

30-32 W. 31ST LLC v Heena Hotel LLC

2020 NY Slip Op 30692(U)

February 28, 2020

Supreme Court, New York County

Docket Number: 651918/2012

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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30-32 WEST 31ST LLC, and ANDREW IMPAGLIAZZO,

Plaintiffs,

INDEX NO. 651918/2012

MOTION DATE 09/20/2019

- v -

MOTION SEQ. NO. 007

HEENA HOTEL LLC, TERRA NOVA TITLE &
SETTLEMENT SERVICES, INC., AND, XYZ CORP.,
KHANDUBHAI PATEL, NAYAN PATEL, B.L. PATEL,
CHAMP PATEL, HAMENT PATEL, NCBL NY, LLC., HY
POINT PROJECT & DEVELOPMENT LLC
(COUNTERCLAIM), RENOTAL CONSTRUCITON INC
A/K/A RENOTAL CONSTRUCTION CORP
(COUNTERCLAIM),

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 467, 468, 479, 480, 481, 482, 483, 486

were read on this motion for SUMMARY JUDGMENT.

This case is about the troubled development, and eventual sale, of a hotel in midtown Manhattan. Plaintiff 30-32 West 31 Street, LLC (“30-32”) and Defendant Heena Hotel, LLC (“Heena”) entered into a joint venture to develop and sell the hotel. Counterclaim Defendants Hy Point Project & Development, LLC (“Hy Point”) and Renotal Construction Corp. (“Renotal”) (collectively, the “Counterclaim Defendants”) were hired to oversee the project and serve as the construction contractor, respectively. At issue between 30-32 and Heena is the proper distribution of proceeds from the sale of the hotel. Heena has asserted counterclaims against 30-32 and Counterclaim Defendants for, among other things, breach of contract, fraud, and negligence.

On this motion, Counterclaim Defendants seek summary judgment dismissing all counterclaims against them. For the reasons set forth below, Counterclaim Defendants' motion is granted in part and denied in part.

BACKGROUND

The undisputed facts relevant to this motion are as follows. Heena purchased the subject property from 30-32 in 2007, and they entered into a joint venture agreement to develop it. In 2008, Hy Point was hired as the "developer" to represent Heena and oversee the project, and Renotal was hired as the construction contractor. In December 2010, Heena made a \$1 million loan to the project and had 30-32, Hy Point and Renotal sign a note in its favor for that money (the "Note"). The parties also signed an amendment to project documents which provided that if the Temporary Certificate of Occupancy was not secured by a certain date, a "late fee" of \$150,000 per month "shall accrue." Ultimately, \$1.5 million in late fees were accrued. In May 2011, all parties executed an agreement approving the sale of the property for \$52.2 million.

The fallout from the sale gave rise to the instant action. 30-32 filed a Summons and Complaint on May 30, 2012, alleging, among other things, that Heena failed to properly divide the sales proceeds. *See* NYSCEF Doc. No. 1, ¶¶37-41. Then in October 2013, Heena answered the Complaint and asserted six counterclaims, including five counterclaims directed at Hy Point and Renotal¹ (*see* Counterclaims ("CC") (NYSCEF Doc. No. 96): (1) "breaches . . . of the agreements to which they were parties," allegedly causing \$20 million in damages, *id.* ¶109; (2) default under the Note, which also allegedly resulted in \$20 million in damages, *id.* ¶112; (3)

¹ The sixth counterclaim, asserted solely against 30-32, sought judgment under the JVA provision that "guaranteed to Heena that the cost of construction and items related thereto . . . would be no greater than \$38,500,000.00 with an additional reserve of \$1,500,000.00 for cost overrun." CC ¶125.

“breaches . . . of the respective agreements to which they were parties,” allegedly causing “additional[] damage[s] due to lost profits in the sum of” \$15 million, *id.* ¶115; (4) fraud in the inducement, *id.* ¶120; and (5) negligence, *id.* ¶122.

DISCUSSION

A party moving for summary judgment pursuant to CPLR 3212 must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see also Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). If a prima facie showing is made, the burden then shifts to the opposing party to produce admissible evidence “sufficient to establish the existence of material issues of fact which require a trial of the action.” *Alvarez*, 68 N.Y.2d at 324.

A. Joinder of Counterclaim Defendants

As a threshold matter, the Court declines to dismiss Heena’s counterclaims for its alleged failure to properly join Hy Point and Renotal as counterclaim defendants in this action. CPLR 3019 provides that “[a] counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable.” *Id.*

Here, Hy Point and Renotal argue that they are not proper counterclaim defendants because “counterclaims against a plaintiff are restricted to the capacity in which [the plaintiff] sues.” *Ehrlich v. Am. Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259 (1970) (dismissing counterclaims against plaintiff-as-representative where plaintiff instituted action in individual capacity). But the Counterclaim Defendants do not explain why that rule, which governs counterclaims against *a plaintiff*, bars Heena’s counterclaims against them.

In any event, the Court has discretion to disregard the labeling of the claims against Hy Point and Renotal and address, instead, the substance of those claims. *See Mirage Rest., Inc. v. Majestic Cevrolet, Inc.*, 75 A.D.2d 808 (2d Dep't 1980) (disregarding denomination of third-party claims as counterclaims and deciding claims on the merits); *Bollinger v. Borden*, 30 A.D.2d 607 (3d Dep't 1968) (same). Dismissing the counterclaims now, over six years after Heena served Hy Point and Renotal and added them as counterclaim defendants, would unduly prejudice Heena and impede the efficient resolution of this case.

B. Damages for Lost Profits

Counterclaim Defendants are entitled to summary judgment dismissing Heena's claims for "damage[s] due to lost profits," *see* CC ¶115. In the construction contract, Heena clearly waived any claims for such damages:

The Contractor and ***Owner waive claims*** against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

1. damages incurred by the owner for actual expenses, for ***losses of use, income, profit***, financing, business and reputation, and for loss of management or employee productivity or the services of such persons.

Affirmation of Bruce Robins ("Robins Aff."), Ex. G, ¶9.11 (emphasis added).

Contractual limitations on the types of damages recoverable are routinely enforced under New York law. *See, e.g., Daily News, L.P. v. Roclavell Int'l Corp.*, 256 A.D.2d 13, 13 (1st Dep't 1998) ("Plaintiff's breach of contract claim seeking consequential damages was properly dismissed since the parties' contract . . . limits the remedies available thereunder and expressly excludes as a remedy the recovery of consequential damages."); *Mom's Bagels of New York, Inc. v. Sig Greenebaum, Inc.*, 164 A.D.2d 820, 822 (1st Dept. 1990) ("We have long held that parties to a commercial contract, absent any question of unconscionability, may agree to limit . . . damages.")

(citations omitted); *see also Chaitman v. Moezinia*, 178 A.D.3d 642 (1st Dep’t Dec. 26, 2019) (“In view of this unequivocal exculpatory clause stating that no other provision in the lease shall entitle the tenant to consequential damages, the claim for lost profits is barred.”). Tellingly, Heena does not argue that the waiver provision is inapplicable or unenforceable.

Therefore, the branch of Counterclaim Defendants’ motion seeking dismissal of Heena’s theory of damages based on lost profits is GRANTED.

C. Damages for Default on the Note and Late Fees

Heena’s breach of contract claim regarding the Note and the late fees raises questions of fact and cannot be dismissed on a motion for summary judgment.

First, the parties dispute whether Counterclaim Defendants still owe Heena for the \$1 million Note and the \$1.5 million in late fees. This dispute stems from the deposition testimony of two Heena principals, Nayan Patel and Khandubhai Patel. Nayan Patel testified that “the Patel entity or entities t[ook] that million-five out of the proceeds of the sale” and also took “\$1 million for that [N]ote out of the proceeds of the sale . . . [p]lus interest.” Robins Aff., Ex. D. Khandubhai Patel, too, testified that the “late fee [was] paid out of the proceeds of the sale.” Robins Aff., Ex. E. Heena now tries to distance itself from that testimony, explaining that “[a]lthough Messrs. Patel may have thought that they paid Heena the late fees out of the sales proceeds, in the final accounting, they did not.” Heena Opp. to Mot. for S.J. at 13-14. That “final accounting” refers to Heena’s expert accounting report, which did not allocate any of the sales proceeds to payment of the \$1.5 million late fees but notes that Heena “would have [been] entitle[d]” to it. *Id.*

On these facts, Counterclaim Defendants have not made a prima facie showing that Heena's treatment of the sales proceeds extinguished their outstanding obligations under the Note or for the late fee. They have not cited any contractual provision or oral representation, for example, suggesting that the Note and late fee amounts would be paid out of the sales proceeds. The agreement states only that the late fee "shall accrue," with no provision discharging that amount through accounting for the sales proceedings,² and Heena's expert opines that Heena is still "entitle[d]" to that amount. To be sure, the Patels' testimony may have an impact on the precise amount of damages recoverable by Heena at trial. But even if the Patels' testimony meant that Heena suffered no damages from Counterclaim Defendants' breach of the Note, "[n]ominal damages are always available in breach of contract actions . . . [because they] allow vindication of" the parties' rights in contracts that arise from the parties' promise." *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 95 (1993); see also *Schleifer v. Yellen*, 158 A.D.3d 512, 513 (1st Dept. 2018) (applying *Kronos* and affirming trial court's decision not to dismiss contract claim for failure to plead damages as "[n]ominal damages are always available in breach of contract action"). The questions of liability and damages must await resolution at trial.

Second, Counterclaim Defendants have not met their burden to show that the late fee constitutes "an illegal penalty." CD Reply Br. at 10. "The burden is on the party seeking to avoid liquidated damages – here, [Counterclaim Defendants] – to show that the stated liquidated damages are, in fact, a penalty." *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 380 (2005). And as "[t]he proponent of a motion for summary judgment," Counterclaim Defendants "must make a prima facie showing of entitlement to judgment as a matter of law, tendering

² To the extent Hy Point and Renotal argue that it is unclear who owes the late fees under the MOPD, that creates another disputed issue of fact precluding summary judgment.

sufficient evidence to demonstrate the absence of any material issues of fact.” *Id.* at 384.

Importantly, “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Id.*

Here, Counterclaim Defendants’ argument relies on two things: that Heena failed to justify the late fee amount to a reasonable estimate of actual damages, and that in deposition testimony, the Patels used the word “penalty” when describing the late-fee clause. CD Reply Br. at 9. The former flips the burden of proof on its head, and the latter presumes that a lay person’s use of the word “penalty” is an admission as to a legal term of art. Neither of these arguments demonstrate the absence of any material issues of fact. Because Counterclaim Defendants “presented no proof to show that [Heena’s] prospective damages . . . were capable of precise estimation at the time the parties executed the Agreement, or that the [late] fee was grossly disproportionate to this probable loss,” summary judgment on that ground is denied. *JMD Holding Corp.*, 4 N.Y.3d at 385.

Therefore, the branch of Counterclaim Defendants’ motion seeking dismissal of Heena’s claims for breach of the Note is DENIED.

D. Fraudulent Inducement and Negligence (Fourth and Fifth Counterclaims)

Next, Heena’s counterclaims for fraud and negligence fail as a matter of law. To begin with, both claims merely restate the breach of contract claims, and do not allege violations of legal duties outside the contracts. *See, e.g., Dormitory Auth. v. Samson Constr. Co.*, 30 N.Y.3d 704, 711 (2018) (granting summary judgment dismissing negligence claim as “merely a restatement, albeit in slightly different language, of the ‘implied’ contractual obligations asserted in the cause of action for breach of contract”), citing *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 390 (1987); *Raytheon Co. v. AES Red Oak, LLC*, 37 A.D.3d 364, 365 (1st

Dep't 2007) (affirming dismissal of fraud claims on summary judgment because “the fraud claims were not collateral or extraneous to the alleged breach of contract”).

In addition, the fraudulent inducement claim cannot stand since it is premised on Counterclaim Defendants' promise about the future – namely, that they could competently complete the construction project – rather than a misrepresentation of a present fact. *Gleyzerman v. Law Offices of Arthur Gershfeld & Assocs., PLLC*, 154 A.D.3d 512, 513 (1st Dep't 2017) (dismissing fraudulent inducement claim because allegations, “at most, represent[ed] a promise about the future”); *CC Pay Operations Ltd. v Alokush*, 2019 WL 103714, at *3 (Sup. Ct. N.Y. Cty. 2019) (“Generally, an individual's opinion about the caliber of work to be performed or her or his ability to perform a task is not an actionable fraud.”), citing *Renaissance Equity Holdings v. Al-An Elevator Maint. Corp.*, 121 A.D.3d 661, 664 (2d Dep't 2014). And to the extent Heena is alleging that Counterclaim Defendants defrauded it by entering into contractual obligations that they had no real intention of meeting, that is not a proper fraudulent inducement claim. It is axiomatic that “[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support [a fraud] claim.” *New York Univ. v Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995); see also *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 614 (1994) (“a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations.”).

Therefore, the branches of the Counterclaim Defendants' motion for summary judgment seeking dismissal of Heena's fourth and fifth counterclaims are GRANTED.³

* * * *

³ Counterclaim Defendants also sought sanctions against Heena for “the frivolous nature of Heena's [claims].” Counterclaim Defendants Mot. for S.J. at 14. The Court denies that request.

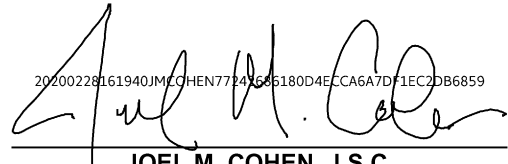
Accordingly, it is

ORDERED that Counterclaim Defendants' motion for summary judgment is Granted insofar as Heena's claims for lost profits, fraudulent inducement, and negligence are dismissed, and the motion is otherwise Denied.

This constitutes the Decision and Order of the Court.

2/28/2020

DATE


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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE