DOLP 1133 Props. II LLC v Amazon Corporate, LLC
2020 NY Slip Op 30274(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 653789/2014
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DOLP 1133 PROPERTIES II LLC, Index No.: 653789/2014

Plaintiff, **DECISION & ORDER**

-against-

AMAZON CORPORATE, LLC,

Defendant.

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JENNIFER G. SCHECTER, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

Defendant Amazon Corporate, LLC (Amazon) moves for summary judgment against plaintiff DOLP 1133 Properties II LLC (DOLP). (Seq. 002). DOLP opposes and separately moves for partial summary judgment against Amazon. (Seq. 003). The motions are granted in part.

Background

Unless otherwise indicated, the following facts are undisputed.[1]

This case concerns Amazon's alleged breach of a letter of intent, dated July 2, 2014 (Dkt. 67 [the LOI]), pursuant to which Amazon negotiated leasing ten floors of a building owned by DOLP, located at 1133 Avenue of the Americas in Manhattan (the Building or DOLP's Building). The LOI is nonbinding – except for paragraphs 27 and 28 (*see id.* at 15).

[1] The facts are drawn from the parties' joint statement (Dkt. 64), the evidence submitted and the detailed largely uncontested affidavit of Thomas Bow (Dkt. 198), the Executive Vice President of The Durst Organization, which manages DOLP (*see Funk v Seligson, Rothman & Rothman, Esqs.*, 165 AD3d 429, 430 [1st Dept 2018] [unchallenged facts deemed admitted]).

Paragraph 27 prohibited Amazon from disclosing the LOI and the parties' negotiations to third-parties (*see id.* at 14). Paragraphs 28 required the parties to negotiate a lease in good faith and on an exclusive basis, expressly prohibiting Amazon from negotiating "the leasing of any space with any other landlord, owner or other third party with respect to its space requirements contemplated for this particular transaction in the New York City metropolitan area" (*id.*). "Negotiate" is defined to "mean (i) the delivery of a written term sheet or RFP to a third party or the delivery of a written counterproposal to a term sheet or RFP from a third party or (ii) a verbal communication to a third party by Landlord, in the case of Landlord, or a verbal communication to a third party by Tenant, in the case of Tenant" (*id.*).

Between July and early September of 2014, the parties negotiated and exchanged drafts of a proposed lease (*see, e.g.*, Dkts. 121, 122). At the same time, at Amazon's insistence, DOLP began performing renovation work that needed to be completed before Amazon would move in. Yet, just over two weeks after the LOI was executed, on July 17, 2014, unbeknownst to DOLP, Amazon began assessing two alternative Manhattan locations where it could lease space instead of at DOLP's property (Dkt. 198 at 14-15; *see* Dkts. 126, 127). By July 21, Amazon was discussing these prospective properties in detail (*see* Dkts. 128-134). On July 25, it was arranging a tour of one of the buildings (*see* Dkt. 135).

On July 28, 2014, Amazon identified a third potential location at 7 West 34th Street (the 34th Street Building) (*see* Dkt. 136). On July 29, Amazon indicated that it

wanted to "quickly ... move on a lease" (Dkt. 137), and it toured the 34th Street Building the very next day, on July 30 (*see* Dkt. 74 [Tr. at 125]). Two days later, on August 1, Amazon decided to sign a lease for the 34th Street Building (Dkt. 140). Amazon did so because it felt the 34th Street Building was "better for [Amazon's] overall needs" than DOLP's building (*see* Dkt. 74 at 43).

Amazon did not inform DOLP of its August 1 decision against signing the DOLP lease and kept pretending that it was still interested in the Building. Amazon keep stringing DOLP along as leverage in its negotiations with the owner of the 34th Street Building (*see* Dkt. 180 [Amazon threatening to enter into lease with DOLP]).

Amazon, however, was only able to keep its involvement with the 34th Street Building a secret until early September, when Bow became privy to a rumor about Amazon's interest in the 34th Street Building (*see* Dkt. 198 at 24). Bow recounts that Amazon's broker:

> affirmatively assured me that the rumors were false and that Amazon would finalize the Lease (with DOLP). Furthermore, Nielsen affirmatively told me that the negotiation for space at 7 West 34th would not affect the Lease with the (DOLP) and that the lease Amazon was negotiating for at 7 West 34th was for warehouse space (*id.*).

On September 10, 2014, DOLP was prepared to sign a lease with Amazon and wanted to schedule a call to address a few outstanding minor issues (*id.* at 25-26; *see* Dkt. 181). Knowing that DOLP was still spending money renovating the Building for Amazon, and without disclosing that <u>it had already decided</u> that it was moving to the 34th Street Building, Amazon <u>falsely</u> indicated that it was still interested but told DOLP that

the relevant Amazon employees were not available to discuss terms until September 30 (Dkt. 198 at 26; *see* Dkt. 182).

On September 29, 2014, DOLP was told that the negotiations were "on hold" (*see* Dkt. 198 at 26). The next day, on September 30, DOLP was told that the negotiations were not really "on hold" and, instead, were over because Amazon was no longer interested in leasing space in DOLP's Building (*see id.* at 26-27).

On November 14, 2014, Amazon entered into a lease for the 34th Street Building (Dkt. 81). DOLP found out and was upset that Amazon lied about its continued interest in the Building because consequently DOLP wasted so much of its money preparing for Amazon's tenancy and, had it known that Amazon was not really interested anymore, it could have begun efforts to procure another tenant (*see* Dkt. 198 at 28).[2]

DOLP commenced this action on December 11, 2014. Its complaint, filed on January 9, 2015, asserted four causes of action: (1) breach of the LOI; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud; and (4) specific performance (Dkt. 2). By order dated August 17, 2015, the court dismissed the second and fourth

[2] *See* Dkt. 198 at 29 ("all of the construction [was] done solely for Amazon and [DOLP lost the] potential to lease the Premises with the existing improvements in place before the work was done. … When (DOLP) learned of Amazon's breach, it endeavored to stop the work that remained to be done, including, but not limited to, not finishing the bathrooms, leaving the escalator in place, not doing the modernization of the hydro car and not installing the hoist on the side of the Building"), 30-31 (discussing work that could not be stopped and setting forth the work that needed to be performed, at Amazon's instance, prior to the lease execution).

causes of action and the claims for lost profits, punitive damages and attorneys' fees (*see* Dkt. 30 [the MTD Decision] at 15).[3] Neither party appealed.

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[3] The court dismissed the implied covenant claim as duplicative of the claim for breach of the LOI because the LOI expressly requires Amazon to negotiate in good faith (*see id.* at 10-11). The court, however, declined to dismiss the fraud claim as duplicative, explaining:

> (DOLP's) fraud claim is not duplicative. While Amazon's negotiations with another landlord are alleged to be violative of its exclusivity and good faith obligations under the LOI, even absent contractual good faith obligations, a contractual party cannot lie, as Amazon allegedly did, about its interest in another property to induce a landlord to continue spending money making custom renovations. While it may well be the case that Amazon's alleged fraud constitutes a violation of Section 28, the question of whether Section 28's obligations were still in place in mid-September is a disputed issue that neither party seeks resolution of on this motion. **If, at the time of the alleged fraudulent misrepresentations, Amazon was no longer bound by Section 28, it may still have committed fraud by lying to (DOLP) about its intentions with respect to the 34th Street Building**. Consequently, it is premature at this juncture to determine whether the claims are duplicative. Additionally, it is unclear what damages are recoverable for breach of the LOI - another issue beyond the scope of this motion (except to the extent set forth below) - and, hence, it is possible that Amazon may be liable for fraud damages that are not recoverable for its alleged breach of the LOI (*id.* at 12 [emphasis added]).

Now that summary judgment is granted on the breach of contract claim, which will entitle DOLP to all of its out-of-pocket losses incurred related to the breach (*see id.* at 13), the fraud claim, though apparently meritorious, is dismissed as duplicative. The measure of damages on a claim for failure to negotiate in good faith and for fraudulent inducement is the same – out-of-pocket damages. While the quantum of such damages is disputed, their duplicative scope necessitates dismissal of the fraud claim. For this reason, the court's discussion of Amazon's fraud is more truncated than it would have been had the court assessed its merits. Nevertheless, it is critical to reiterate that such damages are not limited to negotiating costs, but also some of the renovation costs. As the court explained:

> While (DOLP) cannot compel Amazon to enter into a lease or recover whatever profits (DOLP) may have realized had such a lease been entered into, at this juncture, **the court is not deciding which of (DOLP's) costs are recoverable**. While the LOI contemplated renovations, such costs were supposed to be paid for by (DOLP) and cannot be recovered merely because (DOLP) was hoping a final lease would be agreed to. These costs were a risk (DOLP) assumed in the event the parties did not agree upon a final lease agreement. **That being said, (DOLP) may have stopped spending money once it became aware that Amazon was, as is alleged, not negotiating in good faith.** The moment in time, if ever, that

After completion of fact and expert discovery and the filing of the note of issue, the parties made these motions. Amazon argues that (1) DOLP lacks any evidence that it breached the LOI; (2) the fraud claim should be dismissed due to lack of proof of falsity, scienter, and reasonable reliance; and, in the alternative, (3) DOLP's damages should be limited both categorically and temporally. DOLP, by contrast, only seeks partial summary judgment on liability, arguing there is no question of fact that (1) Amazon actually breached the LOI by negotiating the lease for the 34th Street Building between July and September 2014; and (2) defrauded it by falsely representing its continued interest in the Building in September 2014. DOLP, as noted, concedes that the amount of damages must be determined at trial.

Discussion

Summary judgment may only be granted if there are no material disputed facts (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The moving party bears the burden of making a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If a prima facie showing has been made, however, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of a material question of fact (*Alvarez,* 68

> Amazon committed a good faith breach is a question of fact to be probed in discovery. Such a finding will impact which of (DOLP's) costs, if any, are recoverable (*id.* at 14 n 4 [emphasis added]).

DOLP concedes that a trial is needed to decide the scope of its recoverable renovation costs.

NY2d at 324; *Zuckerman,* 49 NY2d at 562). The evidence must be construed in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman,* 49 NY2d at 562) and the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Amazon unquestionably breached the LOI. Its discussions, which resulted in leasing the 34th Street Building, were in blatant violation of the LOI's exclusivity provision (*see 180 Water St. Assocs., L.P. v Lehman Bros. Holdings*, 7 AD3d 316, 317 [1st Dept 2004] ["because the letter required the parties to negotiate in good faith and only with each other toward a final lease, and to do so on an exclusive basis, plaintiff's allegation that defendant was negotiating with other landlords from the beginning suffices to state a cause of action for breach of an agreement to negotiate"]).[4] Amazon's deception about the 34th Street Building was a breach of its obligation to negotiate in good faith. No reasonable finder of fact could conclude otherwise.[5]

Amazon's argument that the people who negotiated the 34th Street Building lease worked for a division not subject to the LOI and thus their actions cannot give rise to

[4] Though the confidentially provision was also breached, it did not result in additional out-of-pocket damages, making the breach academic.

[5] Amazon's argument that it did not "negotiate" with another landlord within the meaning of the LOI is frivolous. "Negotiate" is defined to include written offers and verbal communications. There is no question of fact that both occurred (*see, e.g.,* Dkts. 168, 180). Of course, it would have been impossible for Amazon to enter a lease without negotiating it (both in writing and orally) and exchanging written drafts.

liability under the agreement is rejected. It does not matter which Amazon division negotiated the lease.[6] An interpretation of the LOI allowing Amazon to evade the exclusivity requirement by having a division of its parent company negotiate with other landlords on its behalf is unreasonable. A contracting party cannot immunize itself by tasking an agent to engage in acts on its behalf that constitute a breach of the agreement (*News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 148 [1st Dept 2005] ["principals are liable for the acts of their agents performing within the scope of their apparent authority"]; *see* Dkt. 231 at 2 ["The Exclusivity Provision unambiguously did not permit a separate 'team' of Amazon employees to freely negotiate for a competing lease, on behalf of and in consultation with (Amazon), during the Exclusivity Period, to fulfill (Amazon's) same office space requirements. To adopt (Amazon's) argument would mean the Exclusivity Provision was meaningless because Amazon could just create a new 'subsidiary' or 'team of employees' to negotiate for a competing lease, in order to deprive (DOLP) of its clear intended benefit"]). There is no question of fact that the negotiations for the 34th Street Building were done for Amazon's benefit, and thus those negotiations breached the LOI (*see Pritchard Servs. (NY) Inc. v First Winthrop Props., Inc.*, 172 AD2d 394, 395 [1st Dept 1991], citing *A. W. Fiur Co. v Ataka & Co.*, 71 AD2d 370, 374 [1st Dept 1979]).[7]

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[6] The LOI makes clear that the identity of the affiliated Amazon corporate entity that would be designated the tenant would be selected in the future (*see* Dkt. 67 at 1). Amazon.com.dedc, LLC signed the lease at the 34th Street Building (*see* Dkt. 81).

[7] DOLP is not seeking to pierce Amazon's corporate veil to hold its parent company directly liable for breach of the LOI. It is merely relying on the rule that a subsidiary can be held liable

In any event, there is no question of fact that employees of Amazon itself, and not employees of a separate legal entity, were involved in the negotiations. Indeed, Amazon has not submitted an affidavit or any other evidence refuting that its own employees participated in the negotiations. On the contrary, Amazon admits that the employees involved in the negotiations worked for a division of Amazon and not a separate legal entity (*compare* Dkt. 85 at 1 [John Schoettler, the Director of Amazon's Global Real Estate & Facilities division (GREF), identifying GREF and Amazon's Global Operations as divisions],[8] *with* Dkt. 64 at 1 [listing Amazon and Amazon.com.dedc, LLC as subsidiaries]). Schoettler also admitted at his deposition that the LOI applies to GREF (*see* Dkt. 76 at 45 [Tr. at 179-80]).

There is no dispute that Schoettler was personally involved with DOLP and the 34th Street Building (Dkt. 198 at 5; *see* Dkt. 138). Even if there was a question of fact about whether the people who were involved with the 34th Street Building worked for Amazon, Schoettler's involvement itself makes any such questions immaterial. No reasonable finder of fact could conclude that the parties intended that Schoettler, who

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when its parent causes it to breach a contract where the parent "exercises control in everyday operations" such that the subsidiary is an "instrumentality" of the parent (*see A. W. Fiur Co.*, 71 AD2d at 374). This makes sense. If all of the individuals who would either perform or breach the contract to which the subsidiary is a party actually work for the parent, the subsidiary would be immunized for its breaches if the actions of its parent were not imputed to it.

[8] Amazon does not actually rebut the facts averred in Bow's moving affidavit. While Amazon submitted Schoettler's affidavit in support of its motion, in opposition to DOLP's motion, rather than submit another affidavit from Schoettler addressing any purported inaccuracies in Bow's affidavit, Amazon resubmitted an identical copy of Schoettler's moving affidavit (*see* Dkt. 200). Schoettler's affidavit, which is far shorter than Bow's, does not contradict any material assertion in Bow's affidavit.

executed the LOI on Amazon's behalf, was not bound by the exclusivity provision (*see* Dkt. 67 at 17). There is also no question of fact that those "at the most senior levels of Amazon" were aware of the simultaneous negotiations for the 34th Street Building and DOLP's Building and that Amazon, by early August of 2014, was no longer interested in DOLP's Building (*see* Dkt. 158).

Amazon breached its exclusivity and good faith obligations as early as July 17, 2014 when it began pursuing other properties. Those breaches became particularly egregious once Amazon decided, on August 1, 2014, that it was going with the 34th Street Building instead of DOLP's Building. Amazon's breaches continued until September 30, 2014, before which Amazon was purportedly negotiating with DOLP in good faith and on an exclusive basis even though it was actively negotiating a lease for the 34th Street Building. Amazon lied to DOLP about what it was doing and falsely gave DOLP the impression that it was still interested in DOLP's Building.[9] Had DOLP known the truth, it could have stopped wasting money dealing with Amazon.

DOLP concedes that proving its out-of-pocket expenses that are directly attributable to Amazon's breach raises factual questions. Amazon largely agrees. It urges, however, that damages should be limited to out-of-pocket costs incurred between September 8 and September 30, 2014. The September 8 date is based on the earliest

[9] With respect to the fraud claim, Amazon argues that its broker's statements were not actually false. But even if that were true, a party is not acting in good faith by giving its counterparty the false impression of interest when it is aware of the out-of-pocket and opportunity costs of solely pursing its tenancy. Amazon knew in August 2014 that it was done with DOLP. It could have easily advised DOLP of its decision. Instead, Amazon kept the DOLP deal nominally alive to use as leverage against the 34th Street Building. No reasonable finder of fact on this record could deny the existence of bad faith.

alleged fraudulent representation (*see* Dkt. 229 at 14). Because it is clear that the contract breach occurred more than a month earlier, and the fraud claim is being dismissed as duplicative, there is no basis to preclude all out-of-pocket expenses incurred prior to September 8, 2014. Thus, the proper date range for damages also raises factual issues and will be determined at trial.

Amazon's contention that the MTD Decision precluded recovery of damages for all renovation costs is wrong. While the court made clear that DOLP was taking a risk by spending money on renovations prior to a binding lease actually being agreed upon, the court was equally clear that renovation expenses incurred after Amazon breached might be recoverable (*see* MTD Decision at 14 n.4). For instance, a breach by Amazon on July 17 would not entitle DOLP to any renovation expenses incurred between July 2 and July 16 if, as of July 16, Amazon had not violated its exclusivity and good faith obligations. But there is no logical reason to preclude DOLP from recovering renovation costs that it would not otherwise have incurred had it known that Amazon was negotiating with another landlord. While there are disputes about the particular renovations that should be recompensed, the issue is for trial. There is no basis to categorically exclude all such expenses.

Consequently, since all out-of-pocket expenses incurred after the first breach – which predated the alleged fraud in September 2014 – are recoverable if they are attributable to Amazon's breaches, DOLP cannot possibly recover any additional out-of-pocket expense due to Amazon's lies about the status of the 34th Street Building and its

intention to continue negotiating (*see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [fraud damages are limited to out-of-pocket losses]).[10] The fraud claim is therefore dismissed as duplicative (*see MBIA Ins. Corp. v Credit Suisse Secs. (USA) LLC*, 165 AD3d 108, 114 [1st Dept 2018] ["Where all of the damages are remedied through the contract claim, the fraud claim is duplicative and must be dismissed"]).

The fraud claim was only permitted to survive, as a claim pleaded in the alternative, due to pre-discovery disputes as to whether the exclusivity period continued into September 2014 – because, if it did not, out-of-pocket expenses incurred in September would not have been recoverable on the breach of contract claim (*see* MTD Decision at 12). There is no longer any question of fact that the Exclusivity Period continued until September 30, 2014, when Amazon told DOLP that the negotiations were over. Paragraph 28 provides that the Exclusivity Period would initially last for 60 days after the date of LOI (i.e., through August 30, 2014) and "for so long as Landlord and Tenant are negotiating the Lease in good faith" (Dkt. 67 at 14). This provision cannot be reasonably construed to mean that, in September 2014, if Amazon told DOLP it was still intending to negotiate in good faith, and DOLP relied on that representation by not soliciting other tenants and kept spending money on renovations for Amazon's benefit, that Amazon's bad faith, unbeknownst to DOLP, actually ended the Exclusivity Period. That is not a reasonable interpretation of the LOI (*see Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). The good faith obligations ended when Amazon told DOLP, on

[10] Such lies, of course, constitute bad faith.

September 30, that their negotiations were over. Thus, on the breach of contract claim, DOLP may recover out-of-pocket expenses through September 30, 2014. Nothing more could be recovered on the fraud claim, which is dismissed.

Accordingly, it is

ORDERED that DOLP's motion for partial summary on liability on its first cause of action for breach of the LOI is granted, damages will be determined at trial, and its motion is otherwise denied; and it is further

ORDERED that Amazon's motion for summary judgment is granted only to the extent that the third cause of action for fraud is dismissed as duplicative, and its motion is otherwise denied; and it is further

ORDERED that the parties shall call the court on January 21, 2020, at 3:30 p.m., to discuss the scheduling of a pre-trial conference.

Dated: January 6, 2020

ENTER:

Jennifer G. Schecter, J.S.C.