

**Foscarini, Inc. v Greenestreet Leasehold Partnership**

2017 NY Slip Op 31493(U)

July 13, 2017

Supreme Court, New York County

Docket Number: 653840/2015

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 39

-----X  
FOSCARINI, INC.,

Plaintiff,

-against-

THE GREENESTREET LEASEHOLD PARTNERSHIP,

Defendant.  
-----X

**DECISION AND ORDER**

Index No.: 653840/2015

Mot. Seq. No. 002

**SALIANN SCARPULLA, J.S.C.:**

Plaintiff Foscari, Inc. ("Foscari") moves, pursuant to CPLR 3211 (a)(7), to dismiss defendant The Greenestreet Leasehold Partnership's ("Greenestreet") second counterclaim for breach of the implied covenant of good faith and fair dealing and third counterclaim for abuse of process.

**Background**

Greenestreet is the owner of the building located at 15-17 Greene Street, New York, New York 10013. On January 16, 2011, Foscari leased the "ground floor storefront unit" for a five-year term, expiring on January 16, 2015. The lease provided that Foscari could renew the lease for an additional five years upon written notice of its intent to renew given between six and twelve months prior to the initial expiration of the lease.

On January 2, 2015, Foscari wrote a letter to Greenestreet in which it informed

Greenestreet of its intention to renew the lease. <sup>2</sup> of 10 Greenestreet alleges that the notice was

defective, in that it was addressed and sent to the wrong party, and was equivocal regarding Foscarini's intent to renew. Greenestreet further alleges that the letter marked the beginning of "a pattern of behavior in which Foscarini pretended to be renewing while never binding itself to anything, a pattern that continued up to, and through, its initiation of this lawsuit." It argues that this pattern is allegedly borne out by an email from June 2015, in which Foscarini's principal, Glenn Ludwig, informed a broker at Coldwell Banker that "Foscarini is at the stage now where we need to renew our lease and or look to buy/lease somewhere else." Thus, Greenestreet alleges, Foscarini merely acted as though it were renewing to give it time to seek alternate premises and to cloud title to the space.

The parties negotiated regarding the renewal term for several months. Greenestreet alleges that when Foscarini was unable to obtain a renewal on acceptable terms, it commenced this lawsuit on November 20, 2015.

Foscarini's complaint alleges two causes of action for: (1) a declaratory judgment that it properly exercised its option to renew the lease, and that the lease has been renewed for a five-year term beginning on January 1, 2016; and (2) for breach of the lease by failing to recognize Foscarini's renewal. On January 4, 2016, Greenestreet filed an answer.

Upon the expiration of the initial term on January 15, 2016, Foscarini failed to vacate the premises. On February 17, 2016, the parties entered into a so-ordered stipulation setting use and occupancy for the premises while Foscarini still occupied it. The stipulation provided that Foscarini would pay \$25,000 per month until otherwise ordered, or the court determined that the lease renewal was valid, or Foscarini vacated the premises. Further, the stipulation provided that Foscarini could leave before the end of a month voluntarily, or by court order, at which point Greenestreet would return a pro-rated portion of that month's use and occupancy. Greenestreet alleges that, having agreed to the stipulation, Foscarini continued to search for alternate commercial space without telling Greenestreet that it was doing so.

On August 9, 2016, Foscarini told Greenestreet that it was vacating the premises on August 31, 2016, and that it was withdrawing its cause of action for a declaratory judgment. Greenestreet alleges that three weeks' notice was insufficient notice to vacate, as it left it unable to quickly locate a new tenant for the premises. Foscarini vacated the premises on August 31, 2016, and, thereafter, demanded the return of its security deposit. Greenestreet disputed Foscarini's right to vacate the premises, to withdraw its cause of action, and to recover the security deposit.

On October 25, 2016, the parties stipulated that Greenestreet could file an amended answer to the complaint. In the amended answer, Greenestreet asserts five

counterclaims for: (1) breach of the lease; (2) breach of the lease's implied covenant of good faith and fair dealing; (3) abuse of process; (4) holdover at fair market value; and (5) for a declaratory judgment that Greenestreet may retain all of Foscarini's security deposit. Foscarini now moves, pursuant to CPLR 3211 (a) (7), to dismiss the second and third counterclaims for breach of the implied covenant of good faith and fair dealing and abuse of process.

### Discussion

In its memorandum of law in opposition to this motion Greenestreet states that it has voluntarily withdrawn the third counterclaim for abuse of process. Accordingly, the only remaining counterclaim subject to this motion is for breach of the implied covenant of good faith and fair dealing.

"[A]ll contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). "To state a claim of breach of the implied covenant of good faith and fair dealing, a party must allege [1] a specific implied contractual obligation, [2] a breach of that obligation by the defendant, and [3] resulting damage to the plaintiff" (*Kagan v HMC-New York, Inc.*, 94 AD3d 67, 77 [1st Dept 2012] [internal quotation marks and citations omitted]). "A claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim" (*Skillgames, LLC*

*v Brody*, 1 AD3d 247, 252 [1st Dept 2003]). Further, a claim for breach of the implied covenant cannot survive where it is duplicative of a breach of contract claim (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]).

Greenestreet alleges that Foscarini breached the implied covenant in three ways. First, that Foscarini commenced “a litigation it knew to be without merit” to gain a negotiating advantage over Greenestreet and to continue paying “under-market use and occupancy” while looking for a new location. Second, that Foscarini failed to vacate the premises when the lease expired. Third, that Foscarini sent a renewal notice that it knew was defective.

Foscarini claims that, to the extent this counterclaim is premised on its commencement of this action, the claim is, in fact, a malicious prosecution claim, the elements of which have not been pleaded. Further, Foscarini states, this counterclaim is duplicative of Greenestreet’s counterclaim for breach of the lease, as both claims allege that Foscarini failed to comply with the lease by sending a proper renewal notice or by vacating the premises when the lease expired. Finally, Foscarini claims that dismissal is warranted because Greenestreet has not been denied the fruits of its bargain.

In response, Greenestreet argues that the claims are not duplicative because Foscarini sent a renewal notice in bad faith, when it had no intention of staying in the premises. Further, Greenestreet contends that Foscarini acted in bad faith by refusing to

vacate the premises at the end of the lease term, and then, by leaving on only twenty days' notice, depriving Greenestreet of the six-month notice period provided for in the lease, and the ability to timely market the premises or obtain a new tenant. In the alternative, Greenestreet argues that the motion should be denied, pursuant to CPLR 3211 (d), because Foscarini failed to provide necessary discovery.

At oral argument, I dismissed the second counterclaim to the extent it arises out of Foscarini commencing this action. As to the second basis for this counterclaim, I find that the allegation that Foscarini breached the implied covenant by failing to vacate the premises, upon expiration of the lease, is duplicative of Greenestreet's claim in the first counterclaim, that Foscarini breached the lease by failing to vacate. As such, to the extent that the second counterclaim is based on Foscarini's alleged failure to vacate the premises, it is dismissed as duplicative.

With respect to the third basis for the implied covenant counterclaim, Foscarini's alleged bad faith attempt to renew the lease when it had no intention of staying in the premises, Greenestreet has successfully pleaded a cause of action. Greenestreet argues that, implied from the strict conditions for renewing the lease, was an obligation that Foscarini only send a renewal notice if it truly intended to renew. Greenestreet alleges that Foscarini purposefully sent a faulty renewal notice, not to renew the lease, but to

make Greenestreet believe that it was renewing while it was searching for an alternate property.

The strict notice period provided for renewing the lease is alleged to have been part of the fruits of Greenestreet's bargain, allowing it the necessary time to relet the premises if Foscarini decided not to renew the lease. Foscarini's faulty notice impeded Greenestreet's ability to lease the premises once the lease expired. Indeed, Greenestreet alleges that the faulty renewal notice was merely the beginning of Foscarini's attempts to prolong its occupancy while searching for new space, as shown by Foscarini's principal telling a real estate broker in June 2015 that it would either renew the lease or look for new space. Greenestreet has successfully alleged that Foscarini breached its implied obligation to send a renewal notice only if it genuinely meant to renew the lease, and that Greenestreet was damaged in its inability to relet the premises upon Foscarini's departure. These allegations are sufficient, on a motion brought under CPLR 3211 (a) (7), to sustain the counterclaim. Foscarini's factual arguments to the contrary go to the merits of the counterclaim and cannot be resolved on a motion addressed to the sufficiency of the pleadings.

Further, Greenestreet does not claim that the improper renewal of the lease is a basis for both its breach of contract and implied covenant counterclaims, only the implied

covenant counterclaim.<sup>1</sup> While Foscarini is correct that the claims may be duplicative if they arise out of the same facts and seek the same damages (*Mill Fin., LLC*, 122 AD3d at 104), Foscarini's proposed interpretation of "arise out of" is so broad as to prevent there ever being an implied covenant claim that runs in tandem with an express breach claim.

Greenestreet's claim of a bad faith renewal could not be brought as an express breach claim. The lease does not place any express, stated conditions on Foscarini's decision to exercise its right to renew, nor, despite Greenestreet's argument to the contrary, does the lease provide that Foscarini's exercise of its right to renew the lease is irrevocable. While Greenestreet pleads similar damages for both claims, the factual bases thereof are distinct and independent such that they may be pleaded together (*see Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995] [implied covenant dismissed as duplicative where it was "intrinsically tied to the damages allegedly resulting from a breach of the contract"]).

Accordingly, Foscarini's motion to dismiss the second counterclaim is granted only with respect to the first allegation that this action was maliciously prosecuted and the

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Greenestreet alleges that the notice was defective as to the addressee, but such defect is not borne out by an examination of the notice. In any case, Greenestreet does not allege that any technical defects in the notice are a basis for its express breach of contract claim.

second allegation that Foscarini failed to vacate the premises when the lease expired, and the motion is otherwise denied.<sup>2</sup>

In accordance with the foregoing, it is

ORDERED that plaintiff Foscarini, Inc.'s motion to dismiss the second counterclaim for breach of the implied covenant of good faith and fair dealing is granted only to the extent described above, and otherwise denied; and it is further

ORDERED that plaintiff Foscarini, Inc.'s motion to dismiss the third counterclaim for abuse of process is denied as moot because defendant The Greenestreet Leasehold Partnership has withdrawn this counterclaim; and it is further

ORDERED that counsel are directed to appear for a status conference at 60 Centre Street, Room 208, on August 16, 2017 at 2:15pm.

This constitutes the decision and order of the Court.

DATE:

7/13/17

  
SALIANN SCARPULLA, JSC

<sup>2</sup>

As to Greenestreet's remaining argument that the motion should be denied for Foscarini's failure to provide necessary discovery, I direct the parties to conference any outstanding discovery issues with the Court at the next compliance conference.