

Ithilien Realty Corp. v 180 Ludlow Dev. LLC
2015 NY Slip Op 32223(U)
October 13, 2015
Supreme Court, New York County
Docket Number: 11701
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ITHILLEN REALTY CORP.,
Plaintiff,

Index No.: 117013/2009

Motion Date: 10/13/15

- v -

Motion Seq. No.: ~~994~~ 005

180 LUDLOW DEVELOPMENT LLC, and
PRIME ASSET FUNDING, LLC,
Defendants.

The following papers, numbered 1 to 9 were read on this motion for summary judgment on causes of action for breach of contract and declaratory judgment.

RECEIVED	
OC: 15 2015	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1-6
Answering Affidavits - Exhibits	7-8
Replying Affidavits - Exhibits	9
GENERAL CLERK'S OFFICE NYS SUPREME COURT - CIVIL	

Notice of Motion/Order to Show Cause -Affidavits -Exhibits
Answering Affidavits - Exhibits
Replying Affidavits - Exhibits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment shall be granted in part as to the second and third causes of action for declaratory judgment and otherwise denied.

Plaintiff has prima facie established its entitlement to a declaration that contrary to the Notice of Cure dated October 20, 2008 sent by defendant, plaintiff has no obligation to execute and deliver any applications, or to obtain any permits to enable defendant to perform alterations that include the installation of a mechanical ventilation system on plaintiff's property under the Zoning Lot Development and Easement Agreement made as of November 14, 2007 (ZLDA). As defendant has raised no issue of fact in regard to the second and third

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

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Check if appropriate: DO NOT POST REFERENCE

causes of action of its complaint in such regard, a summary declaratory judgment and permanent stay of the tolling of the Notice of Cure dated October 20, 2008 in favor of plaintiff is warranted. Likewise, plaintiff has established that the counterclaims are without merit, and defendant has come forward with no evidence that the cantilever described in section 20 of the ZLDA is defined to include any type of mechanical or ventilation system.

Plaintiff fails to come forward with prima facie proof with respect to its fourth cause of action pursuant to General Business Law § 349, which does not apply to commercial entities and is therefore inapplicable to the case at bar and without merit. See Small v Lorillard Tobacco Company, Inc., 94 NY2d 43 (1999).

In the first cause of action of the complaint, plaintiff's negligence claims seek contract damages (See Bank of Nova Scotia v Structure-Tone, Inc., 303 AD2d 273, 274 [1st Dept 2003]). As to such cause of action, plaintiff has come forward with prima facie evidence that establishes as a matter of law that defendant breached the ZLDA. Specifically, the affidavits of plaintiff's witnesses establish that defendant breached ZLDA section 1(b), which states, in pertinent part "All of the easement rights...shall be exercised (i) in a prompt and safe and efficient manner...(ii) taking such precautions as may be necessary or appropriate to prevent damage to the Owner Parcel...(iii) so that on completion of any work, the area of such work is restored to its former condition (insofar as possible) with all debris removed." Defendant offers no evidence of anyone with personal knowledge that refutes that it breached such provision. However, plaintiff's evidence of the pristine condition of the roof prior to the commencement of defendant's construction activity and causation of damages by defendant's

breach is refuted by the evidence in the record, pointed out by defendant, of plaintiff's tenants or cable installer's activities on the roof and the existence of leaks that pre-existed defendant's construction activities.

As to plaintiffs' allegations that defendant failed to procure the requisite insurance under the ZLDA, the acknowledgment letters dated February 1, 2010 and January 10, 2010 from defendant's insurance carriers Scottsdale Insurance Company and Navigators Management Company, Inc. on behalf of Navigators Insurance Company, which plaintiff proffers, do not establish as a matter of law that defendant so breached the ZLDA. ZLDA section 11(c) requires that defendant procure third party liability insurance for claims by third parties against plaintiff arising out of defendant's construction activities under the ZLDA. The acknowledgment letters confirm that such coverage was procured by defendant for the coverage period, though not the extent of such coverage. Neither a declaratory judgment nor a finding that defendant breached the contract in such regard is warranted.

As plaintiff's counsel insisted on oral argument, plaintiff's claims with respect to compensatory damages to its property is based on defendant's breach of the ZLDA, which governs the relationship between the parties, and not the laws of negligence. Though moving for a declaratory judgment with respect to the insurance provision of the ZLDA and damages to its property, plaintiff's first cause of action sounding in breach of contract will provide plaintiff with a full and adequate alternative remedy (see Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50 [1st Dept 1998]), and searching the record pursuant to CPLR 3212(b) the declaration with respect to procurement of insurance and damages to plaintiff's property are dismissed.

Plaintiff does not seek summary judgment on its first cause of action, and, in any event, summary judgment would not be warranted on the breach of the ZLDA as to the roof as there are issues as to both causation and the extent of damages.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment on its second and third causes of action in connection with the Notice to Cure dated October 20, 2008 and dismissing the first, second and third counterclaims is GRANTED, and searching the record pursuant to CPLR 3212(b) the remaining claims for declaratory judgment and the fourth cause of action are dismissed and it is further

ADJUDGED that plaintiff is granted a judgment dismissing the first, second and third counterclaims interposed in defendant's answer and on its second and third causes of action declaring that the Notice to Cured dated October 20, 2008 is unfounded as plaintiff did not breach Article 1, Section (e) of the Zoning Lot and Development and Easement Agreement dated November 17, 2007, and that the running of cure period under the Notice to Care dated October 20, 2008 is permanently stayed, that the undertaking filed by plaintiff is discharged and shall be returned to plaintiff, and the fourth cause of action is dismissed, and the second, third, and fourth causes of action and the first, second and third counterclaims are severed; and the Clerk is directed to enter judgment accordingly, it is further

ORDERED that the action shall continue as to the first cause of action.

Dated: October 13, 2015

ENTER:

FILED

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NEW YORK

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

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