is suing Rockvale to recover a tenant allowance. Renovations to the store front occurred in two stages. The first step was for Rockvale to turn the retail shell into a "vanilla box" consisting of the basic store

features and layout. Then, RBA would complete the second step and "fit out" the space as a Casual Corner Annex store. Under the lease, RBA was entitled to collect a tenant allowance to reimburse them for up to $340,000 in expenses incurred in fitting out the space. Although RBA submitted a reimbursement request and actually received a check from Rockvale in September 2005, RBA never actually collected the allowance.

In order for Rockvale to begin construction of the vanilla box, the Landlord's Work Addendum to the lease required RBA to provide detailed architectural plans and specifications. Rockvale's counterclaim against RBA and RBA's architect, Cowan and Associates,[1] alleges that both parties supplied faulty design plans to Rockvale and that it cost Rockvale over $100,000 to correct these defects.

On January 15, 2006, RBA assigned the lease to a new tenant, Charming Shoppes, Inc.,[2] with Rockvale's consent. At the time of the assignment, RBA had requested but never received the $340,000 tenant allowance. By this date, Rockvale had also not sought reimbursement from RBA or Cowan for the $100,000 in additional costs it incurred due to the faulty plans. Rockvale did not seek reimbursement until it filed its counterclaim on November 6, 2006.

RBA moved to dismiss this counterclaim based on the estoppel provision of the assignment agreement. Under the estoppel clause, Rockvale certified that "the rents,

[1] Cowan has not moved to dismiss Rockvale's counterclaim.

[2] Charming is not a party to the lawsuit.

other charges and payments provided for in the Lease have been paid" in full and "there are no uncured defaults by Assignor [RBA] of any covenant, agreement, term, provision or condition contained in the Lease and there are no events which with notice or lapse of time, or both, would reasonably be expected to result in a default by Assignor under the Lease."

Rockvale responded in opposition to RBA's motion, arguing that RBA had acted inequitably by fraudulently inducing it into making the estoppel certification and that it should be permitted to develop a factual record in support of its counterclaim. In support of its fraud allegations, Rockvale described a discussion between its general partner, David Ober, and an unnamed RBA representative, during a Penn State football game on September 5, 2005. Def's Mem. Opp'n Mot. Dismiss Countercl. p. 10. The RBA representative told Ober that RBA was closing its Casual Corner store and Ober responded that Rockvale would stop payment on the allowance in light of RBA's decision to pull out of a five-year lease. Rockvale argued that "[w]ell aware of Rockvale's reasons for stopping payment, RBA did not protest the decision" and in the following months "RBA never mentioned the [allowance] again until well after it had secured Rockvale's consent to the assignment." Id. Through its silence, "RBA deliberately mislead Rockvale into believing that it agreed that based on the planned early departure and in return for Rockvale's consent to an eventual assignment, the [allowance] was not payable." Id.

II. STANDARD FOR A MOTION FOR RECONSIDERATION

A motion for reconsideration has two primary purposes: “to correct manifest errors of law or fact or to present newly discovered evidence.” Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) cert. denied, 476 U.S. 1171 (1986). The motion should be granted "if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . ..; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing N. River Ins. Co. v. CIGNA Reins. Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). See also Cont'l Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995) ("Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly"). The motion should not be granted if the moving party is merely asking the court to “rethink” what it has already rightly or wrongly decided. Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993)

III. DISCUSSION

Rockvale does not come close to meeting the high standard required to grant a motion for reconsideration. Rockvale fails to present new evidence, an intervening change in the law, or a need to correct a clear error of law or fact. Primarily, Rockvale asks the court to “rethink” its dismissal of the counterclaim.

A. Breach of the Lease Agreement

Count one of Rockvale's counterclaim asserts that RBA breached the lease agreement by providing Rockvale with defective building plans, which caused increased construction costs.

(1) Judicial Estoppel

Rockvale initially moved to dismiss RBA's claim by arguing that RBA no longer had a right to collect the allowance since it had assigned its rights under the lease to Charming, the new tenant. The court disagreed and denied Rockvale's motion to dismiss. After previously asserting the validity of the assignment agreeement, Rockvale urged the court to find one portion of it unenfoceable. This argument made the court note in its prior opinion that the doctrine of judicial estoppel prevented Rockvale from taking such contradictory positions.

In its motion for reconsideration, Rockvale argues that this doctrine should not apply because it is not arguing that the entire assignment agreement is invalid, but only that the estoppel section of the agreement is invalid. Rockvale also points to Section 21.18 of the lease, which provides that if any portion of the lease is invalid, the remainder of the lease remains valid and enforceable. Rockvale expressly withdraws any statements that could be construed as arguing that the assignment agreement as a whole is invalid.[3]

[3] RBA notes the disingenuousness of Rockvale's argument that one clause of the agreement–a clause that conveniently undermines Rockvale's claim–is invalid and unenforceable. RBA also highlights portions of Rockvale's motion to dismiss where Rockvale had argued that the whole assignment agreement was invalid. See Pl's Mem. Opp'n Def's Mot. Recons. p. 10.

(2) Equitable Estoppel

In its opposition brief to RBA's motion to dismiss, Rockvale argued that its counterclaim should not be dismissed because it signed the estoppel certificate as a result of RBA's misrepresentations. Rockvale contended that it was too early in the case to dismiss the counterclaim and that it should be entitled to develop a factual record. The court ruled that Rockvale's counterclaim failed as a matter of law because in Pennsylvania, parol evidence bars a court from considering extrinsic evidence in support of a fraud in the inducement claim. Additionally, since Rockvale had ratified the agreement by accepting its terms and conditions for over a year, its fraudulent inducement claim failed at this juncture.

In its motion to reconsider, Rockvale tries to clarify this argument for the court. Rockvale is not trying to allege fraudulent inducement or fraud against RBA. Instead, Rockvale argues that RBA is barred from asserting an equitable affirmative defense of estoppel based on RBA's own inequitable and fraudulent conduct. Rockvale argues that "[s]ince RBA has raised the affirmative defense of equitable estoppel, Rockvale is entitled to gather facts to demonstrate that RBA has acted inequitably." Def's Mot. Recons. pp. 4-5. This argument was not clearly discernable from Rockvale's motion to dismiss, which used the language of fraudulent inducement and inequitable conduct

interchangeably.[4] Because the contours of Rockvale's argument were not clear to the court, the court concluded that Rockvale's claim was one for fraudulent inducement and therefore barred by the parol evidence rule.

Equitable estoppel is not an independent cause of action but one "raised either as an affirmative defense or as grounds to prevent the defendant from raising a particular defense." Carlson v. Arnot-Ogden Memorial Hosp., 918 F.2d 411, 416 (3d Cir. 1990) (citing Paul v. Lankenau Hosp., 543 A.2d 1148, 1152 (Pa. 1988)). The Pennsylvania Supreme Court has explained that equitable estoppel "arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." Zitelli v. Dermatology Educ. & Research Found., 633 A.2d 134, 139-140 (Pa. 1993) (citations omitted). When the moving party establishes estoppel, "the person inducing the belief in the existence of a certain state of

[4] A review of Rockvale's memorandum in opposition to RBA's motion to dismiss illustrates this. At times, Rockvale discusses equitable estoppel. ("...estoppel certificates simply enforce a more general rule of equitable estoppel. Equitable defenses require that the party asserting the defense has not acted inequitably." p. 9; "...estoppel provision was procured through fraud..." p. 11; "If Rockvale succeeds in proving that it was a fraud victim, enforcement of the estoppel certificate would be contrary to equity and good conscience." p. 12.) At no time, does Rockvale cite the standard for equitable estoppel, discussed *infra*, to argue that they have alleged sufficient facts to overcome RBA's affirmative defense of estoppel and survive a Rule 12(b)(6) motion. Additionally, in the majority of the brief, Rockvale's language suggests that they are arguing RBA fraudulently induced them into entering the assignment agreement. ("Rockvale was induced into signing the Assignment Agreement by the fraud of RBA." p. 4; "Rockvale was induced into making the estoppel certificate by the fraudulent non-disclosures by RBA." p. 10; "Rockvale has alleged that it was fraudulently induced into executing the agreement..." p. 12; "RBA's fraudulent inducement..." p. 13; "The motive for RBA's fraudulent inducement is crystal clear..." p. 13; "At the very least, Rockvale is permitted to pursue discovery to establish the fraudulent inducement." p. 14).

facts is estopped to deny that the state of facts does in truth exist, aver a different or contrary state of facts as existing at the same time, or deny or repudiate his acts, conduct, or statements." Id. Establishing estoppel is a difficult burden, which requires a showing of two core elements: inducement and reliance. Id. Under Pennsylvania law:

> The inducement may be words or conduct and the acts that are induced may be by commission or forbearance provided that a change in condition results causing disadvantage to the one induced. More important, the laws require that...[t]here can be no equitable estoppel where the complainant's act appears to be rather the result of his own will or judgment than the product of what defendant did or represented. The act must be induced by, and be the immediate or proximate result of, the conduct or representation, which must be such as the party claiming the estoppel had a right to rely on. The representation or conduct must of itself have been sufficient to warrant the action of the party claiming the estoppel. If notwithstanding such representation or conduct he was still obliged to inquire for the existence of other facts and to rely on them also to sustain the course of action adopted, he cannot claim that the conduct of the other party was the cause of his action and no estoppel will arise. Where there is no concealment, misrepresentation, or other inequitable conduct by the other party, a party may not properly claim that an estoppel arises in his favor from his own omission or mistake. Estoppel cannot be predicated on errors of judgment by person asking its benefit. Id. (citations omitted).

Applying this standard to test the validity of an estoppel certification, the Superior Court of Pennsylvania has emphasized that "[a]ll that is required for estoppel is that one's conduct *intentionally or negligently* induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." Liberty Prop. Trust v. Day-Timers, Inc., 815 A.2d 1045, 1052 (Pa. Super. Ct. 2003) (quoting Zitelli, 633 A.2d at

139) (emphasis added).

If Rockvale had more clearly asserted this argument in its motion to dismiss, it may have been able to allege the elements of an equitable estoppel claim. Although Rockvale cannot point to any affirmative actions by RBA, it alleges that RBA's conduct–specifically RBA's decision to let its initial demand for the allowance lapse when it sought Rockvale's permission to assign the lease–induced Rockvale to grant permission to assign the lease. This may meet the lenient negligence inducement standard described in Liberty Property Trust. However, Rockvale inadequately plead this element of its defense and poorly plead motions are not grounds for granting motions to reconsider.

Rockvale also argues that the court is required to apply a special pleading standard in allowing it to develop a factual record in support of its counterclaim. This argument is equally uncompelling. In support of its position, Rockvale cites cases from other jurisdictions, which are not binding on or relevant to this decision. Rockvale analogizes to a Texas case with a complete different procedural posture. 7979 Airport Garage v. Dollar Rent A Car Sys., Inc., No. 14-05-00484, 2006 WL 2805556 (Tex. App. Hous. Oct. 3, 2006). In that case, the court was not overruling a trial court's dismissal of an equitable estoppel claim on a motion to dismiss without the development of a factual record. Instead, the appellate court was reviewing whether the jury's vedict was supported by the evidence. Although the tenant in that case had executed an estoppel

certificate saying that there were no uncured defaults under the lease, the jury found that this certificate did not bar the tenant's claim because the new landlord had knowledge of the defect and the tenant had not made a materially false statement in executing the estoppel certificate. Id. at *10-11. While the case does demonstrate an estoppel certificate does not always defeat a party's claim, it does not dictate the development of a factual record.

Rockvale also cites Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc. 804 N.E.2d 979 (Ohio Ct. App. 2004). In this Ohio case, the landlord argued that the tenant's claims were barred by an estoppel certificate and the doctrine of equitable estoppel. The trial court denied the landlord's summary judgment motion and the appellate court affirmed this ruling, holding that the landlord had not carried the summary judgment burden of showing no genuine issue of material fact existed as to the estoppel issue. Id. at 999. This court did not apply a special standard to equitable estoppel claims; instead, the court evaluated the evidence against the well-established summary judgment standard.[5]

Rockvale cites no cases that establish a black letter rule that factual records are required to rule on equitable estoppel claims; instead, the referenced cases simply discuss

[5] Rockvale misquotes this opinion to suggest that "the court held that the defense of equitable estoppel 'is an issue which is best left to be determined by the trier of fact.'" Def's Reply Br. Mot. Recons. p. 4 (citing Mark-It Place Foods, Inc., 804 N.E.2d at 999). The entire sentence cited by Rockvale reads: "Although Fleming refers to evidence in the record to support its contention that New Plan had notice of the breach, we believe this is an issue which is best left to be determined by the trier of fact." Id. That the court found a specific issue concerning equitable estoppel was best left to the jury to resolve issues of fact in that case does not compel a similar ruling in this case.

equitable estoppel at a later stage in the proceedings. In its memorandum and order dismissing defendant's counterclaim, this court followed the Rule 12(b)(6) pleading standard, which is the correct standard. See Leibholz v. Hariri, No. 05-5148, 2006 U.S. Dist. LEXIS 52993, at *35-36 (D.N.J. July 13, 2006) (applying Rule 12(b)(6) standard to evaluate equitable estoppel claim on a motion to dismiss). Rockvale has not presented any binding case law that would compel the court to apply a different standard.

(3) Unilateral Mistake

In its opposition to RBA's motion to dismiss, Rockvale also argued that the assignment agreement was void because of the doctrine of unilateral mistake. The court held that Rockvale's "mistake" did not go to a basic assumption of the assignment agreement, since it involved previously incurred renovations costs. The court determined that Rockvale also had alleged insufficient facts that RBA knew or should have been aware of Rockvale's mistake. The court held that Rockvale's "vague and conclusory allegations" did not establish a unilateral mistake claim as a matter of law and distinguished the single case Rockvale cited in support of its argument.

In its motion for reconsideration, Rockvale simply disagrees with the court's dismissal of its counterclaim and does not cite any new evidence or case law to show that the court committed legal error. Therefore, the court does not need to reconsider or address Rockvale's arguments on this point.

(4) Additional arguments

In an attempt to save its counterclaim, Rockvale brings up several additional arguments. Rockvale argues that the court should not have applied the parol evidence rule because "the estoppel provision could be considered ambiguous" because Rockvale understood the certificate to be a representation that it was not in default. Def's Mot. Recons. p. 10. Rockvale further contends that "the fraud may have been in the execution" and therefore the parol evidence rule is not applicable. Def's Reply Support Mot. Recons. p. 8. In its reply brief in support of the motion for reconsideration, Rockvale also argues for the first time that the doctrine of waiver by estoppel applies as another attack on RBA's utilization of an equitable estoppel defense. Id. pp. 4-5.

Motions for reconsideration are rarely granted due to the strong interest in final judgments. Glendon Energy Co., 836 F. Supp. at 1122. The purpose of a motion for reconsideration is not to allow a party to try out new arguments that were not raised earlier. The court will not address or consider these new arguments.

B. Negligent Misrepresentation

Count two of Rockvale's counterclaim charges RBA with negligent misrepresentation. The court dismissed this count for three reasons: the estoppel provision and the gist of the action and economic loss doctrines. The court concluded that this count arose from RBA's contractual duty to assist in renovations by providing design plans to Rockvale. Therefore, the claim was barred by the gist of the action

doctrine, which precludes parties from recasting ordinary breach of contract claims as tort claims. The court further held that Rockvale's counterclaim was also barred by Pennsylvania's doctrine of economic loss, which prevents a party from recovering under a non-contract theory where the damages at issue are economic ones related to the parties' contract. The court refused to apply the exception to this doctrine established by the Pennsylvania Supreme Court in Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005) because this limited exception applied in cases where an individual in the business of supplying information, such as an architect or design professional, does so negligently and reliance by the third-party is foreseeable. Id. at 286-87. The court ruled that RBA was not an architect or design professional in the business of supplying information.

In its motion to reconsider, Rockvale disagrees with the reasoning of the court's previous opinion and points to one case[6] that the court did not consider in its previous opinion. As discussed elsewhere in this opinion, Rockvale does not meet the standards for a motion for reconsideration and the court will not reconsider its ruling dismissing this claim.

[6] Rockvale cites Silverstein v. Percudani, No. 3:04-1262, 2005 U.S. Dist. LEXIS 10005, at *31-34 (May 26, 2005) and argues that the court held that Bilt-Rite's exception to the economic loss doctrine is not limited to the contractor-architect scenario. Def's Mot. Recons. p. 19. The court's review of the opinion shows that it is not so broad. The Silverstein court held that Bilt-Rite applied to the factual scenario at issue in that case: a home purchaser asserting a negligent misrepresentation claim against a home builder and several mortgage/financial companies who had a financial interest in the transaction. This opinion is not binding on the court and not an adequate reason to grant Rockvale's motion for reconsideration.

IV. CONCLUSION

For the reasons stated above, I will deny Rockvale's motion for reconsideration. An appropriate order follows.

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	:	
v.	:	
	:	
ROCKVALE OUTLET CENTER, LP	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 28th day of March, 2007, upon consideration of defendant's Motion to Reconsider (Document No. 46) and responses thereto, it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.