SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART 42**

Justice

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BSF WEST 175TH STREET HOLDING LLC

Plaintiff,

- v -

NEW FOUNDERS CONSTRUCTION LLC,

Defendant.

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INDEX NO. 153941/2019

MOTION DATE 02/18/2021

MOTION SEQ. NO. 002

DECISION/ORDER AFTER HEARING

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 72, 77, 78, 81, 84, 85, 97

were read on this motion to/for HEARING.

BACKGROUND

In July 2017, the plaintiff, BSF West 175th Street Holding, LLC, and defendant, New Founders Construction LLC, entered into three separate contracts for renovation work on three of the plaintiff's apartments on West 175th Street in Manhattan. The defendant failed to perform as agreed. In April 2019, the plaintiff commenced the instant action seeking damages for breach of contract, and immediately moved for a preliminary injunction, seeking to compel the defendant to close out all open plumbing permits issued by the Department of Buildings for the subject properties so that other contractors could complete the unfinished work (MOT SEQ 001). The defendant opposed the motion. By an affidavit of its principal, Shashi Kubair, the defendant asserted that it commenced work without a down payment, completed all work in one apartment and, before moving on to the other two units, was notified that gas service to the building was shut off due to the building having failed pressure tests. According to Kubair, the

plaintiff then hired a plumbing contractor to install new riser and heaters, and the defendant's work ceased and did not resume due to non-payment by the plaintiff.

Pursuant to a two-attorney stipulation dated November 21, 2019, the plaintiff withdrew its motion for a preliminary injunction and the defendant agreed to complete all work set forth in the parties' contracts and to close out all open plumbing permits by February 21, 2020. The stipulation further provided that if the defendant failed to comply, a hearing would be conducted to determine if there was a breach and if so, the court would "determine damages to be awarded to plaintiff as a result of the defendant's failure to close out the permits." The stipulation further provided that the plaintiff and defendant "expressly reserve any and all of their rights, remedies, claims and defenses, including but not limited to, plaintiff's claim for damages and/or lost rental income." According to the plaintiff, the defendant did not comply with the terms of the stipulation.

On March 3, 2020, the plaintiff filed the instant motion seeking to enforce the settlement agreement and requesting an evidentiary hearing to determine (1) whether the defendant breached the settlement agreement and (2) the amount of damages to be awarded to the plaintiff (MOT SEQ 002). The plaintiff submitted, *inter alia,* the subject contracts, and the affidavit of Domingo Antonio Tapia Matos, the superintendent of the subject properties, who stated that since November 21, 2019, no person from or agent of the defendant LLC, no engineer, contractor, architect or other professional came to the building or attempted to contact him to complete the outstanding work or even to gain access to the building. The plaintiff also submitted photographs of the premises showing the incomplete condition of the property, and the Department of Buildings paperwork concerning the permits. No opposition was submitted.

In the interim, by order dated July 9, 2020, the court granted a motion by the defendant's attorney to be relieved (MOT SEQ 003). Counsel alleged that he had been unable to reach the principals or agents of the defendant. The court stayed the action for 30 days and adjourned the

instant motion to September 9, 2020. No attorney appeared for the defendant. No opposition was filed. [1]

By order dated September 9, 2020, this court granted the plaintiff's unopposed motion to enforce the settlement agreement to the extent of finding liability against the defendant on the breach of contract claim and directed a hearing as to damages. The court conducted the hearing on January 13, 2021. Shashi Kubair, of the defendant, was present at the hearing but did not testify. He represented that the defendant, an LLC, no longer had counsel.

The plaintiff submitted a Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The court credits the testimony of the plaintiff's witness, Christopher Sciochetti, the Chief Operating Officer of Barberry Rose Management, managing agent for the plaintiff, and the documentary evidence to the extent indicated in the following findings of fact.

Sciochetti was employed by Barberry Rose for six years, and oversaw the daily management of the properties, including leasing, property management, compliance, bookkeeping, and all construction and renovation projects. In 2017, he hired the defendant to fully renovate three apartments. He had used them for many prior projects. The plaintiff and defendant entered into three separate, but identical contracts, each dated July 25, 2017, for renovation work on three of its apartments - Apartment 43 in the building located at 565-567 West 175th Street, Apartments 33 and 63 in the building located at 571-53 West 175th Street.

[1] In the meantime, in May 2019, the defendant had commenced a breach of contract action against the plaintiff and it management company, Barberry Rose Management Company, Inc. and other defendants in the Supreme Court, Queens County, seeking to recover $230,725.00 in unpaid invoices (New Founders Constr. LLC v Barberry Rose Mgmt. Co., Inc,. et al, Index No. 707859/2019). In that action, counsel for New Founder's Construction LLC was relieved by a court order dated December 9, 2020. No further activity is reported in that case save for a marking on March 16, 2021, indicating that the case was stayed.

The work was to include the floors, electrical, plumbing, kitchen and windows, and was to be completed within 90 days after the deposit was paid, or the end of October 2017. The contract prices were $28,000.00, $26,000.00 and $31,000.00, or a total of $85,000.00. The contracts required the defendant to "obtain all licenses and permits" as part of the scope of work. The contracts are silent as to the damages, including consequential damages, upon any breach.

Sciochetti explained that the plaintiff intended to renovate the regulated apartments so as to be able raise the rent to market rent levels by passing on the costs of the improvement to the tenants and by qualifying for a vacancy increase under the rent stabilization regulations. The plaintiff hoped to rent the units at the fair market rate of $2,200.00. The new rate would exceed the rent stabilization threshold and the apartment would become deregulated.

As work progressed between October 2017 and January 2018, the defendant submitted three change orders, each in the amount of $21,000.00, or a total of $63,000.00. According to the plaintiff, the contract prices and change orders totaled $148,000.00. While it claims to have paid the defendant a total of $105,000.00, no proof of payment was submitted. The defendant failed to complete the agreed upon work, including the plumbing, and did not close out the permits issued by the Department of Buildings. The plaintiff tried hiring a new plumbing contractor but no plumber would sign off on another plumber's work. More than a year passed.

As Sciochetti recalled, before the defendant could hire other contractors to complete the work, the Housing Stability and Tenant Protection Act (HSTPA), went into effect, on June 14, 2019. As a result, the subject apartments could no longer be deregulated and the plaintiff would be unable to pass along the cost of the renovations to the tenants via increased rents. Rather, the same rents in effect prior to 2017 would apply - $1,355.49, $1,514.44 and $1,3520.00.

Notably, the renovation work on the apartments remained incomplete at the time of the hearing on January 13, 2021, without explanation. Sciochetti revealed that the defendant was just then "gearing up" to get the work finished by other contractors.

At the hearing, the plaintiff does not seek damages related to the $105,000.00 it claims to have paid to the defendant. Rather, it seeks consequential damages of $611,941.02 representing ten years of lost rental income for the three units. The plaintiff argues that the recoverable rent was permanently reduced by reason of the defendant's failure to timely complete the renovations prior to the enactment of the new legislation. It submits calculations of expected losses through August 2021, when it expected to finish the renovations by using other contractors, as well as additional future lost rental income through 2031. Specifically, it seeks $303,600.00 for losses from November 2017 through August 2021, plus an additional $308,341.20 for projected lost rental income from September 2021 through August 2031.

CONCLUSIONS OF LAW

It is well settled that "[s]tipulations of settlement are essentially contracts and subject to principles of contract interpretation." Hotel Cameron, Inc. v Purcell, 35 AD3 153 (1st Dept. 2006); see VNB New York LLC v Maidi, 159 AD3d 556 (1st Dept. 2018). The court generally has the power to enforce settlement agreements pursuant to a motion made in the original action, unless there has been an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement. See Teitelbaum Holdings, Ltd. v Gold, 48 NY2d 51 (1979). No notice of discontinuance has been filed and no judgment entered. Therefore, "the court retains its supervisory power over the action and may lend aid to a party who had moved for enforcement of the settlement." Teitelbaum Holdings, Ltd. v Gold, supra.

The necessary elements of a breach of contract claim are: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). On the prior motion, the plaintiff established that the underlying contracts and the parties' stipulation were valid agreements, and that the defendant breached the agreements.

The court thus granted the plaintiff's motion as to liability and scheduled the hearing on damages. However, the plaintiff failed to establish damages at the hearing.

As previously stated, the only damages sought by the plaintiff are consequential damages of $611,941.02 representing ten years of lost rental income for the three units. Consequential damages in a breach of contract case are not allowable where the contract "contains no provision or language indicating that recovery of consequential damages was within the contemplation of the parties (citations omitted)." Brody Truck Rental, Inc. v Country Wide Ins. Co., 277 AD2d at 125 (1st Dept. 2000) *lv dismissed* 96 854 (2001); see Building Service Local 32B-J Pension Fund v 101 Ltd. Partnership, 115 AD3d 469 (1st Dept. 2014); J&R Electronics Inc. v One Beacon Ins. Co., 35 AD3d 169 (1st Dept. 2006); Chemical Bank v Stahl, 25 AD2d 126 (1st Dept. 1998). As further explained by the First Department in Brody Truck Rental, Inc., supra at 125, "[i]n claims for breach of contract, a party's recovery is ordinarily limited to "general damages which are the natural and probable consequences of the breach" (Kenford Co., Inc. v County of Erie, 73 NY2d 312); any additional recover must be premised upon a showing that the unusual or extraordinary damages sought were "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting'" (id. *quoting* Chapman v Fargo, 223 NY 32,36; see also Am. List Corp. v U.S. News and World Report, Inc., 75 NY2d 38, 42). Thus, "a party may only recover damages for loss of future profits if it 'demonstrate[s] with certainty that such damages have been caused by the breach …, the alleged loss must be capable of proof with reasonable certainty … not [] merely speculative, possible or imaginary … and the particular damages [must have been] fairly within the contemplation of the parties (Kenford Co. v Erie County, [supra at 261])." Wathne Imports, Ltd. v PRL USA, Inc., 101 AD3d 83, 87 (1st Dept. 2012).

The plaintiff's claim for future lost rental income is purely speculative and unsupported by the proof submitted. As explained by the First Department, "[w]here a contract is silent on the subject, courts, employing a 'common sense" approach, must determine what the parties

intended by considering 'the nature, purpose and particular circumstances of the contract known by the parties .. as well as 'what liability the defendant fairly maybe supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose it assumed, when the contract was made.'" Awards.com LLC v Kinko's, Inc., 42 AD3d 178, 183-184 (1st Dept. 2007) *quoting* Kenford Co. v County of Erie, supra at 319.

There is simply no evidence showing that at the time the contracts or the stipulation were executed loss of future rents based on the plaintiff's inability to deregulate the apartment was within the parties' contemplation. See Wathne Imports, Ltd. v PRL USA, Inc., supra; Awards.com LLC v Kinko's, Inc., supra; Brody Truck Rental, Inc. v Country Wide Ins. Co., supra. The plaintiff has not shown that, at the time of the underlying contracts, in July 2017, lost rental income as a result of a delay by the defendant coupled with new legislation in June 2019 barring any rental increase was within the contemplation of the parties as the probable result of a breach. The contracts were silent as any impending or possible legislation and did into mention consequential or any other type of damages. Similarly, the subject stipulation negotiated by two attorneys In November 2019, five months after the legislation, does not mention the legislation or consequential damages for future rents. Nor does the plaintiff now allege that it had any knowledge of impending legislation. The stipulation states only that the parties reserved their respective rights in regard to the plaintiff's "claim for damages and/or lost rental income." The plaintiff does not establish that any particular amount, much less ten years' worth, of lost rental income is attributable to the defendant conduct in 2017 and early and not attributable to other causes, such as the plaintiff's lack of payment, gas and plumbing problems in the building, pandemic related delays, or other reasons which are suggested by this record. Consequently, even though there has been a finding that the defendant breached the contracts, the plaintiff cannot be granted any amount of damages on the proof it has submitted. Nor has the plaintiff submitted any decisional or statutory authority to support the damages it now seeks.

Accordingly, it is

ORDERED that, after an evidentiary hearing, the plaintiff's motion is denied upon its failure to establish damages.

This constitutes the Decision and Order of the court.

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

1/25/2022
DATE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION			
		GRANTED	X	DENIED	GRANTED IN PART		OTHER	
APPLICATION:		SETTLE ORDER			SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE	