

<b>Arnold v 4-6 Bleecker St. LLC</b>
2019 NY Slip Op 32683(U)
September 5, 2019
Supreme Court, New York County
Docket Number: 158541/2013
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARGARET A. CHAN** PART IAS MOTION 33EFM

*Justice*

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INDEX NO. 158541/2013

PETER ARNOLD, ELI LAZARUS, SEAN ROCHA,  
MICHAEL SCHILLER,

MOTION DATE 03/29/2019,  
03/29/2019

Plaintiffs,

MOTION SEQ. NO. 014 015

- v -

4-6 BLEECKER STREET LLC, 316 BOWERY REALTY  
CORP., WALSAM 316 LLC, WALSAM 316 BOWERY  
LLC, WALSAM BLEECKER LLC, LAWBER BOWERY  
LLC, 316 BOWERY NEXT GENERATION LLC

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 014) 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 015) 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 513, 514, 515

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Based on the foregoing, it is Ordered that MS 014 is denied without prejudice; and MS 015 is granted.

In this rent overcharge matter, defendant 4-6 Bleecker Street LLC seeks, in Motion Sequence (MS) 014, partial summary judgment as to liability on its second cross-claim against co-defendants 316 Bowery Realty Corp., Walsam 316 LLC, Walsam 316 Bowery LLC, Walsam Bleecker LLC, Lawber Bowery LLC, and 316 Bowery Next Generation LLC (collectively, the Bowery defendants)<sup>1</sup> for breach of contract of express representations and warranties. The Bowery defendants oppose the motion.

In MS 015, defendants Walsam 316 LLC, Walsam 316 Bowery LLC, Walsam Bleecker LLC, Lawber Bowery LLC and 316 Bowery Next Generation LLC

<sup>1</sup> The defendants, as named in the above paragraph re MS 014 are represented by the same counsel, Bradley Silverbush, Esq. of Rosenberg & Estis, P.C., who, in MS 014 refers to these defendants as the Bowery defendants.

(collectively the Walsam defendants)<sup>2</sup> move for partial summary judgment on liability as to treble damages and a declaration that treble damages are not to be assessed against the Walsam defendants. Co-defendant 4-6 Bleecker Street LLC opposes the motion.

## BACKGROUND

Knowledge of the facts in this case is assumed as these facts have been laid out in the multiple orders issued in this case (NYSCEF ## 140, 287, 290) and in the related case, *Walsam 316 LLC v 4-6 Bleecker Street, LLC*, under Index 153318/2017. However, a brief backdrop is provided to give facts relevant to the instant motions. The focus of the two motions at hand and the related action is a commercial and residential building located at 4-6 Bleecker Street in the city, state, and county of New York.

In August 2012, the building's owner, 316 Bowery Realty Corp. (316 BR-Corp), entered into a Purchase and Sale Agreement with 4-6 Bleecker Street, LLC (the 2012 PSA). Under the 2012 PSA, 316 BR-Corp agreed to convert the building to a two-unit condominium – a commercial portion and a residential portion – and convey the residential portion of the building to 4-6 Bleecker Street, LLC (NYSCEF<sup>3</sup> # 499; # 472 – 4-2 Bleecker's MOL at 5).

In April 2013, during the condo conversion period, 316 BR-Corp entered into a Master Lease dated April 16, 2013, with 4-6 Bleecker LLC wherein 316 BR-Corp net-leased the nine residential units in the residential portion of the building to 4-6 Bleecker, LLC (NYSCEF # 500 – Lease at 1). The leasehold to the residential portion of the building was for a 99-year term and was equivalent to a fee simple ownership giving 4-6 Bleecker Street, LLC the right to set and receive rents from the existing tenants (*id.* at 2).

In September 2013, the tenants of the residential portion of the building commenced this action against defendants 316 BR-Corp and 4-6 Bleecker Street, LLC (4-6 Bleecker) for a declaration that their apartments were subject to the Rent Stabilization Law and to recover overcharged rent.

On April 9, 2014, the Walsam defendants purchased the entire building from 316 BR-Corp and entered into the 2014 PSA. The Walsam defendants' purchase of the building was subject to the 2012 PSA and the Master lease pertaining to nine residential rental apartments in the residential portion of the building (NYSCEF #

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<sup>2</sup> The defendants, as named in the above paragraph re MS 015 are represented by Michael Blumenthal, Esq. and John Doherty, Esq. of Thompson & Knight LLP, who, in MS 015 refers to these defendants as the Walsam defendants. Note that 316 Bowery Realty Corp. (316 BR-Corp) is a defendant in the Bowery defendants, but not in the Walsam defendants.

<sup>3</sup> See also the related action, *Walsam 316 LLC v 4-6 Bleecker Street, LLC*, Index 153318/2017, NYSCEF # 188 – Decision and Order of this court dated October 2, 2018.

503 – 2014 PSA at 4, 6-7). Under the 2014 PSA, the Walsam defendants were entitled to \$1.00 rent per year from the Master Tenant, which is 4-6 Bleecker (*id.* at 13, ¶ 5.1.2.B [ii]).

In a Decision and Order dated October 14, 2015, Justice Joan Madden of this court found that 316 BR-Corp improperly deregulated plaintiffs' apartments and charged illegal rent (NYSCEF # 419). A subsequent order dated October 19, 2015, granted 4-6 Bleecker's cross-motion to name the Walsam defendants, as successors-in-interest to 316 Bowery, as defendants in this action (NYSCEF # 140).

In a later order dated May 31, 2017, Justice Madden confirmed that plaintiffs were entitled to overcharge and treble damages, and attorneys' fees, stating that "each apartment was improperly deregulated," "the rents on the base date were illegal," and "the substantial rent increases and other circumstance were indicia of a fraudulent scheme to deregulate the apartments. . . ." (NYSCEF # 287 – Decision and Order of Hon. Joan A. Madden dated May 31, 2017). The Decision and Orders were affirmed on appeal on October 11, 2018 (NYSCEF # 468; *Arnold v 4-6 Bleecker Street LLC*, 165 AD3d 493 [1st Dept 2018]).

## DISCUSSION

### 4-6 Bleecker's Motion (MS 014)

4-6 Bleecker previously moved for partial summary judgment on its second cross-claim in MS 008 (NYSCEF # 307). The second cross-claim alleges that the Bowery defendants breached the 2012 Purchase and Sale Agreement (2012 PSA) and Master Lease (NYSCEF # 449 – Amended Cross-Claims at 14). This court denied 4-6 Bleecker's motion as premature since several prior orders in this matter that spoke to issues relevant to the motion were then pending before the Appellate Division (NYSCEF #467 – Decision and Order dated May 15, 2018).

On October 11, 2018, the Appellate Division, First Department issued its decision on the several motions that were consolidated. Relevant to the instant motion, the Appellate Division denied 4-6 Bleecker's motion for partial summary judgment seeking indemnification from 316 BR-Corp as premature (NYSCEF # 468 – *Arnold v 4-6 Bleecker Street LLC*, 165 AD3d at 495).

With the appeal now disposed,<sup>4</sup> 4-6 Bleecker again moves for partial summary judgment on its allegation that 316 BR-Corp breached the 2012 Purchase and Sale Agreement (2012 PSA) and Master Lease. 4-6 Bleecker claims that in the Rider to the 2012 PSA between 316 BR-Corp, as Seller, represented to 4-6 Bleecker, as Purchaser, that "(1) all apartments are properly registered with Division of Housing and Community Renewal ("DHCR"); (2) 316 [BR-Corp] has complied with

<sup>4</sup> There is no further appeal of the Appellate Division's October 11, 2018 Order.

all applicable DHCR regulations; and (3) the rents for the tenants of the Building do not exceed those permitted under present law.” (NYSCEF # 472 – 4-6 Bleecker LLC’s MOL at 2 [emphasis omitted]).

Hence, 4-6 Bleecker argues that these findings that 316 BR-Corp improperly deregulated plaintiffs’ apartments and charged them illegal rents are law of the case. 4-6 Bleecker adds that the court’s findings show that 316 BR-Corp breached the 2012 PSA and Master Lease, thus warranting partial summary judgment in 4-6 Bleecker’s favor (*id.* at 13).

In opposition, the Bowery defendants argue: (1) a pending motion (MS 011) precludes the consideration of the instant motion; (2) 4-6 Bleecker’s moving papers lack an affidavit by a person with knowledge of the fact to support its motion; (3) discovery is outstanding; (4) the Appellate Division’s determination is law of the case; (5) plaintiffs’ prior motions for summary judgment bar any subsequent motion for the same relief; (6) movant has not met summary judgment standards; and (7) the related case, *Walsam 316, LLC v 316 Bowery Realty Corp*, Index No. 153318/2017 (*Walsam 316, LLC*), deal with the issues asserted in the instant motion.

The only argument offered by the Bowery defendants that merits consideration is the last one regarding the related case. Arguments 1 through 6 are a rehash of the Bowery defendants’ prior oppositions and motions that have been addressed multiple times – the last time in MS 013.

As to the related case, *Walsam 316, LLC*, the issue in the instant MS 014 by 4-6 Bleecker is the focus of the related case. *Walsam 316, LLC* involves allegations of 316 BR-Corp’s fraud and misrepresentation on the PSAs and Master Lease, among other issues. The relief 4-6 Bleecker seeks in the instant motion is the same relief it seeks in *Walsam 316, LLC* (Index No. 153318/2017 – NYSCEF #187, 4-6 Bleecker’s Answer/Counterclaims at 35). 4-6 Bleecker, a defendant in the related *Walsam 316, LLC* case alleged as its First Counterclaim and Crossclaim – Breach of Contract and Misrepresentation. The asserted facts supporting 4-6 Bleecker’s First Counterclaim are exactly the same as those appearing in its Memorandum of Law in the instant motion (NYSCEF # 472 – 4-6 Bleecker’s MOL at 2).

4-6 Bleecker’s instant motion is better suited for adjudication in the related case as it involves only the defendants herein on issues of fraud and misrepresentation, and neither this motion nor the related case involve the plaintiffs herein. Hence, MS 014 is denied without prejudice for 4-6 Bleecker to file in the companion case under Index No. 153318/2017, if such a motion has not yet been filed in the related case.

It is noted that 4-6 Bleecker does not argue its liability on the overcharge and treble damages issue in MS 014. It is noted also that 4-6 Bleecker was the Master Tenant under a Master Lease that is equivalent to a fee simple ownership of the nine residential apartments, including Plaintiffs' units, at 4-6 Bleecker Street. And 4-6 Bleecker was the landlord at the time plaintiffs commenced this overcharge matter.

*The Walsam Defendants' Motion (MS 015)*

The issue raised in MS 015 by the Walsam defendants is whether they, as the successor owner of the building pursuant to the 2014 PSA and subject to the Master Lease, and having no control over the residential part of the building, can be liable for treble damages under the theory of successor liability.

The Walsam defendants argue that treble damages should not be imposed upon them when they did not participate in the improper and willful deregulation and rent charges. They explain that although they are the successor owner of the building, they have no control over the residential portion pursuant to the 2014 PSA and the Master Lease. They did not set rents nor did they collect or receive any rent payments except for the \$1.00 per year rent payment from the Master Tenant, 4-6 Bleecker. Thus, the Walsam defendants urge that their case be assessed on a case-by-case basis in determining whether they are liable for the treble damages merely because they are the successor owner.

4-6 Bleecker opposes the Walsam defendants' contention arguing that (1) the Appellate Division had decided against the Walsam defendants' motion contesting Justice Madden's findings on the overcharge and treble damages issues, and (2) the Walsam defendants assumed the rights and obligations of 316 BR-Corp under the Master Lease and the 2012 PSA.

4-6 Bleecker is correct in that the Appellate Division's order dated October 11, 2018, denied the Walsam defendants' motion that essentially relitigated Justice Madden's findings on 316 BR-Corp's improper deregulation of plaintiffs' apartments, the rent overcharge, and treble damages, stating:

"The Walsam defendants, which purchased the property from 316 BR-Corp during the pendency of this action, are successors-in-interest to the property and collaterally estopped from relitigating the plaintiffs' showing of entitlement to rent overcharges and treble damages. The Walsam defendants' argument that they were denied due process when the court decided the dispositive motion before they were joined to the action is unavailing, as those defendants were aware of the pending action, shared the same counsel as 316 BR-Corp, and elected not to intervene despite

negotiations to stipulate to their joinder and opportunity to respond to dispositive motions.”

(NYSCEF # 468 – *Arnold*, 165 AD3d at 494 [citations omitted]). The Appellate Division continued that “[the Walsam defendants] were aware of the pending action, shared the same counsel as 316 BR-Corp, and elected not to intervene despite negotiations to stipulate to their joinder and opportunity to respond to the dispositive motions.” (*id.*). Thus, the Walsam defendants are now barred from “relitigating the plaintiffs’ showing of entitlement to rent overcharges and treble damages.” (*id.*).

But, the Walsam defendants’ instant motion does not challenge the plaintiffs’ entitlement to rent overcharges and treble damages. To be clear, the crux of the Walsam defendants’ instant motion is whether treble damages should be passed on to them as the successor owner when they played no part in the improper and willful deregulation of plaintiffs’ apartments, and when they are neither the landlord nor have control of the residential part of the building. Indeed, according to Peter B. Weiss, the Senior Executive Managing Director of Walter & Samuels, Inc., the Walsam defendants’ managing agent, the Walsam defendants purchased only the commercial part of the building and not the residential part of the building, and this argument was never raised before (NYSCEF # 498 – Weiss aff, ¶ 4).

The rationale on passing on overcharge liability on to the successive owner is that a successive owner is “in the best position to ascertain at the time of the purchase of the property whether the previous owners had been guilty of overcharges and protect itself accordingly. . . .” (*West End Avenue Owners, L.P. v New York State Div. of Housing and Community Renewal*, 185 Misc 2d 179 [Sup Ct, NY County, 2000]; see *Polanco v Higgins*, 175 AD2d 729, 730 [1st Dept 1991]; *Matter of Helfand v Division of Hous. & Community Renewal*, 182 Misc 2d 1, 9 [Sup Ct NY County, 1999]). An exception is made for the successive owner who purchased the property upon a judicially ordered sale where records are not available for the successive owner or landlord to ascertain whether the previous owner engaged in improper overcharges (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 549 [1997]).

Here, the Walsam defendants knew of the pending suit against the previous owner, 316 BR-Corp, by the tenants for improper overcharges and other violations of the Rent Stabilization Law. Indeed, the pending litigation was made known in the 2014 PSA. Thus, armed with knowledge of the pending overcharge litigation before the purchase, the Walsam defendants, who are represented by the same counsel as 316 BR-Corp, had or could have had information as to the overcharge claims.

However, as the Walsam defendants point out, arguably for the first time in this case, they purchased only the commercial part of the building. Whether the Walsam defendants' purchase of the entire building was essentially reduced by the Master Lease and the 2012 PSA to only the commercial portion of it is an argument that speaks to their involvement, in any, in the residential portion of the building.

The question becomes whether treble damages should be imputed to the successor owner that had no control over the residential part of the building pursuant to the 2014 PSA and Master Lease.

“Carryover liability for treble damages will be imposed on a case-by-case basis, depending upon the succeeding owner's degree of knowledge or culpability as to an existing overcharge” (*East 163<sup>rd</sup> Street LLC v New York State Div. of Hous. & Community Renewal*, 4 Misc 3d 169, 176 [Sup Ct NY County 2004] citing *S.E. & K. Corp. v New York State Div. of Hous. & Community Renewal*, 239 AD2d 123 [1st Dept 1997]).

In this case, the Walsam defendants purchased the building subject to the Master Lease wherein 4-6 Bleecker has essentially a fee-simple interest in the residential part of the building. 4-6 Bleecker was and remains the landlord of the residential building pursuant to the 2012 PSA and the Master Lease. And there is no dispute that the Walsam defendants neither set nor collected rent, or had the authority to do so. Indeed, 4-6 Bleecker had a part in controlling the Walsam defendants' access to the residential portion of the building (*see Walsam 316, LLC v 316 Bowery Realty Corp*, Index 153318/2017, NYSCEF 188 – Decision and Order of this court dated October 2, 2018, at 4).

Hence, not only did the Walsam defendants have no input or culpability to the overcharge, they had no authority or involvement as to the rent or the tenants in the residential portion of the building pursuant to the PSA and Master Lease. In sum, treble damages should not be imputed to these successor owners where their purchase of the building was subject to the agreements between the original owner and the net-lease tenant that has essentially a fee simple interest in the residential part of the building (*see, Matter of Helfand*, 182 Misc 2d at 8). The Walsam defendants' motion for partial summary judgment of the issue of liability as to treble damages is granted.

## CONCLUSION

Accordingly, it is ORDERED that defendant 4-6 Bleecker Street LLC's motion for partial summary judgment as to liability on its second cross-claim against defendants 316 Bowery Realty Corp., Walsam 316 LLC, Walsam 316 Bowery LLC, Walsam Bleecker LLC, Lawber Bowery LLC, and 316 Bowery Next Generation LLC (Motion Sequence 014) is denied without prejudice for 4-6 Bleecker,


LLC to file in the related case under Index No. 153318/2017, if such a motion has not been filed in the related case; it is further

ORDERED, DECLARED and ADJUDGED that defendants Walsam 316 LLC, Walsam 316 Bowery LLC, Walsam Bleecker LLC, Lawber Bowery LLC and 316 Bowery Next Generation LLC's motion for partial summary judgment on liability as to treble damages is granted; and that treble damages are not to be assessed against these defendants; and it is further

ORDERED that the Clerk of the Court shall enter judgment as written.

9/5/2019

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE