

**CoreSite 32 Ave. of the Ams., L.L.C. v 32 Sixth Ave.
Co. LLC**

2021 NY Slip Op 32789(U)

December 27, 2021

Supreme Court, New York County

Docket Number: Index No. 652792/2019

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CORESITE 32 AVENUE OF THE AMERICAS, L.L.C.,	INDEX NO.	<u>652792/2019</u>
Plaintiff,	MOTION DATE	_____
- v -	MOTION SEQ. NO.	<u>009</u>
32 SIXTH AVENUE COMPANY LLC and TELX - NEW YORK 6TH AVE. LLC,	DECISION + ORDER ON MOTION	
Defendants.		

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219 were read on this motion to/for AMEND CAPTION/PLEADINGS.

In motion sequence number 009, defendant Telx – New York 6th Ave. LLC (Telx) requests leave of court to file and serve an amended answer to plaintiff CoreSite 32 Avenue of the Americas, L.L.C.’s (CoreSite) complaint. Telx seeks leave to (i) replead its mitigation affirmative defense; (ii) allege an affirmative defense of ratification; and (iii) assert counterclaims for unjust enrichment and declaratory judgment. CoreSite opposes Telx’s motion; defendant 32 Sixth Avenue Company LLC (Landlord) does not.

Background

This dispute concerns the significant rental rate increase of certain telecommunication equipment housed in a building owned by Landlord (Building).

CoreSite is a business that provides data center and interconnection solution services. (NYSCEF Doc. No. [NYSCEF] 2, Complaint ¶ 15.) Its operations require “specialized telecommunication connections that must be located in buildings designed to facilitate those connections.” (*Id.* ¶ 16.) The Building was specifically designed to

facilitate these connections which are located in certain areas of the Building known as “hubs” or “Meet-Me-Rooms.” (*Id.* ¶¶ 16-18.)

In 2007, Landlord and CoreSite entered into a 15.5 year lease with two options to extend for five years each (CoreSite Lease). (*Id.* ¶ 21.) Section 29.09(A) of the CoreSite Lease permits CoreSite to “establish certain connections in the Hub and bring telecommunication services from the Hub” to Coresite’s floor and set the rates for doing so. (*Id.* ¶ 26.) In October 2008, Landlord and CoreSite entered into a letter agreement setting forth CoreSite’s exclusive use of specific telecommunications equipment (such as fiber panels and cabinet space), monthly fees for the use of such equipment, and the methods to remit payment (2008 Letter Agreement). (*Id.* ¶¶ 28-30.) The 2008 Letter Agreement is consistent with the rates established in Section 29.09(A) of the CoreSite Lease. (*Id.* ¶ 29.) CoreSite alleges that from 2007 to 2017, CoreSite rented additional fiber panels and cabinet space at rates set forth in the 2008 Letter Agreement and the CoreSite Lease. (*Id.* ¶ 34.)

On August 1, 2013, Landlord “leased and transferred the business of operating the Hub to Telx” under a separate lease (Telx Lease). (*Id.* ¶ 35.) Thereafter, Telx assumed the management and operation responsibilities of the Hub. (*Id.* ¶ 36.) CoreSite alleges that Telx was informed of the obligations Landlord owed to CoreSite under the CoreSite Lease and the 2008 Letter Agreement before entering into the Telx Lease. (*Id.* ¶ 36.) CoreSite alleges that, from 2013 until 2018, Telx charged CoreSite rates for additional fiber panels, cabinets and other equipment consistent with the rates established under Section 29.09 of the CoreSite Lease. (*Id.* ¶ 44.)

In October 2018, CoreSite requested additional panels. (*See id.* ¶ 49.) However, “Telx quoted CoreSite a rate of \$4,500 [per] additional fiber panel in the Hub,

representing more than a 350% increase over the current rate of \$968.96 prescribed by Section 29.09(A) of the [CoreSite] Lease.” (*Id.* ¶ 46.) CoreSite alleges that it reminded Telx of its rights under Section 29.09(A) of the CoreSite Lease after receiving the quote. (*Id.* ¶ 48.) Telx’s parent company, DRT, which acquired Telx in 2015, disagreed with CoreSite explaining that Section 29.09(A) set the prices for one year, and thus, Telx could set its own rates as operator consistent with the Telx Lease with Landlord to which CoreSite is not a party. (*Id.* ¶¶ 43, 48.)

In February 2019, CoreSite again requested the additional panels it previously ordered in October 2018 but never received. (*Id.* ¶ 49.) Telx provided CoreSite with the same quote. (*Id.*) In March 2019, CoreSite agreed to pay the quoted amount but alleges that it expressly reserved its right to challenge the rate as inconsistent with the CoreSite Lease. (*Id.*) CoreSite requested two more panels in April 2019, Telx quoted \$4,500 per panel, and CoreSite agreed to pay the quoted amount again reserving its right to challenge the rate as inconsistent with the CoreSite Lease. (*Id.* ¶ 50.) CoreSite alleges that it paid and continues to pay \$3,531.04 more per month for each additional panel than the fee set forth in Section 29.90(A) of the CoreSite Lease. (*Id.* ¶ 49.)

Procedural History

CoreSite commenced this action in May 2019 and seeks, against Telx, a declaratory judgment that Landlord and Telx are required to comply with Section 29.09(A) (Count I) and monetary damages for Telx’s alleged breach of the CoreSite Lease in the amount of the difference between the rate it paid Telx and the rate as calculated in Section 29.09(A) of the CoreSite Lease (Count III). (*Id.* ¶¶ 53-58, 64-68.) Telx filed its answer in September 2019, alleging various affirmative defenses, including mitigation (Fifth Affirmative Defense) and unjust enrichment (Tenth Affirmative

Defense). (NYSCEF 76, Answer at 12-14¹.) CoreSite moved to dismiss these defenses. The court granted CoreSite's motion to dismiss the mitigation defense with leave to plead. (NYSCEF 171, Decision and Order [motion seq. no. 008]; NYSCEF 229, tr at 32:19-22, 40:10-11.) While the court did not dismiss Telx's unjust enrichment defense, due to the lack of contract between Telx and CoreSite, the court noted that it was not a defense to Coresite's breach of contract claim, but more appropriately a counterclaim. (NYSCEF 229, tr at 33:6-9.)

Following the February 2020 oral argument and decision, the parties paused litigation as a result of the COVID-19 pandemic and attempted to mediate their dispute. (NYSCEF 176, March 2020 Notice referring to Administrative Order 68/20; NYSCEF 181, Status Update Email [Aug. 28, 2020 to Oct. 16, 2020.]) When the efforts were unsuccessful, at the end of August 2020, the parties resumed discovery. (NYSCEF 181, Status Update Email at 2, 5.) In response to the numerous discovery disputes in this action, on February 8, 2021, the court appointed a special referee to facilitate the parties in the discovery process. (NYSCEF 185, Order Appointing Referee.) On February 9, 2021, Telx filed this motion.

Legal Standard

Pursuant to CPLR 3025(b), "[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." Generally, leave to amend a pleading is freely granted absent prejudice or surprise resulting from any delay in asserting the proffered claim. (*Fahey v Ontario County*, 44 NY2d 934, 935 [1978].) The party opposing a motion to amend a pleading must show how it would be significantly

¹ Pages cited refer to NYSCEF generated pagination.
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prejudiced or unfairly surprised in the “preparation of its case or prevented from taking some measure to support its position.” (*Spitzer v Schussel*, 48 AD3d 233, 233 [1st Dept 2008], citing *Loomis v Vietta Corinno Constr. Corp.*, 54 NY2d 18, 24 [1981].)

However, “leave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. “A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, ‘palpably insufficient or clearly devoid of merit’ and thus should not be permitted under CPLR 3025.” (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], *3-4 [Sup Ct, NY County 2021] [citation omitted].) “This approach is consistent with the statutory mandate that leave to amend ‘shall be freely given upon such terms as may be just ...’ (CPLR 3025). The point of the statute is that factual allegations and claims are not locked in stone and may change as the case progresses. It does not, however, sanction the addition of causes of action that fail to state viable claims for relief as a matter of law.” (*Id.*, note 2.)

Discussion

CoreSite opposes Telx’s motion on a variety of grounds. First, CoreSite argues that Telx fails to offer a reason for its late motion in this 2019 case. Specifically, Telx fails to explain why its new allegations were not initially included in its original September 2019 answer. Another appropriate time for Telx to amend its answer was after CoreSite’s motion to dismiss in November 2019. CoreSite also challenges Telx’s failure to explain the six-month delay between August 2020, when the parties resumed litigation, and February 2021 when Telx filed this motion. Second, CoreSite insists that it will be required to engage in additional discovery to respond to Telx’s amendments, resulting in significant delays. CoreSite also points to Telx’s alleged lack of cooperation in complying with document demands, which if continued, would result in more delay.

Significant prejudice exists when the opposing party has been “hindered in the preparation of his case or prevented from taking some measure in support of [its] position.” (*Jacobson v McNeil Consumer & Specialty Pharmaceuticals*, 68 AD3d 652, 654 [1st Dept 2009] [internal quotation marks and citation omitted].) “[M]ere lateness . . . is not a barrier to amendment. Lateness must be coupled with significant prejudice to [the non-moving party].” (*Seda v New York City Housing Authority*, 181 AD2d 469, 470 [1st Dept 1992] [citation omitted], *lv denied* 80 NY2d 759 [1992].) The need for additional discovery does not constitute significant prejudice. (*Jacobson*, 68 AD3d at 654.)

CoreSite fails to demonstrate prejudice: how the amendments will hinder CoreSite’s preparation of the case or pursuit of its position. CoreSite concedes that in December 2020, it provided Telx with a draft document demand in connection with Telx’s proposed amended answer. (NYSCEF 217, CoreSite’s Fourth Request for Production.) As discovery is ongoing, CoreSite will not be hindered in its preparation of its case. Indeed, no depositions had yet to be taken when Telex initiated this motion. (NYSCEF 188, Friedman aff ¶ 22.) Moreover, as to Telx’s alleged prior discovery intransigence, the special referee should eliminate such difficulties. While the court agrees that Telx fails to offer any explanation for its delay in filing this motion, particularly between August 2020 and February 2021,² CoreSite has not established prejudice.

² To the extent that Telx blames its delay on the court so ordering the top page of the transcript instead of the entire transcript, the court reminds Telx that there was a pandemic at the time when we were all working from home making it impossible to scan a 68-page transcript. Telx had the complete transcript – it was filed in NYSCEF as 177 -- and the court wrote “so ordered in its entirety.” (NYSCEF 225.) There could be no question that the entire transcript was so ordered.

As stated above, Telx must establish that the amendments are “not palpably insufficient or clearly devoid of merit.” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].) Failure to state a cause of action, warrants denial of the motion to amend. (*David & Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept 2001] [citations omitted].)

Mitigation Affirmative Defense

Telx seeks leave of the court to replead its mitigation affirmative defense despite the court granting Telx leave to replead it without any further motion practice on February 14, 2020.³ (NYSCEF 226, So-Ordered Transcript.) Telx argues that, if the court finds that it breached its obligations to CoreSite, CoreSite was nevertheless able to mitigate its damages when it increased its prices to its customers. Thus, according to Telx, CoreSite’s alleged damages, if any, should be offset by the amount it was able to pass-off to its customers to avoid double recovery.

Mitigation is a total or complete defense to breach of contract. “The law wisely imposes upon a party subjected to injury from the breach of a contract the active duty to make reasonable efforts to render the injury as light as possible.” (*Losei Realty Corp. v City of New York*, 254 NY 41, 47 [1930].) While Telx fails to use the word “duty” in the amended answer, implicit in its assertion of its right to mitigation is that Corsite has a such duty and pleadings are to be liberally construed. “When the non-moving party opposes amendment on the ground” that amendment is futile because it fails to state a claim, “the moving party should be prepared in its reply brief to defend the proposed

³ The court granted leave to replead Telx’s mitigation defense on the record making a motion to amend unnecessary. Accordingly, Telx must now comply with CPLR 3025 and cannot simply rely on the court’s giving leave to replead. While the court did not give Telx a deadline to replead, certainly waiting one year is too long.

pleading as if it were opposing a motion to dismiss.” (*Olam Corp. v Thayer*, 2021 N.Y. Slip Op. 30345[U], 4 [N.Y. Sup Ct, New York County 2021].)

Since Telx’s answer is sufficient to allege a right to mitigation, Coresite’s conclusory denial of such a duty is woefully inadequate. Further, while there are certain exceptions as a matter of law to a duty to mitigate, CoreSite fails to identify any such exceptions applicable here. (See *e.g., Holy Props. Ltd., L.P. v Kenneth Cole Prods., Inc.*, 87 NY2d 130, 133 [1995] [generally landlords have no duty to mitigate because “unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property” and certainly not where lease expressly provides otherwise].) Instead, relying on *Wilnot v State*, CoreSite complains that Telx fails to identify any reasonable options to mitigate. (*Wilnot v State*, 32 NY2d 164, 168-169 [damages precluded where defendant proves at trial they could have been prevented “by reasonable efforts and expenditures”], *rearg denied* 33 NY2d 657 [1973].) A determination of whether Telx can satisfy its burden to show that increasing Coresite customer prices constitutes mitigation and Telx is entitled to a credit or that Coresite, the non-breaching party, failed to reasonably mitigate its damages and by how much is premature. (See *LaSalle Bank Natl. Assn v Nomura Asset Capital Corp.*, 72 AD3d 409, 411 [1st Dept 2010] [after nonjury trial].) Therefore, Telx’s motion is granted.

Ratification Affirmative Defense

“Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it.” (*Allen v Riese Org.*, 106 AD3d 514, 517 [1st Dept 2013].) Ratification also requires intent and full knowledge of the facts. (*Soma v Handrulis*, 277 NY 223, 231 [1938], quoting *Glenn v Garth*, 133 NY 18, 43 [1892] [“If there is no such

intent and no such volition, but a contrary intent and an opposite purpose, there is no ratification.”].)

Telx alleges that CoreSite ratified Telx’s standard rate when CoreSite submitted payments to lease additional fiber panels in the Hub after it commenced this action against Telx without expressly reserving the right to challenge the pricing in the service orders. (NYSCEF 191, Redline of Proposed Amended Answer, ¶¶ 25-26 at 29.)

Coresite also challenges this amendment as futile, because Coresite allegedly reserved its rights and reminded Telx of the preferential pricing. Certainly, when CoreSite filed this action seeking a declaration that it is entitled to its preferential pricing for the duration of its lease and for return of its overpayment, for which CoreSite alleges it continues to overpay, CoreSite indicated its opposition to Telx’s prices. While challenging an amendment as futile for failure to state a claim shifts the burden to the moving party who “should be prepared in its reply brief to defend the proposed pleading as if it were opposing a motion to dismiss” (Olam Corp., 2021 N.Y. Slip Op. 30345[U], 4), here Coresite makes factual assertions, not arguments as a matter of law. However, CoreSite has not supplied this court with documentary evidence that it reserved its rights and continued to do so after it initiated the litigation, reminded Telx of the CoreSite Lease prior to or during the litigation. (CPLR 3211[a][1].) Finally, Coresite fails to cite to any law to support its position. Therefore, Telx has sufficiently stated the affirmative defense of ratification and an issue of fact exists as to whether CoreSite assented to the new rates after filing this action.

Telx’s Unjust Enrichment Counterclaim

Unjust enrichment is a quasi-contract claim that “contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between

the parties.” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [citations omitted].) A party claiming unjust enrichment must show that (1) another party was enriched (2) at the aggrieved party’s expense, and (3) it is against equity and good conscience to permit the enriched party to retain what is sought to be recovered. (See *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [citation omitted].) The court must examine whether a “benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant’s conduct was tortious or fraudulent.” (*Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1974], *rearg denied* 31 NY2d 709 [1972], *cert denied* 414 US 829 [1973].)

Between August 2013 and October 2018, after Telx assumed responsibility and management of the Hub, CoreSite continued to pay preferential rates set forth in its Lease. In its proposed amended answer, Telx claims that CoreSite has been unjustly enriched, and continues to benefit, in the amount of the difference between the preferential pricing and the fair market rate for those panels. Telx, however, does not allege that CoreSite acted tortiously, fraudulently, or in any way unlawful in receiving preferential rates, and thus, the claim fails. (See *Grika v McGraw*, 161 AD3d 450, 452 [1st Dept 2018] [dismissing unjust enrichment claim for failure to allege unjust for board members to retain compensation]). Rather, implicit in Telx’s claim is that it mistakenly undercharged Telx for five years. An “allegation that the [a party] received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment.” (*Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013].) This makes sense because “[a] claim for unjust enrichment does not lie to relieve a party of the consequences of [the party’s] own failure to . . . exercise caution with respect to a

business transaction.” (*Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 405 [1st Dept 2008] [internal quotation marks omitted] [motion to dismiss unjust enrichment claim granted where contract allowed defendant to retain funds that plaintiff invested].) Therefore, Telx’s motion to amend is denied as to unjust enrichment, and it is dismissed as a defense as well.

Declaratory Relief

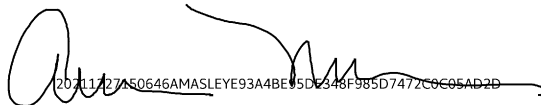
Telx seeks leave of court to add a declaratory judgment claim declaring that (1) it is entitled to charge CoreSite standard market rates and (2) the court has the authority to determine the current fair market rate for the fiber panels in the Hub. (NYSCEF 190, Proposed Amended Answer ¶¶ 31, 34.) “A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action.” (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988] [citations omitted].) While the Court has already determined that Telx cannot enforce its lease with the Landlord against CoreSite, a nonsignatory to the Telx Lease, (NYSCEF 75 at 38:8–9), the question is whether there is any legal theory for Telx to charge CoreSite a market rate. Telx offers two: (1) Telx relies on CoreSite’s assertion that it is a third-party beneficiary of the Telx Lease, (see NYSCEF 2, Complaint ¶¶55, 66) and (2) Telx argues that the preferential price in the Coresite Lease expired after one year. As to the market price, the Telx Lease provides that an arbitrator shall decide market price. (See NYSCEF 5, Telx Lease §36.01; NYSCEF 177, tr at 41:8–11.) However, if Telx is successful in establishing that a market price is applicable here, then the issue arises as to who sets the market price. If the Telx Lease provision is not applicable, then Telx may ask the court to set it through a declaratory judgment

Accordingly, it is

ORDERED that defendant's motion for leave to amend its answer is granted to the extent that Telx may proceed with its mitigation and ratification affirmative defenses and the first counterclaim for a declaratory judgment as set forth in the proposed amended answer in the form annexed to the moving papers, but leave is denied with respect to the proposed second counterclaim for unjust enrichment and Telx's defense of unjust enrichment is likewise dismissed as well; and it is further

ORDERED that the proposed amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that Coresite shall respond to the amended answer with counterclaims within 30 days from the date of this decision.



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12/27/2021

DATE

ANDREA MASLEY, 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