JW E. Bwy LLC v 11 E. Broadway Realty LLC
2020 NY Slip Op 30097(U)
January 7, 2020
Supreme Court, New York County
Docket Number: 160753/2018
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29
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JW EAST BWY LLC and 88-15 EAST BWY LLC,

Plaintiffs,

-against-

11 E. BROADWAY REALTY LLC and
LEE M. FONG a/k/a HENRY LEE FONG,

Defendants.
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Index No.: 160753/2018

Motion Date: 8/7/2019

Motion Sequence No. 001

DECISION/ORDER

HON. ROBERT D. KALISH, J.S.C.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 52 were read on the instant motion by plaintiffs JW East Bwy LLC and 88-15 East Bwy LLC (collectively, "plaintiffs") for summary judgment seeking a declaratory judgement declaring that the plaintiffs are entitled to certain escrow funds being held and to further dismiss the affirmative defenses and counterclaims of defendants 11 E. Broadway Realty LLC and Lee M. Fong a/k/a Henry Lee M. Fong (collectively, "defendants") and for costs, expenses and attorney's fees, and the cross motion by defendants to amend the answer and for costs, expenses and attorney's fees.

The motion by plaintiff for summary judgment is denied and the cross motion by defendants to amend the answer is granted in part to the extent that defendants are granted leave to file the proposed amended the answer and the cross motion is otherwise denied.

BACKGROUND

This is an action in which the purchaser of condominium units seeks disbursement of

$500,000 in escrowed funds, by reason of the seller's purported failure to resolve certain disputes with a commercial tenant within the deadline set by the parties' indemnification agreement. Plaintiffs JW East Bwy LLC and 88-15 East Bwy LLC now move for summary judgment (CPLR 3212) declaring their entitlement to the escrow funds and directing the escrow agent to release them, and dismissing defendants' affirmative defenses and counterclaims. Defendants 11 E. Broadway Realty LLC (Broadway) and Lee M. Fong a/k/a Henry Lee Fong (Fong) oppose the motion and cross move to amend their answer (CPLR 3025[b]) and for an award of attorney's fees, costs and expenses in connection with opposing plaintiffs' motion.

Pursuant to a Purchase Agreement dated May 18, 2016 (the Contract) (Singh Affirm. [Dkt 11], Ex. A [Dkt. 12])[1], Broadway sold three condominium units at 11 East Broadway (the Property) in Manhattan to an entity called Jamaica Woods Holdings, LLC (Jamaica) for $27,500,000. Citigroup Global Markets Realty Corp (CGMRC) financed the purchase (Singh Affirm., Ex. C [Indemnity Agreement]][Dkt. 14] [fourth "whereas" clause]). By an Assignment and Assumption Agreement dated August 24, 2016 (Contract, last two pages), Jamaica assigned the Contract to plaintiffs. Gurpreet Singh (Singh) is the Managing Member of Jamaica and both of the plaintiff entities (*id.*). The closing occurred on August 24, 2016.

At the time of the sale, the sole tenant of the Property was HSBC Bank (the Bank), which had a ten year lease (the Lease) (Ex A. to Contract) commencing September 1, 2004 with an option to renew for another ten years. Article XX of the Rider to the Contract required Broadway to procure an estoppel certificate (the Estoppel Certificate) (Singh Affirm., Ex. B [Dkt. 13]) from the Bank, which the Bank provided in August 2016. The Estoppel Certificate listed a number of

1 References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

the Bank's outstanding claims against Broadway, which included, *inter alia*, claims for damages resulting from a burst pipe and for a credit for the Bank's overpayment of Common Area Maintenance (CAM) charges (the Claims) (Ex. A to Estoppel Certificate).

On August 24, 2016, Broadway and one of its members, Yeun K. Hui, as part of the closing executed an indemnity agreement (the Indemnity Agreement) (Singh Affirm., Ex. C [Dkt. 14]) in favor of plaintiffs, CGMRC and Singh with respect to the Claims. The Indemnity Agreement recited the fact that the parties had proceeded to closing having received the Estoppel Certificate, and provides in pertinent part:

> Seller [Broadway] hereby agree to indemnify and hold Gurpreet Singh, Purchasers, CGMRC, their successors, designees and assigns (collectively "Indemnitee") harmless from any loss or damages, only arising from a Claim, other than items "c" (relating to water infiltration) and "d" (relating to sidewalk violation) and "e" (related to consequential damage) relating to the sidewalk violation on Exhibit "A" (the Indemnified Damages").
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> * * *
>
> [Broadway and Plaintiffs] shall cooperate and work with each other to resolve the Claims as follows:
>
> a. Seller shall prepare, certify and provide to HSBC and Purchaser the Annual statements and all available backup for periods from 2010 to date.
> b. Seller shall diligently pursue any insurance claims, and/or negotiations with [the Bank], through and with the cooperation of [plaintiffs], to resolve all of the Claims.
>
> * * *
>
> In the event all of the Claims are not resolved on or before ninety (90) days following the first anniversary of the date hereof [*i.e*, November 22, 2017], then upon thirty days prior written notice, Indemnitee shall have the right, in the unfettered exercise of its own discretion and judgment, to demand payment of the Estoppel Escrow to CGMRC (or as Purchaser and/or CGMRC as CGMRC may otherwise direct in writing) in full satisfaction

> of the obligations of Seller/Indemnitor, CGMRC, Purchaser, Recourse Indemnitor and Indemnitee, and upon the delivery of the Estoppel Escrow each of the undersigned shall be deemed released of any and all obligations, hereunder.
>
> (Indemnity Agreement, ¶¶ 1, 3, 6).

The parties simultaneously entered into an Escrow Agreement dated August 24, 2016 (the Escrow Agreement) (Singh Affirm., Ex. D [Dkt. 15]) naming Fong as the escrow agent. The Escrow Agreement provided for Broadway to place $500,000 in Escrow (the Escrow Funds) (Escrow Agreement, fourth "whereas" clause) subject to the terms of the Indemnity Agreement. The Escrow Agreement required the Escrow Agent to forward any demand for the release of the Escrow Funds to the non-demanding party, and forthwith disburse the funds if no objection was received within thirty days (Escrow Agreement, ¶ 6). In the event of conflicting demands from the parties or demands inconsistent with the Escrow Agreement, the Escrow Agent was required to interplead the Escrow Funds (*id.*, ¶ 7). The Escrow Agreement further provided that the non-prevailing party in any litigation arising out of the agreement would indemnify the Escrow Agent for any related costs, expenses and attorney's fees (*id.*, ¶ 3).

By letter dated January 9, 2018 (Singh Affirm., Ex. E [Dkt. 16]), plaintiffs demanded payment of the $500,000 Escrow Funds from the Escrow Agent. The letter asserted that "[m]ore than One Hundred Twenty (120) days have passed since August 24th, 2016. All of the Claims (defined as those "contained" in "the exceptions or claims . . . in Exhibit A of the Tenant Estoppel") have not been resolved in any material way or otherwise."

Broadway's counsel responded by letter dated January 30, 2018 (Singh Affirm., Ex. F [Dkt. 17]), denying that it had any liability for the claims asserted by the Bank. Specifically,

Broadway argued that (a) it was not liable under the Lease for damages caused by the negligence of the Bank or its employees; (b) the Bank had not pursued any of the Claims listed in the Estoppel Certificate; (c) the three-year negligence statute of limitation for the negligence Claim expired on December 17, 2017; (d) the six-year statute of limitation for the contractual CAM claim expired in 2016; (e) and Broadway issued a check for the CAM overpayments which the Bank never deposited. However, Broadway also asserted that it was willing to reissue a check for the CAM overcharges, and to commence a declaratory judgment action against the Bank to determine the validity of the Claims. Furthermore, Broadway demanded that the Escrow Funds be released to it, less the sum of the CAM overpayments.

Plaintiff rejected Broadway's position in a letter to the Escrow Agent dated February 7, 2018 (Singh Affirm., Ex. G [Dkt. 18]), quoting the language from paragraph 6 of the Indemnity Agreement that required the Claims to be "resolved" by November 22, 2017. Plaintiffs also demanded that the Escrow Agent interplead the Escrow Funds as required by the Escrow Agreement if he refused to disburse them.

The Escrow Agent did not respond at that time to either parties' demand. However, by letter dated October 17, 2018 (Singh Affirm., Ex. H [Dkt. 19]), he advised the parties as follows:

> It has been difficult to get things settled with a large institution like HSBC as one department has to have consent from another department etc. But now Seller and HSBC are entering a Settlement Agreement voluntarily wherein HSBC has agreed to waive all claims made in said estoppel certificate as Seller has persistently rejected those claims which were without merit pursuant to the lease agreement (see attached proposed settlement agreement). Seller intends to sign the Settlement Agreement.
>
> Further, Escrow Agent has not received any claims to the escrow fund since the closing of title from HSBC as outlined in paragraph 6 of the Escrow Agreement. However, Escrow Agent has received demand from Seller that the fund be released since HSBC has agreed to waive all the claims. Escrow Agent will

release $147,703.48 to HSBC and the balance of fund to Seller once the Settlement Agreement is signed.

Plaintiff commenced this action on November 19, 2018. The Verified Complaint (Singh Affirm., Ex. I [Dkt. 20]) asserts two causes of action. The first cause of action seeks a declaration that plaintiff is entitled to the Escrow Funds by reason of Broadway's failure to resolve the Claims by November 22, 2017. The second cause of action seeks a judgment directing release of the funds to plaintiffs. Issue was joined by the filing of defendants' Verified Answer with Counterclaim (Singh Affirm., Ex. J [Dkt. 21]) on January 23, 2019. That pleading admits most of the relevant allegations and seeks a declaration that the $147,703.48 of the Escrow Funds should be released to the Bank and the balance to Broadway. Defendants also assert nine affirmative defenses.

Plaintiffs filed the instant motion for summary judgment on April 2, 2019. By letter dated April 9, 2019 (Poon Aff. [Dkt. 30], Ex. I (Dkt 40]), Broadway's counsel demanded that plaintiffs pay Broadway $98,110.51, representing real estate taxes for the first half of 2016/2017 that the Bank had erroneously paid to plaintiffs instead of Broadway. Plaintiffs rejected the demand by letter dated April 11, 2019 (Poon Aff., Ex. J [Dkt. 41]), asserting that under the Contract, the parties agreed that any error in adjustments to Broadway under the Lease would be extinguished thirty days after the closing. Plaintiffs also stated that they would oppose any motion to amend the answer. Broadway disputed plaintiffs' position by letter dated April 12, 2019 (Poon Aff., Ex. K [Dkt. 42]), and on May 15, 2019 filed its opposition and cross motion including the request for leave to amend.

The next day, on May 16, 2019, Broadway filed a third-party summons and complaint against the Bank (Poon Aff., Ex. O [Dkt. 46]). That pleading seeks a declaration that the Bank's

Claims are invalid and common law indemnification and contribution for any judgment suffered by Broadway as a result of the Estoppel Certificate containing those Claims, and additionally seeks reimbursement for the $98,110.51 in real estate taxes for 2016/2017.[2]

DISCUSSION

The Motion

Plaintiffs argue that Broadway's offers to issue the CAM check and to commence a declaratory judgment action against the Bank, and its concession that it "was difficult to get things settled" with the Bank prove that the Claims were not "resolved," pursuant to the Indemnity Agreement. Broadway counters that "a claim that is not valid is a claim that is considered 'resolved'" and argues that the statute of limitations bars all of the Claims. Broadway also contends that the Claim for CAM charges was resolved by its issuance of a check to the Bank (Poon Aff., Ex. N [Dkt. 45]), on December 13, 2013–although never cashed.

The Court finds that the language of the Indemnity Agreement creates an ambiguity as to whether the Claims were "resolved" by November 22, 2017. On the one hand, that word can be interpreted to have required the existence of a formal agreement between Broadway and the Bank by that date. On the other hand, it might be interpreted to require only that there was no ongoing, *bona fide* dispute between the parties at that time. Discovery as to the intent of the parties will be required before a determination on this issue can be reached.

Under New York law, "written agreements are construed in accordance with the parties' intent and the best evidence of what parties to a written agreement intend is what they say in their writing" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]. Thus, "a written

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2The Bank filed its answer to the third-party complaint, with counterclaims, on July 18, 2019 roughly 3.5 months after the instant motion was filed.

agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). Extrinsic evidence may be used to interpret a contract only where it is ambiguous, and the determination as to ambiguity is a question of law to be answered by the court (*id.,* at 570.)

A contract is ambiguous if "[it] is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]), but is not made so "just because one of the parties attaches a different, subjective meaning to one of its terms" (*Bank of NY Mellon v WMC Mortgage, LLC*, 136 AD3d 1, 9(1st Dept 2015], *quoting Bajraktari Mortgage Corp. v American Int'l Group, Inc.*, 81 AD3d 432, 432 [1st Dept 2011]). Moreover, "[t]he existence of ambiguity is determined by examining the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed, with the wording viewed in the light of the obligation as a whole and the intention of the parties as manifested thereby" (*Georgia Malone & Co., Inc. v E & M Assocs.*, 163 AD3d 176, 185 [1st Dept 2018] [internal quotations and citations omitted]). In determining the meaning of a particular contractual term, a court may resort to its dictionary definition (*see, e.g, Chelsea Piers L.P. v Hudson River Park Trust* 106 AD3d 410, 411 [1st Dept 2013]; *Big Four LLC v Bond St. Lofts Condo.*, 94 AD3d 401, 403 [1st Dept 2012]), but may also consider a party's interpretation if it is equally reasonable (*see Almah LLC v AIG Employee Servs., Inc.*, 157 AD3d 416, 416 [1st Dept 2018]).

As defendants note, the term "resolved" is not defined by the Indemnity Agreement. Nor has the Court discovered any New York case that interprets that term. However, in a somewhat related context, the Appellate Division, First Department has noted that "[t]here is no magic to the words 'settlement' or 'compromise' in deciding whether a disputed claim has been

discharged with such finality that no action may be brought upon it . . . [c]onsequently, one does not advance the solution of any problem in this area by attaching either label, or presuming to conclude the discussion by making an initial determination that a negotiation has or has not achieved a 'settlement' or a 'compromise'" (*Goldbard v Empire State Mut. Life Ins. Co.*, 5 AD2d 230, 233 [1st Dept 1958]). By the same token, the word "resolved" does not magically resolve the parties dispute, as it could apply equally to a formal or informal accord regarding the Claims. The dictionary definition – "to deal with successfully; clear up" (*see*, *The Merriam-Webster.com Dictionary*, Merriam-Webster Inc., https://www.merriam-webster.com/dictionary/resolve) similarly does not clear up the matter.

Plaintiffs' argument that a formal resolution was intended is compelling. If, in fact, the Claims were already resolved at the time the Indemnity Agreement was executed, it would make little sense to set a later deadline for their resolution. The agreement's requirement that going forward Broadway "diligently pursue . . . negotiations with [the Bank] . . . to resolve all the Claims" is also inconsistent with Broadway's insistence that the Claims were invalid *ab initio*. Additionally, that theory is problematic insofar as the statute of limitations on the negligence claim had not expired when the Indemnity Agreement was made, but only after plaintiffs made their demand for the escrowed funds.

Nevertheless, it is at least plausible that the November 22, 2017 deadline was merely intended to establish the date at which plaintiffs could first exercise their option to demand the escrow funds, rather than to definitively fix the time by which the Claims were to be resolved. This reading is consistent with the 30-day notice period, which requirement would afford the non-demanding party the opportunity to resolve the Claims. In this connection, it is noteworthy

that the obligation to negotiate with the Bank was not imposed unilaterally upon Broadway, but required the "cooperation" of plaintiffs. This further supports the possibility that the parties intended a post-demand cure period to facilitate a mutual resolution of any outstanding issues.

Additional ambiguity arises from the Indemnity Agreement's silence on what method of resolution would suffice. It does not affirmatively require a general release, the written withdrawal of the Claims, the issuance of a clean estoppel certificate, or a settlement agreement or judgment disposing of the Claims or court order. Nor does it exclude the possibility, as urged by Broadway, that the Claims could be extinguished as a matter of law by abandonment or waiver.

Furthermore, the agreement does not specify the mechanism by which Broadway was to notify plaintiffs of the resolution of the claims or what proof must accompany the notice. The Court of Appeals holding in *Grace v Nappa*, (46 NY2d 560 [1979]) is somewhat instructive on this issue. In that case, the parties' contract required the defendant to provide a recordable mortgage estoppel certificate to establish the outstanding balance of a mortgage encumbering the subject real property. The Court of Appeals rejected the lower appellate court's finding that a "reasonable purchaser" would have accepted the canceled checks and amortization schedule as adequate evidence of the mortgage balance in lieu of the contractually-required certificate (*Grace*, 46 NY2d 560, 565-67). Here, in contrast, the Indemnity Agreement provides no mandate, or even guidance, regarding the acceptable proof of resolution.

Accordingly, the motion is denied.

The Cross Motion

CPLR 3025 provides:

> "(b) Amendments and supplemental pleadings by leave. A party may amend his or her 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. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

"As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; *see also Y.A. v Conair Corp.*, 154 AD3d 611 [1st Dept 2017] [holding that leave should be granted "absent . . . surprise resulting therefrom"]). "[P]laintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

Here, defendants seek leave to amend the answer to assert a counterclaim for conversion against plaintiffs alleging that the Bank improperly paid $98,110.51 to Plaintiff–and that this money should have been paid to Broadway as reimbursement for the 2016/2017 real estate taxes–and plaintiffs have refused to pay said sum to Broadway. The Court finds that the proposed amended answer is not patently lacking in merit. Notwithstanding plaintiffs' argument that Broadway failed to notify it of a need to correct or adjust for said tax payments within thirty days of the closing, defendants assert that they discovered the improper payment well after the closing in April of 2019 (oral argument tr at 34-35). Whether Broadway is entitled to recover said sum cannot be determined on the instant motion to amend. The Court only finds that the

proposed amendment is not patently lacking in merit.

The branches of plaintiffs' motion and defendants' cross-motion seeking attorney fees, costs and expenses are denied as premature, as the identity of the "non-prevailing party" has not yet been determined.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of plaintiffs JW East Bwy LLC and 88-15 East Bwy LLC (collectively, "plaintiffs") for summary judgment is denied; and it is further

ORDERED that the cross motion of defendants 11 E. Broadway Realty LLC and Lee M. Fong a/k/a Henry Lee M. Fong (collectively, "defendants") is granted to the extent that it is granted leave to amend its answer and is otherwise denied; and it is further

ORDERED that defendants shall e-file a signed copy of its proposed amended answer within 10 days of the NYSCEF filing date of the decision and order on this motion, and this shall be the amended answer in this action; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry on defendants within 10 days of the NYSCEF filing date of the decision and order on this motion.

This constitutes the Decision and Order of the Court.

Dated: JAN 7, 2020

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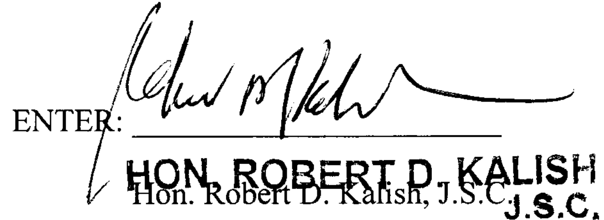

Hon. Robert D. Kalish, J.S.C.