| **San-Dar Assoc. v Fried** |
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| 2016 NY Slip Op 30923(U) |
| April 18, 2016 |
| Supreme Court, New York County |
| Docket Number: 150850/12 |
| Judge: Donna M. Mills |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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SAN-DAR ASSOCIATES and S&M 52nd FEE, LLC,
Plaintiffs,

Index No.: 150850/12
DECISION/ORDER

-against-

JACQUELINE FRIED and RIVER 52, LLC,
Defendants.

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**HON. DONNA MILLS, J.S.C.:**

In this real property action, plaintiffs San-Dar Associates (San-Dar) and S&M 52nd Fee, LLC (S&M; collectively, plaintiffs) move for summary judgment on the amended complaint, and defendants Jacqueline Fried (Fried) and River 52, LLC (River 52; collectively, defendants) cross-move for summary judgment to dismiss that complaint (together, motion sequence number 006). For the following reasons, the motion and the cross motion are both denied.

BACKGROUND

The facts of this case have been discussed at length in several prior decisions, and do not need to be repeated in full now. For the purposes of the present motions, it is sufficient to note that this action centers around two buildings located in the County, City and State of New York. The first, located at 429 East 52nd Street, is owned by S&M, and San-Dar is its current net lessee (the 429 building). *See* notice of motion, exhibit 1 (amended complaint), ¶¶ 5-9. The adjacent building, located at 425 East 52nd Street, is currently owned by River 52, and was formerly owned by Fried (the 425 building). *Id.*, ¶¶ 10-18.

Also of note are the lease and the sublease that plaintiffs' and defendants' respective predecessors in interest executed in 1973 (the 1973 lease and the 1973 sublease). *See* notice of

motion, exhibits 9, 11. Pursuant to the 1973 lease, plaintiffs' predecessor in interest leased the property on which the 425 building now stands - and its unused development rights - from defendants' predecessor in interest (which owned the 429 building). *Id.*; Perlbinder affirmation, ¶ 6. Pursuant to the 1973 sublease, plaintiffs' predecessor in interest leased the newly constructed 425 building - and its remaining unused development rights - back to defendants' predecessors in interest to operate along with the 429 building. *Id.* The relevant portions of the 1973 lease provide as follows:

> "2. The Landlord [i.e., defendants' predecessor in interest] and the Tenant [i.e., plaintiffs' predecessor in interest], each for himself and itself to the other, covenant that neither shall at any time construct upon the demised premises [i.e., the 425 building] ... any structure or improvement which shall increase the floor area, height or lot coverage over the present structure, this covenant to run with the land and for the benefit of the adjoining premises hereinafter described, owned by the Tenant [i.e., the 429 building], it being expressly understood and agreed that the purpose of this lease is to enable the Tenant, its successors and assigns and any owner or lessee of the said adjoining premises to incorporate the unused floor area herein with the ground area of such adjoining premises as a single zoning lot and for no other purpose and that, if such purpose is not approved by the Buildings Department of the City of New York ... or, if such approval is granted and shall be subsequently rescinded, in either event at any time during the term hereof or any renewal hereof, the tenant shall have the privilege to cancel this lease upon three months prior written notice. ..."

*Id.*; exhibit 9. The relevant portions of the 1973 sublease provide as follows:

> "1. The Landlord [i.e., plaintiffs' predecessor in interest] hereby lets and demises to the Tenant [i.e. defendants' predecessor in interest] and the Tenant hereby hires from the Landlord [the 425 building]. Subject and subordinate, however, to a mortgage ... also to the lease heretofore made by [defendants' predecessor in interest] as landlord, to [plaintiffs' predecessor in interest], as tenant, of the same premises hereby demised, this agreement being a sublease back, also to any state of facts which an accurate survey may show, provided such state of facts will not render title unmarketable,

zoning regulations and ordinances of the City of New York."

*Id.*; exhibit 11.

During the discovery process, plaintiffs were deposed on July 30, 2013 via Barton Perlbinder (Perlbinder), the president of Perlbinder Realty, which is the 429 building's managing agent. *See* Minkin affidavit in opposition, exhibit L. Perlbinder stated that, at the time that the 1973 lease and the 1973 sublease were executed, his company retained an architectural firm to calculate the square footage of the floor area of the 425 building. *Id.* at 31-35. Perlbinder also stated that, at some point during the 1980s, contracting work was performed in the 429 building that led to an increase in the square footage of the floor area in that building. *Id.* at 49-50. Perlbinder claimed that, in 2010, he became aware that defendants were attempting to add a fifth floor to the 425 building. *Id.* at 57-59. Perlbinder alleged that this activity enlarged the square footage of the floor area of the 425 building in violation of the 1973 lease and the 1973 sublease, but admitted that neither he nor any of his employees have entered the 425 building to confirm that such enlargement took place. *Id.* at 65-67. Perlbinder stated that he claims that the increase of the square footage of the floor area of the 425 building impermissibly "encroached" on the 429 building, but he also stated that the amount of "encroaching" area exceeded the "residual" floor area of the 429 building that existed as a result of the construction that was done on that building which increased its floor area. *Id.* at 77-78. Finally, Perlbinder admitted that there was ultimately no way to determine whether any "encroachment" exists without measuring the existing floor area of both the 425 and the 429 buildings, which has not been done. *Id.* at 80-81. Perlbinder also admitted that the New York City Department of Buildings (DOB) has not revoked or amended the 425 building's certificate of occupancy on the grounds that overbuilding

encroaches on the 429 building, and that he has not requested that any title company determine whether there is a cloud on the title to the 429 building as a result of the same issue. *Id.* at 79-94.

Defendants thereafter deposed Perlbinder's architect, Robert Braun (Braun), on October 8, 2013. *See* Minkin affidavit in opposition, exhibit N. Braun stated that he had reviewed both the original architectural drawings and those that had been prepared in connection with the 1980s construction work that was performed at the 429 building. *Id.* at 7, 30-31, 42. Braun also stated that he reviewed the building square footage calculations that were included with both of those drawings for zoning purposes. *Id.* at 10-12, 43. Braun admitted, however, that he had never been inside the 425 building, and had never taken any measurements of its floor area. *Id.* at 31-32, 37, 59-63. Braun noted that, in 1975, the Board of Standards and Appeals (BSA) had granted a zoning variance to the 429 building that allowed additional construction work there that increased the 429 building's total permissible floor area beyond what was added by the 1980s construction work. *Id.* at 65-69. Braun also noted that that construction involved Perlbinder himself combining several apartments in the 429 building into a luxury penthouse for his personal use, but stated that he was unsure whether that construction had caused the 429 building to exceed either the original or the new permissible floor area. *Id.* at 69-77.

Defendants also deposed Perlbinder's engineer, Edward Lauria (Lauria), on October 10, 2013. *See* Minkin affidavit in opposition, exhibit M. Lauria stated that he reviewed the same architectural drawings as Braun had, and that he used them to prepare floor area square footage calculations of the 425 building for zoning purposes. *Id.* at 43-47, 55-57. Lauria also stated that, although he had reviewed the aforementioned architectural drawings and plans, he had never entered the 425 building to perform any physical floor space measurements. *Id.* at 51-52. Lauria

noted that the BSA variance indicated that some work that was performed at the 429 building consisted of converting public use space on the lower floors into commercial space (specifically, medical offices), and further noted that this would have resulted in an increase to the amount of floor area in the 429 building that could be devoted to residential use for zoning purposes. *Id.* at 75-80. Lauria stated, however, that he was unaware whether this increase was used up by the addition of floor space in Perlbinder's penthouse. *Id.*

In addition to the foregoing testimony, plaintiffs also provided copies of the architectural plans, agency approvals and the BSA resolution described above. *See* notice of motion, exhibits L-Q. In response, defendants presented an expert's affidavit from engineer/attorney Irving Minkin (Minkin), who notes that, despite plaintiffs' allegations, the plans that were submitted to the DOB regarding construction at the 425 building do *not* indicate that that building's floor area was increased as a result of the construction. *See* Minkin affidavit in opposition. Minkin also notes that the BSA variance and the DOB plans that pertain to the 429 building indicate that defendants had "overbuilt" that building (i.e., exceeded the maximum allowable floor area for zoning purposes) *before* plaintiffs had done any work on the 425 building. *Id.* Minkin finally notes, and the court acknowledges, that neither of the parties have presented any evidence of the current floor area measurements of either the 425 or the 429 buildings. *Id.*

Plaintiffs initially commenced this action on March 15, 2012, and later filed an amended complaint on December 18, 2012 that sets forth causes of action for: 1) a declaratory judgment and permanent injunction; and 2) breach of contract. *See* notice of motion, exhibit 1. On February 20, 2013, defendants filed an answer that included affirmative defenses and counterclaims for: 1) slander of title; 2) specific performance; and 3) breach of contract. *Id.*;

exhibit 2.

Now before the court are plaintiffs' motion for summary judgment on the complaint, and defendants' cross motion for summary judgment to dismiss that complaint and to cancel plaintiffs' notice of pendency (collectively, motion sequence number 006).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003).

As was previously indicated, plaintiffs' first cause of action seeks combined relief in the form of a declaratory judgment and permanent injunction. With respect to the former, declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y. Div. of Hous. & Community Renewal*, 264 AD2d 681,682 (1st Dept 1999). It has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. *See Leibowitz v Bickford's Lunch Sys.*, 241 NY 489,500 (1926). Here, plaintiffs specifically seek:

"(i) a declaratory judgment that defendants have embarked upon construction on the 425 property which has added to the size of the 425 building in breach of the proscription set forth in the 1973 lease; [and]

(ii) a declaratory judgment that construction on the 425 property by defendants has utilized 425 FAR [i.e., floor area ratio] not available to defendants under the terms of the 1973 lease; ..."

*See* notice of motion, exhibit 1 (complaint). The relevant provision of the 1973 lease states that:

"2. The Landlord [i.e., defendants' predecessor in interest] and the Tenant [i.e., plaintiffs' predecessor in interest], each for himself and itself to the other, covenant that neither shall at any time construct upon the demised premises [i.e., the 425 building] ... any structure or improvement which shall increase the floor area, height or lot coverage over the present structure, this covenant to run with the land and for the benefit of the adjoining premises hereinafter described, owned by the Tenant [i.e., the 429 building], it being expressly understood and agreed that the purpose of this lease is to enable the Tenant, its successors and assigns and any owner or lessee of the said adjoining premises to incorporate the unused floor area herein with the ground area of such adjoining premises as a single zoning lot and for no other purpose and that, if such purpose is not approved by the Buildings Department of the City of New York ... or, if such approval is granted and shall be subsequently rescinded, in either event at any time during the term hereof or any renewal hereof, the Tenant shall have the privilege to cancel this lease upon three months prior written notice."

*Id.*, exhibit 2. In light of the foregoing language, it would seem to be a straightforward matter to award plaintiffs the first declaration that they seek, simply because construction work was performed at the 425 building. Upon reviewing the evidence, however, the court finds that the matter is not so straightforward. In the first place, defendants' expert, Minkin, notes that the plans submitted to the DOB regarding defendants' construction at the 425 building do not indicate that there was an increase of floor space at that building as a result of the construction. *See* Minkin affidavit in opposition. In the second place, both of plaintiffs' experts, Braun and Lauria, stated at deposition that there was no way to determine the current floor area of the 425

building without taking physical measurements there, and both also admitted that that has not been done. *Id.*; exhibits M, N. As a result, there is an open issue of fact as to the current floor area of the 425 building, and the court is unable to find that defendants' work there has impermissible increased it in violation of the 1973 lease. Accordingly, the court finds that plaintiffs have not established that they are entitled to the two declaratory judgments that they seek, and denies so much of their motion as seeks summary judgment awarding them those declarations.

As was also noted, plaintiffs' first cause of action additionally incorporates a request for injunctive relief. Specifically, plaintiffs request:

> "(iii) a permanent injunction against defendants:
> (a) compelling defendants to remove the additional construction on the 425 building and restore the 425 building to the 1973 lease dimensions;
> (b) enjoining defendants from encroaching upon plaintiff's development rights pursuant to the 1973 lease; and
> (c) prohibiting defendants from embarking upon any additional or new construction on the 425 property which would utilize 425 FAR in violation of the 1973 lease."

*See* notice of motion, exhibit 1. Pursuant to CPLR 6301:

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

CPLR 6301. The Court of Appeals has held that "[t]he party seeking a preliminary injunction

must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing *Doe v Axelrod*, 73 NY2d 748, 750 (1988). Here, as a result of the court's finding that there is an issue of fact as to whether defendants' construction at the 425 building has resulted in a violation of the 1973 lease, it also cannot be found that plaintiffs are "likely to succeed on the merits" of its claim that defendants have violated that lease. Accordingly, the court finds that plaintiffs are not entitled to the injunctive relief that they request, and denies so much of their motion as seeks summary judgment awarding them such injunctive relief. The court also notes in passing that the stated purpose of the restriction that is set forth in the 1973 lease is "to enable [defendants] to incorporate the unused floor area [of the 425 building] with the ground area of [the 429 building] as a single zoning lot and for no other purpose and that, if such purpose is not approved by the Buildings Department of the City of New York ... or, if such approval is granted and shall be subsequently rescinded, in either event at any time during the term hereof or any renewal hereof, the tenant shall have the privilege to cancel this lease upon three months prior written notice." *See* notice of motion, exhibit 9. Thus, it is clear that the contemplated relief is simply the cancellation of the 1973 lease and sublease and an attendant claim for money damages, and *not* the injunctive relief that plaintiffs request. However, inasmuch as the court has already denied plaintiffs' request for the reasons stated earlier, it need not delve any further into this issue at this juncture.

Finally, plaintiffs' second cause of action seeks money damages for breach of contract; specifically, for defendants' "trespass" on the floor area of the 429 building in violation of the 1973 lease. *See* notice of motion, exhibit 1. The proponent of a breach of contract claim must

plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). "'[T]he burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it.'" *Eden Temporary Servs. v House of Excellence*, 270 AD2d 66, 67 (1st Dept 2000), quoting *Paz v Singer Co.*, 151 AD2d 234, 235 (1st Dept 1989). Here, however, the court has already found that there is an issue of fact as to whether defendants' activity at the 425 building actually constituted a breach. In the absence of sufficient proof of this element, the court now also finds that plaintiffs are not entitled to summary judgment of their cause of action for breach of contract, and denies so much of their motion as seeks this relief. Accordingly, plaintiffs' motion is denied in full. However, since defendants have not submitted sufficient evidence to quiet the aforementioned issue of fact, the court also finds that they are not entitled to summary judgment dismissing plaintiffs' complaint either, and also denies their cross motion in full.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs San-Dar Associates and S&M 52nd Fee, LLC is in all respects denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants Jacqueline Fried and River 52, LLC is denied.

Dated: New York, New York
~~January~~ April 18, 2016

ENTER:

Hon. Donna Mills, J.S.C.