

Walsam 316, LLC v 316 Bowery Realty Corp.

2020 NY Slip Op 34106(U)

December 11, 2020

Supreme Court, New York County

Docket Number: 153318/2017

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

INDEX NO. 153318/2017
MOTION DATE 03/04/2020
MOTION SEQ. NO. 008 009 010 011

WALSAM 316, LLC, WALSAM 316 BOWERY LLC,
WALSAM BLEECKER LLC, LAWBER BOWERY LLC, 316
BOWERY NEXT GENERATION LLC,

Plaintiffs,

- v -

316 BOWERY REALTY CORP., LEONARD TAUB, EVA
TAUB, 4-6 BLEECKER STREET LLC, DOUGLAS
BALLINGER, GRJ LLC, GREGORY JONES

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 444, 446, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 581, 582, 594, 597, 604, 610

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 009) 440, 441, 442, 443, 445, 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, 475, 476, 477, 478, 479, 480, 481, 482, 583, 584, 589, 590, 591, 592, 593, 598, 599, 600, 601, 602, 603, 605, 611, 612, 645, 646, 647, 649

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 010) 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 574, 575, 576, 577, 578, 579, 580, 585, 586, 595, 606, 613, 638, 639, 640, 641, 642, 643, 644

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 011) 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 587, 588, 596, 607, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 648

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The focus of this action is a building located at 4-6 Bleecker Street in the city, state, and county of New York (the Bleecker building). The backdrop of this suit begins with the former owners of the Bleecker building – defendant 316 Bowery

Realty Corp. (316 Bowery) whose principals, Leonard Taub and Eva Taub – entered into a Purchase and Sale Agreement on August 10, 2012 (the 2012 PSA) with defendant 4-6 Bleecker Street LLC (4-6 Bleecker), whose principal was defendant Douglas Ballinger before he sold his interest. Under the 2012 PSA, 316 Bowery agreed to convert the Bleecker building into two condominium portions (NYSCEF # 419 – 2012 PSA).

Pending the completion of the condo conversion, 316 Bowery agreed to net lease the residential portion to 4-6 Bleecker. On April 16, 2013, 316 Bowery and 4-6 Bleecker executed the 1st Amendment of the 2012 PSA; the 1st Amendment survives the 2012 PSA (NYSCEF # 517). Thus, 4-6 Bleecker was granted a leasehold that was equivalent to a fee simple ownership of the residential portion of the building, with the right to set and receive rents from the existing tenants (NYSCEF # 515 – Apr 16, 2013 PSA).

On September 18, 2013, the residential tenants of the Bleecker building brought a rent overcharge proceeding against 4-6 Bleecker and 316 Bowery (*Arnold v 4-6 Bleecker Street LLC*, Index No 158541/2013) in Supreme Court, New York County. While the overcharge proceeding was pending, 316 Bowery entered into an agreement to sell the Bleecker building to plaintiff Walsam 316 LLC, wherein Walsam 316 assumed the rights and obligations of 316 Bowery under the Master Lease. Walsam 316, together with the remaining plaintiffs, took title to the building on June 30, 2014. On October 27, 2015, a 2nd Amendment to the 2012 PSA and Master Lease extended the deadline for the condo conversion to April 16, 2017 (NYSCEF # 520). In 2016, Ballinger sold his interest in 4-6 Bleecker to defendant GRJ LLC, whose principal is defendant Gregory Jones.

On October 14, 2015, another justice of this court, Hon. Joan Madden, rendered a Decision and Order in the rent overcharge proceeding, *Arnold v 4-6 Bleecker Street LLC*, declaring that the residential rental apartments are subject to the protections of the Rent Stabilization Law (NYSCEF # 521). Justice Madden granted 4-6 Bleecker's motion to add the Walsam 316 affiliated entities, Lawber Bowery LLC, and 316 Bowery Next Generation LLC (collectively, the Walsam parties), as defendants in the *Arnold v 4-6 Bleecker Street LLC* on October 19, 2015 (NYSCEF # 522). The newly added defendants and 316 Bowery unsuccessfully moved to reargue and renew Justice Madden's October 14, 2015 Decision and Order (NYSCEF # 525). The First Department affirmed Justice Madden's orders (*Arnold v 4-6 Bleecker Street LLC*, 165 AD3d 493 [1st Dept 2018]).

In the instant case, plaintiffs, the Walsam parties, who are the current owners of the building, brought suit against the former owners – 316 Bowery, Leonard Taub, and Eva Taub; the former master landlord – 4-6 Bleecker and Douglas Ballinger; and the current master landlord – GRJ LLC and Gregory P. Jones, alleging causes of action against the former owner for (1) fraudulent

inducement; (2) breach of contract; (3) contractual and common law indemnification; (4) contribution; and against the landlord for (5) contractual and common law indemnification; (6) contribution; (7) breach of the Master Lease; (8) breach of implied covenant of good faith and fair dealing; (9) a declaratory judgment that the landlord has no right to terminate the Master Lease; (10) a declaratory judgment that the current landlord has no right to terminate the Master Lease; (11) injunctive relief; and (12) attorney's fees.

4-6 Bleecker asserts five counterclaims against the Walsam parties: (1) contractual indemnity under the 2012 PSA; (2) breach of contract for misrepresentations made by defendant 316 Bowery in the 2012 PSA; (3) rescission of the 2012 PSA and the Master Lease for alleged misrepresentations; (4) breach of contract for failure to complete the condominium conversion as required by the 2012 PSA; and (5) attorney's fees incurred by 4-6 Bleecker in this action and the overcharge proceeding.

Additionally, 4-6 Bleecker asserts cross-claims against 316 Bowery for: (1) rescission of the 2012 PSA and Master Lease on the basis of 316 Bowery's alleged fraudulent misrepresentations; (2) breach of the 2012 PSA and Master Lease by 316 Bowery; (3) indemnification for the overcharge proceedings; and (4) attorney's fees.

For its part, 316 Bowery asserts the following counterclaims against the Walsam parties: (1) attorney's fees; (2) breach of contract for failure to perform the condominium conversion; (3) fraudulent misrepresentation regarding Walsam's ability to timely complete the condominium conversion; and (4) a declaratory judgment that pursuant to Section 14.1 of the 2014 PSA, 316 Bowery cannot be liable or responsible for any judgments, costs, and/or expenses in excess of the mutually agreed upon limitations set forth in Section 14.1 of the 2014 PSA.

The several Motion Sequences (MS) 8 through 11 are addressed in this Decision and Order. In MS8, the Walsam parties move pursuant to CPLR 3212 for: (1) partial summary judgment on their fifth cause of action for contractual and common law indemnity and sixth cause of action for contribution against 4-6 Bleecker; and (2) dismissal of 4-6 Bleecker, GRJ, and Gregory Jones's counterclaims asserted against the Walsam parties.

In MS9, 4-6 Bleecker moves for partial summary judgment on its cross-claim for breach of contract against 316 Bowery and on its first counterclaim for breach of contract against the Walsam parties.¹

¹ 4-6 Bleecker originally asserted cross-claims against the Walsam parties and 316 Bowery in the *Arnold* matter. However, this court determined in its September 15, 2019 Decision and Order in *Arnold* that 4-6 Bleecker's breach of contract cross-claims were "better suited for adjudication" in the instant matter (NYSCEF # 454 at 4). The parties submitted a so-ordered stipulation dated October 23, 2019 that severed 4-6 Bleecker's cross-claims in the *Arnold* action and asserted those claims in

Additionally in MS9, co-defendant 316 Bowery cross-moves for: (1) summary judgment on its fourth cross-claim against 4-6 Bleecker which seeks a declaratory judgment that the indemnification provisions in the April 16, 2013 Master Lease and Assignment and Assumption of Lease are valid and enforceable; and (2) dismissal of 4-6 Bleecker's cross-claims against 316 Bowery.

In MS10, 316 Bowery moves for partial summary judgment on its fourth counterclaim against the Walsam parties which seeks a declaratory judgment that the indemnification limits in Section 14.1 of the April 9, 2014 Purchase and Sale Agreement are valid and enforceable.

In MS11, the Walsam parties move for summary judgment on: (1) their claims for indemnification, contribution, and attorneys' fees against 316 Bowery; and (2) dismissal of 316 Bowery's counterclaims against the Walsam parties.

FACTS

The facts in this matter are largely undisputed and prior Decisions and Orders in this and the *Arnold* action succinctly capture the relevant facts. At issue in these motions is the nature of the indemnification clauses contained in the various PSAs and the Master Lease and the assignment of ownership and liability from 316 Bowery to the Walsam parties.

The 2012 PSA and Master Lease

In 2012, 316 Bowery was the fee owner and landlord of the property located at 4-6 Bleecker Street in Manhattan. Under the 2012 PSA, 316 Bowery – the predecessor-in-interest to the Walsam parties – contractually agreed to (1) convert the Building into a two-unit condominium regime with one unit for commercial purposes; and (2) convey to 4-6 Bleecker the residential condominium unit. The 2012 PSA contained a “Rider Annexed to and Forming a Part of Contract of Sale Dated August 10, 2012 Between 316 Bowery Realty Corp., as Seller, and 4-6 Bleecker Street, LLC, as Purchaser, Residential Unit, 4-6 Bleecker Street New York, New York” (the “Rider”), which included representations by 316 Bowery that: (1) all apartments are properly registered with Division of Housing and Community Renewal (“DHCR”), (2) 316 Bowery has complied with all applicable DHCR regulations, and (3) the rents for the tenants of the Building do not exceed those permitted under present law (NYSCEF # 478, Exh. A at 33).

the instant matter (NYSCEF # 458). 4-6 Bleecker's motion for partial summary judgment seeks adjudication of those claims at this time.

The 2012 PSA Rider also includes the following language:

If there are any complaints, challenges or proceedings pending for the reduction of any of the rentals or if any are filed prior to the closing of title the Seller [316 Bowery] will comply with and discharge same prior to closing at the Seller's own cost and expense; and if said complaints, challenges or proceedings are not discharged by the Seller, the Seller shall give to the Purchaser a credit for the cost of such discharge of complaints or proceedings at the closing of title. Seller shall remain responsible for any rent rollbacks, overcharges or refunds for the period prior to the closing of title.

(NYSCEF # 478 at 33). These representations continue to run. To this effect, paragraph 5.2 of the 2012 PSA provides, in pertinent part, as follows: “All representations and warranties of the Seller contained in this Agreement are materially true as of the date hereof and shall also be materially true at the time of Closing as though made at and with reference to such time” (*id.*).

As detailed in the Closing Statement for the Master Lease (and in the recitals to the Master Lease): “Since [316 Bowery] was unable to timely create the said condominium regime and convey the [Residential Unit] to [4-6 Bleecker], the parties agree[d] to restructure the transaction as a net lease,” having an initial term of 99 years ending on April 15, 2112 and a renewal option to 4-6 Bleecker for an additional 99-year period ending on April 15, 2211 (NYSCEF # 497 – Master Lease)

Under the terms of the Master Lease, 4-6 Bleecker paid to 316 Bowery the full \$4.1 million purchase price owed under the 2012 PSA, and 316 Bowery, as landlord, confirmed that it remained solely responsible for completing the condominium within one year from the date of the Master Lease, with a possible 90-day extension. Once the condominium conversion is completed, the Master Lease compels 316 Bowery to convey the Residential Unit to 4-6 Bleecker for \$1.00 and upon which the Master Lease will be terminated. While the 2012 PSA survived the Master Lease and was not merged therein, the Master Lease’s statement of consideration expressly provides that the consideration for the Master Lease included the mutual covenants contained in the 2012 PSA.

The Master Lease, like the 2012 PSA, provides that any subsequent purchaser of the Building assumes any and all covenants and obligations of 316 Bowery: “[I]n the event of any sale of said Demised Premises, the seller shall be and hereby is entirely freed and relieved of all covenants and obligations of Landlord hereunder thereafter accruing, and it shall be deemed and construed, without further agreement between the parties or between the parties and the purchaser of the Demised Premises, that such purchaser has assumed and agreed to carry out any and all covenants and obligations of Landlord hereunder” (*id.*).

As for indemnification provisions in the Master Lease, paragraph 21.1 of the Master Lease reads in pertinent part as follows: “Tenant shall not subject Landlord to any liability by reason of any illegal business or conduct upon the Demised Premises or subject Landlord to any criminal liability or fine by reason of any violation of law or of any legal requirement of public authority or of this lease, but shall exercise such control over the Demised Premises as to fully protect Landlord against any such liability” (NYSCEF # 476, ¶ 21.1). Paragraph 21.2 further states “[4-6 Bleecker] shall indemnify and hold harmless [316 Bowery] from and against any and all liability, fines, suits, claims, demands and actions, and costs and expenses of any kind or nature of anyone whomsoever” (*id.*, ¶ 21.2).

Additionally, paragraph 2 of the 4-6 Bleecker Assignment of Master Lease states “[4-6 Bleecker] assume[d] and shall be liable for any and all liabilities, claims, obligations, losses and expenses, including reasonable attorneys’ fees arising in connection with the [Master] Lease which are actually incurred, and which arise by virtue of [the] acts or omissions occurring thereunder, on or after [April 16, 2013]” (NYSCEF # 477 – Assignment of Master Lease). Paragraph 3 of the 4-6 Bleecker Assignment of Master Lease also requires 4-6 Bleecker to “indemnify and hold [316 Bowery] harmless from any and all liabilities, claims, obligations, loss and expenses, including reasonable attorney’s fees, arising in connection with the Lease” (*id.*, ¶ 3).

The 2014 PSA

As discussed above, the tenants of the 4-6 Bleecker building brought a rent overcharge action against the parties to this action. During the pendency of the rent overcharge action, the Walsam parties purchased the Bleecker building.

Critically for the instant action, on April 9, 2014, 316 Bowery and the Walsam parties entered into the 2014 PSA. Pursuant to the 2014 PSA, the Walsam parties purchased the 4-6 Bleecker property which is defined to include the Building together with “all of the estate, right, title and interest of” 316 Bowery in the 2012 PSA and the Master Lease (NYSCEF # 479 at 5). Under the 2014 PSA, the Walsam parties acknowledged that they acquired the property “as is” (*id.* at 5.4.3) and agreed to an express carve-out for the Overcharge Action from 316 Bowery’s representations and warranties (*id.* at 5.1.3.1).

The 2014 PSA includes a specific indemnification carve-out for the overcharge litigation which reads, in pertinent part as follows:

Seller agrees, provided that Purchaser continues to use R&E as its counsel, to continue paying R&E's legal fees in connection with the Overcharge Proceeding subsequent to the Closing in an amount not to exceed \$100,000.00.... Seller hereby indemnifies and agrees to save, defend and hold Purchaser

harmless from and against any loss, cost, damage, claim, liability or expense, including reasonable attorneys' fees and litigation costs, suffered or incurred as a result of the Overcharge Proceeding in an amount not to exceed \$250,000.00; it being understood that reasonable attorneys' fees shall mean those fees incurred by Purchaser in enforcing this indemnity.

(*id.* at § 14.1).

However, the 2014 PSA included a seller indemnity clause that reads as follows:

Seller [316 Bowery] shall defend, indemnify, and hold harmless Purchaser from all loss, expense (including reasonable counsel fees), damage, and liability resulting from (a) claims of mechanics and materialmen based on work performed on or at the Property by or on behalf of Seller prior to the Closing, (b) claims of whatever nature (including, without limitation, for bodily injury, wrongful death, or property damage) against Purchaser or the Property based on causes of action which arose or accrued prior to the Closing and which involved the actions or omissions of Seller or Seller's agents, employees, contractors and/or representatives, and (c) claims by Tenants, employees, contractors under service contracts, or utility companies (collectively, "Claimants"), with respect to matters that occurred or obligations which accrued prior to the Closing, but only to the extent that the Claimants bring such claims in accordance with applicable laws.

(*id.* at 10.13).

Under the 2014 PSA, the Walsam parties expressly "assumed the rights and obligations of 316 Bowery under the Master Lease and the 2012 PSA" and are 316 Bowery's "successor in interest" (Walsam Complaint ¶¶ 35, 127, 159). Indeed, this court and the First Department have found that the Walsam parties are the "successors-in-interest" to the property. The "Assignment and Assumption of Lease and Security Deposit" assigned all rights, titles, and interest in the Master Lease from 316 Bowery to the Walsam parties (NYSCEF # 500).

Relationship Between 2012 PSA and 2014 PSA

The Walsam parties acquired the building "as is", including assuming the obligations of the 2012 PSA and the Master Lease with 4-6 Bleecker.

The 2012 PSA states: “This Agreement shall be binding in all respects on and shall inure to the benefit of the Seller and Purchaser and their respective successors and permitted assigns” (NYSCEF # 478, 21.3). And the Master Lease provides: “[I]n the event of any sale of said Demised Premises, the seller shall be and hereby is entirely freed and relieved of all covenants and obligations of Landlord hereunder thereafter accruing, and it shall be deemed and construed, without further agreement between the parties or between the parties and the purchaser of the Demised Premises, that such purchaser has assumed and agreed to carry out any and all covenants and obligations of Landlord hereunder” (Master Lease ¶ 39).

Rent Overcharge Proceeding

As discussed above, in the *Arnold* action, the court made a finding of liability in favor of the tenants. The court held that (1) 316 Bowery improperly deregulated the Overcharge Plaintiffs’ apartments, and (2) the rents charged to the Overcharge Plaintiffs were illegal (October 2015 Decision and Order at 10-11). Additionally, in a May 31, 2017 Decision and Order, the court further granted partial summary judgment to the Overcharge Plaintiffs finding that the Overcharge Plaintiffs are entitled to treble damages and attorneys’ fees.

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties 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 Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). “A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate” (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

4-6 Bleecker’s Breach of Contract Claims against the Walsam Parties

To prevail on a claim for breach of contract, a plaintiff must show the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

4-6 Bleecker's motion for summary judgment on its claims for breach of contract is granted. The Express Warranties contained in the 2012 PSA are indisputably false as a matter of law. As the Walsam parties assumed the contractual obligations of 316 Bowery, they are liable for the breach.

The 2012 PSA Rider included express warranties from 316 Bowery to 4-6 Bleecker that (1) all apartments are properly registered with DHCR; (2) 316 Bowery has complied with all applicable DHCR regulations; and (3) the rents for the tenants of the Building do not exceed those permitted under present law (NYSCEF # 478, Exh. A at 33). As the October 15 Order held, 316 Bowery improperly deregulated the apartments and the rents charged were illegal (October 15, 2015 Order at 10-18). As such, the representations were false, and the 2012 PSA Rider breached.

The Walsam parties are the successor-in-interest to 316 Bowery, and since "[a]n assignee 'stands in the shoes' of an assignor," it assumes 316 Bowery's liability for the breach of the contract (*Am. States Ins. Co. v Huff*, 119 AD3d 478, 479 [1st Dept 2014]). Indeed, the Master Lease specifically states that "it shall be deemed and construed, without further agreement between the parties or between the parties and the purchaser of the Demised Premises, that such purchaser has assumed and agreed to carry out any and all covenants and obligations of Landlord hereunder" (NYSCEF # 497, ¶ 39). As such, the Walsam parties are liable for the breach of contract, and 4-6 Bleecker's motion for summary judgment on its claim is granted.

Contractual Indemnification Standard

Under New York law, "[a] party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Further, "it is well settled that 'courts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities' [citation omitted]. 'Contract terms providing for a sole remedy are sufficiently clear to establish that no other remedy was contemplated by the parties at the time the contract was formed, for purposes of that portion of the transaction . . . especially when entered into at arm's length by sophisticated contracting parties'" (*Ambac Assurance Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 581-82 [2018]).

Additionally, "[i]t is fundamental that, 'when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms', and that courts should read a contract 'as a harmonious and integrated whole' to determine and give effect to its purpose and intent. Courts may

not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements [citations omitted]. In that regard, a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision 'meaningless or without force or effect' (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017] [internal citations omitted]).

The Walsam Parties' Contractual Indemnification Claim against 4-6 Bleecker

The Walsam parties' motion for indemnification against 4-6 Bleecker is granted. The Walsam parties purchased the 4-6 Bleecker building "as is" and assumed the contractual obligations of its predecessor-in-interest 316 Bowery. The Master Lease specifically states that "[t]enant shall not subject Landlord to any liability by reason of any illegal business or conduct upon the Demised Premises or subject Landlord to any criminal liability or fine by reason of any violation of law or of any legal requirement of public authority or of this lease, but shall exercise such control over the Demised Premises as to fully protect Landlord against any such liability" (NYSCEF # 476, ¶ 21.1). By its own admission, 4-6 Bleecker illegally collected rent even after the commencement of the rent overcharge proceeding.

Thus, even though 4-6 Bleecker relied on 316 Bowery's representations that the rents were legal, it failed to correct the liability; and the October 2015 Order found that the rents were illegal. While the October 2015 Order did not speak to 4-6 Bleecker's direct involvement in the illegal deregulation scheme, the clear terms of the Master Lease indemnification provisions indicate that 4-6 Bleecker is responsible for violations of any legal requirements and must fully protect the Landlord, now the Walsam parties. As such, the Walsam parties are entitled to indemnification against 4-6 Bleecker.

316 Bowery's Contractual Indemnification Claim against 4-6 Bleecker

316 Bowery's cross motion for summary judgment on its indemnification claim against 4-6 Bleecker is denied, and 316 Bowery's cross-claim is dismissed. 316 Bowery assigned its indemnification rights to the Walsam parties and those rights are extinguished as to it. There is simply no basis to maintain the contractual indemnification claims against 4-6 Bleecker.

Indemnification Rights between the Walsam Parties and 316 Bowery

In MS10, 316 Bowery moves for partial summary judgment for a declaratory judgment that § 14.1 of the 2014 PSA is valid and enforceable and limits its indemnification liability to the Walsam parties. In MS11, the Walsam parties move for summary judgment on their claims against 316 Bowery for indemnification,

contribution, and attorney. As the two motions are intertwined, they will be resolved together.

316 Bowery's motion is granted. Section 14.1 of the 2014 PSA spells out the indemnification limits as follows:

Seller agrees, provided that Purchaser continues to use R&E as its counsel, to continue paying R&E's legal fees in connection with the Overcharge Proceeding subsequent to the Closing in an amount not to exceed \$100,000.00.... Seller hereby indemnifies and agrees to save, defend and hold Purchaser harmless from and against any loss, cost, damage, claim, liability or expense, including reasonable attorneys' fees and litigation costs, suffered or incurred as a result of the Overcharge Proceeding in an amount not to exceed \$250,000.00; it being understood that reasonable attorneys' fees shall mean those fees incurred by Purchaser in enforcing this indemnity.

(Section 14.1 of 2014 PSA). The limitation is clear; 316 Bowery is required to indemnify the Walsam parties for "any liability... suffered or incurred as a result of the Overcharge Proceeding in an amount not to exceed \$250,000.00." The limitation was drafted to account for exactly what happened in this matter. The Walsam parties are sophisticated and assumed the risk that liability in the Overcharge Proceeding would be in excess of the \$250,000.00 limitation.

Section 10.13 of the 2014 PSA and the subsequent Assignment and Assumption Agreements do nothing to alter this undeniable liability limitation. As "[a] party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances,'" it is clear that the highly specific § 14.1 indemnification provision was drafted to limit the indemnification liability of 316 Bowery (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). Indeed, the Assignment and Assumption Agreements were specifically required by the 2014 PSA and no additional consideration was given in exchange for an alteration of the indemnification regime established in the 2014 PSA. As such, the Walsam parties' argument is a disingenuous attempt to greatly expand 316 Bowery's liability.

As to the Walsam parties' motion, it is granted but limited to the terms of § 14.1 of the 2014 PSA. Therefore, 316 Bowery is only required to indemnify Walsam for \$100,000.00 in attorney's fees paid to Rosenberg & Estis, and for \$250,000.00 for all other liabilities and attorney's fees incurred in the overcharge proceeding.

Common Law Indemnification

“To establish a claim for common-law indemnification, ‘the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident’ (*Correia v Professional Data Mgt.*, 259 AD2d 60 [1st Dep’t 1999] [internal citations omitted]). Common law indemnity claims can co-exist with contractual indemnity claims (*see Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 437 [1991]).

Here, the Walsam parties seek common law indemnification from both 4-6 Bleecker (MS8) and 316 Bowery (MS11). It is entitled to such relief and these branches of both motions are granted.

This court’s September 5, 2019 Order in *Arnold* found that “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 2014 PSA and Master Lease” (NYSCEF # 541 at 7). Additionally, as discussed above, both 4-6 Bleecker and 316 Bowery engaged in the conduct leading to the rent overcharges. As such, they are required to indemnify the Walsam parties.

The Walsam Parties’ Motion to Dismiss 4-6 Bleecker’s Counterclaims

The portion of the Walsam parties’ motion seeking partial summary judgment to dismiss 4-6 Bleecker’s counterclaims is denied.

First, it remains a question of fact whether 4-6 Bleecker’s has a claim for rescission of the contracts. Rescission “is not permitted for a slight, casual, or technical breach, but, as a general rule, only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract” (*Callanan v Powers*, 199 NY 268, 284 [1910]). Rescission is available when there is a misrepresentation. “Fraud sufficient to support the rescission requires only a misrepresentation that induces a party to enter into a contract resulting in some detriment, and “unlike a cause of action in damages on the same ground, proof of scienter and pecuniary loss is not needed” (*Bd. of Managers of Soundings Condominium v Foerster*, 138 AD3d 160, 164 [1st Dept 2016]).

The court had determined that the Walsam parties are in breach of the various contracts governing the relationship between it and 4-6 Bleecker. It remains a question of fact whether the breach is so substantial as to defeat the object of the parties in making the contract. As there has yet to be discovery, determination of this issue at this time would be premature.

The Walsam parties' argument that 4-6 Bleecker's rescission claim is untimely is unavailing. "Prompt action in rescinding does not mean immediately, but within a reasonable time" (*Schwartz v National Computer Corp.*, 42 AD2d 123, 126 [1st Dept 1973]). 4-6 Bleecker made its claim for rescission in 2015, after the rent overcharge determination. It was at that time that 4-6 Bleecker learned conclusively that the express warranties of DCHR compliance were false.

Next, 4-6 Bleecker's second counterclaim for breach of contract concerns the Walsam parties' breach of its obligation to timely complete the condominium conversion. The Master Lease specifically requires the Walsam parties to take all steps necessary to timely complete the condominium conversion. It is clear that the building has yet to be converted.

There remains a question of fact as to whether 4-6 Bleecker's conduct has inhibited the Walsam parties' ability to convert the building. Both sides present evidence for their positions. The Walsam parties argue the overcharge proceeding, which it claims is 4-6 Bleecker's fault, inhibited its ability to perform the conversion; 4-6 Bleecker presents evidence that it provided all access required to perform the conversion. This is a question of fact for a fact-finder to determine.

Finally, 4-6 Bleecker's claim for attorneys' fees pursuant to paragraph 10.9 of the 2012 PSA still stands as the breach of contract claims are viable.

316 Bowery's Partial Summary Judgment Cross-Motion against 4-6 Bleecker

316 Bowery's cross-motion for summary judgment to dismiss 4-6 Bleecker's cross-claims for breach of contract is granted. 4-6 Bleecker asserts cross-claims against 316 Bowery for: (1) rescission of the 2012 PSA and Master Lease on the basis of 316 Bowery's alleged fraudulent misrepresentations; (2) breach of the 2012 PSA and Master Lease by 316 Bowery; (3) indemnification for the overcharge proceedings; and (4) attorneys' fees. 316 Bowery assigned all of its agreements to the Walsam parties. As such, the breach of contract claims lie against the Walsam parties, not 316 Bowery. As such, all of 4-6 Bleecker's cross-claims against 316 Bowery must be dismissed.

The Walsam Parties' Summary Judgment against 316 Bowery

In MS11, the Walsam parties seek to dismiss 316 Bowery's counterclaims. 316 Bowery asserts the following counterclaims against the Walsam parties: (1) attorneys' fees; (2) breach of contract for failure to perform the condominium conversion; and (3) fraudulent misrepresentation regarding the Walsam parties' ability to timely complete the condominium conversion.

At the outset, the branch of Walsam parties' motion to dismiss the fraudulent misrepresentation counterclaim is denied. A "party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" and "[t]his is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*James v Aircraft Service Intern. Group*, 84 AD3d 1026 [2d Dept 2011]). Even though this matter is six-years old, document discovery has not yet occurred. Fraud claims are necessarily fact intensive, and discovery may reveal that the Walsam parties had ulterior plans when it entered into the 2014 PSA. As 316 Bowery posits, "discovery may uncover that [the Walsam parties'] plan was to: (i) fraudulently induce 316 Bowery to enter into the 2014 PSA at a bargain price due to the Overcharge Proceeding; (ii) misrepresent that it was going to complete the Conversion; and (iii) then walk away from the Conversion, while still owning the commercial space at the Building. As such, it is unclear at this time whether the fraud claim should be dismissed" (NYSCEF # 637 at 25).

As for 316 Bowery's breach of contract counterclaim, that branch of the Walsam parties' motion is granted. 316 Bowery, in assigning all agreements to the Walsam parties, absolved itself of its liabilities to 4-6 Bleecker and GRJ LLC to perform the condominium conversion and made the failure to do so the Walsam parties' problem. As such, 316 Bowery's claim that the Walsam parties' failure to complete the condominium conversion is a breach of contract is meaningless.

316 Bowery's claim for attorneys' fees survives as the claim for fraudulent misrepresentation survives. This branch of the Walsam parties' motion is therefore denied.

Accordingly, it is ORDERED that the branch of the Walsam parties' motion for partial summary judgment (MS8) on their fifth and sixth causes of action for contractual and common law indemnification and for contribution against 4-6 Bleecker is granted; it is further

ORDERED, DECLARED, and ADJUDGED that 4-6 Bleecker must indemnify and hold the Walsam parties harmless against all liability, fines, suits, claims, demands and actions, and costs and expenses of any kind against the Walsam parties arising out of any breach, violation or non-performance of any covenant, condition or agreement in the Master Lease; it is further

ORDERED that the branch of the Walsam parties' motion for partial summary judgment (MS8) that seeks to dismiss 4-6 Bleecker's counterclaims is denied; it is further

ORDERED that the branch of 4-6 Bleecker’s motion for partial summary judgment (MS9) on its counterclaims for breach of contract against the Walsam parties is granted; it is further

ORDERED that the branch of 4-6 Bleecker’s motion for partial summary judgment (MS9) on its cross-claims for breach of contract against 316 Bowery is denied; it is further

ORDERED that 316 Bowery’s cross-motion for partial summary judgment to dismiss 4-6 Bleecker’s cross-claims is granted and 4-6 Bleecker’s cross-claims are dismissed; it is further

ORDERED that 316 Bowery’s motion for partial summary judgment (MS10) on its fourth counterclaim against the Walsam parties declaring that Section 14.1 of the April 9, 2014 Purchase and Sale Agreement is valid is granted; it is further

ORDERED, DECLARED, and ADJUDGED that the indemnification limits of Section 14.1 of the April 9, 2014 Purchase and Sale Agreement are valid and that 316 Bowery is only required to indemnify the Walsam parties for \$100,000.00 in attorney’s fees paid to Rosenberg & Estis, and for \$250,000.00 for all other liabilities and attorneys’ fees incurred in the overcharge proceeding; it is further

ORDERED that the Walsam parties’ motion for partial summary judgment (MS11) against 316 Bowery is granted subject to the Section 14.1 limitations; it is further

ORDERED, DECLARED, and ADJUDGED that 316 Bowery must indemnify and provide contribution to the Walsam parties for liabilities, costs, and attorney’s fees the Walsam parties incurred as a result of the overcharge proceeding.

This constitutes the Decision and Order of the court.

12/11/2020

DATE


MARGARET A. CHAN, J.S.C.

MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: