136 East 64th St., L.P. v 136 East 64th St. Corp.
2013 NY Slip Op 32245(U)
September 18, 2013
Sup Ct, New York County
Docket Number: 651098/2013
Judge: Cynthia S. Kern
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[*1]
FILED: NEW YORK COUNTY CLERK 09/20/2013 INDEX NO. 651098/2013
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART ______

Index Number : 651098/2013
136 EAST 64TH STREET
vs
136 EAST 64TH STREET
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

The following papers, numbered 1 to ____ , were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | **No(s).** ______

Answering Affidavits — Exhibits ______ | **No(s).** ______

Replying Affidavits ______ | **No(s).** ______

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S):

Dated: 9/18/13

CK, **J.S.C.**
CYNTHIA S. KERN
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

---x

136 EAST 64TH STREET, L.P.,

Plaintiff,

-against-

136 EAST 64TH STREET CORPORATION and THE NEW YORK CITY LANDMARKS PRESERVATION COMISSION,

Defendants.

---x

Index No.651098/2013

DECISION/ORDER

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :__________________________________

Papers	Numbered
Notice of Motion and Affidavits Annexed.................................	1
Answering Affidavits and Cross Motion..................................	2
Replying Affidavits..	3
Exhibits..	4

Plaintiff commenced the instant action seeking a permanent injunction directing defendant to consent to plaintiff's request for the installation of new awnings/signs for two of plaintiff's commercial tenants. It now moves for an order pursuant to CPLR § 3212 granting it summary judgment and pursuant to CPLR § 3211 and/or CPLR § 3212, dismissing defendant's first, second and fourth counterclaims in their entirety, along with the third counterclaim to the extent it alleges a lease breach based on actions by plaintiff's tenants A&A Discounts and Pylones. For the reasons set forth below, plaintiff's motion is denied in part and granted in part.

The relevant facts are as follows. Defendant 136 East 64th Street Corporation (the

"Corporation" or "defendant") is the owner of a building located at 136 East 64th Street, New York, New York (the "Building"). The Building consists of residential space for the Cooperative's shareholder and a commercial space on the ground floor consisting of eleven stores (the "Commercial Space"). On or about December 20, 1984, plaintiff entered into an Amended and Restated Agreement of Lease to rent out the entire Commercial Space from defendant for a 75-year term (the "Lease"). Pursuant to the Lease, plaintiff and its commercial tenants have a right to install new storefronts, awnings and signs on the exterior of the Commercial Space upon consent from the Corporation, which cannot be unreasonably withheld or delayed. Specifically, paragraph 5 of the Lease provides that:

> Lessee shall make no exterior changes to the store fronts or other details affecting the facade of the Building without the consent of the Lessor which consent shall not be unreasonably withheld or delayed by Lessor. Lessor agrees to promptly execute any application or other document or instrument required or deemed desirable by Lessee in connection with obtaining any permit, authorization or other necessary or desirable order or ruling from governmental authorities having jurisdiction whenever such action is necessary or desirable, provided, however, that Lessee agrees to reimburse Lessor for any reasonable cost or expense incurred by Lessor in connection therewith.

In March of 2010, defendant Landmarks Preservation Commission ("LPC"), the agency responsible for identifying and designating the city's landmarks in the city's historic districts, expanded the Upper East Side Historic District ("UESHD") to include the Building. As a building in a designated historic district, the Building must get LPC approval for any proposed changes to the exterior of the Building, including new awnings or storefronts in the Commercial Space. Additionally, pursuant to the LPC regulations, any application to the LPC for approval must bear the property owner's signature.

This action involves two of plaintiff's commercial tenants, A&A Discounts and Stay

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Connected, Inc. ("Stay Connected"), who wish to make changes to their storefronts. In the winter of 2011, after the expansion of the historic district to include the Building, A&A Discount's awning became damaged and needed to be replaced, which required LPC approval. Sometime thereafter, without LPC approval, A&A Discounts erected a replacement awning. On August 22, 2012, A&A Discounts was issued a violation for the awning and on or about September 12, 2012, the LPC sent a "Warning Letter" to the Corporation notifying them that the replacement of the A&A Discounts' awning without a permit was in violation of the Landmarks Law and if defendant did not apply to the Commission within 20 working days and obtain a permit and promptly cure the violation, "the Commission may serve a Notice of Violation." On October 11, 2012, at an Environmental Control Board ("ECB") hearing, A&A Discounts entered into a stipulation wherein it agreed to pay a $1,000 fine and obtain the necessary permit to restore the premises to a legal condition by December 25, 2012.

On or about September 27, 2012, plaintiff submitted a plan for the A&A Discounts replacement awning to the Corporation. Around this same time, on or about November 27, 2012, plaintiff submitted another plan to defendant to install a sign/awning on the Verizon Store storefront, which was opened by Stay Connected in the Commercial Space after the LPC expanded the UESHD to include the Building. In regards to both plans, plaintiff requested the Corporation's consent to the plans and its signature on the necessary applications to LPC and the Department of Buildings ("DOB").

By letter dated February 8, 2013, the Corporation denied both requests (the "Denial Letter"). The Corporation's Denial Letter asserted that its refusal to consent to the proposed changes was based on "extensive research regarding the possible preferences of the New York

City Landmarks Preservation Commission in relation to the plans that have been submitted," and that it was the Corporation's Board Members' view "that [the proposed] awnings would very probably not be acceptable to the Commission." More specifically, the Corporation noted that "in order to be consistent with the views of the commission regarding the historic architectural character of the building, the Corporation has determined not to provide its consent under the Lease."

After it issued its Denial Letter, defendant filed a proposed "Master Plan" for the storefronts with the LPC. The proposed Master Plan allegedly requests that the LPC require uniform signs and prohibit awnings for all tenants in the Commercial Space.

On or about March 26, 2013, plaintiff commenced the instant action to enjoin the Corporation from submitting a Master Plan and directing it to consent to the proposed changes to the A&A Discounts and Verizon Store storefronts. Defendant answered and asserted four counterclaims against plaintiff.

After commencement, plaintiff immediately moved for a preliminary injunction seeking: (a) to enjoin LPC from reviewing or approving the Master Plan filed by the Corporation; (b) directing the Corporation to withdraw, or to refrain from prosecuting, its Master Plan before the LPC; (c) directing the Corporation to consent to plaintiff's requests for the installation of a new sign/awning; and (d) directing the corporation to execute all necessary government applications to the LPC or DOB, or any other documents necessary to complete the requested work. In a decision on the record, this court granted plaintiff a preliminary injunction solely to the extent that the Corporation was directed to withdraw its Master Plan application before the LPC. However, the court declined to direct the Corporation, via a preliminary inunction, to consent to

the sign/awning requests and sign all necessary permits on the grounds that it was the ultimate relief sought and would require a dispositive motion.

Plaintiff now moves for summary judgment on its breach of contract claim on the ground that the Corporation's withholding of its consent to the proposed changes to the storefronts and the act of submitting the Master Plan to the LPC was a breach of the Lease as a matter of law. As relief, plaintiff seeks a permanent injunction ordering defendant to consent to its requests for exterior changes to the two storefronts and directing defendant to execute all necessary applications to the LPC and DOB. Plaintiff also seeks an order enjoining defendant from filing, during the term of the Lease, any Master Plan with the LPC affecting the storefronts appurtenant to the Commercial Space without plaintiff's consent. Plaintiff also moves for summary judgment dismissing defendant's counterclaims.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

It is well settled that when a commercial lease provides that the landlord will not unreasonably withhold consent to an act, the landlord may refuse to consent to the act only on "consideration of objective factors." *Logan & Logan, Inc. v. Audrey Lane Laufer LLC*, 34

A.D.3d 539 (2nd Dept 2006). Accordingly, "subjective concerns and personal desires cannot play a role in a landlord's decision to withhold consent." *Id.* In applying this standard to a situation analogous to the present case, the Second Department held that a landlord may "properly consider whether the proposed signage would detract from the overall appearance of the property or whether it could lead to a decrease in the property's rental values" as these are legitimate objective business considerations. *See Wize Eyes of Syosset, Inc. v. Turnpike Corp.*, 66 A.D.3d 884 (2nd Dept 2009).

In the present case, as an initial matter, plaintiff has demonstrated its *prima facie* entitlement to summary judgment on its breach of contract claim as it has demonstrated that defendant's refusal to consent to the proposed changes to the storefronts on the ground that it believed LPC would not approve of the plans is a breach of the Lease as a matter of law as it was based on subjective concerns. The only reason stated by defendant in its Denial Letter for refusing to consent to the proposed changes was the Corporation's Board Members' belief that the LPC would not approve the awnings. This belief is purely speculative and is not a proper objective factor defendant may consider in refusing to consent to the exterior changes to the storefronts. As such, defendant's refusal to consent on this basis is *per se* unreasonable and a breach of the Lease.

However, in opposition to plaintiff's motion, defendant has presented evidence raising a material issue of fact as to whether, notwithstanding its Denial Letter, the Corporation's refusal to consent was actually based on legitimate objective business considerations. Defendant presents the affidavit of Clifford Dupree, a member of the Corporation's Board of Directors, wherein he attests that:

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> In keeping with maintaining the Building as a 'first class apartment house,' the Corporation withheld its consent to the signage which plaintiff proposed because, pursuant to objective business considerations, (1) the proposed signage and awnings would not be consistent with the awnings/signs on commercial properties connected to first class apartment houses in the [historic district], (2) they would detract from the overall appearance of the Building, (3) they were not consistent with the historical features of the Building and would obscure historic architectural features of the Building, and (4) they would reasonable be expected to lead to a decrease in the Value of the Building.

To support Mr. Dupree's argument that the new signs would lead to diminished property values, defendant includes the affidavit of Mark S. Weiss, the Vice Chairman of Newmark Grubb Knight Frank, which is a leading commercial real estate advisory firm. Mr. Weiss's testimony supports defendant's position that "attractive and sophisticated storefronts increase the overall appearance of properties and garner more value for the properties." As a landlord may "properly consider whether the proposed signage would detract from the overall appearance of the property or whether it could lead to a decrease in the property's rental values," these affidavits are sufficient to raise a material issue of fact as to whether the Corporation's refusal to consent was reasonably based on legitimate objective business concerns. *See Wize Eyes of Syosset, Inc.*, 66 A.D.3d at 885.

To the extent that plaintiff contends that Mr. Dupree's affidavit should be disregarded, such contention is without merit. The court recognizes that generally a self-serving affidavit that contradicts that party's own prior testimony is insufficient to raise a bona fide question of fact and will be disregarded. *Lupinsky v. Windham Constr. Corp.*, 293 A.D.2d 317, 218 (1st Dept 2002). However, in the preset case, Mr. Dupree's affidavit does not directly contradict the statements made in the Denial Letter. Instead, Mr. Dupree's affidavit merely offers another reason for refusing to consent and plaintiff offers no authority that would restrict defendant's

bases for denial to only that which was stated in the Denial Letter. Indeed, to the extent that plaintiff argues that these newly stated reasons are pre-textual, such determination must be left to the trier of fact.

Additionally, to the extent that plaintiff argues that defendant breached the Lease by submitting the Master Plan to the LPC, such argument is unavailing to grant plaintiff summary judgment for breach of contract. While defendant's act of submitting a Master Plan may serve as evidence that its refusal to consent was unreasonable, there is no provision in the Lease that explicitly prohibits defendant from submitting such plans.

The court now turns to the remainder of plaintiff's motion seeking dismissal of defendant's counterclaims. In its answer, defendant asserts four unlabeled counterclaims: (1) a tort claim based on A&A Discounts and plaintiff's other tenant Pylones installing new awnings without obtaining consent from the Corporation and without the proper LPC and DOB permits; (2) a property damage claim based on Stay Connected conducting work to the Verizon storefront without the Corporation's permission; (3) a breach of contract claim based on the same actions identified above; and (4) breach of the implied covenant of good faith and fair dealing. Plaintiff has moved to dismiss defendant's third counterclaim for breach of contract as it pertains to A&A Discounts and Pylones actions on the ground that defendant has not yet been fined for violations caused by these tenants' actions and as such it has not sustained any damage. Additionally, plaintiff moves to dismiss defendant's first, second and fourth counterclaims on the ground that they are merely duplicative of defendant's third counterclaim for breach of contract.

As an initial matter, plaintiff is not entitled to summary judgment dismissing defendant's third counterclaim for breach of contract as it has failed to demonstrate that defendant has not

sustained any damages. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." *Flomen baum v. New York Univ.*, 71 A.D.3d 80, 91 (1st Dept 2009). In the present case, it is undisputed that A&A Discounts, Pylones and Verizon all installed new signs/awnings without prior consent from defendant, which is a breach of the Lease. To the extent that plaintiff argues defendant cannot establish damages stemming from A&A Discounts and Pylones breaches as no fine has been issued for the violations, such contention is unavailing as defendant does not base its damages simply on the threat of fines. Instead, defendant also contends that due to the violations on the building, it was forced to spend extra funds in obtaining its own permits for the Building. In his affidavit attached to defendant's opposition papers, Mr. Dupree states that due to the violations caused by A&A Discounts and Pylones erecting awnings without the proper permits, the Corporation was forced to hire an expeditor to obtain the permits that were necessary to convert the Building's boiler. Accordingly, plaintiff has failed to demonstrate that defendant cannot establish damages as a matter of law, which would entitle it to summary judgment dismissing the claim.

However, the portion of plaintiff's motion seeking to dismiss defendant's first and second counterclaims sounding in tort and the fourth counterclaim for breach of good faith and fair dealing on the ground that those claims are merely duplicative of defendant's third counterclaim for breach of contract is granted. While New York law permits a party to plead alternative legal theories under CPLR § 3014 to support its claim for recovery, "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 23 (2005); *see*

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also Clerk-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382 (1987). Additionally, New York Law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim based on the same facts is also pled. *See Kaminsky v. FSP Inc.*, 5 A.D.3d 251, 252 (1st Dept 2004). In order to maintain such a claim, plaintiff must allege a "breach of a duty other than, and independent of, that contractually established between the parties." *Id.*

Here, defendant's first and second counterclaims are merely restated claims in tort based on plaintiff's tenants' breach of the lease and as such are duplicative of the third counterclaim for breach of contract. Additionally, defendant's claim for breach of the covenant of good faith and fair dealing is based on A&A Discounts, Pylones and Verizon's alleged breach of the lease by making changes to their storefronts without prior approval from the Corporation. These assertions are factually identical to that contained in the breach of contract claim and as such defendant's fourth counterclaim must be dismissed as duplicative as well.

Based on the foregoing, plaintiff's motion is granted only to the extent that defendant's first, second and fourth counterclaims are hereby dismissed. However, the portion of plaintiff's motion seeking summary judgment on its breach of contract claim is denied in its entirety as there remains a material issue of fact as to whether defendant's refusal to consent to the proposed changes to the storefronts was reasonable. As this court has denied summary judgment, it need not address whether a permanent injunction is the proper remedy at this time. This constitutes the decision and order of the court.

Date: 9/18/13 Enter: CK

J.S.C.

CYNTHIA S. KERN
J.S.C.