

**Chrysler E. Bldg., L.L.C. v Abelman Frayne &
Schwab**

2023 NY Slip Op 31984(U)

June 13, 2023

Supreme Court, New York County

Docket Number: Index No. 156456/2021

Judge: Mary V. Rosado

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

CHRYSLER EAST BUILDING, L.L.C,

Plaintiff,

- v -

ABELMAN FRAYNE & SCHWAB, ABC CO, XYZ CORP.

Defendant.

-----X

INDEX NO. 156456/2021

MOTION DATE 11/30/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after oral argument, which took place on March 21, 2023, where Hal Beerman, Esq. appeared on behalf of the Plaintiff Chrysler East Building, L.L.C. (“Landlord”) and Matthew Livits, Esq. appeared on behalf of Defendant Abelman Frayne & Schwab (“Tenant”), Landlord’s motion for summary judgment is granted and Tenant’s cross-motion seeking an order allowing the parties to disclose settlement negotiations which are the subject of a non-disclosure agreement is denied.

I. Background

This is an action to recover allegedly unpaid rental arrears. Landlord commenced this action on July 8, 2021 via summons and complaint (NYSCEF Doc. 1). Landlord seeks (1) declaratory judgment on its first cause of action declaring that the lease between the parties was terminated by a termination notice; (2) termination damages in the form of pre-termination rental arrears, holdover use and occupancy, deficiency between the amount of rent expected during the unexpired portion of the lease term and the net amount of rent actually collected, liquidated

damages, late charges, and interest; (3) in the alternative, damages related to unpaid rent, and (4) attorneys' fees and expenses (*id.* at ¶¶ 16-40).

Landlord alleges it is the owner of the building located at 666 Third Avenue, New York, NY (the "Building") (*id.* at ¶ 4). Landlord alleges it and Tenant entered a commercial lease on August 6, 2014, (the "Lease") wherein Tenant would lease the entire tenth floor and a portion of the basement of the Building (the "Premises") for a term expiring May 31, 2026 (*id.* at ¶ 7). Landlord alleges that Tenant defaulted on its rent obligations from January 31, 2021 through March 8, 2021 and owed \$437,918.05 in arrears (*id.* at ¶ 10). A default notice was sent to Tenant on March 12, 2021 which ultimately provided Tenant the opportunity to cure its default until April 2, 2021 (*id.* at ¶ 11). Tenant failed to cure, so Landlord sent a termination notice dated April 27, 2021, requiring Tenant to exit the premises on May 10, 2021 (*id.* at ¶¶ 12-13). Tenant did not leave the premises, and only made one payment on May 28, 2021, which consisted of \$209,885.87 (*id.* at ¶¶ 14-15).

Tenant responded by filing a pre-answer motion to dismiss on November 5, 2021 (NYSCEF Doc. 4). The motion to dismiss was ultimately denied by this Court by Decision and Order dated August 9, 2022 (NYSCEF Doc. 22). Tenant then filed its Answer with counterclaims on September 12, 2022 (NYSCEF Doc. 24). Tenant asserted in its counterclaim that it "had elected to remain in the premises as opposed to vacating immediately" because of "representations made by [Landlord] during their negotiations regarding forgiveness of arrears and revisions to the terms of the lease." (*Id.* at ¶¶ 48-49). Tenant argues that the representations were made in bad faith and were due to ongoing negotiations regarding refinancing the Landlord's mortgage, and that Landlord only made said representations to keep Tenant on the rent rolls for the benefit of its mortgage negotiations (*id.* at ¶ 50). Landlord filed its reply to Tenant's counterclaims on October

21, 2022 (NYSCEF Doc. 28). On November 17, 2022, Landlord filed the instant motion for summary judgment (NYSCEF Doc. 29).

Landlord argues that pursuant to the plain and unambiguous terms of the Lease, and Tenant's failure to perform under those terms, there are no questions of fact regarding Landlord's entitlement to summary judgment (NYSCEF Doc. 31). Landlord also seeks to have Tenant's affirmative defenses and counterclaims dismissed, arguing they are conclusory and lacking in merit. Landlord asserts the counterclaim, which purports to allege tortious interference with prospective business advantage, fails to state a claim.

On January 17, 2023 Tenant filed its opposition and cross-motion (NYSCEF Doc. 50). Tenant argues summary judgment is premature because there has not yet been any discovery (NYSCEF Doc. 51). Tenant claims that summary judgment should be denied pursuant to CPLR § 3212(f) so that it can seek discovery related to Landlord's alleged representations related to the mortgage refinancing. Tenant cross-moves for an order under CPLR § 4547 allowing it to disclose representations made during settlement discussions.

Tenant submitted the affidavit of Jeffrey Schwab, a partner at the Tenant law firm (NYSCEF Doc. 53). Schwab testified that in March of 2021, Tenant retained a real estate brokerage firm, Colliers, to assist in negotiations with Landlord (*id.* at ¶ 24). The negotiations were subject to a non-disclosure agreement (*id.* at ¶ 26). Schwab swears that Tenant was induced to remain in the Premises by the actions of the Landlord during these negotiations, but the precise information cannot be disclosed due to constraints from the non-disclosure agreement (*id.* at ¶ 30). Schwab states there is evidence (which is barred by the non-disclosure agreement) which provides an inference that there was never an intention by Landlord to settle the rental arrears dispute, and that if discovery is allowed, further evidence may be uncovered (*id.*). Schwab also testified that

payments in August and September of 2021 were made in the amount of \$129,468.29, and that due to the specificity of those payments, it can be rationally inferred that the number was agreed to and tendered for certain expected consideration (*id.* at ¶¶ 32-33). Indeed, the non-disclosure agreement for the purposes of entering negotiations was signed on August 3, 2021 (NYSCEF Doc. 54). An e-mail from Tenant to Landlord dated March 17, 2021, indicates that the non-disclosure agreement was first proposed by Tenant (NYSCEF Doc. 56).

On February 24, 2023, Landlord filed its reply and opposition to Tenant's cross-motion (NYSCEF Doc. 59). Landlord argues that the cross-motion is frivolous and should be denied. Landlord argues the non-disclosure agreement must be enforced according to its clear terms. Specifically, the non-disclosure agreement noted that any information exchanged during the negotiations was for settlement purpose only, would be inadmissible as evidence for any purpose before any court, and that any proposals made in connection with settlement would not be binding on any party until memorialized in a written agreement. Landlord argues that there is no basis to set aside the clear and unambiguous terms of the non-disclosure agreement. Further, Landlord asserts that Tenant has failed to assert any specific basis for denying summary judgment pursuant to CPLR 3212(f). In particular, there is no specified information which Tenant asserts is in Landlord's exclusive possession. Therefore, summary judgment may not be denied on the basis of CPLR § 3212(f).

On February 27, 2023, Tenant filed its reply (NYSCEF Doc. 60). Tenant argues that the non-disclosure agreement should be voided in the interest of public policy (*id.* at ¶ 14). However, Tenant does not provide what public policy grounds warrant voiding the non-disclosure agreement.

II. Discussion

A. Tenant's Cross-Motion

The Court will first address Tenant's cross-motion to allow disclosure of certain representations made which are covered by the non-disclosure agreement, as the granting or denial of this motion will be of consequence in the Court's summary judgment analysis. Based on a careful review of the record and applicable precedent, Tenant's cross-motion is denied.

Tenant appears to ignore the plain and unambiguous language of the non-disclosure agreement which the record reflects Tenant, a sophisticated law firm, proposed (*see* NYSCEF Doc. 56 ["[i]t is our belief that it would be in our mutual interest to have discussions proceed on the basis of a mutual [non-disclosure agreement], and a draft is attached. Once a[] [non-disclosure agreement] is signed we will be sharing certain financial data with you..."]). The non-disclosure agreement explicitly states that any settlement exchanges are "inadmissible as evidence ***for any purpose before any court***" (*see* NYSCEF Doc. 54 at ¶ [1][b]) (emphasis added). Moreover, the non-disclosure agreement provided that "no Settlement Exchanges nor anything contained in this letter agreement shall be deemed to constitute a modification of the Lease or the Parties' respective rights and obligations thereunder. No proposals, offers, acceptances or agreements made during or in connection with Settlement Exchanges shall be binding upon either Party unless and until memorialized in a written agreement." (*id.*).

Thus, pursuant to the agreement which Tenant signed and proposed, nothing said during the negotiations, which it seeks to disclose, would have altered its rights and obligations under the terms of its Lease. Nor were any statements made binding on Tenant. Moreover, Tenant, a law firm, should know that any information it seeks to disclose which is covered by the non-disclosure

agreement is inadmissible for any purpose before this Court, including in support of or in opposition to a summary judgment motion.

As repeatedly held by the Court of Appeals, “when parties set down their agreement in a clear, complete document, their writing should...be enforced according to its terms” (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). “[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing” (*id.* quoting *Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]). To grant Tenant’s motion allowing disclosure, despite the plain and unambiguous terms of the non-disclosure agreement, would render the contract meaningless (*see Dorfman v Reffkin*, 180 AD3d 567 [1st Dept 2020] [refusing to adopt a party’s interpretation of non-disclosure agreement which would render provisions meaningless]). Tenant has failed to provide any persuasive and non-conclusory arguments as to why the non-disclosure agreement, or portions of the non-disclosure agreement, should be voided or set aside. Thus, as Tenant’s cross-motion would render the non-disclosure agreement meaningless, and Tenant has failed to set forth any persuasive arguments as to why the non-disclosure agreement should be voided, the Court denies Tenant’s cross-motion.

B. Tenant’s Counterclaims and Affirmative Defenses

The branch of Landlord’s motion seeking dismissal of Tenant’s counterclaims and affirmative defenses is granted. The first affirmative defense, merely states “the Complaint fails to state a cause of action” yet provides no other detail or information. The Complaint clearly states a claim for breach of contract. Therefore, this affirmative defense is dismissed as conclusory,

boilerplate, and meritless (*Bankers Trust Co. v Fassler*, 49 AD2d 855 [1st Dept 1975]; 366 *Audubon Holding, LLC v Morel*, 22 Misc.3d 1108[A] [Sup. Ct., NY County 2008]).

The second affirmative defense in actuality contains a hodgepodge of different defenses. The first alleged defense is estoppel. To adequately allege estoppel, a party must show that (i) conduct amounted to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts (*First Union Nat. Bank v Tecklenburg*, 2 AD3d 575 [2d Dept 2003]). Tenant premises its allegations for its estoppel defense based on alleged representations made during the course of negotiations, which as previously discussed, are covered by the non-disclosure agreement (*see* NYSCEF Doc. 24 at ¶ 10). However, as previously mentioned, pursuant to the non-disclosure agreement, representations made during the course of those negotiations are not admissible as evidence in this Court, nor were they binding on either party (*see* NYSCEF Doc. 54 at ¶ [1][b] and ¶ 2). Thus, even accepting the allegations contained in this affirmative defense as true, they are barred from this action, nor were they ever binding on either party, pursuant to the terms of the non-disclosure agreement. Thus, the estoppel defense is dismissed. For the same reason, the accord and satisfaction defense is dismissed. Further, there is no writing reflecting any accord and satisfaction. Finally, as Landlord points out, although Landlord drew down from the security deposit, this still did not cover the substantial arrears. Landlord already properly credited the security deposit against the alleged damages (*see* NYSCEF Doc. 44). Thus, the hodgepodge of three affirmative defenses listed under the “second affirmative defense” are all dismissed. The third affirmative defense which alleges improper service of the default notice is without merit and dismissed as it is flatly contradicted by the documentary evidence (*see* NYSCEF Doc. 42). The fourth affirmative defense which reiterates the security deposit defense is dismissed as duplicative.

The fifth affirmative defense, which alleges promissory estoppel related to representations made during negotiations covered by the non-disclosure agreement, is dismissed. To reiterate, Tenant, a sophisticated law firm, agreed that no representations made during the negotiations would prejudice either parties' claims in future litigation, nor would they be admissible as evidence in litigation in any Court. This alone bars the fifth affirmative defense. Moreover, to allege promissory estoppel a party must show reasonable reliance on a sufficiently clear and unambiguous promise (*see Condor Funding, LLC v 176 Broadway Owners corp.*, 147 AD3d 409 [1st Dept 2017]). Here, Tenant could not have reasonably relied on any promise made during negotiations, because the non-disclosure agreement explicitly states that “[n]o proposals, offers, acceptances or agreements made during or in connection with Settlement exchanges shall be binding upon either Party unless and until memorialized in a written agreement signed by both Parties” (*see* NYSCEF Doc. 54 at ¶ 2). It is unreasonable for Tenant, an established law firm, to have relied on any alleged representation made by Landlord during the negotiations that was not memorialized in writing and signed given the plain and unambiguous provision of the non-disclosure agreement. As such, the fifth affirmative defense fails as a matter of law.

The only defense that Tenant provides in opposition to the dismissal of the sixth affirmative defense is that it “is another instance where the [Tenant] is handcuffed from a full presentation of its position”. Specifically, the sixth affirmative defense alleges a negotiated “early surrender of possession of the premises, with an anticipated surrender date in August of 2022” (NYSCEF Doc. 35 at ¶¶ 31-34). However, nowhere is it alleged that the agreement was put in writing and signed by the parties, and therefore neither party was bound to it pursuant to the terms of the non-disclosure agreement. Moreover, pursuant to the terms of the non-disclosure agreement, any representations or promise made is inadmissible as evidence in this action, nor may it prejudice

Landlord's right to recoup sums due and owing under the terms of the Lease. Thus, pursuant to the explicit terms of agreements to which Tenant, a sophisticated law firm, agreed, the sixth affirmative defense is dismissed.

The seventh and eight affirmative defenses allege frustration of purposes and impossibility. It is now well settled that these doctrines, when raised in connection with Covid-19, do not preclude awarding rental arrears due to failure to perform under the terms of a lease (*Bremen House Inc. v LoBosco*, 214 AD3d 557 [1st Dept 2023]; *Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503 [1st Dept 2022]; *558 Seventh Ave. Corp. v Times Square Photo Inc.*, 194 AD3d 561, 561-562 [1st Dept 2021]). These claims are dismissed.

Finally, the ninth affirmative defense, which also purports to be a counterclaim, alleges to tortious interference, although in opposition, Tenant claims it can also meet the requirements for negligent misrepresentation. As reiterated numerous times now, representations that were allegedly made during negotiations are covered by the non-disclosure agreement. Pursuant to the non-disclosure agreement, those representations or promises are not admissible as evidence in this Court, nor may they prejudice either party to any of their claims in this litigation. Moreover, pursuant to the non-disclosure agreement, the representations were not binding until reduced to a written agreement. Tenant, which the Court stresses, holds itself out to be a law firm with global reach, should be well aware of the terms in the agreement it signed. The counterclaim and ninth affirmative defense are dismissed.

C. Landlord's Motion for Summary Judgment

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and

on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. (See e.g., *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see *Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]). To show entitlement to summary judgment on a breach of contract claim, Plaintiff must prove the existence of a contract, Plaintiff’s performance, Defendant’s breach, and damages (see *Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]).

The existence of the lease is not in dispute, nor is Landlord’s performance. Moreover, it is not disputed that there are amounts due and owing, and therefore Tenant has breached. Tenant does not even dispute the fact that there are damages as a result of the breach. Rather, Tenant claims that it requires discovery pursuant to CPLR 3212(f), and that because there has not been discovery, summary judgment is premature.

“A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.” *DaSilva v Haks Eng’rs*, 125 AD3d 480, 482 [1st Dept 2015]; *Orange County-Poughekeepsie LTd. Partnership v Bonte*, 37 AD3d 684 [2d Dept 2007] [“[t]o speculate that something might be caught on a fishing expedition provides no basis pursuant to CPLR 3212(f) to postpone decision on [a] summary judgment motion.”] There has been no evidentiary basis proffered which would lead to relevant evidence. The only evidence which Tenant seeks is related Landlord’s intent during the course of negotiations. However, statements or promises made during those negotiations are (a)

inadmissible as evidence in this action and (b) were not binding on either party. The Court need not revisit these arguments that have already been deemed meritless. Even though there has been little to no discovery, this is a straightforward case seeking to recoup rental arrears based on an executed lease. While the Court has sympathy for Tenant for the economic difficulties it has purportedly gone through, an overwhelming plethora of precedent requires this Court to enforce the contracts to which Tenant law firm has agreed. Thus, Landlord's motion for summary judgment is granted.

Accordingly, it is hereby,

ORDERED that Defendant Abelman Frayne & Schwab's cross-motion seeking an order allowing disclosure of statements covered by the non-disclosure agreement is denied; and it is further

ORDERED that Plaintiff Chrysler East Building, L.L.C.'s motion for summary judgment is granted; and it is further

ORDERED that Plaintiff Chrysler East Building, L.L.C. is awarded \$6,812,748.53 on its second and third causes of action consisting of rent arrears, holdover use and occupancy, and liquidated damages, against Defendant Abelman Frayne & Schwab, plus statutory interest as calculated by the Clerk of the Court from the date of this Decision and Order through entry of judgment, together with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED and ADJUDGED that Plaintiff Chrysler East Building, L.L.C. is granted summary judgment on its first cause of action seeking declaratory judgment, and it is adjudged that the lease's term was terminated by the termination notice on May 10, 2021 in accordance with the terms and conditions of the Lease and applicable law; and it is further

ORDERED that Plaintiff Chrysler East Building, L.L.C. is granted summary judgment on its fourth cause of action seeking attorneys' fees and expenses against Defendant Abelman Frayne & Schwab, and the amount of attorneys' fees and expenses due and owing is respectfully referred to a special referee to hear and report; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such:

(1) the issue of attorneys' fees and expenses for which Plaintiff is entitled to be awarded against Defendant pursuant to Article 16 of the lease; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff(s)/petitioner(s) shall serve a pre-hearing memorandum within 24 days from the date of this order and the defendant(s)/respondent(s) shall serve objections to the a pre-hearing memorandum within 20 days from service of plaintiff(s)/petitioner's(s') papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on Defendant; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

6/13/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE