

Walsam 316, LLC v 316 Bowery Realty Corp.

2022 NY Slip Op 31129(U)

April 8, 2022

Supreme Court, New York County

Docket Number: Index No. 153318/2017

Judge: Margaret Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49M

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

Plaintiffs,

- v -

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

Defendants.
-----X

INDEX NO. 153318/2017

MOTION DATE 06/04/2021

MOTION SEQ. NO. 012

**DECISION + ORDER ON
MOTION**

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 717, 720, 724

were read on this motion to/for LEAVE TO FILE

Plaintiffs commenced this action seeking various monetary and equitable relief relating to transactions involving a building located at 4-6 Bleecker Street in the city, state, and county of New York. In this motion, defendant 316 Bowery Realty Corp. (316 Bowery) seeks (i) leave to file an Amended Verified Answer, Affirmative Defenses, and Counterclaims pursuant to CPLR 3025 (b); and (ii) partial summary judgment dismissing plaintiffs' Second Cause of Action for Breach of Contract as against 316 Bowery pursuant to CPLR 3212.

Background

The court incorporates by reference the facts as detailed in this court's December 11, 2020 Decision and Order (the December 11th Decision) (NYCSEF # 708), which decision the Appellate Division, First Department, affirmed in relevant part (201 AD3d 562 [2022]).

Pertinent to this motion, prior to the issuance of the December 11th Decision, the parties came to two agreements: (1) plaintiffs and 316 Bowery stipulated in a settlement agreement dated August 15, 2019, that 316 Bowery would fund \$500,000 of a contemplated settlement with plaintiffs in the related overcharge proceeding, *Arnold v 4-6 Bleecker Street LLC*, Index No 158541/2013, in exchange for, *inter*

alia, plaintiffs agreeing to dismiss Eva and Leonard Taub (the owners of 316 Bowery) from this present action (NYSCEF # 689 – the 2019 Settlement Agreement); and (2) on January 8, 2020, plaintiffs and 316 Bowery ultimately came to terms with the tenants in the overcharge proceeding, agreeing to pay the tenants \$2,300,000 -- 316 Bowery paid \$1,600,000 of the total, and plaintiffs paid the remaining \$700,000, as provided in an amendment to the 2019 Settlement Agreement with an express reservation of rights that is the subject of the present motion (NYSCEF # 703 – Overcharge Settlement Agreement; NYSCEF # 707 – the Settlement Agreement Amendment).

By the present motion for leave to file an amended answer, 316 Bowery “seeks to amend and/or supplement certain [c]ounterclaims to account for the rulings in the December 11th Decision” (NYSCEF # 693 – MOL at 12; NYSCEF # 686 – Proposed Amended Answer). 316 Bowery bases its various amended counterclaims on the allegation that, in settling the overcharge proceeding, it contributed in excess of the contractual indemnification requirements (the Section 14.1 Bowery Indemnification Cap of \$1,350,000) of the purchase and sale agreement with plaintiffs (NYSCEF # 681 – 2014 PSA).

316 Bowery points to Section 6 of the Settlement Agreement Amendment, which provides:

Reservation of Rights. Notwithstanding any payments made to the Overcharge Plaintiffs... Bowery and Walsam each fully and expressly reserve any and all of their respective rights, claims, remedies, and/or defenses against the other ... for, inter alia, contribution and indemnification relating to or in connection with any and all settlement amounts paid by Walsam and Bowery to the Overcharge Plaintiffs...

Section 7 of the Settlement Agreement Amendment further specifies:

No admission of Liability or Wrongdoing. The Parties expressly acknowledge that they entered into the Overcharge Settlement to avoid the inherent uncertainty associated with litigation and nothing related to or in connection with the Overcharge Settlement, or either Party’s respective payment/contribution towards the Overcharge Settlement shall be deemed or construed or interpreted to be an admission or acknowledgment of liability to the other, or otherwise limit or impede Bowery or Walsam’s respective rights, claims, remedies, and/or defenses as may exist between them....

(*Id.*). Similarly, the Overcharge Settlement Agreement, Section 27 and Section 2 includes, respectively, similar sections covering reservation of rights and non-admission of liability as those provided in the Settlement Agreement

Amendment. 316 Bowery asserts that these various sections retain the right for 316 Bowery to seek reimbursement from plaintiffs for the contribution of 316 Bowery in excess of the Section 14.1 Bowery Indemnification Cap, being \$1,350,000.

Discussion

Amended Verified Answer, Affirmative Defenses, and Counterclaims

CPLR 3025 provides that courts shall freely grant leave for a party to amend their pleadings “unless the proposed amendment is palpably insufficient or patently devoid of merit” or will prejudice or surprise the opposing party (*MBIA Ins. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). “[I]n determining whether to grant leave to amend the court must examine the underlying merits of the causes of action asserted therein” (*Glenn Partition, Inc. v Trustees of Columbia Univ. in City of New York*, 169 AD2d 488, 489 [1st Dept 1991]).

The counterclaims that 316 Bowery seeks to revise cover (1) Attorneys’ Fees, (2) Fraud, Deceit, and/or Misrepresentations, (3) Money Judgment, (4) Unjust Enrichment, (5) Overpayment on Contract Recovered, and (6) Breach of Contract. Without conceding the merits, plaintiffs do not object to the first two amendments of 316 Bowery’s motion -- attorneys’ fees, and fraud, deceit, and/or misrepresentations (NYSCEF # 711 at 2-3, fn 3). Accordingly, without adjudicating the merits, the court grants that part of 316 Bowery’s motion on the first two amended counterclaims.

The branch of 316 Bowery’s motion to amend its answer respecting the third amended counterclaim denominated “Money Judgment” is denied. Plaintiffs are correct that this is “really not a legal claim at all, it’s a claim for relief under whatever theory one might want to plead, but it’s not a cause of action in itself” (NYSCEF # 720 at 21:18-20). Further, even “construing the counterclaim liberally in aid of its sufficiency” (*Broder v Brasselle*, 7 Misc 2d 13, 16 [Sup Ct, NY County 1957]), the counterclaim is patently devoid of merit. Paragraph 101 of 316 Bowery’s amended answer states “with respect to resolving the Overcharge Proceeding, 316 Bowery expressly reserved its right to seek reimbursement from Walsam for its contribution to resolve the Overcharge Proceeding in excess of the limits in Section 14.1 of the 2014 PSA.” The quoted language is clear that 316 Bowery did not “expressly” reserve its right to seek reimbursement from Walsam. However, 316 Bowery did expressly reserve its right to “*inter alia*, contribution and indemnification.” But, while 316 Bowery asserts that the parties “expressly preserved their right to adjudicate their respective contributions to [the resolution of the Overcharge Proceeding] in this action” (NYSCEF # 717 – Reply at 10), 316 Bowery conceded at oral argument that “none of our proposed counterclaims sound in indemnification or contribution” (NYSCEF # 720 – tr. at 8-9). Rather than “expressly” reserving its right to reimbursement, therefore, at best 316 Bowery

impliedly reserved its right to reimbursement in that the phrase “*inter alia*” signaled that “contribution and indemnification” were not exclusive to other forms of relief reserved. It is clear, however, that 316 Bowery did not have the right to reimbursement prior to entering into either of the settlement agreements, and accordingly the reservation of rights and non-admission of liability would not act to expand that which did not exist in the first place.

316 Bowery asserts that interpreting the settlement agreements to reserve only those rights that existed at the time of those agreements would “(i) deem the reservation of rights provisions in the Settlement Agreements meaningless or superfluous; (ii) be absurd and commercially unreasonable; and/or (iii) be contrary to the reasonable expectation of 316 Bowery and Walsam” (NYSCEF # 717 at 10).

At the time the parties negotiated the reservation of rights sections, however, the court had yet to issue its December 11th Decision adjudicating the indemnification issue. Accordingly, the reservation of rights section was not “meaningless or superfluous” as, at minimum, it could have been meant to preserve the rights of plaintiffs to seek indemnification or contribution (which plaintiffs had not (and have not) waived and were seeking to enforce via, *inter alia*, contractual provisions respecting indemnification) to recover the \$600,000 settlement payment they funded in the overcharge proceeding in the event that such right was established.

Furthermore, the result is not “absurd and commercially unreasonable” as 316 Bowery obtained legal protection from the settlement agreements overall, including an \$800,000 set-off credit from Section 5 of the Settlement Agreement Amendment. Finally, it cannot be said that this result is contrary to the parties’ reasonable expectations. If 316 Bowery had expected that reimbursement would be available to it, 316 Bowery could have expressly negotiated for such term. The parties knew how to draft reimbursement provisions; Section 5 of the Settlement Agreement Amendment required plaintiffs to “return \$500,000” to 316 Bowery in the event that 316 Bowery “is held not to be responsible or liable to Walsam in the 2017 Litigation.” The attention the parties gave to the reimbursement provision in Section 5 belies 316 Bowery’s claims as to its expectations about reimbursement given the silence as to reimbursement elsewhere.

The branches of 316 Bowery’s motion to amend its answer respecting the fourth, fifth, and sixth amended counterclaims are also denied.

The fourth counterclaim denominated “Unjust Enrichment” is patently devoid of merit because “a party may not recover in ... unjust enrichment where the parties have entered into a contract that governs the subject matter” (*Cox v NAP Const. Co.*, 10 NY3d 592, 607 [2008]). Here, the settlement agreements and the

2014 PSA covered the rights of the parties respecting the funding of the resolution of the overcharge proceeding and indemnification related thereto.

The fifth counterclaim denominated “Overpayment on Contract Recovered” is equally devoid of merit because 316 Bowery expressly agreed in the Settlement Agreement Amendment contract to pay \$1,600,000 to fund the resolution of the Overcharge Proceeding. For the same reasons described above, 316 Bowery is mistaken in claiming with respect to the fifth counterclaim that it funded the resolution of the Overcharge Proceeding with an “express reservation of rights to seek reimbursement from Walsam” (NYSCEF # 693 at 14); 316 Bowery did not reserve reimbursement.

Finally, the sixth counterclaim denominated “Breach of Contract” is likewise devoid of merit. 316 Bowery argues that plaintiffs’ refusal to honor the Section 14.1 Bowery Indemnification Cap essentially breached the implied covenant of good faith and fair dealing and that 316 Bowery’s excess payment was “a direct and foreseeable consequence of Walsam’s wrongful and bad faith conduct” (NYSCEF # 686, ¶ 166). 316 Bowery is mistaken; 316 Bowery suggests that it accepted the settlement agreement to “stop the bleeding” (NYSCEF # 693 at 9), but such a claim does not include any hint of wrongful or bad faith on the part of Walsam (*see DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 404 [1st Dept 2015] [“conclusory allegations will not serve to defeat a motion to dismiss”]). Rather, it is clear that 316 Bowery voluntarily and intentionally entered into the settlement agreements, and there is no reason to relieve it of the consequences of its bargain (*see id.* [dismissing complaint including claim for breach of the implied covenant of good faith and fair dealing where party failed to allege any reason why it had no choice but to go through with a payment]).

Plaintiffs’ Breach of Contract Action against 316 Bowery

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, 324 [1986]). Once a showing has been made, the burden shifts to the party or 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, 562 [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, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

316 Bowery’s motion for summary judgment dismissing plaintiffs’ breach of contract action is denied. 316 Bowery asserts that this action is “premised

(primarily) upon” plaintiffs seeking reimbursement of legal fees respecting the overcharge proceeding (NYSCEF 693 at 14). The claim, broadly construed, also seeks reimbursement of legal fees in more than just the overcharge proceeding. However, it remains to be seen whether plaintiffs may avail themselves of the various indemnity provisions in the various agreements and other documents relating to attorney’s fee.

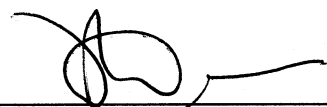
Conclusion

Accordingly, it is

ORDERED that the branch of defendant 316 Bowery Realty Corp.’s motion seeking leave to file an Amended Verified Answer, Affirmative Defenses, and Counterclaims is granted, in part, as follows: leave is granted to amend its counterclaims as set forth in the proposed amended answer for the first counterclaim for Attorneys’ Fees; and the second counterclaim for Fraud, Deceit, and/or Misrepresentation, but leave is denied with respect to the proposed third counterclaim for Money Judgment; the proposed counterclaim for Unjust Enrichment; the fifth counterclaim for Overpayment on Contract Recovered; and the sixth counterclaim for Breach of Contract; and it is further

ORDERED that the branch of defendant 316 Bowery Realty Corp.’s motion for partial summary judgment dismissing plaintiffs’ Second Cause of Action for Breach of Contract as against defendant 316 Bowery Realty Corp. is denied; it is further

ORDERED that, within 20 days from entry of this order, defendant 316 Bowery Realty Corp. shall serve a copy of this order with notice of entry and the amended answer in conformity with this order.

<u>04/08/2022</u> DATE	 MARGARET CHAN, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	