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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

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101 DEVELOPMENT GROUP, LLC and
NCF EQUITIES, INC.,

Plaintiffs,

Index No. 113201/06

- against -

DIAMATARIS PROPERTIES, LTD. and
KREINIK & AARON, LLP,

Defendants.

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COUNTY CLERK'S OFFICE
NEW YORK

APPEARANCES:

For Plaintiffs:

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For Defendant Diamataris Properties:

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For Defendant Kreinik & Aaron:

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FRIED, J.:

The determinative issue is whether the seller of a commercial building was responsible for ensuring that the building was emptied of tenants after the sale. Seller, defendant Diamataris Properties (Diamataris), moves, pursuant to CPLR 3211, to dismiss the causes of action against it. Buyers, plaintiffs 101 Development Group and NCF Equities (NCF), cross-move for partial summary judgment against Diamataris and defendant Kreinik & Aaron, Diamataris' counsel for the sale and the escrow agent.

In December 2004, plaintiff 101 Development Group and Diamataris made a sales contract that provided that plaintiff would buy the building for $10.8 million. The sale closed on April 4, 2005. Soon afterward, ownership of the building passed to plaintiff NCF. Ari Chitrick, who was a member of 101 Development Group and is now the managing member of NCF, makes an affidavit in support of plaintiffs' cross motion. He states that during negotiations, the parties agreed that the seller would deliver the building vacant to the buyer after the sale closed. The buyer planned to do construction at the premises and wanted all the tenants out by December 31, 2005.

The sales contract consisted of a preprinted standard part and a rider drawn to the parties' specifications. Article 30, part of the rider, provided that the tenants, all of whom were commercial entities, "may continue to occupy the Premises" during "the Post-Closing Possession Period" ending on December 31, 2005 (Cross Motion, Ex. B, ¶ 30). Diamataris, the seller, was one of the tenants. Article 30 provided that, during the post-closing possession period, Diamataris would pay $5,000 a month for use and occupancy to the buyer, deposit $35,000 with the escrow agent, and tender to the buyer any rents received from tenants.

The money in escrow was to be "held as security for the faithful performance by Seller of all its obligations contained in this Article 30" (*id.*). If the seller faithfully performed its obligations under Article 30, the escrow agent would return the deposit to the seller. If the seller defaulted on any of its obligations under Article 30, the purchaser would be entitled to claim all or some of the deposit in escrow. Article 30 also provided that its terms would survive the closing. The key disputed sentence, appearing in the middle of the

article, is: "[t]he date Seller delivers possession of the Premises vacant to Purchaser shall be referred to herein as the 'Date of Possession'" (*id.*).

Chitrick alleges that the parties added Article 30 expressly to make the seller responsible for removing the tenants by December 31, 2005. Diamataris argues that the key provision does not have the meaning claimed by NCF and, in any event, once Diamataris was no longer owner, it had no power to dispossess tenants.

Chitrick alleges that, at the closing in April 2005, Diamataris divulged, for the first time, that one of the tenants still maintained a valid lease. At that time, three tenants were in the building, Diamataris, an at-will tenant, and the tenant with a lease. The parties agreed that Diamataris would arrange for the tenant with the lease to leave the building. Two days after the closing, on April 6, 2005, the seller, the buyer, and the escrow agent signed an agreement about the tenant with a lease. The agreement was in the form of a letter from Diamataris to NCF. It stated that Diamataris would deposit $55,000 with the escrow agent, pursuant to Article 30 of the contract, and that the escrow agent would release the deposit to Diamataris when the tenant left the building or when it agreed to leave the building, whichever event was earlier (Cross Motion, Ex. H).

On April 11, 2005, Diamataris and the tenant with the lease entered into a termination and surrender agreement. The agreement took the form of a letter by Diamataris and referred to Diamataris as the landlord. In the agreement, the tenant promised to vacate the premises by December 31, 2005 (Cross Motion, Ex. I). On April 13, 2005, the escrow agent forwarded this letter agreement to NCF, with a note stating that the $55,000 in escrow would be released to Diamataris, after which $35,000 would remain in escrow.

The tenant with a lease left the building. Diamataris left in November 2005, having deposited $35,000 into the escrow fund but owing use and occupancy for seven months. The tenant at will remained in the building. NCF alleges that the tenant at will refused to leave unless it was paid. NCF sued the tenant. Eventually, NCF and the tenant entered into a stipulation that the tenant would vacate the building and that NCF would pay it $55,000. That tenant left the building in May 2006.

NCF alleges that Diamataris' actions concerning the tenant with a lease constituted an acknowledgment of its post-closing contractual obligation to ensure that all the tenants left the premises. NCF also points to the post-closing receipt of rents by Diamataris, as evidence that Diamataris' contractual duties did not end when the sale closed.

NCF's first cause of action is against the escrow agent and seeks the $35,000 that Diamataris deposited, as Diamataris did not comply with contractual provision to pay $5,000 a month for use and occupancy. NCF also seeks treble damages and legal fees from the escrow agent. The second cause of action sounds in breach of contract and seeks to recover $414,000, the sum of these items: 1) the payment to the tenant at will; 2) the legal fees incurred in the lawsuit against the tenant; and 3) the cost of the construction delays caused by the tenant's refusal to leave by December 31, 2005. The third cause of action sounds in unjust enrichment and seeks $5 million in compensation for NCF's loss of the benefit of the bargain. NCF allegedly paid a premium for the property in return for Diamataris' assurance that it would be vacated after the closing, and as Diamataris did not fulfill its side of the bargain, it was unjustly enriched at NCF's expense.

Diamataris moves to dismiss the second and third causes of action and the part of the first cause of action that seeks treble damages and attorneys' fees. Diamataris alleges that the sales contract conclusively proves that it had no post-closing obligations to vacate the building. To obtain dismissal on a CPLR 3211 (a) (1) motion, the movant must provide documentary evidence that "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez,* 84 NY2d 83, 88 [1994]). Overall, on a CPLR 3211 (a) motion, the pleading is afforded a liberal construction, and the facts alleged in the complaint are regarded as true (*id.* at 87). The court does not consider whether a plaintiff can ultimately establish its allegations (*EBC I, Inc. v Goldman, Sachs & Co.,* 5 NY3d 11,19 [2005]). Dismissal will occur only if the essential facts have been negated beyond substantial question so it can be ruled that the plaintiff does not have a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The contractual provisions upon which Diamataris relies do not bear out its arguments. The contract shows that the parties anticipated that tenants would be in the building as of the closing date. "The date Seller delivers possession of the Premises vacant to Purchaser shall be referred to herein as the 'Date of Possession'" (Cross Motion, Ex. B, ¶ 30). As already stated, this is the key provision, and it means that Diamataris was to deliver a building free of tenants as of the "Date of Possession," which was to occur by December 31, 2005, after the closing.

The phrase "Date of Possession" appears two other times in the contact, as follows. The building was purchased with all its improvements, fixtures, and equipment in their "as is" condition, as from the "Date of Possession (defined in Section 30 below)" (*id.*, ¶ 23).

Any equipment or fixtures left on the premises after "the Date of Possession, shall be deemed abandoned ..." (*id.*). In addition, "[t]he premises do not have to be delivered broom clean and will not be delivered vacant at Closing (See Section 30)" (*id.*). Diamataris argues unconvincingly that these provisions show that the term "Date of Possession" refers to the date by which it was to remove fixtures and equipment from the building. It is clear that Article 30 refers to tenants, not fixtures. The "Date of Possession" refers to the post-closing date that was to occur by December 31, 2005, by which date Diamataris was to ensure that the building was vacant of tenants. NCF correctly claims that the "Date of Possession" is the first day that the building is empty of tenants. Diamataris's construction of the contract would render Article 30 meaningless, in violation of well established principles of contract construction (*Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]).

The fundamental objective when interpreting a written contract is to determine the intention of the parties as derived from the language employed in the contract (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]). As a rule, unambiguous contracts should be enforced according to their terms, without the consideration of extrinsic evidence (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). My determination that this contract unambiguously signifies that the parties intended that Diamataris vacate the building after the closing is unrelated to Diamataris' post-closing conduct. Regardless of this conduct, the contract would bear the same meaning.

However, the contract is uncertain about how Diamataris was to perform this obligation. Apart from the key sentence in Article 30, the contract is virtually silent on

Diamataris's post-closing duty. Diamataris argues that once it no longer owned the building, it had no legal authority to dispossess a tenant. Diamataris does not fall into any of the categories of persons empowered to maintain a summary proceeding to recover possession of real property, as listed in Real Property Actions and Proceedings Law § 721. Moreover, the contract provided that the seller would not be required to bring any action or proceeding or to incur any expense in excess of $10,000 to cure any title defect or to enable the seller "otherwise to comply with the provisions of this contract ..." (Cross Motion, Ex. B, ¶ 13.02).

This uncertainty in the contract does not necessarily render it unenforceable. Although a contract must be definite in its material terms in order to be enforceable, it does not necessarily lack all effect merely because it suggests that something is left to future agreement (*Henri Assoc. v Saxony Carpet Co.*, 249 AD2d 63, 66 [1st Dept 1988]; *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 317 [1st Dept 1987]). The complaint sufficiently alleges that Diamataris had a duty under the contract which it failed to perform and that is all that can be determined on this motion. Whether the gaps in the contract are material, and, if not, how they should be filled in, is a decision for the fact finder (*Four Seasons Hotel*, 127 AD2d at 318). Alternatively, it may be determinable on a motion for summary judgment, after discovery (*id.*).

Referring to the provision that the seller did not have to spend more than $10,000 to comply with the contract (Cross Motion, Ex. B, ¶ 13.02), Diamataris contends that the breach of contract claim should be dismissed since it asks for damages in excess of $10,000. This provision is not a liquidated damages clause that limits Diamataris's liability. A liquidated damages clause determines in advance the measure of damages if a party breaches the

contract (*Truck Rent-A-Center v Puritan Farms 2nd*, 41 NY2d 420, 423-424 [1977]). The contract limits Diamataris's expenditure in performing its obligations, not the damages that it may have to pay for not performing them.

Diamataris also contends that since the recalcitrant tenant would leave only if paid $55,000, Diamataris could not have made the tenant leave, since Diamataris did not have to spend more than $10,000. Whether this would have been the case if Diamataris had acted in regard to that tenant and what actions Diamataris could have taken, if any, without spending more than $10,000, cannot be decided now. To the extent that Diamataris argues that the contract set an impossible task, impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible (*Kel Kim Corp. v Central Markets*, 70 NY2d 900, 902 [1987]). The impossibility must result from an unanticipated event that could not have been foreseen or guarded against in the contract (*id.*). In this case, to determine if the means of performance made performance impossible, it must first be determined what means the parties were contemplating when they made the contract. As already stated, this poses a question of fact.

Diamataris also argues that the damages incurred by the tenant's refusal to leave are consequential damages that cannot be recovered because unforeseeable. General damages for breach of contract are those which are the natural and probable consequences of the breach, assumed to be within the contemplation of the parties when they made the contract (*Brody Truck Rental v Country Wide Ins. Co.*, 277 AD2d 125, 125 [1st Dept 2000]). Special or consequential damages do not directly flow from the breach and may result from the acts

of third parties unrelated to the contract (*Aetna Cas. & Sur. Co. v. Kidder, Peabody & Co.*, 246 AD2d 202, 209 [1st Dept 1988]). These extraordinary damages are recoverable only upon a showing that they were foreseeable and within the contemplation of the parties at the time the contract was made (*Brody Truck Rental, Inc.*, 277 AD2d at 125). The breaching party need not have foreseen the breach itself, however, or the particular way the loss came about (*Ashland Mgt. v Janien,* 82 NY2d 395, 403 [1993]). "It is only necessary that loss from a breach is foreseeable and probable" (*id.*). The complaint in this case sufficiently alleges that the parties contemplated the effect of Diamataris failing to dispossess all the tenants. If appropriate facts are shown, NCF may establish a right to damages incurred by the tenant's refusal to leave, so the request for consequential damages will not be dismissed. The second cause of action for breach of contract is not dismissed.

The third cause of action for unjust enrichment, which seeks benefit of the bargain damages, is dismissed as redundant of the second cause of action. The existence of a valid and enforceable written contract governing a particular subject matter precludes an unjust enrichment claim arising out of the same subject matter (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). The unjust enrichment claim is based on the same facts as the breach of contract claim. Benefit of the bargain damages are available through the breach of contract claim (*see Freund v Washington Square Press,* 34 NY2d 379, 382 [1974]; *see also Goodstein Constr. Corp. v City of New York,* 80 NY2d 366, 373 [1992]), so the unjust enrichment claim is unnecessary. Plaintiffs may retain their claim for the benefit of the bargain damages. As plaintiffs have urged, the allegations supporting the unjust enrichment claim will be regarded as an extension of the breach of contract claim.

Per Diamataris' motion, the request for treble damages and attorneys' fees in the first cause of action is dismissed. Nothing in the complaint posits a basis for such damages and plaintiffs concede that they are not recoverable.

Turning to plaintiffs' cross motion for summary judgment, it is denied as to the second and third causes of action. As discussed above, the second cause of action for breach of contract presents an issue of fact, and the third cause of action for unjust enrichment is dismissed.

As for the first cause of action, the escrowee agrees that plaintiffs are entitled to the $35,000 in escrow. That Diamataris owes that amount for use and occupancy is undisputed. Disagreement centers on whether plaintiffs are entitled to interest on the funds in escrow. Defendants also object to plaintiff's motion being made at all, pointing out that motions for summary judgment should not be made before issue is joined. However CPLR 3211 (c) permits a pre-answer motion to be treated as a motion for summary judgment upon notice to the parties and in other circumstances, and plaintiffs are moving pursuant to both CPLR 3211 (c) and 3212.

There are exceptions to the notice requirement, and the question of interest payments on the escrow deposit falls within one of the exceptions. In determining a CPLR 3211 (c) motion, the court may properly grant summary judgment to either side without first giving notice of its intention to do so, where an action involves no issues of fact, but only issues of law fully argued by both sides (*Four Seasons Hotel*, 127 AD2d at 320). Here, the question of interest payments presents only an issue of law, and it has been sufficiently argued by both sides. The parties do not require further notice.

The contract provided that the escrowee was not obligated to hold any proceeds in an interest-bearing account (Cross Motion, Ex. B, ¶ ¶ 2.05 [a], 30). The escrowee deposited the $35,000 from Diamataris in its "interest on lawyer" (IOLA) account, as permitted in Judiciary Law § 497. IOLAs do not pay interest to the depositors of funds, but to the Interest on Lawyer Account Fund for distribution to nonprofit organizations that provide civil legal services to the poor, disabled and elderly, pursuant to State Finance Law § 97-v and Judiciary Law § 497. Attorneys acting as escrow agents are not liable for interest unless they agreed to place the deposit in an interest bearing account or were so ordered by a court (*see Lafasciano v Lorber*, 33 AD3d 666, 667 [2d Dept 2006]; *Maddox v All One Enterprises,* 30 AD3d 478 [2d Dept 2006]). As neither of these situations applies here, the escrowee is not obligated to pay interest to plaintiffs.

In addition, the escrowee is not liable to plaintiffs for not releasing the escrow upon plaintiff's demand. In January 2006, the escrow agent wrote NCF's attorney of its intention to release the escrow deposit to Diamataris in a few days (Kreinik Affidavit, Ex. A). NCF's attorney wrote back requesting that the deposit not be released because of a dispute over whether Diamataris paid for use and occupancy (*id.*, Ex. B). The sales contract provided that if the escrowee received an objection to release of the deposit, it would continue to hold the money until otherwise directed by the parties to the contract or by the final judgment of a court (Cross Motion, Ex. B, ¶ 2.05 [a]). Since both parties did not direct the escrowee to release the funds, the escrowee is not at fault for keeping the funds.

Plaintiffs' only claim against the escrowee involved the escrow fund. Since that has been resolved, there is no reason for the escrowee to be a party in this case. After the

escrowee has paid the money in escrow to plaintiffs, it may apply to be dismissed from this case.

The escrowee is not entitled to costs, attorneys' fees, or sanctions.

In conclusion, it is

ORDERED that the motion of defendant Diamataris Properties, Ltd. to dismiss the complaint is granted as to the third cause of action, which is hereby dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion for partial summary judgment is granted in favor of plaintiffs and against defendant Kreinik & Aaron, LLP as to the first cause of action for the release of $35,000 in escrow, without interest; and it is further

ORDERED and ADJUDGED that ~~defendant Kreinik & Aaron, LLP is directed~~, upon ~~receipt of this order, to disburse to plaintiffs' attorneys the amount of $35,000 held in escrow;~~ and it is further

THE $35,000 HELD IN ESCROW SHALL BE DISBURSED TO PLAINTIFFS, PURSUANT TO MY OCTOBER 9, 2007 MEMORANDUM DECISION WITHOUT FURTHER DELAY.

ORDERED that Diamataris Properties, Ltd. is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: 10/9/07

ENTER:

J.S.C.

HON. BERNARD J. FRIED

FILED
NOV 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

Norman Goodman
Clerk

-12-

1/23/08: JUDGMENT AMENDED PURSUANT TO ORDER OF JUDGE FRIED SIGNED AND ENTERED THIS DATE.

NG / MD