

2497 Realty Corp. v Fuertes

2024 NY Slip Op 31963(U)

May 28, 2024

Supreme Court, New York County

Docket Number: Index No. 151947/2014

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 61M

Justice

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2497 REALTY CORP.,
Plaintiff,

- v -

RODOLFO FUERTES, JONATHAN ABAD, 2497 PARTNER
LLC, and 145TH STREET PROPERTY INVESTOR LLC,

Defendants.

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INDEX NO. 151947/2014

MOTION DATE 04/24/2024

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 263, 264, 265, 266, 267, 268, 270, 271, 272, 273

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

I. INTRODUCTION

In this breach of contract action, the plaintiff alleges that the defendants breached the parties' Contract of Sale of Membership Interests in 2497 Holding LLC (the "Contract") by failing to distribute to it certain settlement proceeds received from non-party ExxonMobil. The defendants now move, pursuant to CPLR 3212(b), for partial summary judgment limiting the plaintiff's potential damages. The plaintiff opposes the motion. The motion is granted.

II. BACKGROUND

In 2009, an oil spill (the "Spill") was discovered on the property located at 2497 Adam Clayton Powell Jr. Boulevard in Manhattan (the "Property"). The Spill originated from an adjacent gas station owned and/or controlled by ExxonMobil. The parties' Contract, which principally concerns membership interests in the entity that owns the Property, was initially executed in February 2010, and gave the plaintiff responsibility for remediation of the Spill and settlement negotiations with ExxonMobil. Amendments to the Contract were thereafter executed in June 2010 (the "First Amendment") and November 2010 (the "Second Amendment"), which, *inter alia*, gave the defendants sole control over remediation of the Property and settlement negotiations with ExxonMobil.

Section 6(b) of the First Amendment (the “Waterfall”) provides a structured plan pursuant to which the defendants were to distribute to themselves and the plaintiff any proceeds received from a settlement agreement with ExxonMobil (the “Settlement Agreement”) related to the Spill and the associated remediation of the Property (the “Remediation”), with priority of payment following the subsections of the Waterfall—i.e., first priority for distributions under Section 6(b)(i), then Section 6(b)(ii), and so on. Sections 6(b)(i) through 6(b)(iii) of the Waterfall all provide for distributions to the defendants. Under Section 6(b)(iv), the plaintiff is entitled to 100% of any remaining settlement proceeds received, up to \$603,484.27, attributable to “fees and expenses incurred by the [plaintiff] or Mauricio Fernandez [the plaintiff’s officer and sole shareholder] in connection with the negotiation and documentation of the Remediation and the Settlement Agreement[.]” Section 6(b)(v), as amended by the Second Amendment, provides for the plaintiff to receive 100% of any remaining settlement proceeds received, up to \$1,000,000.00, attributable to “the diminution in the value of the Property on or before the Effective Date of th[e] First Amendment, directly resulting from the Spill[.]” Finally, pursuant to Section 6(b)(vi), any settlement proceeds remaining after the distributions set forth in Sections 6(b)(i) through 6(b)(v) were to be split evenly between the plaintiff and the defendants.

In June 2011, a Settlement Agreement was reached with ExxonMobil, pursuant to which ExxonMobil agreed to pay \$1,500,000.00 in damages. This action ensued.

The plaintiff commenced the action on March 5, 2014. The court (Ramos, J. [Ret.]) by an order dated June 9, 2014, dismissed the complaint, in effect, without prejudice to restore upon completion of all necessary remediation as set forth in the parties’ agreement (MOT SEQ 001). By an order dated November 9, 2020, the court (Ostrager, J. [Ret.]) denied the plaintiff’s motion to restore the action to active status as no showing was made that remediation was complete (MOT SEQ 003). By an order dated January 22, 2021, the court (Ostrager, J. [Ret.]) denied the plaintiff’s motion to reargue or renew (MOT SEQ 004). By an order dated June 7, 2022, the Appellate Division, First Department, reversed the order dated November 9, 2022, and restored the action to active status upon finding that remediation was completed in accordance with the June 9, 2014, order. *2497 Realty Corp. v Fuertes*, 206 AD3d 419 (1st Dept. 2022).

In its order, the Appellate Division noted the parties' structured plan for distribution of any settlement proceeds received from ExxonMobil, the issue on the instant motion.

The plaintiff filed an amended complaint on August 8, 2022, in which it seeks, *inter alia*, damages of \$1,500,000.00 upon five causes of action sounding in breach of contract, fraud and conversion. The plaintiff alleges, as relevant here, that the defendants breached the Contract by failing to make any distributions to it of the subject settlement proceeds pursuant to the terms of the Waterfall. The defendants filed a joint answer. By an order dated October 4, 2023, the court (Ostrager, J. [Ret.]) denied a pre-answer motion by the defendants to dismiss the complaint, in effect as premature, as remediation was not complete (MOT SEQ 005). Discovery ensued.¹

The defendants now move pursuant to CPLR 3212(b) for partial summary judgment limiting the plaintiff's potential recovery on any cause of action of the complaint to amounts due under Section 6(b)(vi) of the Waterfall (MOT SEQ 006). In support of the motion, the defendants submit, *inter alia*, copies of the Contract and its two Amendments, as well as the transcript of Fernandez's deposition on behalf of the plaintiff, dated August 16, 2023, in which Fernandez testified that he did not personally incur any expenses in connection with the Settlement Agreement or the Remediation of the Property, did not know of and had no documents showing any such expenses incurred by the plaintiff, and did not know of any diminution in the value of the Property due to the Spill.

In opposition, the plaintiff submits a copy of its "supplemental" document production, which was not produced until October 27, 2023, less than twenty days before the Note of Issue deadline. This supplemental production consists of various proposals, invoices, financial statements, and other documents, many of them not directly connected to the plaintiff, that purportedly evidence expenses incurred by the plaintiff in connection with the Remediation and Settlement Agreement.

¹ The plaintiff filed a Note of Issue and Certificate of Readiness on November 15, 2023, which is without effect as it lists discovery still outstanding. Counsel is reminded that when the court gives a Note of Issue deadline, it means that the Note of Issue may be filed on or before that date *provided that all discovery is complete*. It is not a directive to file a Note of Issue notwithstanding outstanding discovery, as doing so would require counsel to make a misrepresentation in the Certificate of Readiness.

The plaintiff also submits an affirmation from non-party Sandra Acosta, a former member of non-party A&C Development Partners, LLC (“A&C”), in which Acosta claims that: she worked with the plaintiff on settlement negotiations with ExxonMobil and dealt with unidentified third-parties to investigate and remediate the Spill; and the documents comprising the plaintiff’s supplemental document production relate to the Spill and reflect expenses incurred on the plaintiff’s behalf, “even though some of the Invoices were addressed to [Acosta] personally or to A&C Development, and even though they were paid by checks issued by A&C Development and [non-party] Crown Street Capital LLC.”

Finally, the plaintiff submits an affirmation from Fernandez, which similarly asserts, as relevant here, that various unidentified third parties worked with the plaintiff in connection with settlement negotiations with ExxonMobil and remediation of the Spill, and that the plaintiff reimbursed those third parties for the expenses they incurred on the plaintiff’s behalf.²

III. DISCUSSION

On a motion for summary judgment, the moving party must establish, *prima facie*, its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with evidentiary proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra.

The defendants’ submissions demonstrate, *prima facie*, their entitlement to judgment limiting the plaintiff’s potential recovery exclusively to amounts that may be due under Section 6(b)(vi) of the Waterfall. Specifically, Fernandez testified at his deposition that he did not

² The Fernandez and Acosta affirmations, though unsworn, are each made under penalty of perjury pursuant to CPLR 2106, which was amended, effective January 2024, to allow “[t]he statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, [to be] used in an action in New York in lieu of and with the same force and effect as an affidavit.”

personally incur any expenses in connection with the Settlement Agreement or the Remediation, did not know of and had no documents showing any such expenses incurred by the plaintiff, and did not know of any diminution in the value of the Property due to the Spill. This testimony suffices to establish, *prima facie*, that the plaintiff cannot recover under Sections 6(b)(iv) and 6(b)(v) of the Waterfall because it did not incur any expenses in connection with the Remediation and Settlement Agreement, nor was there a diminution in the value of the Property directly attributable to the Spill.

In opposition, the plaintiff fails to raise a triable issue of fact. The plaintiff does not argue, let alone submit evidence to demonstrate, a diminution in the value of the Property directly resulting from the Spill, and thus fails to raise a triable issue of fact with respect to its entitlement to recover under Section 6(b)(v) of the Waterfall. As to recovery under Section 6(b)(iv), which is the focus of the plaintiff's opposition, its submissions are likewise insufficient to raise a triable issue of fact. Fernandez asserts in his affirmation that the "Plaintiff and I paid" reimbursements to third parties for expenses they incurred on the plaintiff's behalf related to the Settlement Agreement or the Remediation. This vague, self-serving, conclusory, and, as discussed further below, unsubstantiated contention, is insufficient to raise a triable issue of fact. See Zuckerman v City of New York, *supra* ("mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient"). This is especially so given that the self-serving claim that the "Plaintiff *and I* paid" expenses related to the Settlement Agreement or the Remediation (emphasis added) is plainly at odds with Fernandez's deposition testimony that *he* never personally incurred such expenses. See Phillips v Bronx Lebanon Hosp., 268 AD2d 318 (1st Dept. 2000) (plaintiff's self-serving affidavit in opposition to summary judgment, which clearly contradicted plaintiff's prior deposition testimony and was tailored to avoid the consequences of that earlier testimony, insufficient to raise triable issue of fact).

Acosta's affirmation does not support the claim that either the plaintiff or Fernandez reimbursed third parties for recoverable expenses. While Acosta claims the plaintiff's supplemental production includes invoices reflecting expenses incurred by third parties on the plaintiff's behalf, she notably stops short of expressly claiming that either the plaintiff or Fernandez actually paid or reimbursed these expenses, stating only that "the costs and expenses were not [her] responsibility and were not paid from [her] funds."

The plaintiff's supplemental document production also fails to substantiate Fernandez's claim. Initially, these documents are not submitted in admissible form, as they are not properly authenticated by a person with personal knowledge of their creation and contents (see *Muhlhahn v Goldman*, 93 AD3d 418 [1st Dept. 2012]), nor are they supported by a proper business record foundation (see *135 E. 57th St., LLC v 57th St. Day Spa, LLC*, 126 AD3d 471 [1st Dept. 2015], citing *W. Valley Fire Dist. No. 1 v Vill. of Springville*, 294 AD2d 949 [4th Dept. 2002]). But even if these documents were submitted in admissible form, they do not demonstrate that either the plaintiff or Fernandez incurred expenses "attributable to the documentation of the Remediation and the Settlement Agreement."

The supplemental production includes invoices for various services issued to third parties A&C, Acosta, Crown 145 Street LLC, and Mukang Cho, as well as checks purportedly making payments on those invoices from A&C, Crown Street Capital LLC, and Crown 145 Street LLC. There are no documents, however, demonstrating that any of these expenses were paid or reimbursed by either the plaintiff or Fernandez. Moreover, many of the expenses incurred by these third parties do not obviously relate to either the Remediation or the Settlement Agreement. For example, contracts with The Wrecking Group, Inc. for asbestos removal and the provision of roofing material, and with Major Sewer & Water Contractors, Inc. for removal of a sewer line do not appear to contemplate any costs that would be encompassed by Section 6(b)(iv) of the Waterfall. The production also includes statements issued to the plaintiff for real estate taxes, mortgage payments and insurance premiums for the Property, but these are not accompanied by any proof demonstrating that either the plaintiff or Fernandez actually paid these expenses. In any event, these expenses are not "attributable to the documentation of the Remediation and the Settlement Agreement" and are thus not recoverable under Section 6(b)(iv) of the Waterfall.

IV. CONCLUSION

The defendants' motion is granted such that any potential monetary recovery on any cause of action is limited to distributions under Section 6(b)(vi) of the Contract. That is, the plaintiff's damages are limited to, at most, \$750,000, representing half of the settlement proceeds received from ExxonMobil.

Accordingly, upon the foregoing papers, it is

ORDERED that the defendants' motion pursuant to CPLR 3212(b) for partial summary judgment is granted such that any potential monetary recovery on any cause of action of the complaint is limited to amounts due under Section 6(b)(vi) of the Contract of Sale of Membership Interests in 2497 Holding LLC; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

Nancy M. Bannon
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<u>5/28/2024</u> DATE					<hr/> NANCY M. BANNON, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	