

**311 West Broadway, LLC v Jacob Cram Cooperative,
Inc.**

2008 NY Slip Op 33477(U)

December 29, 2008

Supreme Court, New York County

Docket Number: 104408/07

Judge: Herman Cahn

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

PRESENT: Cahn

PART 49

stice

Index Number : 104408/2007

311 WEST BROADWAY, LLC,

VS.

JACOB CRAM COOPERATIVE, INC.,

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 104408-07

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

ad on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED

DEC 31 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/29/08

Ben Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
 311 WEST BROADWAY, LLC,
 :
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 Plaintiff,
 :
 :
 -against-
 :
 :
 JACOB CRAM COOPERATIVE, INC.,
 :
 MUESER RUTLEDGE CONSULTING
 :
 ENGINEERS and RAND ENGINEERING
 :
 AND ARCHITECTURE, P.C.,
 :
 Defendants.
 :
 -----X

Index No. 104408/07

FILED
 DEC 31 2008
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 NEW YORK

Herman Cahn, J.

Defendant Jacob Cram Cooperative, Inc. (the "Co-op") moves for summary judgment dismissing the complaint. Defendant also counterclaims for recovery of attorneys' fees and costs.

BACKGROUND

This action arises out of plaintiff's 311 West Broadway, LLC's (the "Developer") plans to construct a luxury condominium apartment building (the "Project") on an open-air parking lot adjacent to the Co-op's apartment building located at 307-309 West Broadway in Manhattan. The Co-op's building contains artists' lofts, and is over 110 years old.

The proposed development involved the construction of a building that did not conform with New York City's zoning regulations. As such, the Developer was required to apply to the City and obtain certain permits, before proceeding with the Project. The Co-op was concerned about the affect that the Developer's proposed development might have on its building's structural integrity because of a history of building collapses in the area, due to delicate

subsurface conditions. The Co-op raised these concerns, with a particular emphasis on the Developer's plans to construct an underground parking garage. The Co-op hired its own engineers, co-defendants Mueser Rutledge Consulting Engineers and Rand Engineering and Architecture, P.C.,¹ to work with the Developer and the City to implement a plan that would minimize the effects of the construction and potential damage to the Co-op's building.

On May 10, 2006, the Co-op and Developer executed an agreement regarding the development (the "Agreement"), which the Co-op contends was a condition of the City's approval of the Developer's application for its permits. Several provisions in the Agreement were designed to protect the Co-op building. These included the Developer's limitation to the use of a certain type of foundation piles and their particular method of installation, the requirement that the Developer maintain a ten-foot wide berm of undisturbed soil adjacent to the Co-op building ("Protected Berm") and the requirement that the Developer monitor the vibrations and other impact of its work. *See Agreement, ¶¶ 1, 3, 5.*

The Co-op alleges that in early January 2007, the Developer's contractor excavated in the Protected Berm, in violation of two provisions of the Agreement. Specifically, it alleges that the Developer removed four feet of the ten-foot wide Protected Berm and also installed piles that were not of the type provided for in the Agreement, merely six feet from the Co-op building and within the Protected Berm. It further alleges that, as a result of the Developer's improper excavations, residents of the Co-op building experienced significant vibrations, resulting in

¹ The co-defendant engineers submitted independent answers to the complaint; they are not parties to the instant motion.

cracks in a number of apartments and the shifting of the Co-op building toward the adjacent Project construction site.

By letter dated January 10, 2007, the Co-op requested that the Developer conduct no further excavation of the Protected Berm, without its prior written authorization. In a subsequent letter, the Co-op insisted that the Developer take remedial action or it would seek rescission of the City's approval of the Project. The Co-op alleges that, as a result of the Developer's failure to restore the Protected Berm, it reported the shifting of the Co-op building to the Department of Buildings ("DOB"). On March 16, 2007, upon its own investigation, the DOB issued a Stop Work Order against the Project. On March 30, 2007, the Order was vacated, after the Developer resolved the DOB's objections by submitting various documents.

On the same day, the Developer commenced this action, alleging breach of contract and tortious interference with a contract and seeking a monetary judgment in an excess of \$10,000,000. The Developer alleges that the Co-op breached the dispute resolution procedures of the Agreement, which provide that:

In the event of an exceedance, as set forth above in paragraph 5, the engineers for [the parties] will meet as soon as possible to agree upon the procedure to continue. In the event the said engineers cannot reach agreement, such engineers shall jointly choose a third engineer to resolve the dispute within three (3) days of such dispute.

Agreement, ¶ 6. Paragraph 5 of the Agreement provides that the Developer was responsible for monitoring the vibrations and other impact of its work. It states that "[i]f either the vertical movement or vibration tolerances of 0.25 inches or 1.0 inches per second respectively are exceeded [the Developer] shall cease work on that portion of activity which generated the

exceedence(s). Work on that portion shall resume only following the process set forth in paragraph 6 below.” *Id.*, ¶ 5.

The Developer contends that the Co-op breached the contract by circumventing the dispute resolution provisions of the Agreement by filing a complaint with the DOB, rather than allowing the parties’ engineers resolve the issues that arose.

The Co-op argues, however, that the dispute resolution provisions of the Agreement did not apply in this case. It alleges that the Developer was responsible for more than a mere exceedance, but rather breached two other separate provisions of the Agreement. It contends that the procedure provided for in paragraph 6 applies only in the event of an exceedance, as it is defined in paragraph 5 of the Agreement, which was not what occurred here.

DISCUSSION

Summary Judgment

Ordinarily, a party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

However, in 1992, the Legislature enacted Civil Rights Law § 70-a and § 76-a and amended the CPLR to provide protections for defendants who face litigation that arises from their participation in matters involving a public petition, such as the permits applied for by the Developer in this case. *Duane Reade, Inc. v Clark*, 2004 WL 690191, *3 (Sup Ct NY County Mar 31, 2004); *see also OSJ, Inc. v Work*, 180 Misc 2d 804, 810-12 (Sup Ct Madison County 1999). The Legislature’s intent was to deter “a ‘type of retaliatory litigation . . . referred to as a ‘SLAPP Suit’ or Strategic Lawsuit Against Public Participation’ . . . [which is] ‘a tactic

employed by business and developers who find it an effective means of silencing public opposition to controversial projects.” *Duane Reade, Inc.*, 2004 WL 690191 at *3 (quoting 8 Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.51).

The plaintiff in a SLAPP suit, therefore, bears a heightened burden of proof, to avoid summary judgment dismissal of the action. *See Guerrero v Carva*, 10 AD3d 105, 116 (1st Dep’t 2004); *Yeshiva v Village of New Hempstead*, 98 F Supp 2d 347, 359 (SDNY 2000) (“The new law . . . amended [the CPLR] to make it easier for defendants in SLAPP suits to win motions to dismiss or for summary judgment under CPLR Rules 3211 and 3212.”). The defendant first must “demonstrate[] that the action . . . subject to the motion is an action involving public petition and participation, as defined in” Civil Rights Law § 76-a(1)(a). CPLR 3212(h). The plaintiff then bears the heightened burden of “demonstrat[ing] that the action . . . has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law.” *Id.*

An “action involving public petition and participation,” is defined as “an action . . . that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, . . . challenge or oppose such application or permission.” Civil Rights Law § 76-a(1)(a). A “public applicant or permittee” is “any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body.” *Id.* § 76-a(1)(b).

The Co-op argues that the Developer’s action constitutes a SLAPP suit, and requires dismissal because the Developer has failed to meet the heightened burden required in such actions. It contends that the Developer is a “public applicant or permittee” because it applied for

and obtained permits from the City. Thus, it asserts that the lawsuit readily qualifies as an “action involving public petition and participation.” It contends that the timing of the commencement of the action, the day that the DOB vacated the Stop Work Order against the Project, indicates that it is materially related to the Co-op’s efforts to challenge the DOB permit and seek the rescission of the City’s approval of the Project. In these contentions, the Co-op is correct.

The Co-op argues that the Developer has failed to demonstrate either that its action “has a substantial basis in fact or in law” or that it “is supported by a substantial argument for an extension, modification or reversal of existing law.” CPLR 3212(h). It asserts that the complaint is devoid of details describing the Co-op’s particular conduct which constitute the alleged breach or how the alleged breach caused damage to the Developer. The Co-op contends that the Developer has merely pleaded conclusory assertions that do not constitute a cause of action.

The Developer argues that it has properly pleaded a breach of contract claim against the Co-op because it emphasizes that paragraphs 5 and 6 of the Agreement apply to vibrations or other impacts of the work on the Project, which it contends include the events that lead up to the Co-op’s reporting of the shifting of the Co-op building to the DOB. However, its complaint merely alleges that the Co-op “breached the Agreement by failing to comply with the dispute resolution procedures set forth therein.” Compl, ¶ 9. This is insufficient.

The Developer has failed to meet its heightened burden by demonstrating that its action has a sufficient basis in fact or in law. Additionally, the Developer does not demonstrate or even address the question of whether its action is supported by a substantial argument for a change in the existing law. On the contrary, it argues that its action is not a SLAPP suit, but rather one that

is based on a breach of contract. The Court disagrees and finds that the Developer's action constitutes a SLAPP suit.

Attorneys' Fees and Costs

The Co-op argues that it is entitled to a statutory right of action to obtain recovery of attorneys' fees and costs because it has demonstrated that the Developer's action was commenced and continued "without substantial basis in fact or in law" and cannot be "supported by a substantial argument for an extension, modification or reversal of existing law." Civil Rights Law 70-a(1)(a); *Guerrero*, 10AD3d at 116. This branch of the motion is also granted. The issue of the amount of reasonable attorneys' fees that the Co-op incurred, is respectfully referred to a Special Referee to hear and report. Pending the receipt of the Referee's report and a motion to confirm or vacate the same, the motion is held in abeyance.

Accordingly, it is

ORDERED that the Co-op's motion for summary judgment will be granted and the complaint will be dismissed; and it is further

ORDERED that the Co-op's counterclaim for attorneys' fees is granted, with the issue of the amount of reasonable attorneys' fees incurred by the Co-op, being referred to a Special Referee to hear and report; and it is further

ORDERED, that the motion is held in abeyance pending receipt of the Referee's report and a motion to confirm or vacate the same.

Dated: December 29, 2008

ENTER:



J.S.C.

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