

St. Stephen Community A.M.E. Church v 2131 8th Ave. LLC
2018 NY Slip Op 32093(U)
August 22, 2018
Supreme Court, New York County
Docket Number: 650558/11
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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ST. STEPHEN COMMUNITY A.M.E. CHURCH

Index No. 650558/11

Plaintiff,

-against-

2131 8th AVENUE LLC and
JOY CONSTRUCTION, INC.,

Defendants.

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JOAN A. MADDEN, J.:

Defendants move for an order (1) precluding plaintiff, St. Stephen Community A.M.E. Church (“the Church”) from seeking certain damages at trial; (2) dismissing plaintiff’s claims for punitive damages or precluding plaintiff from pursuing such damages. The Church opposes the motion and cross moves for an order pursuant to CPLR 3025 and 3017, to permitting it to retroactively amend the *ad damnum* clause *nunc pro tunc* to the date of filing the complaint.

Background

The Church is a not-for-profit religious corporation formed pursuant to the laws of the State of New York. Defendants 2131 8th Avenue LLC (“2131”) and Joy Construction, Inc. (“Joy”) (collectively the “defendants”) are New York corporations.

On or about April 26, 2005, the Church and 2131 entered into a Site Development Agreement (“the Contract”), in which the Church agreed to sell to 2131 a track of land located at 2131-2141 Frederick Douglas Boulevard, New York, NY (hereinafter “the Property”) for an agreed upon price of \$6 million. Under the Contract, 2131 agreed to develop a mixed-use condominium project at the property, including a church unit and a retail unit, and thereafter to convey such units to the Church. Joy was hired by 2131 to perform the construction called for

under the Contract.

Defendants built the condominium building, which includes 73 residential units, retail units and the church unit. The church unit and the retail units comprise the street level of the building with the residential units above. The parties entered into three amendments to the Contract, the first one dated August 2006, the second dated June 29, 2007, and the third dated December 24, 2008. The Contract did not provide for full payment of the \$6 million on closing but, rather, established that the cash portion of the purchase price would be paid in installments at various points.

On March 3, 2011, plaintiff commenced this action. The first cause of action, for breach of contract, seeks \$1.3 million contract balance to be paid from 90% of the gross proceeds of the sale of condominium units upon satisfaction of the construction loan on the property. The second cause of action alleges that defendants breached their fiduciary duty by failing to pay the construction loan and using the money obtained from the sale of the condominiums to pay off other obligations and expenses. The third cause of action alleges that defendants diverted moneys intended to be used to pay off the construction loan to pay off other loans and thus breached the Contract. The fourth cause of action alleges that defendants breached the Contract by performing the work and construction on the church unit in a negligent manner and not in compliance with construction standards.

Defendants answered the complaint and asserted counterclaims for breach of contract in connection with the Church's alleged breach of its obligations to install a ceiling and soundproofing in the church unit, to construct walls in the church unit in accordance with the plans and a report prepared by plaintiff's acoustical expert, and to take title to the church unit.

On October 6, 2011, the Church moved by order to show cause for various relief, including for an order granting summary judgment on its first cause of action and requiring defendants' counsel to turn over \$1.3 million held in his escrow account. Defendants opposed the motion.¹ By decision and order dated April 19, 2012, the court granted the Church partial summary judgment as to its first cause of action for breach of contract based on defendants' failure to pay the \$1.3 million balance on the Contract, noting that under the relevant contract provision, the Church was to be paid \$1.3 "immediately following full satisfaction of the construction loan in the following manner; 90% gross proceeds from the sale of the residential units shall go to [Church] until [Church] receives the balance of consideration \$1,300,000." Moreover, the court found that the Church "had met its prima facie burden by demonstrating that [it] sold the Property to 2131 Associates and has not been paid under the Contract, and defendants have failed to controvert this showing with any evidence that the construction loan has not been paid or that it had not received a least \$1.3 million from 90% of the gross proceeds

¹While the motion was pending, the parties entered into a stipulation which was so-ordered by the court on February 2, 2012, which resolved certain aspects of the motion. Specifically, defendants acknowledged that it would pay to the Church \$850,000 out of the \$1.3 million held in their counsel's escrow account. In this connection, it was agreed that defendants' attorney would wire by February 6, 2012, \$425,000 to the IOLA account of counsel for the Church, and that upon the Church taking title to the Church unit, defendants' counsel would wire an additional \$425,000 to the IOLA account of counsel for the Church. The parties also agreed to complete the stage and the sound proofing in the Church unit by March 15, 2012. Upon the Church taking title to the church unit, the Church agreed to be responsible for utilities, taxes and carrying charges; however, defendants agreed to be responsible for these expenses until the Church took title to the church unit, with all rights reserved.

of the sale of the condominium units.²

On February 15, 2013, this court signed the Church's proposed order to show cause seeking an order (1) staying and prohibiting the defendants from compelling the Church to accept a backdated deed and to execute and deliver to the City of New York the tax form, and (2) ordering the defendants to pay over to the Church the sum of \$425,000, which represented the balance of the purchase price due and owing to them. Defendants opposed the motion, although while the motion was pending, defendants paid \$200,000 of the \$425,000 balance. In connection with the order to show cause, the Church submitted a supplemental affirmation seeking prejudgment interest on the \$1.3 million that the court found was due and owing to the Church in its decision granting summary judgment on the Church's first cause of action for breach of contract.

By decision and order dated May 7, 2013, the court granted Church's motion to the extent of (1) directing that the Church's acceptance of a backdated deed and execution of the tax form shall not be a condition of closing on the Church unit, (2) requiring the parties to set a date for the closing of the Church unit within 20 days of service of a copy of this order with notice of entry, and (3) directing the defendants to pay the Church the \$225,000 balance forthwith upon service upon defendants' counsel of a copy of this decision and order with notice of entry. With

²As the parties had already stipulated with respect to \$850,000 of the \$1.3 million owed to the Church (see fn 1, *infra*), the court directed the defendants' counsel to pay \$450,000 to the Church from their attorneys' escrow account, with the amount of interest due and owing to be determined upon completion of discovery. In connection with that motion, it was noted that the Church agreed to take title to the Church unit upon completion by both the Church and defendant of the church stage and sound proofing. Defendants paid the Church the \$450,000 as directed by the court on May 5, 2012.

respect to the Church's request for prejudgment interest, the Court found that the Church was entitled to such interest from the date that defendants were in breach of the Contract provision requiring them to pay the Church the \$1.3 million contract balance. However, the court also denied the request for such interest as premature without prejudice to renewal at the conclusion of discovery and upon the Church's receipt of the final \$225,000 due and owing on the \$1.3 million balance.

After discovery was completed, the Church filed the note of issue on September 25, 2014. By order dated December 30, 2014, the Appellate Division, First Department affirmed the court's May 7, 2013 decision and order.

Thereafter, numerous pre-trial conferences were held. Pursuant to the court's order dated December 4, 2015, in a pre-trial memorandum, the plaintiff set forth the damages sought in connection with each cause of action.

Motion and Cross Motion

Defendants now move to preclude certain damages sought by the Church in its pre-trial memorandum. The Church opposes certain aspects of the motion and cross moves to amend the *ad damnum* clause *nunc pro tunc*.

With respect to the first cause of action, in its memorandum the Church sought \$175,00 representing interest due on the \$1.3 million that was owed to the Church for the balance of the purchased price. As defendants argue, and the Church acknowledges, the \$175,000 in interest has already been paid.

As for the second cause of action, which alleges that defendants breached their fiduciary duty, in connection with defendants' failure to pay the construction loan and using the money

obtained from the sale of the condominiums to pay off other obligations and expenses. the Church sought (I) punitive damages for defendants' alleged failure to voluntarily give an accounting to the Church regarding condominium sales and a partial accounting pursuant to the orders and directives of the court, and (ii) attorney's fees for defendants' alleged refusal to voluntarily supply this information.

As for the third cause of action, which alleges that defendants diverted moneys intended to be used to pay off the construction loan to pay off other loans and thus breached the Contract the Church seeks (I) punitive damages, and (ii) the damages set forth in connection with the fourth cause of action.

As for the fourth cause of action, which alleges that defendants breached the Contract by performing the work and construction on the church unit in a negligent manner and not in compliance with construction standards, the Church seeks (I) \$585,000 as per Third Amendment to the Agreement, the defendants were obligated to pay Church amount of \$15,000 per month for every month that the construction was not complete (based on 39 months), (ii) \$1,080,000 for loss of income for the Church from 2011 through 2016 due to failure to complete construction and decline in Church membership, (iii) \$197,500, reflecting payments already made and that will have to be made to complete and correct some of the work, (iv) \$450,000, amount need to replace the entire Heating and Air Conditioning Units that were inadequate and not completed as per specifications, (v) damages arising out of failure to sell to the Church retail space that Church exercised its option to purchase in 2009 (space had valuation of \$590,000 at that time), (vi) damages in the amount of approximately \$500,000 to fix various defects in construction, including lack of soundproofing on second floor, sewer line improperly tied to restaurant causing

leaks and backups; retail store owned by defendants leaks on regular basis onto Church property, (vii) leaks from second floor roof causing damage to Church walls, carpets and wood floors; and (viii) upstairs apartments leaking into Church Sanctuary causing damage to Church.

Defendants argue that the punitive damages are not appropriately awarded in connection with the second cause of action for breach of fiduciary duty or the third cause of action for breach of contract as this action involves a private contract dispute. In addition, defendants argue the fourth cause of action alleges damages in the amount of \$250,000, and the Church did not previously seek to amend the complaint to assert the additional damages, the amount plaintiff can recover is limited to \$250,000. Defendants further argue that damages sought in the fourth cause of action for lost income are too speculative and should be stricken. Defendants next argue that the claim relating to the option to purchase the retail space has already been satisfied.

In opposition, while the Church does not directly address defendants' arguments seeking the dismissal of its demand for punitive damages in its papers, at oral argument, it asserted that such damages were appropriately sought in connection with its breach of fiduciary duty claim and in light of the nature of the breach of contract claim and the harm done to the Church and its property. Next, although the damages it now seeks in connection with the fourth cause of action are not pleaded in the complaint, the Church argues that its cross moves to amend the *ad damnum* clause *nunc pro tunc* should be granted as defendants have not shown prejudice as a result of the amendment. The Church also argues that it has adequately shown a basis for the other asserted damages sought, including for loss of income from 2011 through 2016 due to defendants' failure to timely complete construction.

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by

setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” “In the absence of prejudice, a motion to amend an *ad damnum* clause, whether made before or after trial, ‘should generally be granted.’” Heller v. Louis Provenzano, Inc., 303 AD2d 20, 22 (1st Dept 2003), quoting Loomis v. Civetta Corinno Constr.29 Corp., 54 NY2d 18, 23 (1981).

Under this standard, the Church’s cross motion to amend its *ad damnum* clause should be granted as defendants have shown no prejudice, since the increase in amount of damages sought is based on the allegations in the original complaint. Loomis, 54 NY2d at 23. Likewise, it is well established that the fact the amendment will expose defendants to increased liability is not a grounds for finding prejudice. Id; see also RCLA, LLC v. 50-09 Realty, LLC, 48 AD3d 538, 539 (2d Dept 2008). It is further noted that throughout the numerous conferences held with respect to this action, many of the items of damages asserted in the fourth cause of action were raised at the conferences and therefore defendants are on notice of these damages.

Insofar as the Church seeks damages based on loss of income to the Church resulting from the alleged breach of a contract, whether such damages are too speculative to be proven is an issue for trial. “Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law.” Kenford Co., Inc. v. Erie County, 67 NY2d 257, 261 (1986). To demonstrate entitlement to such damages, “it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty.” Id at 261.

That said, however, “a degree of uncertainty is to be expected in assessing lost profits

[and]... [w]hen the existence of damage is certain, and the only uncertainty is as to its amount, the plaintiff will not be denied recovery of substantial damages.” Wathnes Imports, Ltd v. PRL USA, Inc., 101 AD3d 83, 88 (1st Dept 2012)(internal citations and quotations omitted). Thus, while a plaintiff “must show a stable foundation for a reasonable estimate of damages, [a]n estimate of lost profits incurred through a breach of contract necessarily requires some improvisation, and the party who has caused the loss may not insist on theoretical perfection.”Id at 89. Furthermore, “it is always the breaching party . . . who must shoulder the burden of the uncertainty regarding the amount of damages” Id. citing Boyce v Soundview Tech. Group, Inc., 464 F3d 376, 392 (2d Cir 2006).

Under these principles, it cannot be said that Church’s claim of loss of income resulting from defendant’s breach of contract is too speculative such that plaintiff should not be given an opportunity to prove such damages at trial. As noted by the Church, its pre-trial memorandum provides that the board members of the Church will testify at trial as to the Church’s finances, loss of revenue, and loss of parishioners. Accordingly, the motion to preclude these damages is denied without prejudice to renewal at the time of the trial.

As for punitive damages, which are demanded in the complaint, defendants’ motion to preclude the Church from seeking such damages at trial is granted as the Church has not shown a basis for recovering such damages in connection with its breach of fiduciary duty and/or breach of contract claim.

With respect to the claim for breach of fiduciary duty, punitive damages are “available [for such breach] only in instances where the fiduciary breach is shown to have entailed an outrageous public wrong” (Guardian Mort Acceptance Corp. v. Bankers Trust Co. of California,

N.A., 259 AD2d 358, 359 (1st Dept 1999)), or “a very high threshold of moral culpability is satisfied.” Giblin v. Murphy, 73 NY2d 769, 772 (1988)(internal citations omitted). Even assuming *arguendo* that a fiduciary duty exists in this case, there is no evidence of a public wrong related to the defendants’ alleged failure to voluntarily give an accounting to the Church regarding condominium sales or a partial accounting as directed by the court, nor does this failure entail the type moral culpability required for an award of punitive damages.

As for the breach of contract claims, contrary to the Church’s position, the nature and the amount of its losses resulting from the alleged breach do not provide a ground for awarding punitive damages. Instead, punitive damages are recoverable for a breach of contract claim only when the breach relates to a public right or is actionable as a tort independent of a party’s failure to perform its contractual obligations. See Rocanova v. Equitable Life Assur. Society, 83 NY2d 603, 613 (1994)(in actions for breach of contract punitive damages are “generally not recoverable as their purpose is not to remedy private wrongs but to vindicate public rights”); AXA Mediterranean Holdings S.P. v. ING Insurance Intern B.V., 106 AD3d 457, 458 (1st Dept 2013)(noting that “punitive damages are not recoverable because defendant's alleged conduct is not actionable as a tort independent of its alleged failure to perform its contractual obligations”). As such circumstances are not present here, the Church is properly precluded from recovering punitive damages in connection with its breach of contract claims.

Conclusion

In view of the above, it is

ORDERED that defendants’ motion to preclude is granted to the extent of precluding the Church from seeking (i) interest in connection with the first cause of action as such interest has

been paid, and (ii) punitive damages, and is otherwise denied; and it is further

ORDERED that the Church's cross motion is granted to the extent of permitting the Church to amend its *ad damnum* clause *nunc pro tunc* with respect to the third and fourth causes of action; and it is further

ORDERED that the parties shall appear on August 27, 2018 at 2:00 pm with their clients for a settlement conference in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: August 23, 2018



J.S.C.

HON. JOAN A. MADDEN
J.S.C.