

Simco Realty LLC v Yadidi 47 TIC LLC

2023 NY Slip Op 31953(U)

May 25, 2023

Supreme Court, New York County

Docket Number: Index No. 653732/2021

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

SIMCO REALTY LLC,

Plaintiff,

- v -

YADIDI 47 TIC LLC, PE47ST LLC, EC 47ST LLC, DC 47ST LLC, CTC 47ST LLC, and ZC 47ST LLC,

Defendants.

-----X

INDEX NO. 653732/2021

MOTION DATE 04/25/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, and 28

were read on this motion to DISMISS.

Upon the foregoing documents, defendants’ motion to dismiss the third cause of action for property damage pursuant to CPLR 3211(a)(1) is decided in accordance with the following memorandum.

Background

Pursuant to a Purchase and Sale Agreement (“PSA”) dated February 14, 2020, defendants conveyed to plaintiff real property located at 15 West 47th Street, New York, New York (the “premises”) (PSA, NYSCEF Doc. No. 15 at 1). Relevant to the instant motion, the PSA provides that if “all or any part of the Property is damaged by fire or other casualty occurring during the Pre-Closing Period,” and provided the repair estimate for such damage was under \$10,000,000, the defendants were to assign to plaintiff any insurance claim and the proceeds of such claim, as well as allowing plaintiff to receive a credit against the balance of the purchase price due at closing for the lesser of the unpaid amount of the deductible on the insurance policy and the unpaid amount of the repair estimate (*id.*, § 14[a][i]). “Any disputes under this Section

14 as to the estimated cost of repair or restoration shall be resolved by expedited arbitration” (*id.*, § 14[c] [emphasis in original]).

Plaintiff alleges that, prior to the closing, defendants “intentionally caused or allowed the damage or destruction of all nine hundred and twelve safe deposit boxes located in the basement of the [premises]” (complaint, NYSCEF Doc. No. 3, ¶ 20). Defendants now move to dismiss on the grounds that any claim for property damage of this kind must be resolved pursuant to the arbitration procedure set forth in the PSA.

Standard of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

At the heart of this dispute is whether the alleged damage to the safe deposit boxes is a “casualty,” thus bringing it within the reach of the arbitration provision in the PSA. The

Appellate Division, First Department, has observed that the phrase “fire or other casualty” in a lease refers to “a sudden damage-causing event” (*Andreas v 186 Tenants Corp.*, 208 AD3d 406, 408 [1st Dept 2022]). Alternatively, that court has also used the terms “accident” or “unfortunate occurrence” (*Blue Water Realty, LLC v Salon Mgt. of Great Neck, Corp.*, 189 AD3d 496, 497 [1st Dept 2020]). Thus, a singular damage-causing event, even one resulting from human error, would be considered a casualty (*e.g.*, *45 Broadway Owner LLC v NYSA-ILA Pension Tr. Fund*, 107 AD3d 629, 630 [1st Dept 2013] [“Immediately after the ‘drain down’ of the building's water, the lobby flooded”]). Thus, it seems clear, and the parties are not in dispute on this point, that if the safe deposit boxes were *intentionally* damaged, it would be outside the scope of the arbitration provision, whereas, if they were damaged by a mere “unfortunate occurrence” then the arbitration provision would apply. The court must determine, then, whether plaintiff has alleged intentional damage or a casualty or whether, as defendants argue, plaintiff has pleaded both as a means of avoiding the arbitration provision.

The answer lies in how one reads plaintiff’s allegation, specifically, plaintiff’s allegation that defendants “intentionally caused or allowed” the destruction of the safe deposit boxes. The word “intentionally” either modifies both “caused” and “allowed,” or, given the disjunctive “or” between the two, only “caused” (complaint, NYSCEF Doc. No. 3, ¶ 20). In this, the court is guided by the standard of review on a motion to dismiss quoted above, namely that the court is to give plaintiff the benefit of every favorable inference (*Leon*, 84 NY2d at 87-88) and resolve all ambiguities in favor of plaintiff (*JF Capital Advisors, LLC*, 25 NY3d at 764). Therefore, the court reads plaintiff to have alleged that defendants either intentionally destroyed the safe deposit boxes or, through intentional failure to act, allowed them to be destroyed. If discovery later reveals that defendants did not intentionally act or fail to act with respect to the safe deposit

boxes, then the arbitration provision of the PSA would control and require dismissal of the third cause of action. At this stage, however, plaintiff has sufficiently alleged a cause of action for property damage not covered by the arbitration provision (i.e., a non-casualty).

Notably, the dispute resolution provision of the PSA is narrow, and applies only where there has been a “casualty.” By contrast, in the cases cited by defendants, the relevant arbitration provisions broadly applied to any dispute arising out of the agreement of any kind (*see, Town of Amherst v Granite State Ins. Co., Inc.*, 129 AD3d 1657, 1658 [4th Dept 2015], *affd* 29 NY3d 1016 [2017]; *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010]).

Accordingly, it is

ORDERED that the defendants’ motion to dismiss the third cause of action is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after the date of filing hereof; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on June 28, 2023, at 2:00 PM.



<u>5/25/2023</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<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