

**Arch 11 Greene St MM LLC v
TDRT 11 Greene St. LLC**

2024 NY Slip Op 32528(U)

July 14, 2024

Supreme Court, New York County

Docket Number: Index No. 654016/2022

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ARCH 11 GREENE ST MM LLC, ARCH PROPERTY
MANAGEMENT LLC, 11 GREENE ST CM LLC, and
ARCH BUILDERS LLC,

Plaintiffs,

- v -

TDRT 11 GREENE STREET LLC, PEROT 11 GREENE
INVESTOR, LLC, and JOHN DOES 1 TO 50,

Defendants.

-----X

INDEX NO. 654016/2022

MOTION DATE _____

MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 155, 156, 157, 158, 159, 160, 165, 169, 170, 171, 199, 218

were read on this motion to/for COMPEL ARBITRATION.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 221, 222, 224

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In mot. seq. no. 005, defendants TDRT 11 Greene Street LLC (TDRT) and Perot 11 Greene Investor, LLC (Perot) move pursuant to CPLR 7503 (a) to (1) compel arbitration and stay proceedings of claims that are subject to mandatory arbitration; and (2) sever and permit the remaining non-arbitrable claims to proceed. In mot. seq. no. 006, plaintiffs Arch 11 Greene St. MM LLC (Arch Member), Arch Property Management LLC (Arch PM), 11 Greene St. CM LLC (Arch CM), and Arch Builders LLC (Arch Builders) (collectively Arches) move pursuant to CPLR 3211 (a) (1) and (7) to dismiss defendants and counterclaim-plaintiffs' (collectively TDRT&P) amended counterclaims.

Background

The following facts are taken from the complaint and the amended answer and counterclaim (Amended Counterclaim) and are accepted as true for the purposes of these motions.

Defendant TDRT is a joint venture formed in 2014 to develop a luxury rental building located at 11 Greene Street, New York, New York 10013 (Property). (NYSCEF Doc. No [NYSCEF] 1, Complaint ¶¶14; NYSCEF 166, Amended Counterclaim ¶¶24 at 23.) 11 Greene Street LLC (11 Greene or Owner), also a counterclaim plaintiff, and a 100% subsidiary of TDRT, holds the ground lease for the Property (Ground Lease) from 335 Canal Street LLC (Landlord). (NYSCEF 166, Amended Counterclaim ¶¶ 2, 25 at 20, 23; NYSCEF 175, LLC Agreement at 7-8; NYSCEF 14, Asaf Bar Natan, authorized representative of Perot, aff ¶¶25; NYSCEF 19, Ground Lease.)

The Ground Lease required that a Temporary Certificate of Occupancy (TCO) issue for the Property no later than November 19, 2019 (later extended to May 19, 2021) and a failure to do so would constitute an event of default under the Ground Lease, which would result in the ground lease termination date being shortened by thirty years, from 2059 to 2029. (NYSCEF 166, Amended Counterclaim ¶¶44 at 28.) A default under the Ground Lease would also constitute an event of default under the then operative loan agreements pursuant to which the 11 Greene had obtained \$45 million in financing for the Project in 2018. (*Id.* ¶¶45 at 28.)

Arch Member became a member of TDRT and replaced the former manager of TDRT pursuant to an Amended and Restated Limited Liability Company Agreement

dated March 9, 2018 (LLC Agreement¹). (NYSCEF 1, Complaint ¶¶14.) Defendant Perot was the other member of TDRT. (*Id.*)

Arch Member served as managing member of TDRT from March 2018 through September 2022. (*Id.*) Arch Member's affiliates, plaintiffs Arch PM and Arch CM entered into a Property Management Agreement dated February 26, 2019 (PMA) and a Construction Management Agreement dated December 27, 2017, as amended in February 2018 and November 2018, (First CMA) with the 11 Greene. (NYSCEF 177, PMA; NYSCEF 176, First CMA; NYSCEF 166, Amended Counterclaim ¶¶ 29, 33 at 25-26.) Another affiliate of Arch Member, plaintiff Arch Builders and 11 Greene entered into a Construction Management Agreement dated July 12, 2022 (Second CMA) and a Construction Management Agreement dated August 1, 2022 (Third CMA, collectively with the First CMA and the Second CMA, the CMAs) related to the build-out of two commercial spaces located on the ground floor of the Property. (NYSCEF 68, Second CMA; NYSCEF 69, Third CMA; NYSCEF 166, Amended Counterclaim ¶¶39 at 27.)

"[T]he LLC Agreement defines 'Substantial Completion' as "completion of the Project substantially . . . in accordance with all the requirements under the Ground Lease, including, without limitation, obtaining a temporary certificate of occupancy for the entire Project" and conditions a significant portion of Arch Member's compensation under the agreement upon timely obtaining a TCO. (NYSCEF 166, Amended Counterclaim ¶¶ 47-48 at 29; NYSCEF 175, LLC Agreement at 18; NYSCEF 159, Second Amendment to the LLC Agreement § 7.03(g) at 71.) Along similar lines, the

¹ Arch Member and Perot executed first and second amendments to the LLC Agreement on February 26, 2019 and June 15, 2020 respectively. (NYSCEF 159 at 64, 68.)

First CMA defines ‘Substantial Completion’ to mean “the date when *inter alia* a temporary certificate of occupancy has been obtained” and requires Arch CM to ‘strictly comply’ with the ‘Construction Schedule’. (NYSCEF 166, Amended Counterclaim ¶¶49 at 29; NYSCEF 176, First CMA §5.1 at 19; §5.8 at 23.) TDRT&P claim that “[a]pproximately two weeks before the May 19, 2021 TCO deadline specified in the ground lease, Arch [CM] for the first time informed [TDRT&P] that the Property would not receive a TCO by the deadline in the ground lease but that Arch CM would obtain the TCO by approximately a week after the deadline.” (NYSCEF 166, Amended Counterclaim ¶¶61 at 33.) When Arch CM failed to obtain an extension, TDRT&P intervened and obtained two extensions from the landowner that moved the TCO deadline to July 16, 2021. (*Id.* ¶¶62 at 33.) However, the TCO was not obtained by July 16, 2021 and was finally issued five days later, on July 21, 2021. (*Id.* ¶¶ 62-63 at 33-34.) Arches do not dispute that the TCO was issued on July 21, 2021. (NYSCEF 224, Argument on mot. seq. no. 006 Tr 4:6-8.)

On September 23, 2022, Perot removed Arch Member as a Manager of TDRT and thereafter demanded that Arch liquidate all bank accounts maintained in the name of TDRT or 11 Greene (Disputed Accounts) and turn the proceeds over to Perot. (NYSCEF 1, Complaint ¶¶ 16-17; NYSCEF 166, Amended Counterclaim ¶¶83 at 38.) The Disputed Accounts include the (i) Development / Construction Account; (ii) Operations Account; (iii) Construction Cost Reserve Account; (iv) Tenant Security

Deposit Account; (v) Legacy Operating Account; and (vi) Letter of Credit Account. (NYSCEF 1, Complaint² ¶¶17; NYSCEF 166, Amended Counterclaim ¶¶91 at 40.)

On September 23, 2022, 11 Greene notified Arch PM that it was terminating the PMA and removing Arch PM as the property manager of the Property, effective October 31, 2022. (NYSCEF 166, Amended Counterclaim ¶¶84 at 38.)

Arches contend that a number of third parties have competing claims to the funds held in the Disputed Accounts. (NYSCEF 1, Complaint ¶¶18.) These third-party vendors were hired directly by Arch PM, Arch CM and Arch Builders and Arches believe that if they are not paid, they will seek to recover the amounts due to them from Arches, which will subject Arches to conflicting claims with respect to the Disputed Accounts. (*Id.* ¶ 19.) Arches allege that it has been Perot's practice to "use funds from accounts earmarked for particular uses to make payments for other purposes for which they were not permitted" and "based on its past practice, if Perot receives access to these funds, the outstanding invoices will not be paid". (*Id.* ¶¶18-19.)

Arches filed this interpleader action on October 25, 2022, seeking to deposit the funds in the Disputed Accounts into the Court until the conflicting claims can be resolved. (Count I) (*Id.* ¶¶ 26-28.)

Further, Arches seek reimbursement for outstanding payments under the PMA and the CMAs. (Count II) (*Id.* ¶¶ 29-34.) Arch Member seeks the pending installment of the TCO Fee (amounting to \$150,000) and "the return of its \$500,000 equity contribution and a return of 8% in priority distributions". (Count IV) (*Id.* ¶¶ 37-40.)

² Arches identify an additional disputed account 'the Construction Managers Account (non-Owner controlled)'. (NYSCEF 1, Complaint ¶¶17.)

Arches also assert an unjust enrichment claim against TDRT and Perot. (Count III) (*Id.* ¶¶ 35-36.)

On November 10, 2022, TDRT&P moved by OSC seeking an order directing Arches to immediately transfer exclusive signatory authority over all bank accounts held in 11 Greene or TDRT's names to Asaf Bar Natan, as authorized signatory for Perot, TDRT, and 11 Greene. (NYSCEF 9, OSC [mot. seq. no. 001].) Arches moved for an order authorizing them to pay into the Court the funds in the Disputed Accounts. (NYSCEF 32, OSC [mot. seq. no. 002].) The court denied Arches' motion and directed Arches to restore control of the Disputed Accounts to TDRT&P. (NYSCEF 214, Decision and Order [mot. seq. no. 001, 002] at 2.)

Defendants answered the Complaint on November 10, 2022, and asserted counterclaims against Arches along with 11 Greene. (NYSCEF 6, Answer and Counterclaims.) Defendants filed an amended answer and counterclaims on December 28, 2022. (NYCEF 166, Amended Answer and Counterclaim.) Defendants and 11 Greene maintain that filing an answer or asserting counterclaims does not constitute a "waiver of their right and intention to arbitrate".... "any claim or claims subject to their respective arbitration agreements with Plaintiffs". (*Id.* at ¶¶2, 20.) As an affirmative defense, defendants also assert that Arches' claims are subject to arbitration. (*Id.* at 17.) TDRT&P assert counterclaims for: (1) breach of the First CMA against Arch Member (CC Count I); (2) conversion against Arch Member and Arch PM (CC Count II); (3) breach of the PMA against Arch PM (CC Count III); and (4) Breach of the Second and Third CMA against Arch Builders (CC Count IV). (*Id.* ¶¶ 119-153.)

Mot. Seq. No. 005

In mot. seq. no. 005, defendants TDRT and Perot move pursuant to CPLR 7503(a) for an order (i) compelling arbitration and staying proceedings of all causes of action that are subject to mandatory arbitration; and (ii) severing and permitting the remaining non-arbitrable causes of action to proceed. Defendants contend that Count IV of the Complaint (Arch Member's claim for breach of the LLC Agreement) is subject to the mandatory arbitration clause in the LLC Agreement.

§ 13.18 of the LLC Agreement provides that "Notwithstanding anything to the contrary contained herein, the Members hereby agree that (a) any Major Decision Deadlock, (b) **any dispute as to the occurrence of a breach of this Agreement**, (c) any dispute as to the occurrence of a Removal Event (or the existence or cure of a Breach), and (d) any dispute as to a Capital Call and Additional Capital Contributions, shall be settled pursuant to the Arbitration Procedures." (Arbitration Clause) (NYSCEF 175, LLC Agreement at 51 [Emphasis supplied].)

In Count IV, Arch Member alleges two breaches of the LLC Agreement. Arch Member claims that TDRT failed to pay the second installment of the TCO Fee (\$150,000). (NYSCEF 1, Complaint ¶ 38.) Section 7.03 (g) of the LLC Agreement, as amended on June 15, 2020, states that

"Provided that Substantial Completion has been achieved on or before the Substantial Completion Deadline³, Arch Member shall be entitled to a success fee (the "TCO Fee"). The TCO Fee shall be in an amount equal to \$300,000, (i)

³ Substantial Completion Deadline means "November 19, 2019 or such later date as Ground Landlord, Arch Member and RT Member agree that a temporary certificate of occupancy may be delivered in order to extend the term of the Ground Lease". (NYSCEF 175, LLC Agreement at 18.) This date was later extended to May 19, 2021 and subsequently to July 16, 2021. (NYSCEF 166, Amended Counterclaim ¶¶ 44, 62 at 28, 33.)

\$150,000 of which shall be paid to Arch Member in three monthly installments of \$50,000 each, to be paid on July 15, 2020, August 15, 2020 and September 15, and (ii) \$150,000 of which shall be paid upon Substantial Completion (subject to Section 7.03(j)).” (NYSCEF 159, Second Amendment to the LLC Agreement at 71.)

Second, Arch Member claims that under the LLC Agreement “it was entitled to receive the return of its \$500,000 equity contribution and a return of 8% in priority distributions” and TDRT’s failure to make these payments is a breach of the LLC Agreement. (*Id.* ¶39.)

Defendants contend that the breaches of the LLC Agreement alleged in Count IV of the Complaint fall within the scope of the valid and enforceable arbitration clause in the LLC Agreement. (NYSCEF 160, Defendants’ Memo of Law [December 14, 2022] at 5-8.)

Arches counter that defendants waived any right to arbitrate by choosing to litigate. (NYSCEF 165, Arches’ Memo of Law [mot. seq. no. 005] at 6.) Arches also contend that Count IV of the Complaint is inextricably intertwined with the remaining non-arbitrable claims and therefore, all the claims should be litigated together. (*Id.*)

The court rejects Arches’ argument that defendants waived their right to arbitrate by filing counterclaims or seeking injunctive relief. Waiver of an arbitration agreement requires “clear and convincing” evidence. (*Friddle v Moehle*, 2024 WL 493536, at *6 [Del. Ch., Feb. 8, 2024].)⁴ Parties may assert the same conduct, but split claims and

⁴ While the parties relied on decisions from New York courts in their memos of law, consistent with the LLC Agreement, the court applies Delaware law here only to make the determination whether the Arbitration Clause was waived. (NYSCEF 175, LLC Agreement §13.15 at 50 [“This Agreement shall be governed by and construed in accordance with the law of the State of Delaware without giving effect to any principles of conflicts of laws”].) In any event, the application of New York law to the issue of

remedies between arbitration and litigation.⁵ (*Parfi Holding AB v Mirror Image Internet, Inc.*, 817 A2d 149, 160 [Del. 2002].) A claim-by claim analysis is required. (*Friddle v Moehle*, 2024 WL 493536, at *6 [Del. Ch. Feb. 8, 2024]; *See also Nutzz.com, LLC v. Vertrue Inc.*, 2006 WL 2220971, at *9 [Del. Ch., July 25, 2006].)

Defendants have consistently asserted their right and intention to arbitrate the claims subject to the LLC Agreement's arbitration clause. (NYSCEF 166, Amended Counterclaim at 2, 17, 20.) Further, the counterclaims asserted by TDRT&P either do not arise from any agreement (CC Count II- Conversion) or allege breaches of agreements other than the LLC Agreement. (CC Counts I, III and IV alleging breaches of the First CMA, PMA, and the Second and Third PMA.) (*Id.* at ¶¶ 119-153.) The injunctive relief sought by defendants was in relation to these counterclaims and cannot be characterized as seeking judicial relief for claims subject to arbitration. Arches also effectively fail to assert prejudice on account of defendants' purported delay in seeking arbitration. (*Halpern Med. Servs., LLC v Geary*, 2012 WL 691623, at *3 [Del. Ch., Feb. 17, 2012].)⁶ In reality, Arches' objection appear to be to proceeding in two forums simultaneously. The parties agreed to the possibility of simultaneous actions.

waiver would not change the court's determination that defendants have not waived their right to arbitrate claims subject to the Arbitration Clause.

⁵ New York law also allows a party to litigate separate, non-arbitrable claims without waiving right to arbitrate claims subject to arbitration. (*See Nolan v DynCorp Intl. LLC*, 108 AD3d 436, 437 [1st Dept 2013]; *Queens Avon Co. v Gerstenhaber*, 111 AD2d 94, 95 [1st Dept 1985].)

⁶ Prejudice is also required under New York law. (*See Matter of NBC Universal Media, LLC v Strauser*, 190 AD3d 461 [1st Dept 2021] [court found no prejudice where there has been "no further discovery, no motion practice and no depositions were taken"]; *Neesemann v Mt. Sinai West*, 198 AD3d 484, 486 [1st Dept 2021] [finding no prejudice even when a party "served discovery demands when it answered the complaint, [but] did not participate in discovery, there were no depositions, and no preliminary conference order was entered".])

“Normally, waiver is only found when the demand for arbitration or dismissal due to the arbitrability of the claims came long after the suit commenced and when both parties had engaged in extensive discovery.” (*Id.*) Defendants did not unduly delay seeking arbitration and the delay of seven weeks is not prejudicial to Arches as there has been no discovery in this action. Therefore, the court finds that defendants have not waived their right to arbitrate claims subject to the LLC Agreement’s arbitration clause.

Arches’ second argument that the arbitrable and non-arbitrable claims are inextricably intertwined is similarly unavailing. Arches contend that while they allege in Count IV that defendants failed to pay Arch Member the TCO Fee, it was the responsibility of Arch CM (under the First CMA) to obtain a temporary certificate of occupancy. (NYSCEF 165, Arches’ Memo of Law [mot. seq. no. 005] at 16.⁷) However, Arch CM did not agree to arbitrate. (*Id.*) Arches contrast Count IV to CC Count I wherein TRDT&P allege that “Arch CM’s failure to provide the aforementioned reports, progress updates, and notifications with respect to the delay of construction resulted in the missed TCO deadline and constitutes a breach of the CM Agreement.” (NYSCEF 6, Answer and Counterclaim ¶¶ 87.)⁸ Arches also assert overlap between TDRT&P’s fifth affirmative defense and Arches’ Count IV. In their fifth affirmative defense, TDRT&P claim that Arches breached first by failing to fulfill their “obligations under the Joint Venture Agreement, the First CMA, the Second CMA, Third CMA, and the PMA.” (NYSCEF 6, Answer and Counterclaim ¶¶18.) Therefore, Arches insist this puts the

⁷ NYSCEF pagination.

⁸ Arches’ opposition to this motion was filed on December 28, 2022, the same day that filed the Amended Counterclaim. The court’s analysis is the same under the Amended Counterclaim.

same issue before both the arbitration panel and this court; whether the TCO was obtained timely and whether any alleged delays were material. (NYSCEF 165, Arches' Memo of Law [mot. seq. no. 005] at 16-17.)

“Where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where . . . the determination of issues in arbitration may well dispose of nonarbitrable matters.” (*Protostorm, Inc. v Foley & Lardner LLP*, 193 AD3d 486, 487 [1st Dept 2021] citing *Cohen v Ark Asset Holdings*, 268 AD2d 285, 286 [1st Dept 2000] [internal quotation marks omitted].)

The arbitrable and non-arbitrable claims here are not ‘inextricably interwoven’ and the determination of issues in arbitration will not dispose of non-arbitrable matters. While both the LLC Agreement and the First CMA mention the TCO and condition certain obligations on the substantial completion of the Project, which includes obtaining a TCO⁹, the claims and available remedies are different. The LLC Agreement conditions payment of the TCO Fee to the Arch Member on, among other things, the Project obtaining a TCO, and the First CMA requires Arch CM to complete work on the Project to timely obtain a TCO. While both the arbitral panel and this court might have to make factual determinations on whether a TCO was obtained on time¹⁰ and whether

⁹ § 7.03 (g) of the LLC Agreement conditions payment of the TCO Fee on the Substantial Completion of the Project on or before the Substantial Completion Deadline with ‘Substantial Completion’ being defined as “including, without limitation, obtaining a temporary certificate of occupancy for the entire Project”. (NYSCEF 159, Second Amendment to the LLC Agreement at 71; NYSCEF 175, LLC Agreement at 18.) Under the First CMA, Arch CM was obligated to strictly comply with the Construction Schedule.¹⁰ According to the LLC Agreement, the TCO was to be obtained no later than November 19, 2019. (NYSCEF 175, LLC Agreement at 18.) This date was later

the Project achieved Substantial Completion, such overlap by itself is not enough to conclude that the claims are ‘inextricably intertwined’. A determination by the arbitral panel on this issue will not necessarily dispose of the non-arbitrable claims at issue before this court. In any event, it is undisputed that TCO was not obtained on July 16, 2021 and was instead obtained on July 21, 2021, five days after the agreed-upon date.

The parties chose to arbitrate certain claims under the LLC Agreement, even though they could have anticipated that claims pertaining to the Project between its affiliates and TDRT&P might be litigated in court considering that none of the other agreements have arbitration clauses.¹¹ (See *50 Madison Ave. LLC v RCDOLNER LLC*, 958 NYS2d 645 [Sup Ct NY Cty 2010] [directed arbitration to proceed because the party opposing arbitration chose arbitration, “even though it had to have anticipated that, if there were any problems with the building’s construction, a purchaser, . . . , might litigate the issues in court”].) The parties cannot now rewrite the terms of their agreements. The court grants mot. seq. no. 005 to the extent that Arch Member, TDRT and Perot are directed to arbitrate Count IV of the Complaint in accordance with the arbitration clause in the LLC Agreement. In doing so, the court is honoring the parties’ intent reflected in the very clear language in the LLC Agreement. The other causes of action in the Complaint (Count I, II, III) are severed and shall simultaneously proceed before this court.

extended to May 19, 2021. This date was later extended to May 19, 2021. (NYSCEF 166, Amended Counterclaim ¶44 at 28.)

¹¹ While the First CMA has a provision for arbitration, it only applies to claims below \$100,000 and is inapplicable to this dispute. (NYSCEF 176, First CMA § 19 at 51-54.)

Mot. Seq. No. 006

In mot. seq. no. 006, Arches move pursuant to CPLR 3211 (a) (1) and (7) to dismiss TDRT&P's amended counterclaims.

Legal Standard

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88[1994] [citation omitted].) However, “conclusory allegations--claims consisting of bare legal conclusions with no factual specificity--are insufficient to survive a motion to dismiss”. (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] [internal citation omitted].) To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the “burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.” (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) “A cause of action may be dismissed under CPLR 3211 (a)(1) only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].) For evidence to be considered documentary, it “must be unambiguous and of undisputed authenticity.” (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2nd Dept 2010].) Affidavits and deposition testimony do not constitute “the type of documentary evidence that may

be considered on a motion pursuant to CPLR 3211 (a) (1).” (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011] [citations omitted].)

Analysis

Arches seek a dismissal of all amended counterclaims.

CC Count I- Breach of the First CMA against Arch CM

TDRT&P allege that Arch CM (i) failed to comply with the agreed-upon construction schedule and, therefore breached § 5.1¹² of the First CMA; (ii) concealed its mismanagement of the Project and in doing so, breached its obligation under the First CMA to keep 11 Greene apprised of the status of the Project (First CMA § 3.2[iii]); failed to provide notice, within two business days, of an ‘Early Warning Event’, i.e., any circumstance that it knew could result in an increase of the Guaranteed Maximum Price or a delay in the completion of the project in violation of § 5.2 of the First CMA; (iv) failed to provide written notice of its inability to comply with the Construction Schedule in violation of § 5.4 of the First CMA; (v) failed to notify 11 Greene of defects in construction, and refused to cooperate and remedy the defects quickly and efficiently leading to the TDRT&Ps incurring costs in excess of the Guaranteed Maximum Price, including costs to remedy the delays and defects that resulted from Arch’s mismanagement; (vi) failed to review and analyze invoices and claims from Subcontractors and make monthly Application for Payment compliant with the terms of the First CMA, to 11 Greene in violation of §§ 6.6, 6.9 of the First CMA; and (vii) failed to provide to 11 Greene all documents connected to the Property, including documents

¹² § 5.1 of the First CMA provides that “The Construction Manager acknowledges and agrees that it shall strictly comply with the Construction Schedule...”. (NYSCEF 176, First CMA at 18.)

indicating the as-built conditions of the Property despite repeated requests by 11 Greene in violation of § 3.14 of the First CMA. (NYSCEF 166, Amended Counterclaim ¶¶ 120-128 at 46-48.)

TDRT&P assert damages in the amount of approximately \$20 million for Arch CM's breaches of the First CMA and injunctive relief in the form of an order directing Arch CM to transfer to 11 Greene and its new property manager all plans, documents, books, and records as required under the First CMA including the as-built plans. (*Id.* ¶¶ 124, 128 at 47-48, 53.)

The elements of a viable breach of contract claim “include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages”. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425,426 [1st Dept 2010] [internal citation omitted].)

Breach due to Delays

It is undisputed that Arch CM and 11 Greene entered a contract, namely the First CMA. Arches claim that Arch CM complied with its obligations under the First CMA including ‘strictly complying’ with the Construction Schedule. (NYSCEF 183, Arches’ MEMO OF LAW [January 17, 2023] at 14-15.) Arches contend that they substantially completed the work before the substantial completion date and the delay in issuance of the TCO was attributable to the Department of Buildings’ delay in issuing the TCO. (*Id.*) TRDT&P dispute this assertion. Any dispute on whether Arch CM complied with the Construction Schedule, substantially completed¹³ all work under the First CMA by the

¹³ § 5.8 of the First CMA defines Substantial Completion as “the date when [among other conditions] . . . a temporary certificate of occupancy has been obtained, unless
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substantial completion deadline such that a TCO could be issued in time is an issue of fact and cannot be decided by a court on a motion to dismiss. On a motion to dismiss, the court accepts the facts as alleged in the counterclaim as true and accords TDRT&Ps the benefit of every possible favorable inference. Further, the court cannot rely on the complaint filed in *11 Greene St LLC v 335 Canal Street, LLC, Index No. 654346/202* (Ground Lease Litigation) or admissions made in that action as appropriate documentary evidence under CPLR 3211 (a) (1) as the complaint was verified by an attorney, not a person with knowledge. The court accepts as true for the purpose of this motion to dismiss TDRT&P's factual assertion that "Arch CM failed to comply with the Construction Schedule" and finds that the TDRT&P have adequately alleged a breach of § 5.1.

Failure to Keep 11 Greene Apprised and provide requisite documents under the First CMA

Arches reject the TDRT&Ps' assertion that Arch CM failed to keep "the Owner apprised of the true status of the project" because "Plaintiffs were in near-constant contact with the regarding the status of the Project with the [TDRT&P]." (NYSCEF 183, Arches' Memo of Law [January 17, 2023] at 15-16.) Arches also claim that the TDRT&P fail to identify which reports and documents, purportedly due under the First CMA, were provided late or not provided at all to 11 Greene. (*Id.* at 16.)

The court reiterates that on a motion to dismiss, the court accepts the facts as alleged in the counterclaim here as true and accords TDRT&P the benefit of every possible favorable inference. Any dispute over whether Arches and TDRT&Ps were in

receipt of such certificate is delayed for reasons beyond the reasonable control of the Construction Manager". (NYSCEF 176, First CMA at 23.)

constant contact or whether Arches provided the requisite reports or information due under the First CMA to 11 Greene is an issue of fact and cannot be resolved at the stage of motion to dismiss. Further, TDRT&P are not required to include specific details of every report or document not provided by Arches in their Complaint. While alleging a breach of § 3.14, TDRT&P have in fact identified the broad category of documents not provided by Arches (construction documents, documents indicating the as-built conditions of the Property, materials in support of their applications for payment etc.) (NYSCEF 166, Amended Counterclaim ¶¶126, 127 at 48, ¶104 at 43.) The TDRT&P have adequately pleaded breaches of § 3.2(iii), § 5.2, §5.4 and § 3.14.

Defective Work

Arches contend that TDRT&P have failed to state a claim for breach based on purportedly defective work because they do not allege any facts to support their claim that Arch CM performed defective work and then refused to remedy it. (NYSCEF 183, Arches' MEMO OF LAW [January 17, 2023] at 16.) The court agrees that the claim is vague in violation of CPLR 3013. TDRT&P allege that Arch CM failed to "notify Owner of defects in construction", refused to "cooperate and remedy the defects quickly and efficiently. These defects constituted Defective Work under the CM Agreement". (NYSCEF 166, Amended Counterclaim ¶122 at 47.) However, TDRT&P fail to identify the defects. While they are not required to catalog every defect, TDRT&P are required to identify something. Indeed, in *Skae Power Sols., LLC v Rae Corp., Tech. Sys., Inc.*, 2011 N.Y. Slip Op. 32856[U] [Sup Ct, New York County 2011], a case relied upon by Arches, the complaint includes a description of the defect. ("In early January 2010, the Chiller was allegedly still experiencing problems. Specifically, it is alleged that the

Chiller had start/stop issues, could not be automatically restarted after a power loss, and was experiencing low pressure alarms.”) This is classic conclusory pleading which is impermissible. (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] [internal citation omitted].) Therefore, CC Count I for breach of contract is dismissed without prejudice to the extent TDRT&P allege a breach based on defective work and failure to remedy.

While Arches assert that they seek to dismiss the counterclaims in their entirety, Arches have not challenged counterclaim based on §§ 6.6 and 6.9.

Damages

Arches contend that TDRT&P have failed to state a viable damages theory.

TDRT&P seek \$20 million in damages. (NYSCEF 166, Amended Counterclaim ¶3.) Alleged damages include the cost: (1) of remedying “the delays and defects caused by Arch CM’s mismanagement caused the development of the Property to run approximately \$20 million over the budget set pursuant to the CM Agreement” (¶69); (2) of litigation with the landlord to extend the TCO deadlines which TDRT&P settled by making a substantial payment to the landlord (¶62); (3) to “compensate tenants for delayed move-in dates. TDRT&P also incurred legal fees related to disputes with tenants regarding the delayed move-in dates” (¶64); (4) of failure to timely advise TDRT&P of construction problems which increased the cost to repair (¶71); and (5) “Under the terms of the CM Agreement, however, Arch CM is liable to Owner for all costs exceeding the Guaranteed Maximum Price, as well as Owner’s costs to correct

Defective Work and costs due to Arch CM's negligence. CM Agreement §§ 8.3.5,¹⁴ 8.3.6,¹⁵ 8.3.8,¹⁶ 18.6¹⁷." (§170).

First, Arches challenge TDRT&P's damage items 1-4 above because § 22.19¹⁸ of the First CMA bars consequential damages. Since rental expenses are specifically defined as consequential damages by §22.19, the third item of damages is dismissed. (See *400 15th St., LLC v Promo-Pro, Ltd.*, 28 Misc 3d 1233(A) [Sup Ct 2010] [damages barred by contract provision similar to §22.19: "losses due to the change in the Zoning Resolution, consisting of its delay damages, its payment of attorneys' fees to appeal the zoning change, and its payment of additional interest, insurance, and other carrying

¹⁴ It provides: "Costs due to the negligence or other wrongful conduct of the Construction Manager, the Subcontractors or any of its agents or employees and/or not reimbursed by insurance."

¹⁵ It provides: "To the extent the Construction Manager is required to obtain insurance under the Agreement, Costs which would have been insured but for the failure of the Construction Manager or any Subcontractors to carry the insurance required by this Agreement or under the applicable Subcontracts. Costs for uncovering or correcting Defective Work."

¹⁶ It provides: "Costs in excess of the Guaranteed Maximum Price, unless adjusted or approved pursuant to the terms of this Agreement."

¹⁷ It provides: "The Owner's Right to Correct the Work. If the Construction Manager defaults or neglects to carry out the Work in accordance with the Contract Documents or if Construction Manager fails to commence and continue to correct any Defective Work, the Owner may, without prejudice to other remedies the Owner may have, correct such Defective Work and charge all reasonable costs associated therewith to the Construction Manager."

¹⁸ It provides: "The Construction Manager and Owner waive claims against each other for consequential damages arising out of or relating to this Agreement. This mutual waiver includes: (1) damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and (2) damages incurred by the Construction Manager for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit anticipated arising directly from the Work. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination."

NYSCEF 176, CMA § 22.19 at 62.)

charges].) Otherwise, damage items 1, 2, and 4 are not consequential, but may directly flow from the core of the agreement which was to timely obtain the TCO. Damages may “qualify as general or direct damages when they are the natural and probable consequence of the breach”. (*MUFG Union Bank, N.A. v Axos Bank*, 196 AD3d 442, 443 [1st Dept 2021] [internal quotation marks and citation omitted].)

As to damage item 5, Arches challenge any damages based on §8.3.8 arguing that the parties never agreed to a Guaranteed Maximum Price. (NYSCEF 183, Memo of Law at 11.) Implicit in §8.3.8 is that there was such an agreement. The court must “accept the facts as alleged in the complaint as true, accord Arches the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88[1994] [citation omitted].) Arches do not challenge the damages based on the other subsections of §8.3. Therefore, Arches’ motion is denied except as to damages arising from tenants.

CC Count II- Conversion against Arch Member and Arch PM

In CC Count II, TDRT&P allege that Arch Member refused to turn over exclusive signatory authority over the Construction Cost Reserve Account and the Development / Construction Account and Arch PM has refused to turn over exclusive signatory authority over 11 Greene’s Operating Account. (NYSCEF 166, Amended Counterclaim, ¶132 at 49.) TDRT&P allege that Arch Member and Arch PM have substantially interfered with the “Owner’s right to possess and control its own bank accounts and the funds therein, in derogation of Owner’s rights”. (*Id.* ¶133 at 49.)

Arches argue that TDRT&P’s conversion counterclaims fail because they are predicated on an alleged breach of contract. (NYSCEF 183, Arches’ Memo of Law

[January 17, 2023] at 20.) Further, Arches assert a timing issue. They argue that the conversion claim is precluded by Arches' earlier interpleader action. (*Id.* at 23.) Arches contend that TDRT&P "cannot subject Arch PM or Arch Member to liability for not transferring signature authority pending disposition by this Court". (*Id.* at 24.)

The court rejects Arches' argument that the filing of the interpleader action somehow precludes the conversion claims. Arches initiated this action on October 25, 2022, six days before October 31, 2022, when TDRT&P served a demand on Arch Member to transfer exclusive signatory authority over all bank accounts and when the termination of the PMA became effective. On November 11, 2022, TDRT&P moved by OSC for a preliminary injunction directing Arches to transfer signatory authority to TDRT&P. (NYSCEF 9, OSC.) TDRT&P maintain that they were entitled to signing privileges when Arches were terminated in September, 2022. (NYSCEF 14, Asaf Bar Nata aff ¶45.) Arches' contention that since the interpleader action seeks directions pertaining to these very bank accounts, they cannot act absent court directions is wholly without merit. The court on April 8, 2023 granted, in part, TDRT&P motion seeking immediate transfer of exclusive signatory authority over the Disputed Accounts identified in the OSC (which include the accounts identified in CC Count II and III) and directed Arches to restore control of these accounts to TDRT&P. (NYSCEF 214, Decision and Order [mot. seq. no. 001, 002] at 2.) In violation of this court's order, as far as this court is aware, Arches have yet to transfer control of these accounts to TDRT&P. (NYSCEF 224, Tr [mot. seq. no. 006] at 22:4-25; 23:1-6.) This court's order supersedes Arches' interpleader request. Moreover, having failed to abide by this

court's order, Arches cannot rely on the interpleader action for protection from a conversion claim.

As to Arches' argument that the contract claims preclude the conversion claim, the court rejects the argument as to Arch Member. TDRT&P have not alleged a breach of contract claim against Arch Member under the LLC Agreement for failing to transfer exclusive signatory authority over all bank accounts in this action. Such a claim would be subject to the mandatory arbitration clause in the LLC Agreement. (NYSCEF 193, TDRT&P's Memo of Law [mot. seq. no. 006] at 21, fn 4.)

As far as the conversion claim against Arch PM are concerned, the court finds that they are duplicative of the breach of contract claims alleged in CC Count III. "A cause of action for conversion cannot be predicated on a mere breach of contract" (*Fesseha v TD Waterhouse Investor Servs.*, 305 AD2d 268,269 [1st Dept 2003].) A party must allege "independent facts sufficient to give rise to tort liability". (*Interstate Adjusters, Inc. v. First Fid. Bank, N.A.*, 251 AD2d 232, 234 [1st Dept 1998] [internal quotation marks and citation omitted].) TDRT&P's conversion claims against Arch PM are predicated on the PMA which requires Arch PM to surrender and transfer exclusive signatory authority over all bank accounts after the PMA terminates, but Arch PM allegedly failed to do so. TDRT&P fail to allege any independent facts to give rise to tort liability. The conversion counterclaim against Arch PM is accordingly dismissed and survives against Arch Member.

CC Count III- Breach of the PMA against Arch PM

In CC Count III, TDRT&P allege that Arch PM (i) "breached its fiduciary duties by failing to act in good faith and in a commercially reasonable manner in its management

of the Property;” (ii) failed to deliver documents and papers pertaining to the Property and the operation thereof including unpaid invoices, ledgers, bank accounts, contracts, payment histories, pending service requests, and pending transactions, to 11 Greene and its new agent despite repeated requests in violation of PMA Art 4 (b) and Ex. B, § (o) (NYSCEF 177, PMA at 3, 12); (iii) failed to “arrange Owner’s signature authority to draw from the Operating Account, Collections Account, and Security Deposit Account” in violation of PMA Art 6 (NYSCEF 177, PMA at 3-4); and (iv) failed to surrender its signature authority and deliver exclusive signature authority over these accounts to 11 Greene or the new property manager after the termination of the PMA on October 31, 2022. (NYSCEF 166, Amended COUNTERCLAIMS ¶¶ 135-146 at 49-52.)

The parties dispute whether Arch PM arranged for 11 Greene’s signature authority to draw from the Operating Account, Collections Account, and Security Deposit Account. Arch PM contends that it did not breach its obligation in this regard because it arranged for its principal, Mr. Simpson, who was also an authorized representative of 11 Greene to have signature authority over the accounts when it opened them. (NYSCEF 183, Arches’ Memo of Law [January 17, 2023] at 26.) TDRT&P contend that Arch PM ignores that when Mr. Simpson was removed as a Manager of TDRT, he stopped being a representative of 11 Greene and Arch PM took no steps thereafter to give 11 Greene or its designee signature authority. (NYSCEF 193, TDRT&P’s Memo of Law [mot. seq. no. 006] at 24.) This dispute is an issue of fact and cannot be decided on a motion to dismiss. The court accepts the facts alleged in the amended counterclaim and finds that TDRT&P have stated a claim for breach of Art 6 of the PMA. Further, Arches’ argument that TRDT&P have somehow waived their

pre-termination right to signature authority on the three accounts by affirmative conduct and by failure to act (NYSCEF 183, Arches' Memo of Law [January 17, 2023] at 26-27) is without merit. Article 13¹⁹ of the PMA, which is an anti-waiver provision precludes Arches' argument of waiver.

Arches' argument that TDRT&P fail to adequately allege a claim for breach of PMA Article 4 (b) and Ex. B, § (o) because they "fail to allege with any specificity what documents were supposedly not provided" is facially incorrect. TDRT&P have very clearly averred that Arches failed to "deliver to Owner documents and papers pertaining to the Property and the operation thereof even after Owner and Owner's new agent requested them, including **unpaid invoices, ledgers, bank accounts, contracts, payment histories, pending service requests, and pending transactions**".

[Emphasis supplied].

The court has already addressed Arches' arguments pertaining to the filing of this interpleader action in relation to the transfer of signature authority over the Disputed Accounts in the section above and the same analysis applies to this counterclaim as well. The motion to dismiss CC Count III is denied.

CC Count IV- Breach of the Second and Third CMA against Arch Builders

In CC Count IV, TDRT&P allege that Arch Builders failed to reimburse 11 Greene for expenses (amounting to at least \$41,435.24) paid to third-party contractors to correct

¹⁹ Article 13 of the PMA provides that "The failure of either party at any time to require performance by the other party of a provision hereunder shall in no way affect the right of that party to enforce the same, or to enforce any of the other provisions in this Agreement...". (NYSCEF 177, PMA at 6.)

defective work performed by Arch Builders, in violation of Art. 12, § 12.3 of the Second CMA. (NYSCEF 166, Amended Counterclaim ¶¶ 151-152 at 52.)

Arches claim that TDRT&P failed to adequately state a claim for breach of the Second and Third PMA because they fail to plead with requisite specificity. (NYSCEF 183, Arches' Memo of Law [January 17, 2023] at 28-29.) Further, Arches argue that this counterclaim fails because TDRT&P did not allege compliance with the notice requirements in the Second and Third PMA which were conditions precedent to bringing a claim. (*Id.* at 29-30.) The court rejects Arches' first argument because, unlike CC Count I, TDRT&P here broadly identify the defects in Arch Builders' work. In the Amended Counterclaim, TDRT&P allege that Arch Builders "failed to install sheetrock in and paint portions of the one retail space per the terms of the Second CM Agreement and refused to correct defects in the flooring of that space" and "failed to complete the second retail space per the terms of the Third CM Agreement, and refused to correct the flooring, layout, and electrical wiring of that space." (NYSCEF 177, Amended Counterclaim ¶¶ 107-108 at 44.)

The court rejects Arches' notice challenge. TDRT&P alleged that 11 Greene demanded that Arch Builders remedy these defects and Arch Builders refused. The CPLR does not require them to do more. "In an action on a contract, the obligation to raise the issue of compliance with conditions precedent rests on the party disputing their performance or occurrence. Thus, the burden to plead 'specifically and with particularity' that any condition precedent has not been fulfilled rests on the party resisting enforcement of the contract." (*1199 Hous. Corp. v Int'l Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005].)

Accordingly, it is

ORDERED that motion seq. no. 005 is granted, in part, to the extent that Arch Member, TDRT and Perot are directed to arbitrate Count IV of the Complaint in accordance with the arbitration clause in the LLC Agreement. Proceedings on Count IV are stayed while proceedings on the remaining counts shall proceed; and it is further

ORDERED that motion seq. no. 006 is granted, in part, and Count I of the Amended Counterclaim for breach of contract is dismissed only to the extent that it alleges that Arches failed to notify 11 Greene of defects in construction and refused to cooperate and remedy the defects quickly and efficiently; and it is further

ORDERED that TDRT&P are granted leave to serve and file an amended counterclaim addressing the deficiencies of the first cause of action which may be repleaded to comply with CPLR 3013; and it is further

ORDERED that the amended counterclaim shall be served and filed within 20 days after service on TDRT&P's attorneys of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that TDRT&P fail to timely serve and file an amended complaint, leave to replead shall be deemed denied and the CC Count I of the Amended Counterclaim to the extent it alleges breach of the Construction Management Agreement of defective construction shall be dismissed; and it is further

ORDERED that Count II of the Amended Counterclaim is dismissed against Arch Property Management LLC only; and it is further

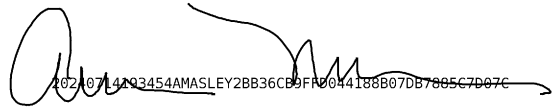
ORDERED that the motion to dismiss Count III of the Amended Counterclaim is denied; and it is further

ORDERED that the parties are referred to the Alternative Dispute Resolution Program of the Commercial Division; and it is further

ORDERED that counsel for the parties shall, within 5 business days of the filing of this order, jointly submit a fully executed ADR Initiation Form by email to ADR-1JD@nycourts.gov; and it is further

ORDERED that counsel shall comply with all of the ADR Rules. Failure to do so may result in the imposition of sanctions or other appropriate action by the court; and it is further

ORDERED that the proceedings in this action, including discovery or motion practice, shall not be stayed during ADR.



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7/14/2024

DATE

ANDREA MASLEY, 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