

<b>Mad Scientists Brewing v CH Gowanus LLC</b>
2021 NY Slip Op 31325(U)
April 12, 2021
Supreme Court, Kings County
Docket Number: 512286/2020
Judge: Reginald A. Boddie
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2021 APR 20 AM 10:08

At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 12th day of April 2021.

**P R E S E N T:**

Honorable Reginald A. Boddie, JSC

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MAD SCIENTISTS BREWING, and CRAFT  
REVOLUTION, LLC d/b/a ARTISANAL  
BREWING VENTURES,

Plaintiffs,

Index No. 512286/2020  
Cal. No. 15 MS 1

-against-

**DECISION AND ORDER**

CH GOWANUS LLC, SBLM ARCHITECTS  
P.C., and ROBERT SILMAN ASSOCIATES  
STRUCTURAL ENGINEERS, D.P.C.,

Defendants.  
-----x

Papers      Numbered  
MS 1          Doc. # 32-155

Upon the foregoing cited papers, the decision and order on defendant CH Gowanus' motion to dismiss, pursuant to CPLR 3211 (a) (1) and (7), is as follows:

Plaintiffs, Mad Scientists Brewing Partners LLC (Mad Scientists) and Craft Revolution LLC, doing business as Artisanal Brewing Ventures (Craft), are commercial tenants and guarantors of a 15-year lease, dated May 24, 2019, for Building 4 located at 94-124 Ninth Street, Brooklyn, New York (the subject premises). Plaintiffs alleged they leased the premises from the landlord, defendant CH Gowanus LLC (CH Gowanus), for the purpose of constructing a Sixpoint Brewery and restaurant.

Plaintiffs alleged the landlord's material misrepresentations concerning the subsurface conditions of the slab and its illegal work at the subject premises completely frustrate the purpose of their planned use and occupancy of the premises. They alleged that but for the material

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omissions, they would not have entered into or guaranteed the lease because the slab is a critical part of the premises and an essential component of the proper buildout of the premises.

Plaintiffs alleged that during negotiations for the lease of the premises, the landlord was informed that plaintiffs would need a slab for heavy tanks and other equipment used for brewing, and on January 27, 2019, landlord issued a letter of intent which misrepresented that it would provide a slab on grade. Plaintiffs alleged landlord intentionally failed to disclose, prior to execution of the lease, the report of a geotechnical investigation, dated May 2016 (the Pillori report), which indicated “the existing fill in its current condition is unsuitable for the support of a new ground floor slab.”

Plaintiff averred, after execution of the lease, its design team discovered the Pillori report because it was referenced in the landlord’s base building plans drawings, and it was only then that landlord provided it. Subsequently, the landlord undertook construction work on the slab, which plaintiffs alleged is not in compliance with the New York City Building Code and was performed without the required permits and municipal approvals. Plaintiffs also averred the landlord ignored their requests for drawings, approvals, permits and pile test results. Plaintiffs issued a notice of termination of the lease on May 7, 2020, which the landlord rejected.

Plaintiffs alleged the landlord’s fraud, material omissions and illegal construction have derailed their buildout and resulted in millions of dollars of damages in hard and soft costs, including the cost of specially manufactured brewery equipment for the subject premises. Plaintiffs commenced this action seeking monetary damages and declaratory judgment. Plaintiffs alleged five causes of action against the landlord: 1) fraud in the inducement, 2) breach of covenant of good faith and fair dealing, 3) breach of contract, 4) declaratory judgment determining whether plaintiffs validly exercised their right to terminate the lease, and 5) rescission.

Landlord moved to dismiss the first, second, third, and fifth causes of action pursuant to CPLR 3211 (a) (1) and (7), the fourth cause of action pursuant to CPLR 3211 (a) (1) and declaring that tenant failed to validly exercise its right to terminate under the parties' lease, and for leave to interpose counterclaims against plaintiffs including collection of arrears and monetary damages.

Landlord argued, "this action is about what has unfortunately become a typical landlord-tenant dispute caused by a commercial tenant's inability to pay rent as a result of the COVID-19 pandemic. What makes this case less typical, however, is that Plaintiffs, believing that 'offense is the best defense,' preempted Landlord and commenced this lawsuit as a decoy and delay tactic." Defendant argued its failure to disclose the Pillori report before the lease was executed does not constitute a breach of covenant of good faith and fair dealing because the lease was not a binding contract when the purported inaction took place, and it subsequently provided the report. It further argued that plaintiffs insufficiently pleaded which work performed by landlord was non-compliant with the Building Code, which provisions of the Building Code were violated, which agreements with plaintiffs' design team were violated, and how.

Landlord further contended plaintiffs allegations are contradicted by the fact that the Department of Buildings (DOB) inspected the premises and issued a temporary certificate of occupancy. Landlord also argued that plaintiffs' allegations are barred because they are completely inconsistent with the disclaimer and merger clauses in sections 3.1 (a) and 23.10 of the lease. Finally, landlord argued that plaintiffs' cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of their first and third causes of action for fraud and breach of contract because all three claims rely on the same allegations in connection with the slab and all seek the same damages.

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84

NY2d 83, 87-88 [1994]). The facts as alleged in the complaint are accepted as true, plaintiff is accorded the benefit of every possible favorable inference, and the Court determines only whether the facts as alleged fit within any cognizable legal theory (*id.*). The court's function is to determine whether plaintiff's factual allegations fit within any cognizable theory, without regard to whether the allegations ultimately can be established (*e.g. JGK Indus., LLC v Hayes NY Bus., LLC*, 145 AD3d 979, 980 [2d Dept 2016] [citation omitted]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, [] dismissal should not eventuate'" (*Tsinias Enters. Ltd. v Taza Grocery, Inc.*, 172 AD3d 1271, 1272 [2d Dept 2019], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d at 88). For the purposes of a motion to dismiss, the evidence must be "unambiguous, authentic, and undeniable," such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 808 [2d Dept 2017]). Letters, emails, and affidavits do not meet the requirements for documentary evidence (*id.*).

The elements of plaintiffs' first cause of action to recover damages for fraud are " 'a misrepresentation or a material omission of fact which was false and known to be false by

defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' ” (*Tsinias Enters.*, 172 AD3d at 1272, citing *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; see *Genger v Genger*, 152 AD3d 444, 445 [2017]). “To state a [cause of action to recover damages] for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury” (*Tsinias Enters.*, 172 AD3d at 1273, citing *GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [2010]).

It has long been the rule that parties may not assert fraud claims seeking damages that are duplicative of those recoverable on a cause of action for breach of contract (*see e.g. Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]). To survive a motion to dismiss for failure to state a cause of action for fraud, the complaint must allege a breach of a duty separate from a breach of contract (*Mañas*, 53 AD3d at 453). “. . . [W]here the plaintiff pleads that it was induced to enter into a contract based on the defendant’s promise to perform and that the defendant, at the time it made the promise, had a ‘preconceived and undisclosed intention of not performing’ the contract, such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud” (*Mañas*, 53 AD3d at 453-454, citing *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

Further, fraud damages are meant to redress a different harm than damages on a cause of action for breach of contract (*Mañas*, 53 AD3d at 454). Contract damages are meant to restore the nonbreaching party to as good a position as it would have been in had the contract been performed (*see id.*). Fraud damages are meant to indemnify losses suffered as a result of the fraudulent inducement, such as damages for foregone opportunities, that would not be recoverable under a contract measure of damages (*see id.*). Where all of the damages are remedied through the contract claim, the fraud claim is duplicative and must be dismissed, even where plaintiff adequately

alleged the breach of an duty independent of the contract (*see id.*; *see also Chowaike & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600-601 [1st Dept 2014] [dismissing fraud claim seeking duplicative damages even where the plaintiff sufficiently alleged breach of an independent duty owed them independent of the contract]; *Triad Intl. Corp. v Cameron Indus., Inc.*, 122 AD3d 531, 531-532 [1st Dept 2014] [affirming dismissal of fraud claim where the damages sought on the fraud claim were duplicative, explaining that “plaintiff seeks the same compensatory damages for both claims. . . . (I)ts purported fraud damages are actually contract damages”]; *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422-423 [1st Dept 2014] [fraud claim duplicative of a breach of contract claim where the fraud claim sought the same damages, namely return of the deposit paid by the plaintiff under the contract]).

Here, plaintiffs alleged that during lease negotiations in 2019, the landlord omitted information about the suitability of the slab and misrepresented that it would provide a slab on grade. Plaintiff alleged landlord knew from the Pillori report it was impossible to provide a slab on grade because of the highly unstable subsurface conditions. Plaintiffs further alleged that in reliance on the landlord’s promise to provide a slab on grade, they executed the lease. They alleged that but for the omissions, they would not have entered into the lease since the slab is a critical part of the operation of their business which requires the use of heavy tanks and other equipment. Plaintiffs alleged that as a result of this fraud, they lost the opportunity to employ their time and capital in connection with another location at which a brewery/restaurant could have been successfully developed. Accordingly, defendant’s motion to dismiss the first cause of action is denied.

Plaintiffs’ second cause of action alleged a breach of the covenant of good faith and fair dealing. “ ‘Implicit in every contract is a covenant of good faith and fair dealing which encompasses any promise that a reasonable promisee would understand to be included’ ” (*25 Bay*

*Terrace Assoc., L.P. v Public Serv. Mut. Ins. Co.*, 144 AD3d 665, 667 [2d Dept 2016], quoting *Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc.*, 97 AD3d 781, 784 [2d Dept 2012]; [citations omitted]). “The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct” and even if a party is not in breach of its express contractual terms (*25 Bay Terrace*, 144 AD3d at 667, quoting *Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976 [2d Dept 2016]; [citations omitted]; *Elmhurst Dairy*, 97 AD3d at 784). “The covenant is breached ‘where one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other’ ” (*Michaan v Gazebo Horticultural, Inc.*, 117 AD3d 692, 693 [2d Dept 2014]). “Such a cause of action is not necessarily duplicative of a cause of action alleging breach of contract” (*25 Bay Terrace*, 144 AD3d at 667, quoting *Gutierrez*, 136 AD3d at 976; *Elmhurst Dairy*, 97 AD3d at 784).

Here, plaintiffs alleged landlord breached the covenant of good faith and fair dealing by failing to disclose the Pillori report and failing to provide documentation to plaintiffs such as approved drawings, test results, and municipal permits and approvals that establish whether the slab is suitable for plaintiffs’ use and the construction work was performed legally. Plaintiffs argued that although the lease did not expressly require landlord to cooperate in providing them proof that the construction was legally compliant, landlord’s failure to do so deprived them of the delivery of a safe and structurally sound premises in which to operate the brewery.

Here, the allegations are duplicative of those asserted in plaintiffs’ fraud and breach of contract claims and failed to alleged defendant sought to prevent the performance of the lease, or to withhold the benefits of the lease from the plaintiffs (*see Michaan*, 117 AD3d at 693).

Accordingly, defendant's motion to dismiss the second cause of action for good faith and fair dealing is granted.

Plaintiffs' third cause of action alleged breach of contract which resulted in over \$2 million in damages consisting of labor, materials, and other hard and soft costs including specially manufactured brewery equipment for the subject premises. Plaintiffs alleged defendant breached the lease by waiting to disclose the Pillori report, failing to cooperate with their design team to build out the space, failing to provide copies of all approved plans, and refusing to provide proof that its work was completed in compliance with all applicable laws and as agreed between the parties' design teams.

Defendant argued for dismissal of this claim on the ground no express provision in the lease required landlord to fulfill these purported requirements. Landlord averred that the lease did not require it to provide the Pillori report. Landlord further averred it complied with section 3.1 of the lease, which obligated it to prepare the premises for plaintiffs' occupancy according to the work described in Phase 1 and/or Phase II (landlord's work) and deliver all warranties associated with the landlord's work. In response to plaintiffs' contention that a portion of the ground floor slab does not have the load-bearing capacity required for its heavy brewing equipment, landlord argued the lease does not reference any load-bearing specification for the slab, can only be read within the four corners, and excludes monetary damages as a remedy related to the condition of the premises.

The landlord further contended the building passed final New York City Department of Buildings (DOB) inspections in August and September 2020, and a temporary certificate of occupancy was issued for the premises. Landlord proffered the affidavit of an expert, formerly employed by DOB, in support of its argument that the DOB inspection and temporary certificate

of occupancy establish that the building is safe and ready for occupancy in full compliance with the building code.

Here, however, plaintiffs claim that despite the DOB inspection and temporary certificate of occupancy, the structural integrity of the slab to support specialized brewing equipment weighing in excess of 63 tons is in question. Plaintiffs alleged the landlord failed to submit updated plans for approval with the relevant municipal entities, sought approval from DOB based on outdated plans, and breach its obligations under section 3.1 of the contract by performing illegal, unsafe, and defective work.

Accordingly, this claim is not duplicative of plaintiffs' claims of fraudulent inducement and plaintiff adequately pleaded a breach of contract claim. As to defendant's contention that sections 3.1 (a), 3.1 (f) and 12.4 constitute a waiver of monetary damages for causes of action alleged here, the Court disagrees. Section 12.4 expressly governs disputes regarding the landlord's reasonableness in exercising judgment or withholding its consent or approval pursuant to a specific provision of the lease. According plaintiffs the benefit of every possible favorable inference, which the Court must, the landlord's reasonableness in exercising judgment or withholding its consent or approval pursuant to a specific provision of the lease is not at issue here. Accordingly, defendants' motion to dismiss the third cause of action for breach of contract is denied.

Defendant also sought to dismiss, pursuant to CPLR 3211 (a) (7), plaintiff's fifth cause of action for rescission for failure to state a cause of action. Defendant argued plaintiffs' claims for fraudulent inducement and rescission are duplicative, based on the same allegations, and seek the same damages. Plaintiffs argued landlord's breach of the lease was so fundamental as to defeat the object of the parties in making the lease because plaintiff would be required to proceed with the

additional expense of the build out while landlord's illegal and defective work puts the certificate of occupancy in jeopardy.

The complaint alleged since September 2019, defendant has (a) failed and refused to address their concerns about the integrity of the existing slab, the piles in the depressed slab area, waterproofing, and the legality of its work, including landlord's failure to file all necessary plans with the DOB and MTA and landlord's failure to obtain all required approvals and permits from the DOB and MTA, and (b) failed and refused to provide the requested information and drawings related to said concerns.

Rescission is an equitable remedy that is not available where damages, a legal remedy, would be sufficient (*Empire Outlet Bldrs. LLC v Construction Resources Corp. of N.Y.*, 170 AD3d 582, 583 [1st Dept 2019]). As a general rule, rescission of a contract is permitted "for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but . . . 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" (*RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654 [2d Dept 2005], quoting *Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]).

Here, the factual allegation of fraud is the same for plaintiffs' claims for rescission and fraudulent inducement, and plaintiffs' claims of material breach is the same for their claims for rescission and breach of contract. Accordingly, defendant's motion to dismiss plaintiff's fifth cause of action for rescission is granted on the grounds that the alleged harm may be monetarily compensated under the first and third causes of action.

As to the plaintiff's fourth cause of action for an order declaring plaintiff properly exercised its right to terminate the lease pursuant to section 3.1 (d). Section 3.1 (d) of the Lease provides "

.. if the Commencement Date does not occur on or before the date that is one hundred and eighty three (183) days following the Final Plans Date (the ‘Termination Outside Date’) (as such date may be extended by Force Majeure Events and Tenant Delays), then Tenant shall have the right to terminate this Lease by giving written notice to Landlord (the ‘Termination Notice’) not later than ten (10) days following the Termination Outside Date (time being of the essence).”

Plaintiff argued the Commencement Date has not yet occurred because: (1) the landlord’s “Substantial Completion Notice - Phase I,” dated February 25, 2020, is defective in that it incorrectly provided that Phase I “will be substantially completed as of March 6, 2020;” (2) said notice was not copied to their attorney as required by Section 23.1 of the Lease; and (3) they raised objections to all of the landlord’s work, including the legality thereof as early as September 6, 2019. Moreover, plaintiffs averred landlord received their plans on October 28, 2019, 183 days from that date was April 28, 2020, and therefore, their May 7, 2020 notice of termination was delivered within 10 days from the Termination Outside Date pursuant to section 3.1 (d) of the lease.

Defendants argued for dismissal of plaintiff’s fourth cause of action, for an order declaring that tenant failed to validly exercise its right to terminate under the parties’ lease, and for leave to interpose counterclaims against plaintiffs including collection of arrears and monetary damages. Defendants argued sections 3.1 (b) and 3.1 (d) governed tenant’s termination right under the lease and provided that tenant’s right to terminate would accrue only if the Lease Commencement Date was 183 days or more from the Final Plans Date. Defendant argued this condition was never satisfied because, as the complaint alleges, the Final Plans Date was October 28, 2019, and the Commencement Date was March 6, 2020, as set forth in landlord’s Substantial Completion Notice. Defendant argued landlord’s Substantial Completion Notice constituted a “final determination” under the lease because tenant admittedly failed to timely dispute the Substantial Completion

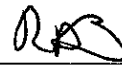
Notice and tenant’s termination right pursuant to Section 3.1 (d) of the Lease was never triggered because the Commencement Date occurred within 183 days from the Final Plans Date.

Section 3.1 (b) of the lease provides, “[t]he Substantial Completion Notice provided to Tenant pursuant to this paragraph shall constitute a final determination as between Landlord and Tenant that the Substantial Completion Date shall be the Commencement Date, unless Tenant, within ten (10) Business Days after the delivery of such notice, shall give written notice to Landlord that it disputes the Substantial Completion Date (‘Tenant’s Substantial Completion Dispute Notice’).” Here, there is no evidence plaintiff served a Substantial Completion Dispute Notice and defendant provided proof of service pursuant to section 23.1. Accordingly, defendant’s motion to dismiss plaintiff’s fourth cause of action for declaratory judgment is granted. Defendant shall file an answer and is granted leave to interpose its counterclaims.

It is therefore so ordered:

Defendant’s pre-answer motion to dismiss is granted to the extent plaintiff’s second, fourth and fifth causes of action are dismissed. Defendant shall file an answer pursuant to the CPLR and is granted leave to interpose counterclaims.

ENTER:



Honorable Reginald A. Boddie  
Justice, Supreme Court

**HON. REGINALD A. BODDIE  
J.S.C.**

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