

**Broadway Storage Solutions LLC v Gretsches Bldg.
Partners, LLC**

2017 NY Slip Op 33531(U)

September 15, 2017

Supreme Court, Kings County

Docket Number: Index No. 501523/13

Judge: Kathy J. King

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FILED
2017 SEP 22 AM 8:12
KINGS COUNTY CLERK

At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of September, 2017.

PRESENT:

HON. KATHY J. KING,

Justice.

-----X

BROADWAY STORAGE SOLUTIONS LLC,

Plaintiff,

- against -

Index No. 501523/13

GRETSCHE BUILDING PARTNERS, LLC,
JOSEPH KAUFMAN and 60 BROADWAY
PARTNERS LLC,

Defendants.

-----X

60 BROADWAY PARTNERS LLC,

Third-Party Plaintiff,

- against -

BOARD OF MANAGERS OF THE GRETSCHE
BUILDING CONDOMINIUM,

Third-Party Defendant.

-----X

The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

51-77 81, 83-90

Reply Affidavits (Affirmations) _____

95-99

Memoranda of Law _____

78 93 82

Upon the foregoing papers in this action, third party plaintiff 60 Broadway Partners LLC ("60 Broadway Partners LLC") moves for an order granting it leave to

serve and file an amended verified third-party complaint, and leave to serve and file amended cross claims (Motion Sequence No. 1). Third Party defendant Board of Managers of the Gretsch Building Condominium (“Board of Managers”) opposes the requested relief. Plaintiff Broadway Storage Solutions LLC (“Broadway Storage”) also moves for an order pursuant to CPLR §3025(b) granting it leave to serve and file demanded cross claims, which is unopposed (Motion Sequence No. 2).

FACTS AND PROCEDURAL BACKGROUND

The instant action arises from a lease agreement dated June 18, 2012 between plaintiff, Broadway Storage Solutions (“Broadway Storage”) and defendants Gretsch Building Partners LLC (“Gretsch”), 60 Broadway Partners, and Joseph Kaufman. 60 Broadway Partners is the owner of the Commercial Units in the Gretsch Building Condominium (“the Condominium”), and the predecessor-in-interest of Gretsch Building Partners LLC (“Gretsch”). Defendant Joseph Kaufman is the owner of Gretsch. The Condominium is governed by a Declaration and By-Laws and its affairs are managed by Third Party Defendant Board of Managers of the Condominium.

On October 22, 2012, 60 Broadway Partners purchased the Commercial Units from Gretsch, and a portion of the Commercial Units was subject to the lease between Gretsch, as Landlord, and plaintiff. 60 Broadway Partners succeeded to the interest of Gretsch as Landlord under the Lease. Plaintiff’s lease was for a commercial unit in the Condominium for a term of ten (10) years together with an option to extend for an

additional (5) five years. The lease authorized the plaintiff to perform certain build-outs of the premises. The lease between plaintiff and Gretsch commenced on October 19, 2012 based on a Commencement Date Agreement, which supplemented the lease by fixing certain dates left open in it.

On March 26, 2013, Plaintiff commenced the within action against Gretsch, Kaufman and 60 Broadway Partners LLC, based on its claim that on numerous occasions between January 2013 and February 2013, representatives of the Condominium's Board of Managers intentionally prevented it from performing work and making improvements, contrary to the provisions of the Declaration and Bylaws of the condominium.

Accordingly, plaintiff, in its complaint, seeks cancellation of the lease and a declaration that the lease is null and void. Plaintiff also seeks the return of its security deposit, and its first month's rent. In addition, plaintiff seeks to recover pre-construction costs, and other compensatory and punitive damages.

On May 28, 2013, 60 Broadway Partners filed a combined pleading which included a verified answer asserting counterclaims against plaintiff, cross-claims against defendants Gretsch and Kaufman, and a third party complaint against the Board of Managers as Third Party Defendant.

60 Broadway Partners now moves to amend its verified answer to assert additional claims against the Board of Managers alleging that the Board of Managers continued interference with plaintiff's rights to occupy and make improvements to the leasehold

was in violation of the Condominium's Declaration and By-Laws.

It asserts that its proposed third-party claims are meritorious and that there is no prejudice to the Board of Managers because these claims are based upon the Board of Managers' breaches of the Declaration and the Bylaws and that its original third-party claims were also based upon the Board of Managers' breaches of these governing documents. It also argues that there is nothing new about its third-party claims, which assert that the agents of the Board of Managers are illegally breaking into the commercial units and depriving both 60 Broadway Partners LLC and plaintiff of their exclusive possession of the commercial units. The original third-party claims concern the fact that plaintiff was not allowed to perform the improvements to the premises.

Plaintiff, by its motion, seeks to amend its cross claims. Its proposed amended cross claims seeks to add that Gretsche and 60 Broadway Partners LLC can make alterations, additions, or improvements to the premises without the consent of the Board of Managers, based on the Condominium's Declaration which provides that the Board of Managers has no authority over how the premises are used. Further, plaintiff's proposed amended cross claims include the allegation that the Board of Managers' wrongfully interfered with the improvements to the premises and engaged in self-help measures, such as preventing access to the premises, to prevent and disrupt work that it disliked.

DISCUSSION

While 60 Broadway Partners LLC's original third-party complaint asserted four causes of action, 60 Broadway Partners LLC now seeks, based upon these new factual allegations, to assert 11 causes of action in its proposed amended third-party complaint.

CPLR §3025[b] provides that, "Although leave to amend a pleading 'shall be freely given' in the absence of surprise or prejudice, the determination whether to grant such leave is within the court's discretion" (*see Sewkarran v DeBellis*, 11 AD3d 445, 445 [2d Dept 2004]). "In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (*see Haller v Lopane*, 305 AD2d 370, 371 [2d Dept 2003]; *see also Branch v Abraham & Strauss Dept. Store*, 220 AD2d 474, 475 [2d Dept 1995]). "Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied" (*see Putnam County Sav. Bank v Aditya*, 91 AD3d 840, 841 [2d Dept 2012], quoting *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]).

Prejudice exists where a proposed amendment seeks to add new theories of liability and recovery which were not readily discernible from the allegations of the original pleading (*see Morris v Queens Long Is. Med. Group*, 49 AD3d 827, 828-829 [2d Dept 2008]; *Cohen v Ho*, 38 AD3d 705, 706 [2d Dept 2007]). Furthermore, where

substantial discovery has been conducted, and the proposed amendment would require supplemental discovery, thereby resulting in prejudicial delay, a motion to amend should be denied (*see Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67, 73 [1st Dept 1990]).

While this action concerns the lease and plaintiff's decision to terminate the lease and vacate the premises, the Court agrees with third party defendant, in opposition, and finds that 60 Broadway Partners' new allegations are based on the Board of Managers' construction project, its theft of electricity, and its breach of the mail room lease, all of which occurred after plaintiff vacated the premises and were not pled in 60 Broadway Partners' original pleading. (*see Morris*, 49 AD3d at 828-829; *Cohen*, 38 AD3d at 706) The Court also notes that since discovery has been substantially completed, prejudice would result to the Board of Managers, who would have to conduct discovery on these new claims, if the motion was granted.

On the other hand, plaintiff's proposed amended cross claims do not seek to add any new claims, but only to supplement its original claims by adding certain facts. (*See Mahler v North Shore Camp, LLC*, 145 AD3d 678, 679 [2d Dept 2016]). These facts, which plaintiff now seeks to add, amplify the plaintiff's claims in its original cross claims against the Board of Managers, as to its wrongful intent to prevent or interfere with plaintiff's work and authority to determine how the premises are used and whether Gretsch and 60 Broadway Partners LLC can make alterations, additions, or

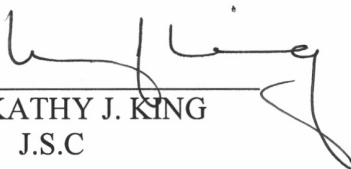
improvements to the premises without the consent of the Board of Managers.

The Court finds that there has been no showing of prejudice or surprise to the Board of Managers as a result of the additional factual allegations contained in plaintiff's proposed amended cross claims, since the Board of Managers failed to answer plaintiff's original cross claims and there is no opposition submitted by the Board of Managers with respect to plaintiff's motion. (*See AFBT-II, LLC v Country Vil. on Mooney Pond, Inc.*, 21 AD3d 972, 973 [2d Dept 2005]).

Based on the foregoing, 60 Broadway Partners LLC's motion for leave to serve and file an amended answer and third-party complaint is denied (Motion Sequence No. 1). Plaintiff's motion for leave to serve and file amended cross claims against the Board of Managers is granted (Motion Sequence No. 2).


This constitutes the decision and order of the court.

ENTER,



HON. KATHY J. KING
J.S.C

**HON. KATHY J. KING
JSC**


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