Board of Mgrs. of 405 Greenwich St. Condominium v 403 Greenwich Enters. LLC
2019 NY Slip Op 31391(U)
May 14, 2019
Supreme Court, New York County
Docket Number: 158810/2017
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** ***Justice*** **PART** **IAS MOTION 18EFM**

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BOARD OF MANAGERS OF 405 GREENWICH STREET CONDOMINIUM

Plaintiff,

- v -

403 GREENWICH ENTERPRISES LLC,

Defendant.

--X

INDEX NO. 158810/2017

MOTION DATE 04/15/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for DISMISSAL.

Upon the foregoing papers, plaintiff moves to dismiss defendant's counter-claims pursuant to CPLR 3211 (a) and CPLR § 3013 or in the alternative, moves to strike paragraphs 9, 11, 16, 17, 18 and 28 from defendant's counter-claims pursuant to CPLR 3024 (b).

Defendant is the developer and owner of the site located at 403 Greenwich Street, New York, NY. Defendant purchased the site in 2011 seeking to build a new luxury condominium building. Plaintiff is the Board of Managers of the building adjacent to defendant's site located at 405 Greenwich Street, New York, NY. On or about October 11, 2012, the parties entered into a licensing and protection agreement (LIPA) which gave defendant temporary permission to access plaintiff's building for the purposes of performing work. At issue here is Section 5 (a) of the LIPA, which states in pertinent part:

> "The Developer shall promptly, within ten (10) business days of receipt of a demand notice from the Condominium, directly pay or reimburse the Condominium for all of the reasonable, out of pocket costs and expenses including, without limitation, reasonable engineering, architectural, consulting and legal fees and disbursements, incurred by the Condominium directly or indirectly in connection with (i) the negotiation, execution or performance of this Agreement"
> (NYSCEF Doc. No. 18, p 9).

Motion to Dismiss

Plaintiff requests that the Court dismiss defendant's breach of contract claim for failure to state a claim. Plaintiff argues that the LIPA does not allocate to defendant the power to "unilaterally" deem what a reasonable fee is. Plaintiff claims it is entitled to submit all reasonable fees, as stated in the LIPA, and denies defendants' claim that plaintiff's members have an incentive to inflate reimbursements. Plaintiff further argues that defendant could have negotiated for a definition of reasonable in the contract but failed to do so. Additionally, defendant knew that the engineering team would be RSD Engineering P.C., and what their hourly rates would be, prior to executing the LIPA.

In opposition, defendant argues that plaintiff is attempting to narrowly or strictly interpret the contract. Defendant maintains it is not seeking to add a term, but rather, as the LIPA twice states that fees must be reasonable, there is an implied promise and obligation that they actually be so. Defendant also argues that the term "reasonable" is often not defined in contracts and the inclusion of the word was done with the intent to limit fees.

On a motion to dismiss pursuant to CPLR 3211, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (Leon v Martinez, 84 NY2d 83, 87 [1994]). The court must simply determine "whether the facts as alleged fit within any cognizable legal theory" (id. at 87-88). However, "allegations consisting of bare legal conclusion...are not entitled to such consideration" (Roberts v Pollack, 92 AD2d 440, 444 [1st Dept 1983]). To state a claim of breach of contract, defendant must allege "1) the parties entered into a valid agreement, (2) [defendant] performed, (3) [plaintiff] failed to perform, and (4) damages" (VisionChina Media Inc. v Shareholder Representative Services, LLC, 109 AD3d 49, 58 [1st Dept 2013]).

In the instant matter, defendant's claim is predicated on the allegation that plaintiff breached Section 5 (a) of the LIPA by submitting unreasonable fee reimbursement requests. Defendant also contends that plaintiff intentionally and arbitrarily inflated some reimbursement requests. For example, on January 5, 2013, defendant alleges that Kelley Parker, the president of the condominium board, sent emails to defendant making statements such as "increase the cap on engineering costs by a reasonable amount and I'll call the dogs of war off for a Monday filing. Don't, and you'll spend much more on legal defense I promise you that" (NYSCEF Doc. No. 62, p 3); "my definition of reasonable will grow each hour at least by my own hourly rate" (id. at p 2); "there are very expensive associates in the [Paul Weiss] office ruining their weekend to draft this complaint. You will pay one way or another and if it takes thru the weekend, then it will just be a bigger cost for you" (id.).

Defendant further alleges that in 2015, it requested to speak to plaintiff regarding recent engineering reimbursement requests because defendant was concerned about the high cost. In response, plaintiff allegedly emailed defendant warning them not to "rattle the cage. Please submit reimbursement so we can move on, this will surely complicate your job" (NYSCEF Doc. No. 43, [Answer with counter-claims] ¶ 30]). Accepting these allegations as true, defendant does adequately plead a claim for breach of contract. While plaintiff is correct that the LIPA does not empower defendant to be the sole determiner of what is reasonable, it likewise does not allocate such power to plaintiff. That the fees must be reasonable is an express term which appears twice in Section 5 (a) of the LIPA. Thus, when fairly construed in the context of its whole provisions, it is plausible that the LIPA grants defendant, at a minimum, the right to question fees that are seemingly unreasonable (see generally Reiss v Fin. Performance Corp., 97 NY2d 195, 199

[2001]; Salomon v Citigroup Inc., 123 AD3d 517 [1st Dept 2014]). To find otherwise would render the term "reasonable" useless.

The Court similarly rejects plaintiff's contention that the counter-claims are not sufficiently particular. CPLR § 3013 requires that a pleading be sufficiently particular to give the court and parties notice of the transaction or occurrence. However, so long as the pleading may be said to give notice, no matter what terminology it chooses, it satisfies this requirement (see Foley v D'Agostino, 21 AD2d 60 [1st Dept 1964]). Defendant's pleading need not specify each and every invoice that it alleges is unreasonable. Rather, "it is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (id. at 65, quoting Condon v Associated Hosp. Serv. of New York, 287 NY 411, 413 [1942]). Accordingly, defendant's pleading is sufficiently particular and that branch of plaintiff's motion seeking to dismiss the first counter-claim is denied.

With respect to the counter-claim for breach of the implied covenant of good faith and fair dealing, that part of plaintiff's motion is granted and the counter-claim is dismissed. "A cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (Deer Park Enterprises, LLC v Ail Sys. Inc., 57 AD3d 711, 712 [2d Dept 2008] quoting Canstar v Jones Constr. Co., 212 AD2d 452, 453 [1st Dept 1995]). Here, the conduct and injury in the two counter-claims are nearly identical. Defendant's argument that the implied covenant claim encompasses broader conduct is unavailing as both speak to the actions taken by plaintiff with respect to fee reimbursements.

Motion to Strike

Pursuant to CPLR 3024 (b), a party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading. Plaintiff seeks to have paragraphs 9, 11, 16, 17, 18, and 28 stricken as they are inflammatory and prejudicial. Defendant asserts that they are relevant to the counter-claims and have no prejudicial effect. With respect to paragraphs 9, 11, and 17 plaintiff's request is granted. The allegations contained therein have no bearing on the breach of contract claim (Soumayah v Minnelli, 41 AD3d 390, 392 [1st Dept 2007] ["In reviewing a motion pursuant to CPLR 3024(b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action"]). However, the remaining paragraphs are relevant as they speak to the conduct surrounding the reimbursements.

Accordingly, it is hereby

ORDERED that branch of plaintiff's motion to dismiss the counter-claim for breach of contract is denied; it is further

ORDERED that branch plaintiff's motion to dismiss the counter-claim for breach of implied covenant and good faith and fair dealing is granted; it is further

ORDERED that plaintiff is directed to serve its responsive pleading within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that branch of plaintiff's motion to strike is granted in part to the extent that paragraphs 9, 11, and 17 are hereby struck from defendant's counter-claims.

This shall constitute the decision and order of the Court.

HON. ALEXANDER M. TISCH

5/14/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE