SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

----------X

MARYBETH MCKENZIE, TONY MYSAK, ZSUZSA MYSAK, CHARLOTTE PFAHL, DANIEL SCHNEIDER and MAX SCHNEIDER,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 153180/16

517-525 WEST 45 LLC and
NEW YORK CITY LOFT BOARD,

Defendants.

----------X

HON. NANCY M. BANNON, J.S.C.:

In this action by tenants of five loft buildings located at 517-525 West 45th Street in Manhattan, the complaint demands, *inter alia*, breach of contract damages and injunctive relief essentially seeking enforcement of a 2006 agreement that a tenant's association had with a prior owner. The current owner, defendant 517-525 West 45 LLC (landlord) moves for summary judgment to dismiss the complaint (MOT SEQ 006), and plaintiffs Marybeth McKenzie, Tony Mysak, Zsuzsa Mysak, Charlotte Pfahl, Daniel Schneider and Max Schneider (tenants) move separately for summary judgment on the complaint and to disqualify owner's counsel (MOT SEQ 007). Motion Sequence 006 is granted and Motion Sequence 007 is denied.

BACKGROUND

Landlord is the current owner of five semi-attached, formerly industrial buildings which have now been converted for residential occupancy (the property), and are located at 517-525 West 45th Street in New York County *See* verified complaint, ¶ 2. Tenants are the occupants of three "interim multiple dwelling" (IMD) apartments, which are located in one of the property's buildings, and which are subject to Article 7-C of the Multiple Dwelling Law (the Loft Law).

Over the course of this protracted litigation, there have been a number of decisions discussing the facts of the case, and there is no need to recite them at length in this one. It is sufficient to note that these summary judgment motions concern tenants' four remaining causes of action against owner[1] for: 1) breach of contract/specific performance; 2) a permanent injunction; 3) attorney's fees; and 4) architect's fees. *See* notice of motion (motion sequence number 006), exhibit A (complaint), ¶¶ 31-44, 49-55. Those causes of action, in turn, seek relief pursuant to the terms of a stipulation of settlement that tenants, along with other tenants of the property, executed in 2006 with landlord's predecessor-in-interest in order to resolve several harassment and diminution of services complaints that had been combined in the Housing Part of the Civil Court of the City of New York under Index No. L&T 99254/04 (the 2006 stip). *Id.*; exhibit H. The relevant fact to note in connection with the current motions is that, although the 2006 stip contained a number of provisions relating to the predecessor landlord's plans to renovate and legalize the property in compliance with the Loft Law, those plans were eventually supplanted by alternate plans which the current landlord submitted to the New York City Department of Buildings (DOB) sometime after it acquired the property in 2014. *Id.*, exhibits B, G. Tenants litigated their objections to landlord's alternate plans extensively before the Loft Board; however, on June 15, 2017, the Loft Board issued an order (the Loft Board order) which upheld an earlier administrative determination denying tenants' objections (the Loft Board determination). *Id.*, exhibits C, B. Tenants filed an Article 78 petition to challenge the Loft Board order, however that petition was dismissed by this court (Hagler, J.) after a hearing held on January 3, 2019 (Judge Hagler's order). *Id.*, exhibit D. In his order, Judge Hagler took note of the pendency of this action, which tenants had commenced on April 13, 2016, but specifically declined to address any of the claims

[1]. Tenants discontinued this action against the Loft Board, which was named in an additional cause of action for declaratory relief, via a stipulation dated January 23, 2018.

raised in it. *Id.* For its part, this court issued an order on May 28, 2019 that denied tenants' earlier motion for leave to file an amended complaint (MOT SEQ 004), and which noted that tenants' proposed amendments appeared to be "palpably insufficient or patently devoid of merit," and that "the claims in the original complaint are now largely moot." *Id.*, exhibit W. Nevertheless, despite having discontinued this action as against the Loft Board, tenants seek to continue to prosecute their claims against landlord.

Landlord filed its motion for summary judgment (MOT SEQ) on September 24, 2019. Tenants thereafter filed their motion for summary judgment (MOT SEQ 007) on September 30, 2019. The parties submitted opposition and reply papers and the motions were submitted for decision on January 29, 2020.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g.*, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, the parties' respective motions make competing requests for summary judgment with regard to the four remaining causes of action in tenants' complaint. The court will address each of them in turn.

Tenants' first cause of action alleges that landlord breached the 2006 stip, and seeks specific performance of the portion of the 2006 stip that required landlord to "perform minimum building legalization as set forth in the [original] plans . . ., including without limitation the resolution of any disputes pursuant to paragraph 34 of the [2006 stip]." *See* verified complaint ¶¶ 31-36. Landlord's motion argues that this claim is barred by the doctrine of collateral estoppel and/or is moot. *See* defendant's mem of law (motion sequence number 006), at 6-18. Tenants respond that the doctrine of collateral estoppel does not apply because there is no "identity of issues," and assert that the cause of action is not moot because landlord's alleged breach of the 2006 stip has never been litigated. *See* plaintiff's mem of law in opposition (MOT SEQ 006) at 12-24. Landlord's reply papers assert that is has legalized the building pursuant to its alternate, Loft Board-approved renovation plans, and notes that the DOB has issued the property a temporary certificate of occupancy (C of O). *See* Mandel reply affirmation, ¶¶ 1-13. Tenants' own motion alleges that they have established all of the elements of a breach of contract claim; particularly that landlord breached the 2006 stip via its "unilateral amendment of the [property's] legalization plans." *See* tenants' mem of law (MOT SEQ 007) at 4-12. Landlord responds that tenants have failed to establish either the elements of breach or damages in connection with their breach of contract claim. *See* defendant's mem of law (MOT SEQ 007) at 6-12. Tenants' reply papers restate their original arguments, and further contend that they themselves did *not* breach the 2006 stip, and that they are not required to establish their damages for landlord's breach at this juncture. *See* tenants' reply mem of law (MOT SEQ 007) at 8-18. The court finds that, although the parties' arguments generally contain correct statements of the law, they nevertheless miss the mark by failing to apply that law accurately to the facts of this case.

The dispositive fact in this action, which all of tenants' arguments seem to willfully ignore, is that Section III (E), the portion of the 2006 stip that sets forth the renovation plans that the landlord's predecessor-in-interest agreed to use to legalize the property, is no longer enforceable. The January 6, 2017 Loft Board determination approved, with modifications, landlord's recently amended, alternate renovation and legalization plans. *See* notice of motion (MOT SEQ 006), exhibit B. With respect to tenants' reliance on the plans in the 2006 stip, the Loft Board determination stated that "a prior agreement with a prior owner regarding a different legalization plan is irrelevant." *Id.* The June 15, 2017 Loft Board order upheld the Loft Board determination; finding in pertinent part, that:

> ". . . Tenants should have demonstrated how the Alternate Plan Determination [in the Loft Board determination] is not supported by the substantial evidence in the record or how the Executive Director incorrectly applied the law. The Loft Board finds that Tenants did neither. Rather, Tenants restate the same exact arguments they made in their underlying answer to the Alternate Plan Application without adding any further analysis or argument. Restating the same exact arguments presented in the underlying proceeding does not constitute a valid basis for granting an appeal. Further, the Loft Board finds that the facts found are supported by substantial evidence in the record, and that the law was correctly applied."

Id.; exhibit C.

Finally, Judge Hagler's January 3, 2019 order denied tenants' article 78 petition to overturn the Loft Board order; finding, in pertinent part, that:

> "Here, the petitioners argue that the Loft Board failed to comply with the 2006 stipulation. Counsel for petitioner argued, very cogently, that the Loft Board has very little discretion once the parties agree on legalization.
>
> "Here, the facts are very different than what occurred in 2006. All parties agree that the 2006 plans needed to be modified in some substantive manner. For instance, there was a 2008 harassment finding which required a cure; there needed to be a modification of (sic] that. There were modifications to the layout in the plans with regard to Building C, on the fourth floor; both parties modified that. And both parties modified the ADA-compliance issues and the necessity for modifications with regard to the new requirements for an elevator.

> "It's quite clear that the DOB - strike that - that the Loft Board did not have to blindly follow the stipulation which it was not a party to. Its mandate and its very existence is to enforce the Multiple Dwelling Law and to legalize IMD's and tenants under those laws. It need not comply with the 2006 plan that could not be enforced in the very same manner in which it was agreed to in 2006. As the parties here even concede, that was the case. Given that there was a necessity to change the 2006 plan, it was within the discretion of the Loft Board to negotiate and to have the at-least-five Narrative Statements that occurred and come up with a solution to legalization. The thrust of the argument that the Loft Board disregarded the 2006 plan is beside the point, as it was required that there be modifications; and since such modifications occurred, the Loft Board, within its discretion, within its mandate, properly permitted the new owner to file a plan that was not strictly in conformity with the 2006 plan."

Id.; exhibit D at 68-70.

All of these administrative and judicial rulings found that the renovation plans in the 2006 stip were replaced and superseded by landlord's alternate renovation plans. The concomitant result of that finding is that the portion of the 2006 stip that sets forth the original renovation plans is no longer valid or enforceable.

As previously mentioned, landlord argues that the above administrative and judicial determinations have preclusive effect that can be enforced via the doctrine of collateral estoppel. *See* defendant's mem of law (MOT SEQ 006), at 6-12. Tenants respond that the doctrine is inapplicable where there is no "identity of issues" between the matters that were decided in the previous and current litigation. *See* plaintiff's mem of law in opposition (MOT SEQ 006) at 12-16. The Appellate Division, First Department, has noted that "[a] necessary prerequisite to issue preclusion is that the identical issue has already been fully litigated in the prior action and must be dispositive of the present action; the party seeking the benefit of collateral estoppel bears the burden of demonstrating such an identity of issues." *Jeffreys v Griffin,* 301 AD2d 232, 238 (1st Dept 2002) (internal citations omitted). Here, tenants are technically correct to argue that there is no exact identity of issues, since none of the prior determinations specifically ruled on the

viability of tenants' contract-based claims under the 2006 stip.[2] Therefore, the court agrees that landlord's collateral estoppel argument is deficient. That does not end the inquiry, however.

Tenants also acknowledge that the proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See* tenants' mem of law (MOT SEQ 007) at 4-12; *see e.g.*, *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). However, tenants incorrectly assert that "a valid, enforceable contract exists between the parties; i.e., the 2006 Agreement." *See* tenants' mem of law (MOT SEQ 007), at 5. New York law requires that "the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it." *Eden Temporary Servs., Inc. v House of Excellence Inc.*, 270 AD2d 66, 67 (1st Dept 2000); *quoting Paz v Singer Co.*, 151 AD2d 234, 235 (1st Dept 1989). However, as discussed above, the corollary effect of the Loft Board determination, the Loft Board order and Judge Hagler's order was to render the "legalization" portion of the 2006 stip (Section III [E]) irrelevant and unenforceable. As a result, tenants are precluded from demonstrating the "validity" of the 2006 stip, as a matter of law. Thus, tenants cannot meet their burden of establishing all of the elements of their breach of contract claim, and it too must fail, as a matter of law. Therefore, the court finds that landlord's motion for summary judgment should be granted, and that tenants' motion for summary judgment should be denied, with respect to tenants' cause of action for breach of contract/specific performance.

---

[2] In fact, Judge Hagler took great care in his January 3, 2019 decision to state that "[t]his is without prejudice to any claims that remain before Judge Bannon," and that "this Court has not issued any orders that would interfere or would contradict or would, in any way, shape or form, take away her discretion with regard to the stipulation that occurred in 2006 and specific performance that is being requested by the petitioners herein." *See* notice of motion (MOT SEQ 006), exhibit D at 70.

Tenants' second cause of action seeks a permanent injunction to prevent landlord "from performing work to legalize the Building, whether or not with a permit and/or Loft Board certification, except in compliance with the 2006 [stip]." *See* verified complaint ¶¶ 37-44. Landlord argues that tenants' claim for injunctive relief must fail because they "cannot show that they will prevail on the merits." *See* defendant's mem of law (MOT SEQ 006), at 16-18. Tenants respond that they have demonstrated all of the elements of their claim. *See* tenants' mem of law in opposition (MOT SEQ 006) at 22-24. Tenants' own motion does not raise any additional arguments about their second cause of action. For its part, the court notes that "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing CPLR 6301. Here, given that the "legalization" portion of the 2006 stip (Section III [E]) is unenforceable, it is clear that tenants *cannot* prevail on the merits of their claim. Thus, tenants cannot meet their burden of establishing all of the elements of their request for injunctive relief. Therefore, the court finds that landlord's motion for summary judgment should be granted, and that tenants' motion for summary judgment should be denied, with respect to tenants' cause of action for a permanent injunction.

Tenants' fourth cause of action seeks an award of attorney's fees pursuant to the 2006 stip, and their fifth cause of action seeks an award of architect's fees pursuant to the 2006 stip. *See* verified complaint ¶¶ 49-55. Landlord argues, first that "there is no lease providing for legal fees or architectural fees," and also that, should it prevail on its motion for summary judgment, then "plaintiffs will not be the prevailing party in this action and their claim for attorneys' fees will be moot." *See* defendant's mem of law (MOT SEQ 006), at 18-19. Tenants agree that their

claims for attorney's and architect's fees depend on a finding "that defendant is in breach of the 2006 Stipulation," but assert that the court should make such a finding. *See* plaintiff's mem of law in opposition (MOT SEQ 006) at 22. Tenants repeat this same argument in their own motion, but landlord makes no further response in its opposition thereto. *See* tenants' mem of law (MOT SEQ 007) at 12. This court is unable to locate either an "attorney's fees" or an "architect's fees" provision in the text of the 2006 stip. *See* notice of motion (MOT SEQ 006), exhibit H. Thus, there does not appear to be a contractual basis for either of tenants' fee claims. Even if there were, however, New York law holds that, "[u]nder the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491(1989); *see also Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 (1st Dept 2007). Here, because this decision dismisses tenants' breach of contract claim, landlord is correct to assert that tenants are not the "prevailing party" in this action, and therefore are not entitled to an award of fees. Therefore, the court finds that tenants cannot meet their burden of establishing their entitlement to attorney's fees or architect's fees, with the result that landlord has met its burden of proof that it is entitled to summary judgment dismissing those claims. Accordingly, the court finds that landlord's motion for summary judgment should be granted, and that tenants' motion for summary judgment should be denied, with respect to tenants' fourth and fifth causes of action.

The balance of tenants' motion seeks an order to disqualify landlord's counsel from representing it in this action because one of their attorneys, Michael Bobick, Esq. (Bobick), was previously employed by the Loft Board, and represented it in plaintiffs' previous Article 78 proceeding before Judge Hagler. *See* notice of motion (MOT SEQ 007), at 13-22. Landlord

responds that tenants' arguments misrepresented the nature and extent of Bobick's contributions in the Article 78 proceeding and this action, and conclude that tenants have not demonstrated a basis for his, or his firm's, disqualification. *See* landlord's mem of law in opposition (MOT SEQ 007) at 26-31. Tenants' reply papers repeat their original allegations. *See* Pfahl reply affirmation (MOT SEQ 007), ¶¶ 65-74. The court takes seriously all allegations of attorney misconduct. However, there is no need to assess whether it would be proper to permit Bobick and/or his firm to continue to represent landlord in this action, since the court has ruled that the action should be dismissed. *See e.g.*, *Tally v 885 Real Estate Assoc.*, 11 AD3d 242 (1st Dept 2004) (grant of dismissal motion justifies denial of disqualification motion). Thus, the second portion of tenants' motion is denied as moot. In any event, the court cautions counsel to comply with Rule of Professional Conduct 1.11, which applies to situations in which government-employed attorneys enter private practice and are assigned to matters that they worked on in their former official capacity.

CONCLUSION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant 517-525 West 45 LLC (MOT SEQ 006) is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs Marybeth McKenzie, Tony Mysak, Zsuzsa Mysak, Charlotte Pfahl, Daniel Schneider and Max Schneider (MOT SEQ 007) is denied, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: July 21, 2020

ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON