

**Walsam 316, LLC v 316 Bowery Realty Corp.**

2022 NY Slip Op 34431(U)

December 12, 2022

Supreme Court, New York County

Docket Number: Index No. 153318/2017

Judge: Margaret A. 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: COMMERCIAL DIVISION 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,

INDEX NO. 153318/2017

MOTION DATE 06/03/2022

Plaintiffs,

- v -

MOTION SEQ. NO. 013

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

**DECISION + ORDER ON  
 MOTION**

Defendants.

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 766, 767, 768, 769, 770, 771, 772, 773

were read on this motion to/for

RENEW/REARGUE/RESETTLE/RECONSIDER

The above-captioned plaintiffs (collectively, Walsam) commenced this action concerning a building at 4-6 Bleecker Street in Manhattan. In a prior motion (motion sequence 012), defendant 316 Bowery Realty Corp. (316 Bowery) moved for (i) leave to amend its counterclaims and (ii) partial summary judgment dismissing Walsam's second cause of action. The court denied 316 Bowery's motion, except for two amended counterclaims that Walsam did not oppose (NYSCEF # 727 – the April 8 decision). 316 Bowery now moves for reargument, which Walsam opposes.

“A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [citations and quotation marks omitted]).

316 Bowery's motion to reargue is granted only for the branch of the motion seeking partial summary judgment to dismiss Walsam's second cause of action; it is denied as to the branch of the motion on the leave to amend its counterclaims.

**Summary Judgment as to Walsam's Second Cause of Action**

The background of this matter has been addressed at length multiple times (NYSCEF #'s 187, 653, 723), and is omitted here. Briefly for this issue, the law firm of Rosenberg & Estis (R&E) represented both 316 Bowery and Walsam in a related

overcharge proceeding brought by tenants against 316 Bowery and Walsam. In the 2014 Purchase and Sale Agreement (PSA), under section 14.1, 316 Bowery had agreed to fund R&E's legal fees in the overcharge proceeding "in an amount not to exceed \$100,000" (NYSCEF # 681, § 14.1). In the present action, Walsam asserted a second cause of action for breach of contract seeking to enforce the PSA and the escrow agreement to recover attorney's fees (NYSCEF # 132, ¶¶ 136-139).

In the April 8 decision, this court denied 316 Bowery's motion for partial summary judgment dismissing Walsam's second cause of action for breach of contract stating that Walsam's claim, "broadly construed, also seeks reimbursement of legal fees in more than just the overcharge proceeding." (NYSCEF # 727). 316 Bowery argues that this court overlooked the facts by reading Walsam's claim broadly to encompass more than the overcharge proceeding. 316 Bowery points to an earlier decision dated December 11, 2020, in which this court found that under section 14.1 of the 2014 PSA, "316 Bowery is only required to indemnify [Walsam] for \$100,000.00 in attorney's fees paid to [R&E]" (NYSCEF # 751 at 15). The First Department affirmed this specific finding stating that section 14.1 of the 2014 PSA "applies to liability in this action, as that liability is incurred as a result of the rent overcharge litigation" (201 AD3d 562, 563-64 [1st Dept 2022]).

In contrast, Walsam explains that 316 Bowery is still not entitled to summary judgment because "the gravamen of the breach of contract claim concerns 316 Bowery's obligation to reimburse Plaintiff for legal fees" (NYSCEF # 767, ¶ 18). Walsam claims that 316 Bowery failed to pay legal fees in the overcharge proceeding other than a \$100,000 escrow amount which was exhausted.

In that the wording in the April 8 decision stated that Walsam's claim "seeks reimbursement of legal fees in more than just the overcharge proceeding" is seemingly contrary to the prior findings, 316 Bowery's motion to reargue the denial of the branch of its motion for partial summary judgment dismissing Walsam's second cause of action is granted, and, upon reargument, 316 Bowery's motion to dismiss the second cause of action is denied.

The allegation on this attorney's fees issue is that 316 Bowery failed to pay any of its legal fee to R&E since the exhaustion of the escrow amount, which caused Walsam to pay R&E for not only Walsam's defense but also 316 Bowery's defense (NYSCEF 132, ¶¶ 136-139). Hence, Walsam's second cause of action seeks to recover the amounts it paid beyond the \$100,000 amount. This claim is for the amounts it paid beyond the escrowed \$100,000. None of the prior holdings limits Walsam's recovery for the legal fees it expended for 316 Bowery due to 316 Bowery's alleged failure to pay R&E for its joint representation of both Walsam and 316 Bowery in the overcharge proceeding.

#### **Leave to Amend Counterclaims**

In connection with the overcharge proceeding that resulted favorably for the residential tenant-plaintiffs, 316 Bowery paid, via settlement, \$1.35 million in

excess of the indemnification cap that it had negotiated with Walsam (NYSCEF # 681 – 2014 PSA, § 14.1). 316 Bowery's various amended counterclaims sought to recover the excess. In the April 8 decision, this court found that 316 Bowery voluntarily settled without a right to reimbursement from Walsam, stating that the agreement by which Walsam and 316 Bowery "each fully and expressly reserve any and all of their respective rights . . . for, inter alia, contribution and indemnification" did not warrant the relief 316 Bowery sought (NYSCEF # 707).

Such language only reserved that which already existed. As 316 Bowery failed to identify any basis for reimbursement, the court denied the proposed amended counterclaims as being patently devoid of merit.

The court did not, as 316 Bowery argues, overlook that leave to file an amended pleading shall be freely given (NYSCEF # 764 – MOL at 13). In addition to noting that standard, the April 8 decision added the qualification that leave be denied where the amendment "is palpably insufficient or patently devoid of merit" (NYSCEF # 727 at 3). The cases 316 Bowery cites in support of its position do not hold a contrary standard.<sup>1</sup> Essentially, 316 Bowery's argument is with what this court finds as "palpably insufficient or patently devoid of merit" in 316 Bowery's proffered amended counterclaims.

316 Bowery argues that the court improperly accepted facts, including about the parties' intentions, in analyzing the meaning of the reservation of rights and the parties' use of reimbursement language elsewhere in the settlement agreement amendment (NYSCEF # 707 – Settlement Agreement Amendment; NYSCEF # 764 at 13-15). 316 Bowery is mistaken.

316 Bowery mischaracterizes the court's analysis of what the settlement agreement amendment reservation of rights "could have been meant" as a finding of fact (NYSCEF # 727 at 4; NYSCEF # 764 at 14). 316 Bowery fails to recognize that the court was not making a finding of fact but was rather addressing 316 Bowery's argument that, without crediting 316 Bowery's interpretation of the contract, the reservation of rights would be "meaningless or superfluous" (NYSCEF # 717, Reply in MS012 – at 4). As explained in the April 8 decision, the reservation of rights could have been meant to protect Walsam's ability to seek indemnification and contribution from 316 Bowery (NYSCEF # 727 at 4). 316 Bowery now in fact lends credence to that interpretation: (referring to the reservation of rights in Section 6 of the First Amendment of the Taub Settlement Agreement)

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<sup>1</sup> 316 Bowery Nor did the court misapprehend the facts and circumstances of *Glenn Partition, Inc. v Trustees of Columbia Univ. in City of New York*, as Bowery charges; the court did not rely on such facts and circumstances (NYSCEF # 764 at 13-14; 169 AD2d 488 [1st Dept 1991]). To the extent the standard for granting leave to amend is stated differently in *Cruz v Brown*, the court would reject the counterclaims under *Cruz* as well for being "palpably insufficient or patently devoid of merit" (129 AD3d at 456).

Thus, since the dispute concerning 316 Bowery's indemnification obligations to Walsam had not yet been adjudicated, the words "inter alia" were included to provide: (i) 316 Bowery with the right to later assert claims against Walsam to recover its payments made in excess of \$250,000.00 to resolve the Overcharge Proceeding; and (ii) Walsam with the right to assert claims additional to its (then pending) indemnification and contribution claims against 316 Bowery.

(NYSCEF # 764 at 3).

316 Bowery also mischaracterizes the court's analysis of Section 5 of the settlement agreement amendment (*id.* at 15). The court analyzed Section 5 to illustrate that the parties knew how to draft a provision that explicitly called for the contingent return of funds, in contrast to the silence in Section 6 of the amendment respecting any reimbursement right of 316 Bowery (NYSCEF # 727 at 4).

At this stage, against the court's analysis of the objective language of the contract, 316 Bowery fails to establish the relevance of extrinsic evidence respecting 316 Bowery's expectations (*see Ashwood Cap., Inc. v OTG Mgmt., Inc.*, 99 AD3d 1, 6 [1st Dept 2012] ["in order to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it"]).

316 Bowery points to Walsam's legal malpractice action against Rosenberg & Estis P.C. (R&E)<sup>2</sup>, filed on June 13, 2022, to show that Walsam admitted that 316 Bowery reserved the right to claw back from Walsam the sums in excess of the indemnification cap (NYSCEF #'s 773 at 2-3; 772 – Walsam Complaint in the R&E Action, ¶ 100). Even accepting for argument's sake that 316 Bowery correctly characterizes Walsam's statement, this court had no opportunity to address the June 13, 2022 filing at the time of the April 8, 2022 decision, and it is noted that 316 Bowery does not now move to renew. Therefore, this statement cannot be considered now as it is improperly raised for the first time in reply on this motion for reargument (*see CPLR 2221 [d]* [a "motion for leave to reargue . . . 2. shall not include any matters of fact not offered on the prior motion"]).

316 Bowery's argument that its breach of contract claim is supported by Walsam having disingenuously attempted to expand 316 Bowery's liability is unavailing. 316 Bowery does not address the court's April 8 determination that there is no reason to relieve 316 Bowery of the consequences of its bargain where 316 Bowery made the voluntary and intentional decision to settle liability without expressly negotiating reimbursement terms (NYSCEF # 727 at 5, citing *DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 404 [1st Dept 2015]).

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<sup>2</sup> NYSCEF index no. 156357/2020 – the R&E Action.

The court has considered 316 Bowery's remaining arguments and finds them to be without merit. Accordingly, the court denies that branch of 316 Bowery's motion to reargue the court's denial of its amended counterclaims.

**Conclusion**

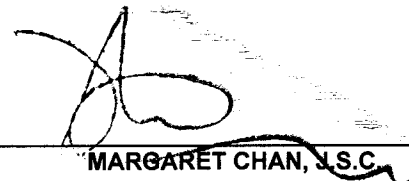
In view of the foregoing, it is

ORDERED that the branch of 316 Bowery's motion for leave to reargue its motion for partial summary judgment dismissing plaintiffs' second cause of action for breach of contract is granted and, upon reargument, this branch of 316 Bowery's motion to dismiss plaintiffs' second cause of action for breach of contract is denied; and it is further

ORDERED that the branch of 316 Bowery Realty Corp.'s motion for leave to reargue its motion to amend its counterclaims is denied.

12/12/2022

DATE

  
MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: