

**Swiss Institute, a N.Y. Not-for-Profit Corp. v 130
Second Realty, LLC**

2019 NY Slip Op 32035(U)

July 12, 2019

Supreme Court, New York County

Docket Number: 652942/2017

Judge: Anthony Cannataro

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

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INDEX NO. 652942/2017

SWISS INSTITUTE, A NEW YORK NOT-FOR-PROFIT CORP.,

MOTION DATE 05/26/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

130 SECOND REALTY, LLC, SM TIC 1 130 SECOND, LLC

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

In this commercial landlord-tenant action, plaintiff, Swiss Institute, moves, pursuant to CPLR 2104, to enforce an alleged settlement agreement entered between it and defendants, 130 Second Realty, LLC., and SM TIC 1 130 Second, LLC. In the alternative, plaintiff moves, pursuant to CPLR 3015(b), for leave to file and serve a second amended complaint.

Plaintiff entered into a ten-year lease with defendants for an area within the building located at 130 Second Avenue in Manhattan. The terms of the lease provided for a gut rehabilitation of the building interior, with defendants promising to reimburse up to \$512,000 in tenant improvement ("TI") costs. The lease further provided that plaintiff had the right to use the building's flat roof for entertainment purposes, with defendants maintaining control of the roof and responsibility for the condition of the roof, as well as for the structure of the building.

When a dispute arose prior to this litigation concerning TI costs, the parties attempted to negotiate a settlement. After a series of telephone and email discussions, defendants' counsel, Mr. Joseph Goldsmith Esq., sent an email on October 15, 2018,

stating that the landlord was “not interested in raising the TI beyond its previous offer of \$512,000, even though the tenant did not meet the qualifications, and to increase the TI costs by another \$50,000.” Mr. Goldsmith also stated, “Let’s get on with discovery. When are you planning to serve your discovery? Let me know.” Tenant’s counsel, Mr. John Van Der Tuin Esq., called Mr. Goldsmith on October 22nd and emailed him on October 30th, saying, “are you preparing the settlement agreement on these terms or do you want me to do so? I assume a private settlement agreement and a bare stipulation of discontinuance of the action with prejudice.” Mr. Goldsmith responded to this email on October 31st saying, “the owner does not want the deal and I am still talking to him.”

Plaintiff argues that the October 15th email constitutes subscribed writing with mutual manifestation of assent to the settlement’s essential terms and there was oral acceptance of that offer in the October 22nd phone call and again in the October 30th email. Defendants’ argue that there was never an agreement between the parties and that the emails merely amount to a memorialization of negotiations between counsel with insufficient material terms to constitute a meeting of the minds and that there is no evidence showing a manifestation of mutual accord or an intent to be bound.

CPLR 2104 provides that an agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party, unless, it is in a writing subscribed by him or his attorney (*Bonnette v Long Island Coll. Hosp.*, 3 NY3d 281 [2004]). New York courts have held that an email message may be considered “subscribed” as required by CPLR 2104 and therefore capable of enforcement where there is a manifestation of mutual assent to all material terms of the agreement, and the party to be charged, or its agent, types its name under circumstances manifesting an intent to be bound by that agreement (*Kataldo v Atl. Chevrolet Cadillac*, 161 AD3d 1059, 1060 [2d Dept 2018], citing *Forcelli v*

Gelco Corp., 109 AD3d 244, 248 [2d Dept 2013]). Further, the Court of Appeals in *Bonnette*, factored in New York's strong policy promoting certainty in settlements, finding it imperative that settlements be clear, final and the product of mutual assent in order to allow parties to conduct settlement negotiations without the fear of being bound by preliminary offers (*Bonnette v Long Island Coll. Hosp.*, 3 NY3d 281 [2004]).

In *Williamson*, the court held that an email exchange between parties was sufficiently clear and concrete to constitute an enforceable contract and further indicated that the defendant was aware, consented, and intended to be bound by the settlement (*Williamson v Delsener*, 59 AD3d 291 [1st Dept 2009]). Moreover, the record in that case contained no indication to contrary (*id.*)

Unlike in *Williamson*, the particulars of the alleged settlement in this case are not explicitly expressed in the emails. The email sent by Mr. Goldsmith on October 15th was not clear and concrete, but instead, ambiguous. Most notably, the email made no mention of discontinuance of the action in exchange for the payment. Instead, the email ended by expressing defendants' intent to proceed with discovery, which tends to manifest an intent to not settle on the terms discussed during negotiations and proceed on a path to trial.

Since there was no manifestation of mutual assent or intent to be bound to the essential terms of the agreement, the email correspondence sent by defendants' counsel on October 15th was not "subscribed" in a manner required by CPLR 2104. Accordingly, plaintiff's motion to enforce settlement is denied.

With respect to plaintiff's motion for leave to serve and file a second amended complaint, CPLR 3015(b) requires that motions to amend be freely granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit (*Davis v S. Nassau Cmty. Hosp.*, 26 NY3d 563, 582 [2015]). In this case, plaintiff seeks to file a second amended complaint to update its

allegations and quantify damages, and to discontinue its fifth cause of action related to defendants' statements and actions as to the status of the certificate of occupancy for the building and the need to construct a second means of egress to use the second floor for the intended purpose.

Defendants argue that plaintiff did not meet its burden of establishing the merit of the proposed amended complaint and did not submit evidentiary proof that supports its newly quantified damages. However, plaintiff's proposed amendments include additional facts, which are supported by an affidavit affirming refurbishment and rebuilding costs, that allows it to assign specific damages figures to its pre-existing causes of action.

Although there was a delay in plaintiff moving to amend its complaint, there is a valid excuse that the build out was not complete at the time the first complaint was filed, therefore, the damages were not exact and the additional facts contained in the proposed amendments will not prejudice the defendants. Instead, it will help guide discovery of this action by narrowing the facts and issues in dispute. Therefore, since plaintiff's amended complaint does not lack merit and would not prejudice defendants, plaintiff's motion to seek leave and serve a second amended complaint is granted.

Accordingly, it is

ORDERED that the portion of plaintiff's motion seeking to enforce a settlement agreement between the parties is denied; and it is further

ORDERED that the portion of plaintiff's motion for leave to amend the complaint herein is granted, and the second amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

