Commercial Tenant Servs., Inc. v Building Serv. 32BJ Health Fund
2022 NY Slip Op 30998(U)
March 23, 2022
Supreme Court, New York County
Docket Number: Index No. 653371/2019
Judge: Arthur Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR ENGORON** **PART** **37**

Justice

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COMMERCIAL TENANT SERVICES, INC.,

Plaintiff,

- v -

BUILDING SERVICE 32BJ HEALTH FUND,

Defendant.

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INDEX NO. 653371/2019

MOTION DATE 01/03/2022, 01/03/2022

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 180, 181, 182

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 175, 176, 177, 178, 179, 183, 184, 185, 186, 187, 188, 189, 190

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons stated hereinbelow, the motion of defendant for summary judgment is granted and the motion of plaintiff for summary judgment is denied.

Background

Plaintiff, Commercial Tenant Services, Inc. ("CTS"), is a New York corporation that provides commercial lease auditing services in which it analyzes leases, rent statements, bills, escalation statements and the like to determine if its clients have been overcharged or are otherwise overpaying rent or related expenses.

Defendant, Building Service 32BJ Health Fund ("The Fund"), is a tax-exempt trust that serves the members of Service Employees International Union, Local 32BJ ("SEIU"), a union that represents property service workers.

Because of SEIU's connection to building service industry employees The Fund, to avoid potential conflicts of interest and violations of federal law, retains Qualified Professional Asset Managers ("QPAM") to, inter alia, help it locate and negotiate terms for office spaces and their leases. Additionally, The Fund employs non-party Newmark Grubb Knight Frank ("Newmark") as a managing agent, with its Vice President Director of Operations, Bart McDade, acting as The Fund's authorized agent.

i. The Lease, The Audit Agreement, and The Confidentiality Agreement

On May 14, 2010, The Fund entered a lease ("The Lease") with option to purchase office space at 25 West 18th Street, New York, New York, a/k/a 620 Avenue of the Americas ("The Premises"), with non-party landlord, the Cheitrit Group. NYSCEF Doc. No. 70. The Lease was negotiated on behalf of The Fund by its QPAM, Daniel Robinson, Managing Director, Finance & Investment Consulting, at non-party American Realty Advisors. Mr. Robinson, as QPAM, later negotiated The Fund's exercising of its purchase option.

On June 26, 2013, plaintiff and defendant, the latter through its authorized agent Mr. McDade, entered into a two-page agreement ("The Agreement") by which CTS was retained on an exclusive basis to review The Fund's "submitted leases, rent statements, electric billings, and escalation statements" in order to "seek and determine whether [The Fund] has been or is being overcharged in, or is otherwise overpaying or has overpaid, its rent, additional rent, rent taxes or other rent related charges." NYSCEF Doc. No. 71.

At some point before The Agreement, The Premises were sold by the Cheitrit Group to another non-party, RXR 620 Master Lessee LLC ("RXR"), which "assumed the lease and the purchase option agreements." NYSCEF Doc. No. 82 fn. 3. In addition, and significantly for the disputes to come, RXR is also the building manager for The Premises.

Pursuant to The Agreement, potential overcharges found by CTS were to be referred to as "Identifications," and based on those, CTS, or The Fund, was authorized to attempt to obtain "Refunds," as defined by The Agreement, from RXR. If, and only if, The Fund received any Refunds for the years under audit, it agreed to pay CTS 25% of the value of the Refund for that year and for three years subsequent. If, at its sole discretion, The Fund chose not to pursue an Identification, it would not be liable to CTS, but The Agreement was clear that in such a case The Fund "shall promptly notify CTS in writing of any such election." NYSCEF Doc. No. 139.

Pursuant to The Agreement, "Refunds" are defined broadly and:

> shall include but not be limited to all refunds, credits, savings, rent reductions, rent concessions, reductions in past or future escalation charges, rent tax savings, reductions in other rent related charges, increased payments from [The Fund's] tenants and/or subtenants, settlement proceeds, compromise or forgiveness of an obligation arising under any prior lease, the current lease or any renegotiated leases (including concessions and reductions in bills or other benefits resulting from a transaction related to the current lease or renegotiated lease or sublease, including assignment of the lease), or other consideration, financial, transaction or otherwise.

Id.

Significantly, however, Section 5 of The Agreement also allows that fees due to CTS "will not be reduced should [The Fund] enter into any agreement with the landlord or other person or entity which would otherwise reduce or cause a reduction of the fees that would be payable to CTS." Id.

Finally, Section 7 of The Agreement says:

> All proprietary or legally protected information of [The Fund] or its affiliates, made available by virtue of this Agreement and not generally available to the public or the landlord shall be treated as confidential to [The Fund] and its affiliates except as may be otherwise required by law or by judicial process. CTS and its agents shall not disclose such information to any third party without the prior written consent of [The Fund] or its affiliates, excepting any action to enforce this Agreement.

Id.

In a letter dated August 6, 2013, and confirmed and agreed to by CTS on August 23, 2013, CTS, "as agent for [The Fund]," and RXR entered into a confidentiality agreement ("The Confidentiality Agreement") stating that any "Evaluation Materials" provided by RXR were to be "used solely for the purpose of conducting an audit of the Company's books and records relating to the Property for the years 2011 and 2012" and were to be "kept confidential" except to share with The Fund or with the written consent of RXR. NYSCEF Doc. No. 84.

The Confidentiality Agreement defines "Evaluation Materials" to include "without limitation, all notes, analyses, complications, Excel spread sheets, data, reports, studies, interpretations, forecasts or other documents." Id.

The Confidentiality Agreement, however, also states that the term "Evaluation Materials" does *not* include information that becomes available in a nonconfidential basis from another source, becomes generally available to the public other than as a result of disclosure in violation of The Confidentiality Agreement, or "has been or is independently developed by you or your Representatives without the use of the Evaluation Material." Id.

ii. The Audit and The Purchase Option Negotiations

In a letter dated October 17, 2014, CTS informed RXR that it had "completed our initial review of the escalatable operating expenses for 2012" and alleged to have found "overcharges" connected to cleaning, insurance, management fees, administrative costs, and security contributions paid by The Fund worth $263,712.00. NYSCEF Doc. No. 85.

In an e-mail dated January 2, 2015, a representative of RXR responded to CTS' findings, reviewing each alleged overcharge, and concluding that, in their opinion, RXR only owed The Fund a $558 operating expense credit for the year 2012. NYSCEF Doc. No. 87.

In a letter dated April 1, 2015, CTS replied that, having consulted with The Fund, it disputed RXR's interpretation of the alleged overcharges relating to cleaning, insurance, and management fees. NYSCEF Doc. No. 107. CTS' reply focused on the calculation of management fees, disputing the way the fees were calculated for The Premises, if they were comparable to similar buildings, and if RXR, as landlord and building manager, was "disregarding the requirement of a reasonable expectation of an arm's length fee absent the landlord relationship." Id.

In an email dated May 1, 2015, RXR responded to CTS that it had "thoroughly answered all of your follow-up questions and we believe this matter to be closed… If there is any disagreement on this we will need to discuss directly with [The Fund]." NYSCEF Doc No. 153.

At some point in the fall of 2014, which was during CTS' audit, The Fund began to exercise its option to purchase The Premises. NYSCEF Doc. No. 104. Negotiations included discussions of the management fees that would be charged by RXR. The minutes from a "Condo Expense Review Meeting" held June 2, 2015, and attended by representatives of RXR as well as The Fund's authorized agent Mr. McDade, states that:

> Management fees of $800,000 were discussed and [Mr. McDade] held firm that the going market is closer to $200,00. RXR contends that this is a reasonable rate. [RXR] also stated that the unit that [The Fund] is buying is 40% below market. [Mr. McDade] said that has no bearing on the fact that their proposed management fee will cost [The Fund] approx. $160,000 more per year than they should be paying. [Mr. McDade] also said that the management agreement is 'not arm's length.'

NYSCEF Doc. No. 152.

In an e-mail thread dated June 22, 2015, a representative for RXR informed CTS that "there is nothing further to discuss at this point in time. The e-mail sent to you on May 1st is the Landlord's final response," prompting CTS to push Mr. McDade to persuade The Fund to "proceed to Expedited Arbitration as defined in the Lease." NYSCEF Doc. No. 153.

In an e-mail thread dated July 13, 2015, The Fund's Executive Director, Peter Goldberger, reached out to outside counsel at the Proskauer law firm for advice on whether, based on CTS' arguments, The Fund had "a good case if we chose to arbitrate the dispute," and also noting that '[o]ur audit as well as condo negotiations are stuck on the issue of management fee." NYSCEF Doc. No. 116.

Proskauer replied, disagreeing with CTS' interpretation, noting that The Lease entitled RXR to charge management fees in the amount of 2.5% of the rents, and that "2.25% is well within market for a management fee," but noting the fee "increased dramatically after the base year" which "calls into question how the management fee for the base year was calculated." Id.

The next morning, July 14, 2015, in response to the Proskauer opinion, Mr. Goldberger wrote to Mr. McDade and Larry Gonzalez, The Fund's Director of Finance and Administration, that "based on [Proskauer's] interpretation I do not feel we would have the strongest case in arbitration. We should discuss next steps within the context of our overall condo negotiations with the landlord." NYSCEF Doc. No. 156.

Also on July 14, 2015, less than an hour after Mr. Goldberger expressed his desire to move forward in "the context of our overall condo negotiations," CTS e-mailed Mr. McDade seeking "any word on moving forward with expedited arbitration." NYSCEF Doc. No. 164. Mr. McDade does not appear to have responded.

On July 21, 2015, Mr. McDade e-mailed Mr. Goldberger that he "totally disagree[d]" with Proskauer's interpretation and advised The Fund to ask three third-party management companies "what the market rate for [property management] services are for a 600,000 square foot building with 3-4 condominium units." NYSCEF Doc. No. 176. The next morning Mr. Goldberger replied that, although he understood Mr. McDade's position, he was "not sure if we have a strong legal case. I don't want to pursue a losing arbitration if it may hurt our condo discussions of the operating budget. I am not optimistic that we will win this fight but need to figure out how to keep our claim alive as we negotiate our future arrangement." Id.

On July 29, 2015, CTS again wrote Mr. McDade asking about The Fund pursuing expedited arbitration. NYSCEF Doc. No. 164. Mr. McDade forwarded CTS' e-mail to Mr. Goldberger, who responded: "I don't want to proceed until we figure out our strategy on the condo. Don't want to pursue a losing arbitration that may hurt our chances to get what we need with the condo negotiations." Id. On August 10, 2015, Mr. McDade forwarded Mr. Goldberger's response to CTS with "FYI" in the body of the message. Id.

On August 19, 2015, The Fund's QPAM, Mr. Robinson, e-mailed various agents and counsels of The Fund, including Mr. Goldberger and Mr. McDade, and reviewed parts of the ongoing condo negotiations, reporting that: "We discussed the property management fee for an extended period of time. It is too high and they know it. We may get some movement there, but the savings to us will only be 31% of the reduced amount." NYSCEF Doc. No. 161.

In an e-mail dated September 1, 2015, Mr. Goldberger wrote to Mr. Robinson about the condo negotiations that the "key is the management fee." NYSCEF Doc. No. 119.

In an e-mail dated September 29, 2015, a representative wrote to Mr. Robinson agreeing in principle that "the condo board shall have the discretion to set the management fee so long as it is capped at $400,000." NYSCEF Doc. No. 120.

Meanwhile, on September 18, 2015, October 26, 2015, November 4, 2015, November 24, 2015, and December 14, 2015, CTS e-mailed Mr. McDade to discuss moving forward with any arbitration, with the final three e-mails cc'ing Mr. Goldberger. NYSCEF Doc. No. 121. Neither Mr. McDade nor The Fund appear to have replied.

On or about June 30, 2016, The Fund completed its purchase of The Premises, now a condominium, from RXR. NYSCEF Doc. No. 104.

In a letter dated July 19, 2016, CTS wrote to Mr. McDade, cc'ing Mr. Goldberger, acknowledging The Fund's purchase of The Premises and seeking advice as to the status of what it saw as outstanding audit issues. NYSCEF Doc. No. 167.

In a letter dated July 22, 2016, a regional director for Newmark, Mr. McDade's firm, wrote to The Fund proposing a renewal of their facility management agreement, and highlighting some of the savings it alleged Newmark had achieved for The Fund, including having "[w]orked on the condominium budget, effective in reducing the property management fee by $400,000." NYSCEF Doc. No. 125.

In a letter and e-mail dated August 11, 2016, CTS again wrote to Mr. McDade, cc'ing Mr. Goldberger, seeking to "discuss the status and possible disposition" of the audit claim. NYSCEF Doc. No. 169.

On August 16, 2016, Mr. McDade replied: "After numerous meetings with you and discussions internally with our legal advice [sic] we determined that CTS did not have a credible claim against the landlord." NYSCEF Doc. No. 91.

iii. The Instant Lawsuit

On June 10, 2019, CTS sued The Fund, asserting five causes of action: 1) breach of contract; 2) breach of implied covenant of good faith and fair dealing; 3) promissory and equitable estoppel; 4) unjust enrichment; and 5) quantum meruit. NYSCEF Doc. No. 1.

On June 17, 2019, The Fund moved to dismiss CTS' second through fifth causes of action as duplicative of the first. NYSCEF Doc. No. 3.

In a Decision and Order dated October 11, 2019, this Court granted The Fund's motion to dismiss CTS' second cause of action (good faith and fair dealing) while denying the rest of the motion. NYSCEF Doc. No. 23.

On October 29, 2019, The Fund interposed an answer consisting of general denials and five affirmative defenses: 1) failure to state a cause of action upon which relief may be granted; 2) claims barred by a written agreement; 3) failure to mitigate; 4) estoppel, waiver and laches; and 5) claims are unduly speculative. NYSCEF Doc. No. 25.

On April 16, 2021, this Court so-ordered a stipulation amending the caption to refer to The Fund as defendant, replacing all references to SEIU, Local 32BJ, and "the Union," and acknowledging that The Agreement was between CTS and The Fund, and that references to SEIU, Local 32BJ were inadvertent. NYSCEF Doc. No. 56.

In a Decision and Order dated June 28, 2021, this Court granted CTS' motion for leave to file a First Amended Verified Complaint. NYSCEF Doc. No. 57. On July 7, 2021, CTS filed this Complaint, adding a fifth cause of action, for attorney's fees. NYSCEF Doc. No. 59. On July 12, 2021, The Fund answered again. NYSCEF Doc. No. 60.

On November 16, 2021, following the completion of discovery, a Note of Issue was filed requesting a bench trial. NYSCEF Doc. No. 61.

iv. The Instant Motions

On November 24, 2021, The Fund moved, pursuant to CPLR 3212, for summary judgment against plaintiff's First Amended Complaint. NYSCEF Doc. No. 63.

Defendant argues, first, that CTS' case is based on inadmissible evidence obtained and governed by The Confidentiality Agreement between CTS, as an agent of The Fund, and the landlord, and

second, that by its own terms CTS cannot establish a breach of The Agreement as no "Identifications" were pursued by The Fund and turned into "Refunds," a requisite for CTS to earn payment.

In reply, plaintiff argues that The Fund lacks standing to assert a confidentiality agreement it is only a third-party beneficiary of. CTS further argues that no unsurmountable ambiguities exist in The Agreement, as it defines "Refunds" broadly, and that Section 5 of The Agreement allows it to recover "should [The Fund] enter into any agreement … which would otherwise reduce or cause a reduction of the fees that would be payable to CTS."

Also on November 24, 2021, CTS moved, pursuant to CPLR 3212, for summary judgment granting the breach of contract and attorney's fees causes of action in its First Amended Complaint. NYSCEF Doc. No. 95.

In reply, defendant argues that CTS cannot move forward procedurally because it had inconsistent theories of relief nor can it move forward without breaching The Confidentiality Agreement as, it claims, CTS' case "is entirely derivative of the Landlord's 'books and records relating to the Property', which must be 'kept confidential' and used 'solely for the purpose of conducting the audit.' The Fund also argues CTS has not shown that a "Refund," as defined in The Agreement, was achieved; that CTS inappropriately relies upon contradictory terms in a contract it drafted; that CTS' motion is based on disputed facts; that there can be no damages for a purported failure to give notice; and that The Fund's affirmative defenses are meritorious.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Now, The Fund alleges that CTS' case is based on inadmissible information obtained or derived from, and governed by, The Confidentiality Agreement that CTS entered into with RXR as an agent of The Fund and therefore must be dismissed.

CTS replies that The Fund is merely a third-party beneficiary of The Confidentiality Agreement and therefore lacks standing.

The Confidentiality Agreement is clear that CTS entered into it with RXR as The Fund's *agent* and therefore The Fund is *not* merely a third-party beneficiary. However, The Fund fails to point to any specific information obtained or inappropriately derived from any of RXR's Evaluation Materials.

The Fund argues that "[a]ll documents and calculations that are the subjects of CTS's claims for fees are derived from the confidential information provided by the Landlord to CTS, in its capacity of agent of the Fund." But this does not appear to be the case as The Confidentiality Agreement has a carve-out for information that "has been or is independently developed by you or your Representatives without the use of the Evaluation Material."

In the volumes of exhibits submitted by plaintiff, the only specific information that appears to come directly from RXR is The Confidentiality Agreement itself. As far as derived information, in its Counter-Statement of Material Facts, The Fund only objects once to something it specifically alleges is based upon confidential information: the actual numerical amounts of the management fees. NYSCEF Doc. No. 179 ¶ 38. Defendant's objection is unconvincing here, as CTS more than sufficiently shows that those same numbers were developed independently in discovery through e-mails obtained from The Fund and the deposition of Mr. Goldberger.

Therefore, defendant's motion for summary judgment, to the extent that it is based on the argument the cause of action was built upon inadmissible information, should not be granted.

The Fund also argues that by the terms of The Agreement, no Identifications were actually pursued by The Fund and turned into a Refund for CTS to collect on, and therefore there is no case. The Fund argues that this Court should not compare management fees paid by a tenant to management fees paid by a condominium owner, and that, further, because of irreconcilable provisions in The Agreement, this Court should find it ambiguous and look to the intent of the parties in interpreting it.

CTS, in reply, points to Section 5 of The Agreement, which allows for it to recover if The Fund entered into "any agreement … which would otherwise reduce or cause a reduction of the fees that would be payable to CTS." This clause, plaintiff argues, is sufficient to allow CTS to collect from The Fund based on the lowered management fees it pays to RXR now that The Premises are a condominium.

Whether a contract is ambiguous is a question of law for the courts and is determined by looking at the four corners of the document, not outside it. See W.W.W. Assocs. V. Giancontieri, 77 NY2d 157, 162-163 (1990). To read Section 5 of The Agreement broadly to allow non-rent-related agreements to lead to payments to CTS without "Identifications" and "Refunds," as plaintiff would have this Court, is to read ambiguities into it. When ambiguities are found in an agreement, and where "the document makes clear the parties' over-all intention, courts examining isolated provisions should then choose that construction which will carry out the plain purpose and object of the [agreement]." Kass v Kass, 91 NY2d 554, 567 (1998) (internal citations and quotations omitted).

According to The Agreement, The Fund hired plaintiff to review and analyze The Fund's "leases, rent statements, electric billings, and escalation statements" in order to see if The Fund had overpaid "its rent, additional rent, rent taxes or other rent related charges." Viewing The Agreement as a whole, CTS was only allowed to collect on *rent*-related charges, including management fees, that The Fund paid as part of its commercial lease. The purpose of Section 5

of The Agreement is therefore to prevent one of CTS' clients from making a runaround on CTS by making a *rent*-related agreement that would otherwise prevent CTS from collecting its fees.

Here, The Fund did not enter into a rent-related agreement with RXR. The Fund *purchased* The Premises and the management fees that The Fund pays to RXR as a condo owner are not the same as the management fees that it paid as a tenant as part of its rent. The Fund's agreement to pay those condo management fees is therefore not the kind of agreement that Section 5 contemplates.

The intention of The Agreement, drafted by plaintiff, is clear: defendant hired plaintiff to identify rent-related overcharges and was entitled to a fee if identifications it made of rent-related overcharges turned into actual money saved. The carve-out in Section 5 of The Agreement allowing collection on agreements between defendant that might have denied plaintiff its fee, therefore, can only be read to refer to rent-related agreements that The Fund might have made. Therefore, as The Fund's agreements with RXR as an owner are *not* the type of agreements contemplated by Section 5, that section does not apply.

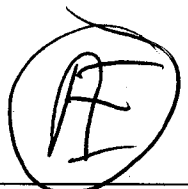
Furthermore, there is ample evidence presented that defendant was hardly keeping its condominium negotiations a secret from plaintiff, and that plaintiff only began to conflate the two types of management fees in preparation for this lawsuit. The Fund's purchase option for The Premises was in The Lease that CTS was hired to analyze and the negotiations to exercise it were mentioned in numerous communications that CTS was privy too. CTS' repeated attempts to push The Fund into arbitration *before* the condo conversion closed imply it knew that it would not be paid based on agreements not related to rent.

Therefore, defendant's motion for summary judgment should be granted.

This Court has considered plaintiff's other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, the motion of defendant, Building Service 32BJ Health Fund, for summary judgment is granted, and the motion of plaintiff, Commercial Tenant Services, Inc., is denied. Accordingly, the clerk is hereby directed to enter judgement dismissing the instant action.



3/23/2022
DATE

ARTHUR ENGORON, J.S.C.

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