

MBCJAN1 LLC v 10 Greene Owner LLC

2023 NY Slip Op 30590(U)

February 27, 2023

Supreme Court, New York County

Docket Number: Index No. 154599/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

-----X

MBCJAN1 LLC,

Plaintiff,

- v -

10 GREENE OWNER LLC and SCHWARTZ SLADKUS
REICH GREENBERG ATLAS LLP,

Defendants.

-----X

INDEX NO. 154599/2020

MOTION DATE 08/11/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 50, 51, 52, 53, 54, 56, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, and 74

were read on this motion for REARGUMENT/RECONSIDERATION/AMEND.

Upon the foregoing documents, defendant 10 Greene Owner LLC's motion to reargue its prior motion to dismiss the complaint (mot. seq. 001), and plaintiff's cross-motion to amend its complaint, are decided as follows.

The court previously dismissed plaintiff's first, second, third, and fourth causes of action while severing and continuing the fifth cause of action (NYSCEF Doc. No. 46). Moving defendant seeks to reargue the court's denial of its motion: (i) to dismiss the fifth cause of action; (ii) to declare plaintiff in default of the parties' Purchase Agreement; and (iii) to award attorneys' fees (*see*, NYSCEF Doc. No. 50 [Notice of Motion]). The court notes that although the plaintiff cross-moves to amend its complaint, there is otherwise no opposition in the record. Plaintiff posits that its cross-motion serves as opposition to moving defendants' motion to reargue. However, plaintiff does not substantively oppose the moving defendant's motion outside of stating "it is respectfully requested that the Court deny Defendant's motion for leave to reargue" (Reply Affirmation, NYSCEF Doc. No. 70 ¶ 14).

Moving defendant points out that the court overlooked the parties' stipulation resolving the fifth cause of action seeking injunctive relief prior to the motion to dismiss (Affirmation, NYSCEF Doc. No. 51 ¶¶ 9-10). The stipulation, signed by both parties, resolves the need for injunctive relief as sought by the fifth cause of action in the complaint (NYSCEF Doc. No. 44). Plaintiff has acknowledged in its opposition to motion sequence 001, that "The Fifth Cause of Action has been resolved by Stipulation dated July 14, 2020" (NYSCEF Doc. No. 40 at 5). The court finds that the parties previously stipulated that the fifth cause of action was rendered moot and, accordingly, grants defendants' motion dismissing the fifth cause of action.

As for declaring the plaintiff in default under the Purchase Agreement, moving defendant prematurely sought such a summary declaration because, as this court previously found, this "require[s] the resolution of factual issues beyond the allegations of the complaint" (Decision and Order, NYSCEF Doc. No. 46). Thus, this part of the motion to reargue is denied.

Plaintiff cross-moves under CPLR 3025(b) for leave to serve an amended complaint which includes the already-dismissed first through fourth causes of action, plus the now-dismissed fifth cause of action; but which introduces two new causes of action – one styled as a sixth cause of action, for breach of contract; and another styled as a seventh cause of action, for a declaratory judgment that the parties' contract is terminated and escrow of the plaintiff's down-payment should be released to the plaintiff (*see*, proposed amended complaint, NYSCEF Doc. No. 63). The theory of the "sixth" cause of action is that defendant failed to satisfy section 6 of the parties' contract by failing to appear, in person, at scheduled closings, and that defendant failed to prepare a deed in the form designated in the pertinent Offering Plan, and that defendant failed to perform other contractual requirements preparatory to closing. The theory of the

“seventh” cause of action is that defendant was not “ready, willing and able to close” on either of the scheduled closing dates designated by the parties (*see, id.*).

Defendant argues that leave to serve the proposed amended complaint should be denied because the proposed amended complaint contains the original causes of action which, as of now, are all dismissed. However, the two newly proposed causes of action, styled as the sixth and seventh causes, stand independent of the original five causes, which, in overwhelming part, seek avoidance of the contract altogether on theories of frustration of purpose, impossibility, impracticability, and breach of the covenant of good faith and fair dealing. By contrast, the proposed sixth and seventh causes of action acknowledge the existence of an enforceable contract; but allege the defendant’s breach of same (*see, id.*).

CPLR 3025(b) provides that leave to amend a pleading shall be freely given, and that a defendant “must overcome a heavy presumption of validity in favor of permitting amendment” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). Additionally, denial of leave to amend requires “some indication that the defendant has been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position” (*id.*). Defendant has not demonstrated any hindrance that would overcome the heavy presumption of potential validity. Accordingly, the plaintiff’s motion to amend the complaint is granted to the extent that it may serve an amended complaint containing two causes of action commensurate with its allegations underlying what are now styled as plaintiff’s sixth and seventh causes of action.

Because of the present posture, so much of defendants’ motion seeking to recover attorneys’ fees is denied, without prejudice to renew after continued litigation on plaintiff’s two newly proposed, and remaining, causes of action.

Accordingly, it is hereby

ORDERED that defendants' motion to reargue is granted to the extent of in part, dismissing the fifth cause of action; and it is further

ORDERED that plaintiff's motion for leave to amend its complaint is granted to the extent that plaintiff may serve an amended complaint containing two causes of action commensurate with its allegations underlying what are now styled as plaintiff's sixth and seventh causes of action; and it is further

ORDERED that said proposed amended complaint shall be served upon defendant 10 Greene Owner LLC¹ no later than March 13, 2023; and it is further

ORDERED that defendant 10 Greene Owner LLC shall serve an answer to said amended complaint, or otherwise respond thereto, within 20 days from the date of service of said complaint.

This constitutes the decision and order of the court.



<u>2/27/2023</u> DATE					_____ LOUIS L. NOCK, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

¹ The parties stipulated that plaintiff would not serve the summons and complaint on, or prosecute this action against, defendant Schwartz Sladkus Reich Greenberg Atlas LLP (NYSCEF Doc. No. 44, ¶ 3).