

Alekna v 207-217 W. 110 Portfolio Owner LLC

2017 NY Slip Op 32369(U)

November 9, 2017

Supreme Court, New York County

Docket Number: 156847/16

Judge: Carol R. Edmead

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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 35

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III, WILLIAM BLAIR DEBART, ALEX BERRICK,
ASHAN SINGH, LAMAR SMALL, RACHEL L.
PERKINS, SARA MUSE, KYUNG CHAN ZOH,
and JIHOE KOO,

Index No. 156847/16
Motion Seq. No. 001

DECISION AND ORDER

Plaintiffs,

-against-

207-217 West 110 PORTFOLIO OWNER LLC, 207
REALTY ASSOCIATES L.L.C., MANN REALTY
ASSOCIATES and GFB MANAGEMENT LLC,

Defendants,

-----X
CAROL R. EDMEAD, J.S.C.:

In a case involving claims of improper deregulation and rental overcharges, defendants 207 Realty Associates L.L.C (Realty) and Mann Realty Associates (Mann) (together, the Mann defendants) seek an order compelling defendant 207-217 West 110 Portfolio Owner LLC (207-217) to defend and indemnify it, and to reimburse it for attorney’s fees already expended in this matter.

BACKGROUND

This action involves a 6-story apartment building located at 207 Central Park North in Manhattan. Plaintiffs allege that the building participated in the J-51 tax benefits program from 1998 to 2015. Plaintiffs further allege that, under the holding of the Court of Appeals’ decision in *Roberts v Tishman Speyer Props., L.P.*, 13 NY2d 270 (2009) and its progeny, the Mann

defendants improperly deregulated apartments in the building while receiving J-51 benefits.

Roberts held that “building owners who receive J-51 benefits forfeit their rights under the luxury decontrol provisions even if their buildings were already subject to the RSL” (*id.* at 283).

Plaintiffs allege that the Mann defendants were owners of the subject building in the case of *Altschuler v Jobman*, 2013 NY Slip Op 30208 [U] [Sup Ct, NY County 2013]), a case which involved the implications of the Court of Appeals ruling in *Roberts*. In *Altschuler*, Justice Scarpulla held that the tenant was entitled to damages for rent overcharges and declared that the tenant was entitled to a declaratory judgment as to the rent-stabilized status of the apartment. Plaintiffs here allege that the Mann defendants began marketing 207 Central Park North immediately after the *Altschuler* decision and were motivated, in part, to sell the subject building to avoid potential liability stemming from the deregulations.

The Mann defendants sold the subject building to 207-217 by a purchase and sales agreement dated January 22, 2016. Separately, the Mann defendants assigned leases for the building to 207-217 by an agreement dated April 20, 2016. Plaintiffs filed their complaint on August 16, 2016. They allege eight causes of action.

The first and second causes of actions each seek a judgment against 207-217 and defendant GFB Management LLC (GFB) declaring that: (1) plaintiffs’ apartments are subject to the Rent Stabilization Law (RSL) and/or the Rent Stabilization Code (RSC), as any deregulations of their apartments were invalid; (2) that plaintiffs are entitled to rent stabilized leases; (3) the amount of legal regulated rent for each apartment; (4) that any leases offered to plaintiffs are invalid unless they are offered on lease forms and terms prescribed by the Division of Housing & Community Renewal (DHCR); (5) plaintiffs are not required to pay any rent increases unless and until permissible rent-stabilized lease offers are made to, and accepted by them.

The third cause of action seeks injunctive relief, (1) enjoining 207-217 from instituting any actions or proceedings to dispossess, terminate or otherwise interfere with plaintiffs' tenancies based on the purported expiration of their respective leases and (2) directing 207-217 to provide plaintiffs with rent-stabilized leases for their respective apartments in a form promulgated by the DHCR. The fourth, fifth and sixth causes of action are against all defendants and they are for, respectively, rent overcharge, harassment, and breach of the covenant of good faith and fair dealing. The seventh cause of action is against the Mann defendants and seeks an injunction (1) enjoining them from making any distributions from the sale of the subject property to its members pending this litigation and (2) directing the Mann defendants to return any distributions made from its sale of the building. Finally, the eighth cause of action, against all defendants, seeks attorney's fees.

This motion involves a dispute between the Mann defendants and 207-217, as to which party will pay for the Mann defendants' defense and any ultimate liability they might have to plaintiffs. The Mann defendants claim that provisions in both the sales agreement and the assignment entitle it to defense and indemnification from 207-217. 207-217 argues that neither of the provisions are applicable.

DISCUSSION

"A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]).

The Purchase Agreement

The purchase agreement is between 207-217, as purchaser and Realty and nonparty 217 Realty Associates, LLC, as seller. Article 8, section 2 of the purchase agreement, entitled "As-is

Sale; Disclaimers,” provides that 207-217 would accept the property “AS IS, WHERE IS, WITH ALL FAULTS” (purchase agreement at 19 [emphasis in original]). This section of the purchase agreement also provides that:

UPON CLOSING, PURCHASER SHALL ASSUME THE RISK THAT ADVERSE MATTERS, INCLUDING BUT NOT LIMITED TO, CONSTRUCTION DEFECTS AND ADVERSE PHYSICAL AND ENVIRONMENTAL CONDITIONS, MAY NOT HAVE BEEN REVEALED BY PURCHASER’S INVESTIGATIONS, AND EXCEPT WITH RESPECT TO MATTERS WHICH BY THE EXPRESS TERMS OF THIS AGREEMENT SURVIVE CLOSING, PURCHASER, UPON CLOSING, SHALL BE DEEMED TO HAVE WAIVED, RELINQUISHED AND RELEASED SELLER (AND SELLER’S OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS) FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION (INCLUDING CAUSES OF ACTION IN TORT), LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES (INCLUDING REASONABLE ATTORNEYS’ FEES) OF ANY AND EVERY KIND OR CHARACTER, KNOWN OR UNKNOWN, WHICH PURCHASER MIGHT HAVE ASSERTED OR ALLEGED AGAINST SELLER (AND SELLER’S OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS) AT ANY TIME BY REASON OF OR ARISING OUT OF ANY LATENT OR PATENT CONSTRUCTION DEFECTS OR PHYSICAL CONDITIONS, ENVIRONMENTAL CONDITIONS, VIOLATIONS OF ANY APPLICABLE LAWS AND ANY AND ALL OTHER FACTS, OMISSIONS, EVENTS, CIRCUMSTANCES OR MATTERS REGARDING THE PROPERTY”

(purchase agreement at 19-20 [Emphasis in original]).

In its opposition papers, 207-217 argues that this release is limited to the physical condition of the property. In support, 207-217 refers to the portion of the disclaimer which states that it waives any claims it might have against Realty or the other nonparty entity seller arising out of “any latent or patent construction defects or physical conditions, environmental conditions, violations of any applicable laws and any and all other facts, omissions, events, circumstances or matters regarding the property.” 207-217 invokes the interpretive concept of *ejusdem generis* to argue that this clause cannot be interpreted to include violations of the rent law.

However, the court need not apply this concept to reach the conclusion that this waiver does not oblige 207-217 to defend and indemnify the Mann defendants, as the waiver plainly refers to claims that 207-217 has, rather than claims that third-parties to the purchase agreement, such as plaintiffs in this action, might have against Realty. Mann is not a party to the purchase agreement, so it cannot derive any indemnification rights from it.

An application of *ejusdem generis* would lead to the same result. “Under the rule of *ejusdem generis*, the meaning of a word in a series of words is determined ‘by the company it keeps’” (*Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52 [1st Dept 2015], quoting *People v Illardo*, 48 NY2d 408, 416 [1979]). Or, as the Court of Appeals put it, “a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series” (*Matter of Riefberg*, 58 NY2d 134, 141 [1983]). Here, the general term is “violations of any applicable laws” and, given the surrounding terms, it refers to the laws regarding the physical and environmental integrity of the building.

Here, plaintiffs’ allege that the Mann defendants violated the rent laws, harassed them, and improperly distributed assets following the sale of the property. Clearly, these do not relate to the physical or environmental integrity of the building. Thus, as the waiver clause does not cover plaintiffs’ claims against the Mann defendants, it cannot serve as a basis to compel 207-217 to defend and indemnify the Mann Mann defendants.

The Assignment of Leases

The assignment, like the purchase agreement, does not involve Mann. In it, Realty and non-party 217 Realty Associates, LLC assigned the leases related to the subject property to 207-217. The assignment provides that 207-217 “agrees to indemnify, protect, defend and hold

harmless [Realty] from and against all liabilities, losses, costs, damages and expenses (including reasonable attorney's fees) directly or indirectly arising out of Assignee's failure to perform its obligations under or with respect to the Leases from and after the date hereof)" (assignment of leases, ¶ 3).

Here, the question is whether plaintiff's claims against the Mann defendants arise out of 207-217 failure to perform its obligations under the subject leases. Certainly, plaintiffs allege that 207-217 failed to perform its obligations under the leases. But plaintiffs' claims against the Mann defendants do not arise, even indirectly, out of those claims. That is, even if 207-217 had begun performing all of its obligations under the leases to plaintiffs' satisfaction upon buying the property, plaintiffs' claims for rent overcharge, harassment, and breach of the covenant of fair dealing against the Mann defendants would be unaltered.

Thus, the indemnification provision in the assignment is not triggered. As there is no clear and unambiguous agreement intent, in either the purchase agreement or the assignment of leases, the Mann defendants motion to compel a defense and indemnification from 207-217 must be denied.

Accordingly, it is

ORDERED that defendants 207 Realty Associates L.L.C (Realty) and Mann Realty Associates motion to compel defendant 207-217 West 110 Portfolio Owner LLC to defend and indemnify them is denied; it is further

ORDERED that counsel for 207-217 West 110 Portfolio Owner LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 9, 2017

ENTER:



Hon. CAROL R. EDMED, JSC

HON. CAROL R. EDMED
J.S.C.