

<b>Building Serv. Local 32B-J Pension Fund v 101 L.P.</b>
2013 NY Slip Op 33111(U)
March 12, 2013
Sup Ct, NY County
Docket Number: 652266/2010
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

BUILDING SERVICE LOCAL 32 B-J PENSION FUND
et al

INDEX NO. 65-2266/2010

MOTION DATE

-v-

MOTION SEQ. NO. 005

101 Limited Partnership

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is by plaintiffs for partial summary judgment dismissing defendant's counterclaims for delay damages and dissolving a bond to GRANTED per the attached Decision and Order.

A Status Conference is scheduled for 4-23-13 at 11AM at 60 Centre St. Room 218

Dated: March 12, 2013

MELVIN L. SCHWEITZER

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

- 1. CHECK ONE: CASE-DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X	
BUILDING SERVICE LOCAL 32B-J PENSION FUND;	:
BUILDING SERVICE LOCAL 32B-J HEALTH FUND;	:
BUILDING SERVICE LOCAL 32B-J LEGAL	:
SERVICES FUND; LOCAL 32B-32J SERVICE	:
EMPLOYEES INTERNATIONAL UNION	:
	:
	:
Plaintiffs,	:
	:
-against-	:
	:
101 LIMITED PARTNERSHIP	:
	:
	:
Defendant.	:
-----X	

Index No. 652266/2010  
DECISION AND ORDER  
Motion Sequence No. 005

MELVIN L. SCHWEITZER, J.:

**Background**

Plaintiffs are Building Service Local 32b-J Pension Fund, Building Service Local 32b-j Health Fund, Building Service Local 32b-J Legal Services Fund and Local 32b-32j Service Employees International Union. They move pursuant to CPLR 3212 (e) for partial summary judgment dismissing defendant’s counterclaim for delay damages and dissolving a \$4,708,242 bond.

Plaintiffs were the net lessees of a building at 101 Avenue of the Americas (the Building) pursuant to multiple twenty-year net leases (the Leases) that expired on December 31, 2011. Defendant (101 Limited Partnership, now known as 101 A of A Ground Lessee LLC) was plaintiffs’ landlord. Plaintiffs vacated the Building and surrendered possession to defendant on December 31, 2011. From approximately 2006, when the Leases commenced the last quarter of their twenty-year term, plaintiffs and defendant were in a dispute as to (a) certain net cash flow payments defendant withheld from plaintiffs; and (b) repair work, *i.e.*, state-of-the-art upgrades

and renovations of the Building, that defendant required plaintiffs to make before the Leases terminated.

Plaintiffs commenced this action in December 2010 to recover the disputed net cash flow amounts. Defendant responded with a default notice warning of a possible Event of Default under the Leases if plaintiffs did not immediately commence state-of-the-art building system replacements and modernizations by January 20, 2011 (the so-called Retaliatory Notice). In the Retaliatory Notice, defendant threatened entry to the premises during plaintiffs' occupancy in order to perform the work, or termination of plaintiffs' occupancy, or declaration of termination of the Leases, if plaintiffs did not comply with defendant's requests.

In January 2011, plaintiffs moved by order to show cause for a temporary restraining order and injunction preventing defendant, among other things, "from taking any action, including issuing any further notice or entering the premises and interfering with such parties' right of quiet enjoyment, for alleged purposes of 'curing' any defaults in the Retaliatory Notice, or otherwise interfering with such parties' possession of the premises."

At a February 17, 2011 *Yellowstone* hearing, defendant told the court that its claim for delay damages (and need for a bond) was premised on its claim that the Building otherwise would have been ready for a new tenant on January 1, 2012, but now would need to be empty for a period of several more months (*i.e.* the "delay" in delay damages) so that the repair work could take place after plaintiffs moved out. Defendant said:

What we lose is the fact that tenant[s] come and go in New York. If we had the building ready January 1 [2012], we might attract a tenant who is available January 1, but who isn't interested in the space[d] June 1, and then it will take us, you know, when we have the building ready June 1, it may take us more time, because the tenant who was there wasn't there.

In defendant's brief submitted a week later, defendant again claimed that, absent the injunction, it could "seek to rent the building to new tenants with the assurance that the subject work would have been completed by January 1, 2012."

On March 7, 2011, the court issued a *Yellowstone* injunction, prohibiting defendant from entering the Building to conduct the repair work while plaintiffs occupied the Building. The court also ordered a bond of \$4,708,242 due to the possibility that postponing the repair work would increase its cost, and delay a rent stream from a new tenant.

Defendant's answer, served in June 2011, contained an affirmative defense and three counterclaims. One of the counterclaims contained an express request for delay damages occasioned by the *Yellowstone* injunction. It reads::

As an additional consequence of Tenant's choice to block Landlord from performing the Repair Work in respect of the obsolescent System during the balance of Tenant's Lease term, as sought in Landlord's Notice, tenant is liable for 'delay damages,' in an amount anticipated to be in excess of the bond set by the Court in the amount of \$4,708,242.

### **Discussion**

Plaintiffs assert that the work is now done and was done for less cost and in less time than would have been the case if the work had been performed while plaintiff occupied the building. Consequently, they argue there is no viable claim for delay damages.

Defendant argues that plaintiffs mischaracterize the delay damages claim. According to defendant, plaintiffs are liable for the costs of the replacement-for-obsolescence work which was performed pursuant to Sections 12.01 and 21.02 of the Leases. Additionally, since plaintiffs chose to force a delay of that work until after December 31, 2011 – the expiration of the Leases – plaintiffs should be deemed a holdover for the reasonable time necessary to perform the work, and thus are liable for the fair market rent for that period. Plaintiffs rely on the holdings in

[\* 5]

*Niagra Frontier Transportation Authority v Euro-United Corp.*, 303 AD2d 920 (4th Dept 2003) and *Omnabuild Corp. v Copacabana Nightclub Inc.*, 7/21/94 NYLJ 23 (Civ Ct NY Co) to support their claim.

Defendant concedes plaintiffs were able to substantially complete the replacement-for-obsolence work for \$4.9 million – less than the \$7.4 million estimated if the work had been done in 2011. Defendant contends this is irrelevant as it has no bearing on the damages due with respect to plaintiffs being deemed a holdover.

The repair work was completed in approximately 7-1/2 months – a shorter period than the 9 months projected in 2011. During this period defendant also performed other work – “gutting” of interior partitions and lighting fixtures. Plaintiffs assert that this “gutting” work would have taken place in this time period under any circumstances, thus erasing defendant’s claim for delay damages.

Defendant argues that the “gutting” work is irrelevant to defendant’s delay damages, as they are, as a matter of law, an issue of whether plaintiffs are deemed to have elected to holdover/trespass. Defendant argues it need not show actual injury. It also argues that plaintiffs’ contention that defendant must be charged with a reduction of delay damages of four to five months because of the “gutting” work is without factual support.

Plaintiffs assert that defendant predicates its delay damages claim on a commitment that it would be ready to re-let on January 1, 2012, but that there was nearly a year’s hiatus in defendant’s efforts to re-let the building because of a disagreement between internal factions at defendant. Thus, say plaintiffs, the defendant could not have been ready to re-let on January 1, 2012 in any event, and its delay damages claim is nullified. Defendant counters that this point is irrelevant to its delay damages claim which it predicates on plaintiffs being deemed a holdover.

Plaintiffs contend that lost rent claims are unavailable in New York repair damage cases. They cite *Mudge v West End Brewing Co.*, 145 AD 28, 31 (1911), *affd* 207 NY 696 (1913) for the long established rule that “[t]he covenant to surrender the property in good condition at the expiration of the lease manifestly can relate only to the physical condition of repair. The rule of damages applicable to such covenant precludes the idea that loss of rent is included in it. The rule, without variation, is that under such a covenant the damages are what it would cost to put the premises in the required state of repair.”

Defendant argues that there is an exception to this rule because it has a purported self-help right. This means that although plaintiffs moved out in December 2012, they are now “holdover tenants/trespassers” during the period in which repairs were conducted after they moved out. Defendant states the rule as follows:

The issue re delay damages, again, is not whether the landlord can show actual injury, but rather whether the tenant is deemed to have elected to holdover/trespass. . . . The rule in this holdover/trespass context is that if and when a tenant, after lease expiration, nevertheless chooses to “make use” of the space for additional time, then the tenant must pay therefor, regardless of any actual loss to the landlord.

Plaintiffs assert that there is no basis in law for treating them as holdovers because of defendant’s repair claim. They argue that this “rule” cannot have any application to a non-holdover, breach of repair clause dispute. They cite New York law as flatly negating any such “rule” and which expressly reject claims of “holdover” damages in repair cases. *See e.g. Chemical Bank v Stahl*, 255 AD2d 126, 127 (1st Dept 1998) (breach of repair clause case, affirming dismissal of claim for lost rent: “[n]or can plaintiff recover lost rental income on the theory that defendant held over its tenancy”); *Charlebois v Carisbrook Indus.*, 23 AD3d 821, 822 (3d Dept 2005) (affirming dismissal of claim for lost rent claim based on alleged “holdover

tenancy” in a breach of covenant to repair case); *Arnot Realty Corp.*, 245 AD2d 780, 782 (3d Dept 1997) (“the law is well settled in New York that a tenant who has vacated premises but breached covenants to repair cannot be held liable for holdover rent while the repairs are made and the premises released.”)

Plaintiffs further contend that defendant’s “holdover” cases are distinguishable. First, *Niagara Frontier Transp. Auth. v Euro-United Corp.*, 303 AD2d 920 (4<sup>th</sup> Dept 2003), which defendant cites as the basis of its delay damages claim, involved a situation where tenant “vacated the premises after the lease was terminated but left behind three massive pieces of equipment” (*Id.* at 921) which “weighed 2,000 tons, 1,500 tons and 1,000 tons, respectively. The machines blocked access to the premises and prevented plaintiff from leasing the property to a new tenant.” (*Id.* at 923) Similarly, in *Omnabuild Corp. v Copacabana Nightclub, Inc.*, Vol. 212 No. 14 NYLJ 23 col. 1 (Civ Ct NY Co July 21, 1994), tenant nightclub refused to move out for an extended period, and when it finally did, its owners opened a new nightclub in the holdover space. The court there found that tenant, by holding over indefinitely, effectively deprived petitioner of a reasonable opportunity to relet the premises.

The court agrees with plaintiffs that the rule in New York is well established that the covenant to surrender property in good condition at the end of the lease relates only to the physical condition of repair. The rule of damages applicable to such covenant precludes the idea that loss of rent is included in it. There is no exception to the rule precluding recovery of lost rent as delay damages. Plaintiffs were not holdovers because of defendant’s repair claims and cannot be held liable for holdover rent.

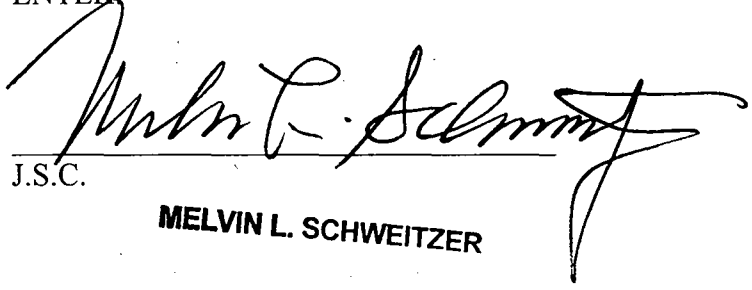
The court's opinion is that the plaintiffs' motion for partial summary judgment dismissing defendant's counterclaim for delay damages and dissolving the \$4,708,242 bond is granted

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment dismissing defendant's counterclaim for delay damages and dissolving the \$4,708,242 bond is granted.

Dated: March 12, 2013

ENTER:

  
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J.S.C.  
MELVIN L. SCHWEITZER