

TW Telecom of N.Y., L.P. v Ackerman

2012 NY Slip Op 33295(U)

January 3, 2012

Sup Ct, NY County

Docket Number: 105870/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: J.S.C.
Justice

PART 11

TW Telecom of NY
- v -
IRWIN ACKERMAN

INDEX NO. 105870/10
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annex decision and order.

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

Dated: January 3, 2010

[Signature]
HON. JOAN A. MADDEN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
TW TELECOM OF NEW YORK, L.P., INDEX NO. 105870/10

Plaintiff,

-against-

IRWIN ACKERMAN, 211 WEST 61ST STREET
ASSOCIATES, L.P., 211 COWEST ASSOCIATES, LLC
and THE GATEWAY SCHOOL OF NEW YORK,

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action involving a lease for commercial premises, defendants move for order pursuant to CPLR 3211(a)(1), (5) and (7), dismissing the 1st through 15th causes of action in the First Amended Complaint on grounds of statute of limitations, a defense founded on documentary evidence and failure to state a cause of action.¹ Plaintiff opposes the motion

The following facts are not disputed unless otherwise noted. On April 28, 1995, defendant 211 West 61st Street Associates, L.P. ("211 West 61st") as landlord/owner, entered into a lease with plaintiff as tenant for the 5th floor and a portion of the sub-basement, in the building located at 511 West 61st Street in Manhattan. The lease provided for initial term of 15 years commencing May 15, 1995, and gave the tenant the right to extend the term for three additional five-year periods. Sometime thereafter, the building was converted to a commercial

¹Under motion sequence no. 001, defendants Irwin Ackerman and 211 West 61st Street Associates make one motion to dismiss, which is joined in by defendant 211 Cowest Associates, LLC, and defendant Gateway School of New York makes a separate motion to dismiss. Since the three motions are all made under one sequence number, the court will refer to them collectively as one motion.

condominium, and plaintiff's 5th floor premises became known as "Unit 5." On January 11, 2006, plaintiff and defendant 211 West 61st entered in to an Amendment to Agreement of Lease. By deed dated March 24, 2006, defendant 211 West 61st conveyed Unit 5 to co-defendant 211 Cowest Associates, LLC ("Cowest"). By deed dated June 29, 2007, Cowest conveyed Unit 5 to co-defendant The Gateway School of New York ("Gateway").

On May 4, 2010, plaintiff commenced the instant action seeking damages and declaratory relief, alleging that it was overcharged approximately \$1.4 million for electricity charges as a result of the improper installation or maintenance of the primary submeter used for billing electricity to plaintiff, and the addition of an improper 20% surcharge to its electric billing. The First Amended Complaint asserts causes of action against all defendants for breach of lease (1st, 6th, and 11th causes of action), fraud (2nd, 7th and 12th causes of action), unjust enrichment (3rd, 8th and 13th causes of action), money had and received (4th, 9th and 14th causes of action), and accounting (5th, 10th and 15th causes of action). The First Amended Complaint also asserts a 16th cause of action against defendant Cowest for a declaration of the parties' rights with respect to the real estate tax escalation billing. In lieu of answering, defendants are moving to dismiss the breach of contract claims as barred by the statute of limitations. With the exception of the 16th cause of action, defendants are seeking dismissal of the entire complaint for failure to state a cause of action and based on documentary evidence.

On a pre-answer motion to dismiss addressed to the sufficiency of the pleadings, the complaint must be liberally construed, and the Court must accept all allegations as true and accord them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory. Cron v. Hargro Fabrics, 91 NY2d 362, 366 (1998); Merrill

Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC, 19 AD3d 273 (1st Dept 2005); DeMicco Bros., Inc. v. Consolidated Edison Co., 8 AD3d 99 (1st Dept 2004). In determining a motion to dismiss for failure to state a cause of action, the test is simply whether the proponent of the pleading has a cause of action, not whether the pleading has stated one. Leon v. Martinez, 84 NY2d 83, 88 (1994); Wiener v. Lazard Freres & Co., 241 AD2d 114 (1st Dept 1998). Dismissal under CPLR 3211(a)(1) based on a defense founded on documentary evidence is warranted only if defendant submits documentary evidence conclusively refuting plaintiff's claims or conclusively establishing a defense to the claims as a matter of law. See A.G. Capital Funding Partners, L.P. v. State Street Bank & Trust Co., 5 NY3d 582 (2005); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144 (2002); Gorelik v. Mount Sinai Hospital Center, 19 AD3d 319 (1st Dept 2005), lv app den 6 NY3d 707 (2006).

The motion to dismiss is denied as to plaintiff's breach of contract claims. In view of the parties' lease agreement, the first amended complaint sufficiently alleges breach of contract claims, and those claims are not barred by the applicable six-year statute of limitations. Paragraph 47 of the lease, entitled "Additional Rent – Electricity," obligated plaintiff to pay "all charges for electricity consumed at or from the demised premises from and after the Term Commencement Date," and obligated defendants to "maintain" the electricity meter "throughout the term of this lease."

The complaint alleges that plaintiff "has determined that the primary submeter at Premises (Meter 008614) that was used for billing electricity to Plaintiff was installed with mismatched current transformers that resulted in overbilling of energy demand by approximately 34%." The complaint specifically alleges that "there were three (3) current transformers passing

through the primary submeter, Phase 'A,' Phase 'B,' and Phase 'C.' Phase 'A' was installed with a 600:5 amp current transformer whereas Phase 'B' and Phase 'C' were installed with 1200:5 amp current transformers. The primary submeter was billed with a 240 multiplier, which was determined by the current transformer ratio of 1200/5. Because the 600:5 amp current transformer read double the actual amount of energy and demand, the resulting overbilling of energy and demand was approximately 34%." Based on the foregoing allegations, the complaint asserts that defendants breached paragraph 47 of the lease, which required defendants "to maintain [the primary submeter and transformers] in normal working order throughout the term of the Lease."

The complaint also alleges that defendants added an unauthorized 20% surcharge to plaintiff's electrical billing. Specifically, the complaint alleges that in January 1999, plaintiff "brought the 20% Surcharge to the attention" of 211 West 61st, and by letter dated February 5, 1999, 211 West 61st agreed that the lease did not provide for such surcharge, so it would no longer the surcharge in plaintiff's bill. The complaint alleges that "thereafter" 211 West 61st reinstated the surcharge without plaintiff's knowledge, and that defendants Cowest and Gateway also added a 20% surcharge without plaintiff's knowledge, which plaintiff paid through July or August 2008, or sometime shortly thereafter. The complaint seeks damages for overbilling going back six years to May 4, 2004, in the amount of "not less than \$408,795.00, of which not less than \$152,220.00 is attributable" to the 20% surcharge.

Accepting the foregoing allegations as true and according them the benefit of every favorable inference in plaintiff's favor, plaintiff has sufficiently asserted causes of action for breach of contract and those claims are not barred by the applicable six-year statute of

limitations. Plaintiff essentially alleges that defendants' improper installation and maintenance of the electricity meter resulted in overbilling, in breach of defendants' continuing obligation under Paragraph 47 of the lease to "maintain" the electricity meter in proper working order so that it accurately recorded the actual amount of electricity used by plaintiff, in order for plaintiff to comply with its obligation to pay its share of the electricity charges.

Contrary to defendants' assertion, such breach is not referable exclusively to the date on which the original wrong was allegedly committed, i.e. when meter was first installed. See 1050 Tenants Corp v. Lapidus, 289 AD2d 145 (1st Dept 2001). Rather, since defendants' obligation to maintain the meter and correctly calculate and bill plaintiff for its proper share of electricity charges was a continuing one, plaintiff's breach of lease claims accrued anew for each continuation of the wrong. See Fifth Avenue of Long Island Realty Assocs v. LCI Holdings, Inc., 2007 WL 4846229 (Sup Ct, Nassau Co 2007). Defendants' reliance on the holding in Goldman Copeland Assoc, P.C. v. Goodstein Bros & Co, Inc, 268 AD2d 370 (1st Dept), lv app dismiss 95 NY2d 825 (2000), is misplaced, as plaintiff is not challenging the methodology used by defendants in calculating electricity charges. The voluntary payment doctrine is likewise inapplicable to the electricity charges at issue, since plaintiff alleges its payments were made under a mistake of fact as to the actual amount of electricity used and the actual amount owed. See Kirby McInerney & Squire, LLP v. Hall Charne Burce & Olson, S.C., 15 AD3d 233 (1st Dept 2005).

The complaint also alleges that defendants added an unauthorized 20% surcharge to the electricity billing. While the voluntary payment doctrine may ultimately preclude such claim, at this pleading stage of the action, dismissal on that ground is not warranted. Thus, since the

breach of contract claims are sufficiently pleaded and seek damages within the six-year limitations period, defendants' motion to dismiss is denied as to those claims.

Turning to the balance of the First Amended Complaint, the causes of action for fraud must be dismissed as duplicative of the breach of contract claims, since they are based on the same facts underlying the contract causes of action, they are not collateral to the contract, and they do not seek damages that are not recoverable under a contract measure of damages. See Havell Capital Enhanced Municipal Income Fund, L.P. v. Citibank, N.A., 84 AD3d 588 (1st Dept 2011); Financial Structures Ltd v. UBS AG, 77 AD3d 417 (1st Dept 2010). The claims for unjust enrichment and money had and received, which are based upon a theory of quantum meruit, cannot lie as a matter of law where, as here, a valid contract covering the same subject matter exists between the parties. See Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co., 70 NY2d 382 (1987); Gillon v. Traina, 70 AD3d 1443 (4th Dept), lv app den 14 NY3d 711 (2010); Goldman v. Simon Property Group, Inc., 58 AD3d 208 (2nd Dept 2008); Lum v. New Century Mortgage Corp., 19 AD3d 558 (2nd Dept 2005), lv app den 6 NY3d 706 (2006); Skillgames, LLC v. Brody, 1 AD3d 247 (1st Dept 2003); MJM Advertising, Inc. v. Panasonic Industrial Co., 294 AD2d 265 (1st Dept 2002). As to the claims for an accounting, in the absence of a fiduciary relationship between the parties, plaintiff is not entitled to such relief. See Simons v Ross, 309 AD2d 667 (1st Dept 2003).

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted to the extent of severing and dismissing the 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 10th, 12th, 13th 14th and 15th causes of action in the First Amended Complaint; and it is further

ORDERED that the motion is denied as to the 1st, 6th and 11th causes of action, and the action shall continue with respect to the 1st, 6th, 11th and 16th causes of action; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for January 5, 2012 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

DATE: ~~December~~ ^{January} 3, 2012
~~, 2011~~

ENTER:



J.S.C.