

50 Madison Ave. LLC v RCDolner, LLC

2010 NY Slip Op 30910(U)

April 7, 2010

Supreme Court, New York County

Docket Number: 590141/09

Judge: Emily Jane Goodman

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

PRESENT **EMILY JANE GOODMAN**

PART 17

Index Number : 702769/2007

50 MADISON AVENUE LLC

VS.

RCDOLNER LLC

SEQUENCE NUMBER : # 001

PARTIAL SUMMARY JUDGMENT

Justice

INDEX NO. 702769-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read 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

is decided for

As read

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
APR 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/7/10

EGJ

EMILY JANE GOODMAN

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 PART17

-----X
50 MADISON AVENUE LLC and SAMSON
MANAGEMENT, LLC,

Third-Party Plaintiffs,

-against-

Third-Party
Index No.: 590141/09

RCDOLNER, LLC, COMMODORE CONSTRUCTION
CORP., G.M. CROCETTI, INC., ELITE FLOORS, INC.
and DESIGNED FLOORS, INC.,

Third-Party Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Third-party plaintiffs, 50 Madison Avenue LLC and Samson Management, LLC (together, Samson), seek indemnification for claims made by two plaintiffs, Simon Lorne and Ludmila Lorne (the Owners),¹ in a separate action (the Owners' Action), about a condominium apartment (the Unit), located at 50 Madison Avenue, that the Owners purchased in 2005.

Samson moves for an order, pursuant to its sixth cause of action, granting partial summary judgment: (a) adjudging third-party defendant RCDolner, LLC (Dolner) liable for the amount of attorneys' fees and other costs that Samson has incurred in responding to the claims in the Owners' Action and that Dolner must indemnify Samson, and reimburse its attorney's fees and costs, going forward, with respect to such claims; and (b) adjudging that Dolner is responsible for any costs incurred by Samson to repair the Owners' floor.

¹The Owners' lawsuit is captioned *Lorne v 50 Madison Avenue LLC*, Supreme Court (New York County), Index No. 602769/07. "The Owners" refers to either of the Lornes, or the Lornes together.

Background

This motion involves issues concerning an agreement between Samson and Dolner, dated May 31, 2006 (the Agreement), which was previously addressed by this court in its decision dated November 20, 2008 (the 2008 Decision), in a related action captioned *RC Dolner LLC v Samson Management, LLC* (Index No. 100694/07) (the Dolner Action), which was filed, by Dolner, on January 16, 2007. Familiarity with this decision is assumed.

Dolner was the general contractor for a renovation project done on the building. 50 Madison Avenue LLC is the sponsor of the project, and Samson Management, LLC the property manager.

The Owners filed their lawsuit against Samson and others, on August 21, 2007, seeking recovery for defective workmanship on the Unit, with their main complaint about the floors. The Owners also seek to recover for misrepresentations that they allege that Samson made concerning the condition of the Unit. The Owners have amended their complaint to include breach of warranty and General Business Law (GBL) §§ 249 and 250 claims (Amended Complaint).

In the second cause of action of the Amended Complaint (the Fraud Claim), in the Owners' Action, the Owners allege that, with respect to the 2005 pre-closing inspection, Samson knowingly made false representations to them about the Unit. Specifically, they allege that they

“were reassured by [Samson] that the issues they identified were cosmetic, that there were no issues or defects that would affect the habitability of the Unit, and that the issues the [Owners] had identified were: a) not significant; b) easy to correct, and c) would be corrected within the period provided in the Contract and Offering Plan for the correction of defects,” and that [Samson] knew, or in the exercise of reasonable care should have known, but did not disclose to the [Owners], the true depth, nature and extent of the construction defects in the Unit, and that such defects in fact rendered the Unit inhabitable”

(Berman Aff., Exh. E, ¶¶ 23, 25; *see also id.*, ¶¶ 67-70).

Although it appears undisputed that Dolner was no longer performing work on the Owners' floors as of October 2006, the Owners allege that as of March 2007, Samson had failed to make the necessary repairs to the floors and was "never able to have the work completed according to the specifications of the Construction Plans, or in any acceptable manner," and that they were still not living in their apartment (*id.*, ¶ 42). The Owners further allege that Samson was either incapable of having the work on the Unit properly, or timely completed, or negligently or intentionally permitted the work to be performed in a manner inferior to that required, and prevented the Owners from proceeding expeditiously to have the work completed (*id.*, ¶¶ 43-46).

The Agreement between Dolner and Samson was intended to resolve disputes between the two about work. Where in conflict, the Agreement superseded the original construction contract (the Contract). In paragraph 5 of the Agreement, Dolner acknowledged that there had been complaints from owners regarding the floors and, where an owner complained, Dolner was to, at its sole cost, promptly take actions "reasonably necessary to inspect, repair, and if necessary, replace all or a portion of the Floors in such unit to the Owner's . . . reasonable satisfaction in accordance with the Contract . . . specifications within the warranty period". The warranty period was for six years, during which time Dolner agreed, at its sole expense, to make repairs or replace the floors "to the owners' . . . reasonable satisfaction in accordance with the Contract[']s specifications," except where the defect was "due to damage or defect caused by abuse, modifications not executed or approved by Dolner . . . or normal wear and tear under normal usage" (Agreement, ¶ 5). Dolner also promised to pay the expenses necessary to comply with the provisions of paragraph 5, including the reasonable expenses that an owner incurred due

to the disruptive nature of the work, such as relocation costs. In the event that any unit owner looked to Samson in connection with a claim or dispute with respect to the floors, paragraph 5 provides that Dolner would defend, indemnify, and hold harmless Samson from such claim or dispute, as set forth in paragraph 13 of the Agreement, which is an indemnification clause (the Indemnification Clause). Paragraph 5 also provides that, in the event of a dispute between Dolner and an owner arising in connection with floor repairs, Samson was to reasonably cooperate with Dolner in effectuating any agreed-upon remedy.

The Indemnification Clause provides that Dolner agreed to:

“defend, indemnify, and to hold harmless Samson . . . from and against any and all claims, causes of action, damages, liabilities, mechanic’s liens, and obligations of any nature that may be brought or asserted against [Samson] . . . in regard to any aspect of this agreement or any of the work to be performed pursuant to this agreement, including but not limited to, (a) any claim by Owners . . . as to defects in workmanship and/or materials, and (b) any claims for payment by subcontractor, materialman, vendor, supplier, or other person or entity who has provided services or materials with respect to the Work. . . . Reasonably promptly upon [Samson’s] receipt of notice that [it] is being sued . . . Dolner shall immediately retain attorneys selected by or reasonably agreeable to [Samson] to defend [Samson] in such proceeding . . .”

(Berman Aff., Exh. A, at 11-12, ¶ 13).

On October 13, 2006, counsel for Dolner wrote to Samson concerning difficulties it claimed it was experiencing with the Owners, and requested that Samson proceed under paragraph 7 of the Agreement. Paragraph 7 provides that the floor repair and replacement work described in paragraph 5 would be performed so as to minimize inconvenience and disruption to unit owners. Paragraph 7 further provides that if an owner refused to permit Dolner to perform further work, and Dolner was not able to successfully negotiate with an owner to have an alternative vendor perform the work at Dolner’s expense, Samson was permitted to arrange to

hire a vendor to have the work completed, or to make some payment or other accommodation in order to settle with the owner. In the event that Samson retained an vendor to perform the work, the cost of retaining the vendor was limited to the usual and customary costs for the work under the circumstances.

Paragraph 7 also provides that the cost of settling with the owner, through a payment or accommodation, was to be set off against the respective payments to be made to Dolner under the Agreement, and that Dolner was to indemnify Samson for costs exceeding the amount of those payments. Finally, pursuant to paragraph 7, Dolner was to pay all of the reasonable costs actually incurred by an owner due to the disruptive nature of the work, including relocation costs. What Samson did, on or after October 13, 2006, if anything, in terms of hiring an alternative vendor, has not been established here.

On January 16, 2007, Dolner filed the Dolner Action, seeking payments under the Agreement for work that it claims to have performed. The record reveals that thereafter, in April 2007, Samson's and Dolner's respective counsel began to exchange letters concerning the Owners' complaints and other matters about the floors. On September 12, 2007, Samson's counsel demanded that Dolner, pursuant to the Indemnification Clause and common law, immediately take all actions necessary to settle the Owners' claims, and agree to fund the costs of Samson's defense in the Owners' Action. By letter dated October 9, 2007, Dolner's counsel responded that Dolner would not defend or indemnify Samson, because Samson had failed to comply with the Agreement.

In mid-2008, in the Dolner Action, Samson moved for summary judgment seeking

essentially the same relief it seeks here.² In the 2008 Decision denying the motion, this court interpreted the Indemnification Clause as providing that Dolner had agreed to defend and indemnify Samson for claims arising out of Dolner's work on the building, but was not required to indemnify or defend Samson for the Fraud Claim, which is not based on poor workmanship, or the results thereof, but on Samson's alleged misrepresentations regarding the condition of the Unit. As there remained the possibility that the Owners would obtain a judgment against Samson that did not implicate Dolner, Samson's motion for an order for indemnification was deemed premature. The court also determined that Dolner's duty to defend was not greater than its duty to indemnify, and that Dolner was not obligated to pay for all of Samson's defense costs, with Samson failing to demonstrate that the defense costs arose from complaints about the quality of the work, as distinct from the Fraud Claim. The court further identified other unresolved issues that precluded summary judgment, including whether Dolner was relieved of its indemnification obligation due to Samson's breach of the Agreement, and whether Samson was responsible for any alleged delays or damages to the Owners' floor after October 13, 2006.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to

²In the Dolner Action, Samson moved for a judgment for damages of over \$100,000, that it claims to have already paid to the Owners in relocation fees, but represents that it does not seek such relief here.

require a trial of material questions of fact” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “If there is any doubt as to the existence of a triable issue, the motion should be denied” (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002]).

Samson argues that Dolner is obligated to indemnify and defend Samson, and that it is entitled to a judgment reflecting this obligation. To meet its summary judgment burden, Samson submits, in addition to the pleadings and agreements involved, the 2008 Decision, and copies of some of the attorney letters previously mentioned.

Samson argues that the Amended Complaint in the Owners’ Action, and especially the Owners’ GBL (fifth) cause of action, make clear that the Owners’ fraud allegations relate to a general complaint that the Unit and building did not meet standards of design and construction in accordance with building plans and specifications. Samson further argues that the Owners’ allegations concerning Samson’s misrepresentation emanate from Dolner’s responsibilities under provision 3.2.1 of the Contract, which is entitled “Review of Contract Documents and Field Conditions by Contractor.”³ Samson argues that the Fraud Claim is inextricably tied to Dolner’s poor workmanship, emanates from Dolner’s responsibilities under the Contract and Agreement, and that to the extent that the Owners’ allege that Samson made misrepresentations, Samson was

³Provision 3.2.1 of the Contract provides that Dolner was to study and compare the Contract documents with each other and with certain information furnished by 50 Madison LLC and immediately report to the architect errors, inconsistencies or omissions discovered, but was not liable to 50 Madison LLC or the Architect for damage resulting from errors, inconsistencies or omissions in the Contract unless Dolner recognized and knowingly failed to report same. In the event that Dolner performed construction activity knowing that it involved a recognized error, inconsistency or omission in the Contract, without notice to the architect, Dolner agreed to assume appropriate responsibility for such performance, and to bear an appropriate amount of correction costs.

a mere passive conduit for Dolner's warranties and representations about its work.

Samson's arguments are not compelling. The Fraud Claim allegations do not differ in any significant respect from those contained in the Owners' original complaint. Moreover, the Fraud Claim is distinct from the claims involving faulty work as it is based on Samson's alleged false representations about the Unit's condition. Samson's argument, that it was "a mere passive conduit" has not been demonstrated, and would require a finding that it did not make false representations.

Samson's argument that had Dolner fulfilled its obligations under the Contract and Agreement, the Owners' complaints would have been rendered a nullity, was previously addressed by this court when it stated that "[t]he fact that Dolner may have been responsible for certain defects does not relieve Samson from any responsibility for allegedly having misrepresented the state of the building during the [walk-through] inspection in 2005" (2008 Decision, at 5). The court's opinion remains the same. As the court has determined that the Fraud Claim is not covered by the Indemnification Clause, it need not address Samson's argument that "fraud is a proper subject of an indemnification agreement" (Samson Reply Mem., at 9 n 4). In addition, as the scope of the Amended Complaint exceeds the scope of the Indemnification Clause, there remains the possibility that the Owners could obtain a judgment against Samson that does not implicate Dolner, making a judgment of indemnification premature.

Regarding the scope of the duty to defend, in moving, Samson argues that First Department precedent imposes a broader duty to defend than to indemnify in non-insurance policy cases, and that an indemnitor must defend even if certain claims fall outside of the scope of the indemnification obligation (Samson Memo of Law, at 10-12). In *Viacom Inc. v Philips*

Elecs. N. Am. Corp. (16 AD3d 215, 215-216 [1st Dept 2005]), however, the First Department stated: “[d]efendant is not an insurer, and the contract of indemnity pursuant to which it is bound, strictly construed, does not impose upon it a defense obligation comparable in breadth to that ordinarily borne by an insurer; its duty to defend is no broader than its duty to indemnify [citations omitted]” (*see also Brasch v Yonkers Constr. Co.*, 306 AD2d 508 [2d Dept 2003]).⁴ This clear language does not support Samson’s assertion that an indemnitor must defend for claims that fall outside of the scope of the indemnification obligation.

In reply, Samson has veered from its moving argument — which is the argument to which Dolner responded in its opposition — contending that the plain language of the Indemnification Clause imposes a duty to defend that is broader than the duty to indemnify, and sufficiently broad to encompass all of the causes of action in the Owners’ Action. This argument is not compelling. The plain language of the Indemnification Clause provides that Dolner has a duty to defend Samson for those claims that fall within the scope of the Indemnification Clause, but not claims that are not included within the scope of the Indemnification Clause, such as the Fraud Claim.

While Samson relies on *McCleary v City of Glen Falls* (32 AD3d 605 [3d Dept 2006]), to support its contention that the language of the Indemnification Clause is broad, *McCleary* merely reiterates that in non-insurance policy cases, the scope of an indemnification provision is determined by the provision’s language. In *McCleary*, the court determined that the duty to defend for claims that were included within the provision was not relieved merely because those claims were dismissed against the indemnitee. This does not change that the language of the

⁴Samson notes that in *CIGNA Corp. v Lincoln Natl Corp.* (6 AD3d 298 [1st Dept 2004]), which preceded *Viacom Inc.*, the Court reached a different result.

Indemnification Clause does not provide for indemnification for all of the Owners' claims, or the related defense costs. In addition, while Samson seeks a *judgment* for defense costs, including attorney's fees, past and future, its has not demonstrated that these costs arose from complaints about the quality of the work, as distinct from the Fraud Claim.

In opposition to the motion, Dolner also argues that any determination of indemnification or reimbursement is premature until the parties' rights under the Agreement have been determined. Dolner points to the December 2008 Decision, wherein the court identified an unresolved issue as to whether Samson materially breached the Agreement, and submits the affidavit of its principal, stating that Samson has failed to make three payments under the Agreement. Dolner also notes that only very limited discovery has been conducted to date, as was also the case when the court rendered the December 2008 Decision. In reply, Samson responds that Dolner may not claim a material breach where it has not elected to terminate the contract, and has no colorable argument that Samson has materially breached the Agreement.

It is hornbook law that a breach of contract may occur where a party fails to perform on a promise, or prevents the other party's performance of a contractual obligation. "When a party has breached a contract, that breach may excuse the nonbreaching party from further performance if the breach is 'material'" (*New Windsor Volunteer Ambulance Corps v Meyers*, 442 F3d 101, 117 [2d Cir 2006]; see *NAS Elec. v Transtech Elec. PTE*, 262 F Supp 2d 134, 145 [SD NY 2003] ["the non-breaching party is discharged from performing any further obligations under the contract, and . . . may elect to terminate the contract and sue for damages"]). It is well settled that "[u]nder New York law, for a breach of a contract to be material, it must 'go to the root of

the agreement between the parties [citation omitted]” (*Frank Felix Associates, Ltd. v Austin Drugs, Inc.*, 111 F3d 284, 289 [2d Cir 1997]), and essentially defeat the parties’ objective in making the contract (*Robert Cohn Assoc., Inc. v Kosich*, 63 AD3d 1388, 1389 [3rd Dept 2009]). Accordingly, while a material breach is not one that is inconsequential, insubstantial, or minor, “failure to tender payment is generally deemed a material breach of a contract” (*ARP Films, Inc. v Marvel Entertainment Group, Inc.*, 952 F2d 643, 649 [2d Cir 1991]).

Generally, “[w]hen a party materially breaches a contract, the nonbreaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the [other party’s] default” (*Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007]). “[C]onduct indicating an intention to continue the contract in effect will constitute a conclusive election, in effect waiving the right to assert that the breach discharged any obligation to perform” and the rule that the aggrieved party’s duty to perform is discharged does not apply where that party, “with knowledge of the facts, either performs . . . despite the breach, or insists that the defaulting party continue to render future performance” (14 Lord, *Williston on Contracts* § 43:15, at 626 [4th ed]).

Samson’s argument that Dolner has elected to continue the contract solely because of the declaration that it seeks in the first cause of action of the Dolner Action is unpersuasive. Regarding that cause of action, the court has stated that Dolner seeks money damages in the Dolner Action, and that “Dolner’s declaration is merely a breach of contract claim” (2008 Decision, at 7), and thus alone is not sufficient to demonstrate, as a matter of law, that Dolner elected to continue the Agreement.

Samson also argues that it has already performed its obligations under the Agreement, because it has made payments to Dolner of \$1,109,337.90, which constitute performance sufficiently substantial to give rise to Dolner's indemnification obligation. Samson contends that the parties merely dispute liability for three payments, of \$307,424.96, \$35,000 and \$71,250, which do not constitute the core of the Agreement. Samson characterizes Dolner's claim of breach as a mere dispute over whether, or under what conditions, Dolner is entitled to the payments, with Dolner's remedy to sue for damages, as it has done in the Dolner Action.

Samson further argues that, as the Agreement contains separate categories of payments, each conditioned on Dolner's fulfillment of certain obligations, this is not a case where a party fails to make continuing payments in consideration for ongoing counter-performance. Samson continues that the Indemnification Clause is not conditioned on any particular payment by Samson, and also argues that it has refused to pay Dolner \$307,424.96 because Dolner has not satisfied various conditions precedent to payment (Berman Reply Aff., ¶ 21).

Addressing the last issue first, Samson is correct that, as a general premise, where a condition precedent is not satisfied by the party burdened with the condition, the dependent obligation, of the party that benefits from the condition, does not mature. Here, however, Samson has not conclusively demonstrated that any specific condition of the Agreement was not satisfied, such that its obligation to pay had not matured. While Samson claims that Dolner's failure to *repair* the Owners' floor was the failure of a condition precedent, the record demonstrates fact questions that remain unaddressed as to whether the floors, after Dolner's work, met contract specifications, and whether the Owners' claim of lack of satisfaction was

reasonable. In addition, the Agreement provides that Samson was permitted to hire a vendor to repair the floors, which may have occurred, and Samson has not pointed to anything in the Agreement that indicates that, thereafter the responsibility to *repair* the floors was Dolner's.

Samson discusses factors that courts have considered in determining whether a breach is material, but brings up these factors *only in reply*, when Dolner has not had the opportunity to address them, or Samson's contentions. In any event, Samson, seeking judgment regarding contractual obligations, was required to demonstrate, as part of its *prima facie* burden in moving, that it had fully performed under the contract, but did not do so. In light of the foregoing, Samson's motion for a judgment for indemnification and for attorney's fees and defense costs is denied. Therefore, Dolner's contention that there is an issue of fact as to whether Samson is responsible for delays and damages after October 13, 2006 need not be addressed.

Finally, Samson seeks a judgment that Dolner is responsible for any costs incurred by Samson to repair or replace the Owners' floors. In its moving brief, Samson maintains that it is entitled to summary judgment, based on paragraphs 5 and 7 of the Agreement, arguing that these provisions demonstrate that Dolner was obligated to repair or replace the Owners' floor at Dolner's cost, and is responsible for *any* costs incurred by Samson to retain an alternative vendor to repair or replace the Owners' floor.

In opposition, Dolner argues that there has been no finding that there is anything wrong with the Owners' floors, and that it has already fulfilled its obligations, in that it undertook to perform all requested repairs, and adhered strictly to the specification standards set forth in the Contract. In support, Dolner provides the affidavit of its principal, and an inspection report, and

asserts that the Owners, among other things, demanded installation outside of the specification standards, interfered with Dolner's attempts to complete the work in a timely manner, and made it impossible to complete the job. Dolner also argues that, while it was responsible for taking all actions reasonably necessary to inspect, repair and, if necessary, replace the floors to the Owners' reasonable satisfaction in accordance with the Contract, there is a material fact issue as to whether a reasonable person would have been satisfied. Dolner further points to the December 2008 Decision, wherein the court stated that it was not clear how such circumstances would affect Dolner's responsibility for expenses that arose after October 13, 2006, when Samson apparently took over the work, or whether Samson was thereafter responsible for succeeding delays or damages.

On another note, Dolner contends that Samson informed it that it was planning to retain a contractor to perform certain work on the floors, and provided Dolner an estimate in the amount of \$49,375.65, for which Samson has already reimbursed itself from the escrow account provided for pursuant to the Agreement. Finally, Dolner notes that, while Samson seeks judgment on this motion that Dolner is responsible for any costs incurred by Samson to repair the Owners' floor, in its pleading, Samson seeks only indemnification, or judgment over, in the event that Samson is found liable in the Owners' Action.

In reply, Samson maintains that the issue of whether the Owners have been reasonable, that bears on Dolner's obligations under paragraph 5, ignores that Dolner's obligations under paragraph 7 and the Indemnification Clause, do not depend on the Owners' reasonableness. Samson contends that, under paragraph 7 of the Agreement, whether Dolner had an alternative

vendor perform the work at Dolner's sole cost, or Samson undertook the work, with costs set off against payments due Dolner, the costs of the work were to come out of Dolner's pocket, without regard to whether the Owners acted reasonably. Samson also argues that, to the extent that the Owners's floor is to be repaired, Dolner should be responsible for the costs, despite that paragraph 7 provides that Dolner is only responsible for the usual and customary costs, because under the Indemnification Clause, once Samson was sued, Dolner was responsible to defend, indemnify and hold harmless Samson from all claims, causes of action, damages and liabilities.

Samson is correct that, as a general rule, a contractual obligation may not be avoided merely because it may have become more burdensome than anticipated. Still, it is not entitled to judgment on the floor costs issue. In its moving brief, Samson argues that Dolner is responsible for Samson's costs in repairing the floors pursuant to paragraphs 5 and 7 of the Agreement (Samson Mov. Memo. of Law, at 12-13), and that Dolner's responsibility for the costs incurred by Samson to repair or replace the Owners' floor is an "obligation separate and apart from Dolner's general defense and indemnification obligations" (Samson Mov. Mem. of law, at 12). Thus, to the extent that Samson can be said to have referred to the Indemnification Clause, it appears to have done so only to emphasize that it was moving for relief based on other paragraphs of the Agreement, the text of which it typed out in full. Samson's newly-raised reply argument about the Indemnification Clause may not be entertained here concerning the issue of payments for Samson's costs for floor repairs (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] ["reply papers (are) to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new

grounds (or evidence) for the motion”]).

As to paragraph 7, while it provides that, in the event that Samson chose to retain alternative contractors, it could set off the costs against the respective payments, with Dolner indemnifying Samson for those costs that exceeded the payment amounts, it also explicitly states that: “[i]n no event shall the cost to Samson of retaining alternative contractors to perform the work exceed the usual and customary costs for such work under the circumstances.” This is an express limitation of Dolner’s obligation concerning Samson’s costs for retaining alternative contractors. Samson has not demonstrated that the costs were the usual and customary costs for the work under the circumstances, and therefore, has not demonstrated that, under paragraph 7 of the Agreement, it is entitled to a judgment that Dolner is responsible for Samson’s costs for the floors, and its motion is denied. At this juncture, what occurred concerning the floors in the Unit before and after October 13, 2006, such as whether Samson hired an alternative contractor, or made other arrangements, has not been established with admissible evidence, such that a judgment could be granted based on paragraph 7 of the Agreement. Furthermore, Dolner has also raised an issue of fact as to whether it met its obligations under paragraph 5 of the Agreement.

Moreover, in the Amended Complaint, which is verified, at paragraphs 43-46, the Owners allege that Samson intentionally permitted the work to be performed in a manner inferior to that required, and prevented the Owners from proceeding expeditiously to have the work completed. These averments raise a question as to whether Samson’s conduct played a role in increasing costs or expenses concerning the floors. Finally, Samson also has not addressed Dolner’s

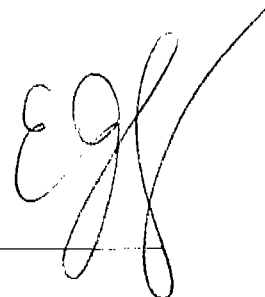
assertion that it has already deducted money for floor repair costs from the escrow account. In sum, the motion, like the prior motion made in the Dolner Action, is premature.

Accordingly, it is

ORDERED that the motion of 50 Madison Avenue LLC and Samson Management, LLC for partial summary judgment is denied.

Dated: April 7, 2010

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
APR 13 2010
NEW YORK
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