

Stabilis Fund II LLC v CBRE, Inc.
2019 NY Slip Op 30843(U)
March 20, 2019
Supreme Court, New York County
Docket Number: 150345/16
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

STABILIS FUND II LLC,

INDEX NO. 150345/16

- v -

MOT. DATE

CBRE, INC. a/k/a CBRE

MOT. SEQ. NO. 003 and 004

The following papers were read on this motion to/for summary judgment (003) and seal (004)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).
Replying Affidavits NYSCEF DOC No(s).

This is an action for gross negligence in connection with a calculation error in an appraisal prepared by the defendant in October 2013. Plaintiff claims that the defendant's failure to include rental income from a tenant impacted the income capitalization valuation of the property, thereby causing plaintiff damages. Plaintiff seeks a money judgment against defendant for \$1.1 million dollars.

In motion sequence number 003, defendant moves for partial summary judgment seeking to enforce the limitation of liability in the underlying contract which it maintains caps damages at \$10,000, arguing that the calculation error at issue does not, as a matter of law, rise to the level of gross negligence. Plaintiff opposes that motion and in motion sequence number 004, moves to amend its complaint to assert three new causes of action as well as to seal certain documents attached to plaintiff's opposition papers to defendant's motion (NYSCEF Doc No. 69). An unredacted version of the subject documents has been provided to the court in camera. Defendant opposes the motion to amend only.

The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

Seal

At the outset, the request to seal NYSCEF Doc. No. 69 is granted without opposition. The records which plaintiff seeks to file concern non-public proprietary business and financial information. Plaintiff has established that its interest in keeping these documents confidential outweigh the public's interest in the subject matter of the subject documents.

Partial summary judgment on the first cause of action

The court will next consider the motion for summary judgment. Issue has been joined but note of issue has not yet been filed. Therefore, summary judgment relief is available. The relevant facts are

Dated: 7/20/19

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

undisputed and are as follows.

The following facts are based upon the complaint. Plaintiff alleges that it was the lender in relation to a property in Florida that went into foreclosure. Defendant appraised the property pursuant to a written contract for the sum of \$2,500 in October 2013 shortly before the foreclosure sale. The appraisal was prepared by Gregory Becker, defendant's employee. Subsequently, defendant discovered and disclosed to plaintiff an error in its calculation of total rents for the property which resulted in an undervaluation. The error resulted from defendant's failure to update a formula contained in an excel spreadsheet used to calculate the total contract rents for tenants at the property. Plaintiff claims that the error caused it to: [1] bid less than it would have at the foreclosure sale; and [2] settle for less than it would have in a subsequent New York litigation against the guarantor.

There is no dispute that defendant's work on the appraisal is governed by a contractual limitation of liability cap, which provides as follows:

4 LIMITATION OF LIABILITY. EXCEPT FOR THE HOLD HARMLESS PROVISION ABOVE, ANYTHING IN THE AGREEMENT TO THE CONTRARY NOTWITHSTANDING, UNDER NO CIRCUMSTANCES WHATSOEVER SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY SPECIAL, CONSEQUENTIAL, PUNITIVE, OR INCIDENTAL DAMAGES OF ANY KIND WHATSOEVER. EXCEPT FOR THE HOLD HARMLESS PROVISION ABOVE, IN NO EVENT WHATSOEVER SHALL EITHER PARTY'S TOTAL LIABILITY TO THE OTHER FOR DIRECT DAMAGES UNDER THE AGREEMENT OR ANY OTHER DAMAGES WHATSOEVER EXCEED IN THE AGGREGATE THE SUM OF TEN THOUSAND DOLLARS (\$10,000.00).

Pursuant to this provision, defendant maintains that its damages on plaintiff's first cause of action (which is not the subject of the plaintiff's motion to amend) should be capped at \$10,000. Defendant further argues that there is no proof that defendant and/or Becker were grossly negligent in preparing the appraisal. Defendant explains that Becker has performed over 9,000 appraisals since 1989, that this is the first time one of his appraisals has been the subject of litigation based upon a claimed error, and that Becker otherwise performed the appraisal "using traditional valuation approaches including the income capitalization method where he analyzed the net operating income by assessing current leases and expected rents through a rent roll analysis."

In opposition to the motion, plaintiff argues that defendant was grossly negligent in the services it provided. Plaintiff relies upon the affidavit of Stephen D. Roach, who claims to be an expert in the field of real estate appraisal. According to Mr. Roach, defendant was grossly negligent not only in inserting a calculation error in the appraisal, but thereafter defendant "improperly manipulated the other two approaches downward to be consistent with the erroneous income capitalization analysis." Roach further opines as to how defendant failed to comport with multiple rules of the Uniform Standards of Appraisal Practice ("USPAP"). Otherwise, Roach maintains that the October 2013 appraisal, which a subsequent appraisal, was improper because it was "not a new appraisal with an independent analysis, but rather the files were copies from [an] earlier erroneous report..." Finally, plaintiff takes issue with the fact that Becker's report was signed off by his supervisor, James Agner, but that Agner did not actually review the report.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Contractual limitations of liability are generally enforced and serve a broad public purpose by limiting a parties' exposure to liability and keeping the costs of goods and services down. In order to circumvent the limitation of liability cap with respect to its breach of contract action, plaintiff is required to demonstrate that defendant's conduct constituted gross negligence, which "must smack of intentional wrongdoing (*Sommer v. Federal Signal Corp.*, 79 NY2d 540 [1992] [internal quotations omitted]). Gross negligence is conduct which "evinces a reckless indifference to the rights of others (*Id. citing Kalish-Jarcho, Inc. v. City of New York*, 58 NY2d 377 [1983]).

Here, defendant has met its burden and demonstrated that Becker did not commit gross negligence and in turn, plaintiff has failed to raise a triable issue of fact. Certainly, that Becker made a calculation error by inserting an incorrect number in a spreadsheet does not constitute intentional wrongdoing. Roach's opinion that Becker made downward departures in other areas of the appraisal to hide the income valuation calculation error is also unavailing, since it is not based upon any evidence but rather Roach's mere speculation. As defendant points out, Roach has failed to specifically point to where the alleged downward departures were made to cover up Becker's calculation error.

As for the prior evaluation which was in February 2013, Roach's opinion that there was some impropriety with respect to the carryover of work from said evaluation is baseless. Assuming *arguendo* that the first appraisal contains the same error that the second appraisal had, this theory is a red herring. Indeed, the court finds that no reasonable factfinder would conclude on this record that Becker engaged in anything more than ordinary negligence at best.

Plaintiff's argument that Becker's supervisor signed the October 2013 appraisal but didn't review it for accuracy before furnishing it to plaintiff is equally unavailing. The court finds that such conduct does not constitute gross negligence. Similarly, even if plaintiff could prove that defendant violated USPAP, the provisions which plaintiff relies on are either general aspirational standards or otherwise do not evince reckless indifference sufficient to raise a triable issue of fact on this point.

Accordingly, defendant's motion for partial summary judgment is granted as to the amount of damages defendant owes on plaintiff's breach of contract claim.

Amendment

The balance of plaintiff's motion seeks to amend plaintiff's complaint nearly three years after this action was commenced. Plaintiff claims that it seeks to add two new causes of action for breach of contract and fraud based upon new allegations it learned after "the production of the workfiles and after Plaintiff's prior attorney was deposed and flatly contradicted [Becker's] testimony [] "regarding the timing of Becker's disclosure of material information about the [a]ppraisals."

Plaintiff's new claims arise from the February 2013 appraisal and also assert claims for fraud. Plaintiff maintains the motion should be granted because defendant cannot possibly be prejudiced since "Plaintiff is relying on facts that were fully explored in discovery and integrally relate to the allegations in the Complaint."

Defendant opposes the motion and vehemently maintains that it is "a blatant attempt to avoid this Court's adjudication of [defendant's] pending summary judgment motion." Further, defendant argues that the alleged new facts should have been asserted when this action was commenced, and that the additional proof upon which plaintiff's motion is based is meritless.

Leave to amend a pleading should be freely given in the absence of prejudice or surprise to the non-moving party (*Fahey v. Ontario County*, 44 NY2d 934 [1978]; see also *Seda v. New York City Housing Authority*, 181 AD2d 469 [1st Dept 1992]). The opponent of a motion to amend bears the burden of demonstrating prejudice (*Seda, supra* at 470). 'Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay' (*Oil Heat Institute of Long Island Ins. Trust v. RMTS Associates, LLC*, 4 AD3d 290 [1st Dept 2004] quoting *Heller v. Louis Provenzano, Inc.*, 303 AD2d 20 [1st Dept 2003]).

Because plaintiff has failed to offer a reasonable excuse for bringing the instant motion three years after this action was commenced and after it was faced with defendant's motion for partial summary judgment, the motion to amend must be denied. Indeed, there can be no dispute that the relevant facts underlying plaintiff's new causes of action were known or should have been known by plaintiff. Plaintiff does not argue that it just learned that the February 2013 appraisal contained the same error as the October 2013 appraisal. Plaintiff implicitly concedes as such when it bases its allegedly new knowledge, in part, on the deposition of its own former counsel. To the extent that plaintiff bases its late motion on Roach's opinions, there is no explanation for why Roach was not retained earlier in his litigation. Having knowingly and strategically charted the course of its claims in this litigation, the court cannot countenance plaintiff's regret for pinning its hopes on demonstrating defendant's gross negligence. Such a result would result in a second bite at the apple, which would clearly result in substantial prejudice to the defendant.

Accordingly, the motion to amend is denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendant's motion for partial summary judgment as to plaintiff's damages on the first cause of action for breach of contract (motion sequence number 003) is granted in its entirety; and it is further

ORDERED that defendant is entitled to summary judgment fixing plaintiff's damages at a maximum of \$10,000 in accordance with the parties' contractual limitation of liability; and it is further

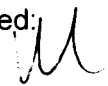
ORDERED that plaintiff's motion (motion sequence number 004) is granted only to the extent that NYSCEF Doc No. 69 shall be sealed and the County Clerk is directed to mark said document sealed upon service of a copy of this order with notice of entry; and it is further

ORDERED that the balance of motion sequence number 004 is denied; and it is further

ORDERED that Plaintiff is directed to retrieve the documents it submitted *in camera* from the Part 8 Clerk at 80 Centre Street, Room 278, within 30 days or same shall be discarded.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3/10/19
New York, New York

So Ordered: 

Hon. Lynn R. Kotler, J.S.C.