

Excell Assoc. v Excelsior 57th Corp.

2011 NY Slip Op 32117(U)

August 3, 2011

Sup Ct, NY County

Docket Number: 108755/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 108755/2009
EXCEL ASSOCIATES
 vs.
EXCELSIOR 57TH CORP.
 SEQUENCE NUMBER : 003
 PARTIAL SUMMRY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

UNFILED JUDGMENT

Cross-Motion: Yes No

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Upon the foregoing papers, it is ordered that this motion be

**MOTION TO DISMISS IS DENIED WITH
 THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: AUG 0 2011


 HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

-----X		Decision and Order
EXCEL ASSOCIATES,		Index No. 108775/09
	Plaintiff,	
	-against-	Seq. No.: 003
EXCELSIOR 57 TH CORP.,		Present:
	Defendant.	<u>Hon. Judith J. Gische</u> J.S.C.
-----X		

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's n/m (3212) w/ MM and IS affids, exhs (sep back)	1,2
Pltf's x/m (3025) w/GT, SM affid, exhs (sep back)	3,4
Amended complaint	5
Excelsior reply w/MM affid	6
Excel reply w/RJG affid	7

Judith J. Gische, J.:

This matter concerns rights and obligations between parties to a master commercial lease (the Lease) with defendant Excelsior 57th Corp. (Excelsior), as landlord, and plaintiff Excel Associates (Excel), as tenant. Issue has been joined and Excel filed the Note of Issue on August 5, 2010. Presently before the court is a timely motion by Excelsior for partial summary judgment dismissing the complaint (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Excel has cross moved to amend the complaint. The motions are decided as follows:

ARGUMENTS PRESENTED

The Lease between the parties commenced on January 1, 1969 and, depending on the

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future actions of the parties, may expire as late as July 31, 2097. Excel is the master commercial lessee of five floors of commercial space and a three-level garage (the Premises) located in the building known as 301-303 East 57th Street, New York, New York (the Building). Excelsior is the lessee of the Building and the land upon which it stands pursuant to a ground lease which will expire the day following the expiration of the Lease.

The parties' dispute concerns which one of them is responsible for repairs that were made to/on account of a swimming pool located on the 5th floor of the Premises. In 1969, when Excel took possession of the Premises under the Lease from Excelsior, the Building was outfitted with a pool. A subtenant of Excel, Megafit Corp., leased the 5th floor of the Premises in June of 1984, and in that lease, assumed responsibility for the pool that was existing on the Premises. In 1986, Megafit installed a new pool in the same location (the Pool). In 2005, however, the Pool began developing severe leaks which caused multiple floods to occur in the offices of a second subtenant of Excel, Ruder Finn, Inc., which occupies the 2nd, 3rd and 4th floors of the Premises.

In early June 2008, Excel was informed by Ruder Finn that yet another leak had occurred and that the source of the leak appeared to be the Pool. In response to the foregoing Pool leak of June 2008, and upon information and belief, at the behest of Excel, Megafit performed some patchwork repairs of the Pool. Unfortunately, these repairs soon proved insufficient, and on June 23, 2008, the Pool leak reoccurred. Subsequently, Excel contacted Megafit and stated that, given the grave harm being caused, Excel would be draining the Pool in order to ascertain the cause.

After a series of inspections and tests, it was determined that the Pool had suffered structural damage in that the gutter trough had corroded to a very thin layer and was the most likely cause for the continuing leaks that had been occurring. Further, the inspectors concluded

that the Pool gutter trough could not be patched as the entire trough was corroding and any patches would just transfer the heavier corrosion to the remaining exposed metal. The engineers submitting affidavits herein generally agree that the leaks occurred due to improper maintenance over the life of the Pool (*see* Shtulberg Aff., ¶ 6, and Hanbicki Aff., Def. Opp., Exh E, *Megafit Corp. v Excel Assoc.*, Index No. 117229/08, Sup Ct, NY County, ¶ 5), or improper installation of the Pool generally (*see* Hanbicki Aff., ¶ 8). In April 2010, Excel completed repairs to the gutter and filtration system of the Pool.

Concurrently, Excel's other subtenant, Ruder Finn, had allegedly also been complaining about the heating and cooling within the Premises for years prior to the leaks. The problem was identified to fan coil units, dating back to the original construction of the Building, which were becoming ineffective and inoperable. In or around April to June of 2008, Excel replaced 118 fan coil units within the Premises. In addition, Excel allegedly incurred the cost of overtime paid to asbestos contractors used by Excelsior to remediate asbestos within or around the Premises over the Memorial Day weekend of 2009. Excel maintains that Excelsior is responsible for both of the aforementioned expenses, and seeks to recover for them herein.

The Lease, dated January 1, 1969, provides in Article IX (b) that "Tenant, at its sole cost and expense, shall make all nonstructural repairs to and upon the demised [P]remises, and all structural repairs thereto which are caused by the negligence of the Tenant, Tenant's subtenant or any of its or their servants, employees or agents." The Lease goes on to state, in Article IX (c), that "Landlord, at its sole cost and expense, shall make all structural repairs other than those required to be made by the Tenant above, whether foreseen or unforeseen, to and upon the demised premises."

Article V (a) (2) of the Lease provides that Excelsior shall provide heat, hot and cold water, air conditioning and ventilation, and gas to the Premises. Although the Lease goes on to obviate Excelsior's obligation to provide the aforementioned utilities if repairs to the machinery and equipment of the Building are necessary (Lease, Art. V [c]), by subsequent amendment, Excelsior agreed to "repair ... the air handlers (including automatic controls) and other air conditioning equipment servicing the second, third and fourth floors." *See* Agreement, dated July 9, 1995, amending the Lease, Plaintiff's Exh. E.

In commencing this action, Excel seeks: (i) a declaration that the repairs to the Pool were structural repairs for which Excelsior was responsible under the Lease (3rd cause of action); (ii) a declaration that Excelsior must indemnify Excel in any action brought by third parties resulting from damages due to the Pool (7th cause of action); (iii) breach of the Lease due to Excelsior's failure to repair the Pool (9th cause of action); and (iv) unjust enrichment and promissory estoppel for the expenses Excel incurred in replacing the fan coils, and paying overtime wages to asbestos removal workers (10th through 13th causes of action). Since Excelsior seeks partial summary judgment dismissing Excel's 10th through 13th causes of action because the Lease covers the subject matter of the claims, Excel has cross-moved to amend its complaint to include, alternatively to the 10th through 13th causes of action, claims for breach of the Lease due to Excelsior's failure to pay to replace the fan coils and pay overtime to asbestos-removal workers (14th and 15th causes of action).¹

¹Excel also originally brought causes of action relating to the validity of a Notice to Cure issued by Excelsior under the Lease as of May 29, 2009, for a *Yellowstone* injunction relating to potential actions under that Notice (1st, 2nd, 4th, 5th, and 6th Causes of Action), and for an injunction compelling Excelsior to repair the Pool (8th Cause of Action). By stipulation of July 15, 2010 (*see* Exh. M, Plaintiff's Opp.), and subsequent submissions to the court (*see e.g.*

Primarily, upon this motion, Excelsior seeks partial summary judgment, pursuant to CPLR 3212, dismissing Excel's causes of action, and granting its first counterclaim for a declaration that Excel was obligated to make the necessary nonstructural repairs to the Pool.

FIXING THE POOL: STRUCTURAL OR NONSTRUCTURAL REPAIR?

Excel and Excelsior each seek a declaration stating that the other is financially responsible for fixing the Pool. Excel paid to repair the Pool, and seeks to recover its money from Excelsior because the repairs to the Pool were structural in nature, and thus, the responsibility of Excelsior under the Lease. Excelsior rejoins that, under the Lease, Excel is responsible to pay for nonstructural repairs, such as that of the Pool, and thus, Excel bears responsibility for those repairs to the Premises.

As a preliminary matter, the court finds that the parties are entitled to a declaration of their rights, as there is a real and present controversy between them. *See e.g. De Veau v Braisted*, 5 AD2d 603, 606 [2nd Dept 1958], *aff'd* 5 NY2d 236 (1959). The cross motions for a declaration depend directly on what constitutes structural versus nonstructural repairs under the Lease. In the event that the repairs to the Pool are determined to be structural, the question of whether Megafit negligently caused the damage necessitating the repairs will arise. *See* Lease, Article IX (b) ("Tenant ... shall make ... all structural repairs thereto which are caused by the negligence of ... Tenant's subtenant ...").

Generally, courts have construed the distinction between structural and nonstructural alterations to a building with regard to permission to make alterations, not with regard to the

Tockstein Aff. In Opp., ¶ 36), the parties agreed that these causes of action are now moot, as Excel has repaired the Pool. They are, accordingly, all dismissed.

obligation to make such alterations. This is important because the landlord bears a presumptive burden to keep a building in proper repair (*see e.g. Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 642-646 [1996]), while at the same time having the right to dispose of property in the way the landlord sees fit (*see e.g. Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 405-406 [1984]).

Nonetheless, a persistent understanding in the law is that “[a] structural change or alteration is such a change as affects a vital and substantial portion of the premises, as changes its characteristic appearance, the fundamental purpose of its erection, or the uses contemplated, or, a change of such a nature as affects the very realty itself – extraordinary in scope and effect, or unusual in expenditure.” *Garrow v Smith*, 198 AD2d 622, 623 (3rd Dept 1993) (citations and internal quotation marks omitted); *Pross v Excelsior Cleaning & Dyeing Co.*, 110 Misc 195, 201-202 (Mun Ct, NY County 1920). Because of the flexibility of this definition, courts have tended to make any such determination on a case-by-case basis, with due consideration for “the nature and extent of the proposed repair or alteration ... [and] the structure itself.” *Garrow v Smith*, 198 AD2d at 623; *see also Harar Realty Corp. v Michlin & Hill*, 86 AD2d 182, 186 (1st Dept), *appeal dismissed* 57 NY2d 607 (1982).

Here, the repairs to the Pool involved the gutter system, including the filtration and drainage systems of the Pool. *See Shtulberg Aff.*, ¶¶ 4, 5; *Hanbicki Aff.*, ¶ 4-7. None of these features are part of the Building or the Premises. Indeed, the Pool could be excavated wholesale, without any effect on the structure of the Building. Moreover, the repairs to the Pool do not appear to be such as to change any vital aspect of the Premises, or, for that matter, the health club containing the Pool. The fundamental appearance of the Building and the prior or continued use

of the Premises also appear to be unaffected by the repair. In short, while the installation of a new sewer system may be a structural change (*see Josam Assoc. v General Bowling Corp.*, 135 AD2d 502, 503 (2nd Dept 1987)), there is nothing extraordinary about replacing a corroded gutter or a filtration system in the Pool: such repairs are patently nonstructural.

Therefore, it is declared below that the repair of the Pool was a nonstructural repair for which Excelsior was not responsible under the Lease (3rd cause of action). As a result, Excelsior is not required to indemnify Excel in any action brought by third parties resulting from damages due to the Pool (7th cause of action). Moreover, as the repair to the Pool was nonstructural, the ninth cause of action for breach of the Lease due to Excelsior's failure to repair the Pool is dismissed.

FAN-COIL REPLACEMENT AND ASBESTOS-WORKER OVERTIME REIMBURSEMENT

Excel has also brought causes of action for unjust enrichment and promissory estoppel. Excel claims to recover the expenses it incurred in replacing the fan coils, and paying overtime wages to asbestos removal workers (10th through 13th causes of action) on the basis that Excelsior is responsible for those costs. Excelsior argues that it is entitled to summary judgment, dismissing those causes of action because the Lease covers the subject matter of the claims. In response, Excel has cross-moved for leave to amend its complaint to include, alternatively, to the 10th through 13th causes of action, claims for breach of the Lease due to Excelsior's failure to pay to replace the fan coils and pay overtime to asbestos-removal workers (14th and 15th causes of action).

Amendment to Complaint

It is well settled law that leave to amend a pleading shall be freely granted absent

prejudice or surprise resulting from the delay. CPLR 3025 (b); *Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166 (1989). However, if a proposed claim patently lacks merit, amendment of a pleading to assert that claim would serve no purpose but needlessly to complicate discovery and trial. *Id.*, 74 NY2d at 170. Since both parties apparently agree that the original causes of action for unjust enrichment and promissory estoppel are potentially covered by the Lease (i.e. the contract between the parties), there is no prejudice to the defendants nor any need to resort to principles of quasi contract. Therefore, the cross motion to amend the complaint is granted and the court proceeds to consider whether Excelsior has proved its entitlement to these claims, as amended.

Analysis of the Lease and Unjust Enrichment/Promissory Estoppel Claims

With regard to the fan coils, Article V of the Lease states that Excelsior “shall furnish and supply[,] in and to the [Premises,] ... as are now, or which hereafter may be, required to be furnished by the Landlord pursuant to ... (2) the terms of any and all sub-leases of any portions of the [Premises] which may hereafter be made by the Tenant, as landlord, during the initial term of this Lease or any renewal thereof ... air conditioning and ventilation.” Excelsior argues that the replacement of the fan coils was an inducement for Ruder Finn to extend the term of its sublease with Excel, and, as such, Excelsior had no obligation to make, or pay for, such replacements. Nonetheless, Excelsior argues, as the subject matter of air conditioning is covered by the Lease, the causes of action for unjust enrichment and promissory estoppel must be dismissed.

Excelsior’s argument is wildly circular. The argument starts that the causes of action for unjust enrichment and promissory estoppel are precluded by the existence of a Lease. This is only partially true. While the court acknowledges that “[t]he existence of a valid and enforceable

written contract *governing a particular subject matter* ordinarily precludes recovery in quasi contract for events arising out of the same subject matter” (see *Clark-Fitzpatrick v Long Island R. R. Co.*, 70 NY2d 382, 388 [1987] [emphasis added]), it is clear that “where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies (*Joseph Sternberg v Walber 36th Street Assoc.*, 187 AD2d 225, 228 [1st Dept 1993]).

Excelsior’s argument continues that there is no obligation for the cost of the replacement of the fan coil units under the Lease simply because Excel made such replacements in order to induce Ruder Finn to renew its existing sublease. If Excelsior’s argument is true, then the Lease does not cover the *particular subject matter of the claim*, i.e. sublease incentives. Therefore, Excel could certainly bring causes of action for unjust enrichment and promissory estoppel. See *id.* In any event, Excelsior’s argument that there is no obligation because the replacement of the fan coils was an inducement in the sublease with Ruder Finn, is clearly buffeted by the words of the Lease: Excelsior “shall furnish and supply ... *pursuant to ... the terms of any and all sub-leases of any portions of the [Premises] which may hereafter be made by the Tenant, as landlord, during the initial term of this Lease or any renewal thereof ...* air conditioning and ventilation.” Lease, Article V (a) (emphasis added). Although, as noted above, the Lease goes on to obviate Excelsior’s obligation to provide the aforementioned utilities if repairs to the machinery and equipment of the Building are necessary (Lease, Art. V [c]), by subsequent amendment, Excelsior agreed to “repair ... the air handlers (including automatic controls) and other air conditioning equipment servicing the second, third and fourth floors.” See Agreement, dated July 9, 1995, amending the Lease, Plaintiff’s Exh. E.

While “the existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter” (*Clark-Fitzpatrick*, 70 NY2d at 388), where, as here, there is a possibility that the “contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit[,] and will not be required to elect his or her remedies.” *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 405 (1st Dept 2007), citing *Joseph Sternberg*, 187 AD2d at 228; *see also American Tel. & Util. Consultants v Beth Israel Med. Ctr.*, 307 AD2d 834, 835 (1st Dept 2003). The motion for summary judgment dismissing the tenth and eleventh causes of action for unjust enrichment and promissory estoppel, respectively, with regard to the replacement of fan coils in the Premises is denied.

With regard to the causes of action for unjust enrichment and promissory estoppel related to asbestos remediation work performed in the Premises over the Memorial Day of 2009 weekend, it is unclear whether the same clause of the Lease arguably applicable to the fan coil units applies to such work. As such, it would be patently premature to dismiss the twelfth and thirteenth causes of action upon summary judgment. Excelsior states that there is no evidence of an obligation or an unambiguous promise of the type necessary to prove promissory estoppel. However, it is not Excel’s obligation to prove its claim upon Excelsior’s motion for summary judgment. Rather, “[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof, but must affirmatively demonstrate the merit of its claim or defense.” *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 (4th Dept 1992). The motion for summary judgment dismissing the twelfth and thirteenth causes of action is denied.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the first, second, fourth, sixth, and eighth causes of action are dismissed as moot; and it is further

ORDERED that the motions for partial summary judgment dismissing the third and seventh causes of action of the complaint, and summary judgment on the first counterclaim of the answer, are granted to the extent adjudged and declared below; and it is further

ADJUDGED and DECLARED that the repairs made by plaintiff Excel Associates to the swimming pool in the leased premises within 301-303 East 57th Street, New York, New York were nonstructural, and therefore, not the obligation of defendant Excelsior 57th Corporation; and it is further

ORDERED that the ninth cause of action for breach of the master commercial lease between defendant, Excelsior 57th Corporation, as landlord, and Excel Associates, as tenant, for failure to pay the costs of repairs made to the swimming pool referenced in the prior paragraph is dismissed; and it is further

ORDERED that the motion of defendant Excelsior 57th Corporation to dismiss the tenth, eleventh, twelfth and thirteenth causes of action is denied; and it is further

ORDERED that the cross motion of plaintiff Excel Associates to amend the complaint to include causes of action for breach of the Lease as the fourteenth and fifteenth causes of action is granted; and it is further

ORDERED that plaintiff shall serve a copy of this decision on the Office of Trial


[* 13]
Support and Mediator Miles Vigilante within Ten (10) Days hereof; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
August 3, 2011

So Ordered:



Hon. Judith J. Gische, JSC

UNFILED JUDGMENT

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