Datagram Inc. v Broad Fin. Ctr. LLC
2015 NY Slip Op 31275(U)
July 21, 2015
Supreme Court, New York County
Docket Number: 152571/2013
Judge: Shlomo S. Hagler
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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DATAGRAM INCORPORATED,

Plaintiff,

-against-

BROAD FINANCIAL CENTER LLC,

Defendant.

--x

Index No. 152571/2013
Motion Sequence No.: 001

DECISION AND ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

This action is brought by plaintiff Datagram Incorporated ("Datagram" or "plaintiff") against defendant Broad Financial Center LLC ("Broad Financial" or "defendant"). In the instant motion (sequence number 001), Broad Financial seeks an order dismissing Datagram's complaint pursuant to CPLR 3211 (a) (1) and (a) (7). Datagram's original complaint contained three causes of action, two of which are based on negligence and the third is based on breach of contract, i.e., the lease agreement dated March 21, 2008, between the parties wherein Datagram is the tenant and Broad Financial is the landlord of an office building ("Lease"). After Broad Financial interposed the instant motion to dismiss, Datagram filed an amended complaint, alleging that a certain Lease provision was also breached by Broad Financial, as discussed below. At oral argument, the parties confirmed to this court that the instant motion would be deemed to

deal with the amended complaint, which obviated a determination as to whether leave of court would have been required for the amended complaint[1].

Background

The following facts are derived primarily from the amended complaint, which are assumed to be true for purposes of this motion to dismiss. Datagram and Broad Financial are parties to the Lease whereby Datagram leased the entire 25th floor ("Premises") of the commercial building owned by Broad Financial, which is located at 33 Whitehall Street in lower Manhattan of New York City ("Building"). The Lease, an 81-page document with 44 articles, commenced in 2009 and will expire in 2021. Datagram is a business entity that provides a wide range of services to its clients, including managed server hosting, internet access, disaster recovery, data backup, co-location, office automation and email. Amended Complaint at ¶6.

As early as October 22, 2012, news about the approach of Super Storm Sandy ("Storm") pervaded the news media because of the anticipated destruction along its path, which included New York City and parts of the Northeast. Amended Complaint at ¶9. On October 28, 2012, the Storm struck New York City and then Mayor Bloomberg ordered businesses and residents in the low lying areas, including downtown Manhattan, to evacuate due to the impending flood. Amended Complaint at ¶11.

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[1] While plaintiff sought punitive damages in the initial complaint, it has removed the claim for punitive damages in the amended complaint. Therefore, the branch of the motion to dismiss the claim for punitive damages is moot.

Datagram alleges that Broad Financial took minimal action, if any, to mitigate flooding or other potential damage to the Building, and as a result, the Storm flooded the Building's basement with water, causing extensive damage to its electrical and other systems. Due to the loss of electrical power in its Premises, Datagram was unable to provide services to its clients from October 29, 2012 until December 8, 2012. Amended Complaint at ¶19. It is undisputed that Broad Financial provided Datagram with a 100% rent abatement, totaling more than $109,500, for the above mentioned period.

Notwithstanding the rent abatement, Datagram asserts that it suffered additional economic damages because of certain alleged acts or omissions of Broad Financial that are described by Datagram as "negligent, grossly negligent and willful wrongful acts," which constitute the basis of Datagram's negligence and breach of contract claims. Broad Financial's alleged acts or omissions are composed of two categories: (1) failure to take protective measures before the Storm to mitigate damage, such as not sealing the ConEd sleeves coming into the Building, which would have prevented flood water to inundate the basement; not covering and securing street grates that lead to the ConEd vault; insufficient pumps and hoses to quickly remove the flood water; and (2) failure to take remedial measures after the Storm, such as hiring only one engineer at the beginning to address the basement water and other issues; failure to procure a street generator to power the Building while other commercial buildings in the area obtained street generators within one or two days after the Storm; failure to maintain essential spare parts for the

Building's critical infrastructures; and Broad Financial took a transfer switch from Datagram without permission to repair the Building's electrical system.

Datagram also asserts that, pursuant to certain Lease provisions, Broad Financial can be held liable to Datagram for negligence and breach of contract. Such provisions include: sections 4.05 (failure in power supply by reason of a public utility providing the Building with power); 7.01 (failure to maintain good repair of the Building's facilities in a manner consistent with similar first class buildings in downtown Manhattan);[2] 9.03 (property damage to the Building due to water, rain or leaks); 21.02 (failure to notify Datagram in advance of any stoppage in electricity service and to proceed diligently with repair work necessary to resume service); and 44.03 (negligence in connection with operation of the Building's back-up power system).

As a result of Broad Financial's alleged acts and omissions before and after the Storm, Datagram asserts that it suffered economic damages, which include: expenses to procure fuel and run back-up generators and other equipment to provide electrical service to the Building and its Premises; loss of customers and business opportunities; business interruptions; customer rebates; and loss of equipment and personal property. Datagram asserts that its damages amounted to about $638,000. Amended Complaint at ¶50.

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[2] The alleged breach of section 7.01 of the Lease, which was missing in the original complaint, is added in the amended complaint.

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Applicable Legal Standard

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002) (internal quotation marks omitted). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

On the other hand, while factual allegations in a complaint should be accorded a "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration, particularly if the allegations are contradicted by documentary evidence. *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (allegations consisting of bare legal conclusions or incredible facts that are contradicted by documentary evidence are not entitled to favorable treatment); *Matter of Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). "When the moving party offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one." *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2d Dept 2005) (internal quotation marks and citation omitted).

Dismissal of the complaint is warranted when the moving party demonstrates that the documentary evidence conclusively refutes the allegations of the complaint. *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-592 (2005).

Discussion

I. The Negligence Claims

Datagram points to certain Lease provisions to support its negligence claims against Broad Financial. For example, section 4.05 of the Lease provides, in part, that "Landlord shall not be liable in any way for any failure . . . in the supply . . . of electric energy . . . by reason of any requirement, act or omission of the public utility providing the Building with electricity . . . except to the extent due to the negligence or willful misconduct of Landlord . . .." Also, section 9.03 provides that "Landlord . . . shall not be liable for any injury or damage to persons or property resulting from . . . electricity, water, rain . . . unless any of the foregoing shall be caused by or due to the negligence of Landlord . . .." Since the amended complaint alleges that Broad Financial failed to take protective and remedial measures before and after the Storm to secure and repair the Building, and that such failure contributed or exacerbated the damages inflicted by the Storm, Datagram argues that its negligence claims should not be dismissed, particularly when they can be pled in the alternative under relevant New York law.

Datagram's argument is unavailing. It is settled law that a breach of contract claim does not give rise to a tort (such as negligence) claim unless the defendant "breached a

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duty of care independent of any purported contractual obligation." *Old Republic Natl. Title Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 (2d Dept 2005), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987). Indeed, to sustain a negligence claim, the plaintiff must show that there is a "special relationship" or a legal duty that is "distinguishable from the contract itself." *Scott v Keycorp.*, 247 AD2d 722, 725 (3d Dept 1998). Moreover, tort claims that "arise from the same [contractual] provisions said to have been breached and seek the same damages" should be dismissed because they "merely duplicate the insufficient contract claims." *Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 581 (1st Dept 2010). Further, a claim for negligent performance of a contract is not cognizable in New York. *Id.* at 582; *City of New York v 611 W. 152nd St.*, 273 AD2d 125, 126 (1st Dept 2000). In the instant case, even Datagram concedes that both of its negligence claims "do not expand the scope of the Lease or violate its provisions." Plaintiff's opposition brief at 18. Accordingly, Datagram's negligence claims (first and second causes of action) should be dismissed.

II. The Breach of Contract Claim

As noted above, Datagram alleges that Broad Financial breached the following provisions of the Lease, namely: sections 4.05, 7.01, 9.03, 21.02 and 44.03. The requisite elements of a breach of contract claim are: existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of the contract, and damages resulting from

that breach. *Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc.*, 84 AD3d 122, 127 (2d Dept 2011). "Generally, a party alleging a breach of contract must demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement." *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 (2011) (internal quotation marks and citation omitted). The alleged breach and the specific language of each of the foregoing Lease provision is analyzed in detail below.

Section 4.05

Article 4 of the Lease (entitled "Electricity") is composed of sections 4.01 to 4.08. Datagram alleges that Broad Financial breached section 4.05, which provides, in relevant part, that "Landlord shall not be liable in any way for any failure . . . in the supply . . . of electric energy furnished to the demised premises by reason of any requirement, act or omission of the public utility providing the Building with electricity . . . except to the extent due to the negligence or willful misconduct of Landlord . . .." Datagram alleges that Broad Financial failed to provide electricity to the Building and its Premises and thus breached a contract term of the Lease. Amended Complaint at ¶ 35.

Notably, section 4.01 of the Lease states that "[s]ubject to the circumstances contemplated within Article 34 hereof, Landlord shall make such power available to the demised premises throughout the term of the Lease." Article 34 (entitled "Inability to Perform") contains the so-called "force majeure" provisions of the Lease and states, in relevant part, that "[i]f, by reason of . . . acts of God . . . Landlord shall be unable to fulfill

its obligations under this Lease or shall be unable to supply any service which Landlord is obligated to supply, this Lease and Tenant's obligations to pay hereunder shall in no wise be affected, impaired or excused." Article 34, § 34.01. In turn, section 34.02 provides, in relevant part, that in the case of a force majeure event, the rent payable under the Lease "shall be abated for the period of time commencing on the 11th consecutive Business Day following the date Tenant was precluded from using the demised premises . . . until the earlier of such time as Tenant re-occupies the demised premises or such time as such [Landlord's] obligation is fulfilled and service is restored."

Datagram argues that the force majeure provisions of the Lease do not excuse Broad Financial's performance of the Lease because section 4.05 states that "Landlord shall not be liable . . . to Tenant for any failure . . . in the supply of electric energy . . . except to the extent due to the negligence or willful misconduct of Landlord," and that the Storm "did not literally inhibit Broad Financial from satisfying" its obligation to supply electricity. Plaintiff's opposition brief at 12. Datagram also argues that section 34.01 does not excuse Broad Financial's performance or liability, and that such section "should be interpreted as merely reinforcing the Lease, and not relieving Broad Financial of any liability whatsoever." *Id.* at 16.

The arguments are unpersuasive. It is undisputed that the Storm was an "act of God" that wreaked havoc upon New York City due to the unprecedented surge of seawater it caused, which precipitated catastrophic flooding in many low lying areas,

including lower Manhattan where the Building is located. Also, a natural reading of sections 4.01 and 34.01 leads to a logical conclusion that Broad Financial's obligation to provide electricity is subject to the force majeure provisions. Further, it is true that section 34.01 seeks to reinforce the Lease, as argued by Datagram, because even when the Landlord's obligation to provide services is excused, Tenant's obligation to pay rent is not excused. However, as noted above, it is undisputed that, after the Storm and pursuant to the Lease, Datagram has received the rent abatement for the period it was unable to use the Premises. Therefore, there is no breach of section 4.05 of the Lease.

Section 7.01

Article 7 (entitled "Repairs") of the Lease states in section 7.01 thereof, in relevant part, as follows: "Landlord shall . . . keep and maintain in good order and repair . . . in a manner which is consistent with the maintenance standard for other first class office buildings in the downtown area of the Borough of Manhattan similar to the Building . . .." The amended complaint alleges that, as owner of the Building, but unlike similar office buildings in lower Manhattan, Broad Financial did not cover and secure the street grates, did not maintain sufficient water pumps and hoses to quickly remove the flood water, and even rejected Datagram's offer to provide additional pumps. Thus, Datagram alleges that Broad Financial has breached section 7.01.

In rebuttal, Broad Financial points to section 7.04, which provides, in part, as follows: "Except as otherwise specifically provided in Section 34.02 . . . there shall be no

allowance to Tenant for diminution of rental value and no liability on the part of Landlord by reason of . . . injury to [Tenant's] business arising from the making of any repairs . . . to any portion of the Building or demised premises . . .." Based on the foregoing, Broad Financial argues that, while it is obligated to keep the Building in good repair, it is not liable for any injury to Datagram's business arising from making those repairs after the Storm, and as such, Datagram cannot hold Broad Financial liable for loss of customers and income, loss of business opportunities and business interruptions.

Notably, however, section 7.04 also provides, as follows: "Landlord shall exercise reasonable diligence in performing any such work or repairs in the demised premises so as to minimize interference with Tenant's business operations, but shall not be required to perform the same on an overtime or premium pay basis . . .." A logical interpretation of Article 7 leads to the conclusion that, even though Broad Financial is not liable to injury to business arising from making repairs after the Storm, the non-liability is subject to performing such repairs with "reasonable diligence," as required under section 7.04. Ignoring the "reasonable diligence" requirement would be improper, where Broad Financial is the drafter of the Lease, and any ambiguity should be construed against it. *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755 (2d Dept 2009) (even though the negligence claim against the defendant landlord was dismissed because it was based upon the same allegations as those underlying the contract, dismissal of the breach of contract claim was unwarranted because the lease required the landlord to repair pipe leakages and

all structural repairs, and there was no merit to the contention that the lease provision which stated that plaintiff took premises "as is" conclusively disposed of its claims). Whether Broad Financial has complied with the foregoing requirement is a factual issue that cannot be conclusively determined based on documentary evidence (i.e., the Lease). Thus, dismissal of the section 7.01 breach of contract claim is unwarranted at this time.

Section 9.03

Section 9.03 provides, in part, as follows: "Landlord . . . shall not be liable for any injury or damage to persons or property resulting from . . . electricity, water, rain . . . or leaks from any part of the Building . . . unless . . . any of the foregoing shall be caused by or due to the negligence of Landlord . . .." Datagram argues that this provision was breached because Broad Financial failed to "maintain the Building and thereby avoid or minimize any unnecessary consequences and damages to the Building and Datagram from Sandy." Plaintiff's opposition brief at 9. At oral argument, Broad Financial's counsel clarified that the negligence provision was included in the Lease in order to comply with New York's General Obligations Law, which allows a negligence claim to proceed, to the extent a separate legal duty exists. Transcript of oral argument, at 5 and 16. Notably, section 9.03 of the Lease further states, as follows: "[n]otwithstanding the preceding provisions of this Section 9.03, Tenant covenants and agrees that . . . (ii) in no event shall Tenant be entitled to make a claim for consequential, indirect or special damages pursuant

to this Section 9.03."[3] As noted above, the damages asserted by Datagram include: expenses to procure back-up generators and other equipment to provide electrical service to the Premises, loss of customers and business opportunities, business interruptions, as well as loss of equipment and personal property.

The issue of whether a lease provision barring the imposition of liability on landlords from loss of business or business interruption claims may violate the General Obligations Law, which declares void as against public policy lease provisions that exempt landlords from liability for injuries to property, has been addressed by the courts. *See e.g. Periphery Loungewear v Kantron Roofing Corp.*, 190 AD2d 457 (1st Dept 1993). In *Periphery*, tenant plaintiff sued the landlord to recover business interruption losses in connection with a water leak due to heavy rain. *Id.* at 459. Pursuant to the lease, the tenant obtained insurance coverage for "property damage" but not for losses due to business interruption. *Id.* The landlord moved to dismiss, basing its arguments upon the waiver of subrogation clause and the exclusion from business interruption loss provision of the lease. *Id.* at 460. As a threshold matter, the Court noted that while General Obligations Law deems any agreement exempting a landlord from liability for its own negligence as void and unenforceable, absent an indication of overreaching, a waiver of subrogation provision has been upheld as valid and enforceable. *Id.* The Court then

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[3] Section 9.03 (i) provides that Tenant's claim against Landlord is subject to the waiver of subrogation provision of section 9.08 which, in turn, states that the parties mutually agree to waive the right of subrogation for damages covered by their respective insurance policies.

noted that, while "property damage" was not defined in the lease, "it has a well understood meaning with respect to insurance coverage as referring to tangible property rather than intangible property rights such as business interruption." *Id.* Hence, the court found inapplicable the waiver of subrogation clause to a claim for business interruption. *Id.* at 461. The court next found that the business loss exclusion provision of the lease, "[o]n its face and by its plain meaning," barred the plaintiff's claim for losses due to business interruption. *Id.* *Accord Yenrab*, 68 AD3d at 759 (because a claim for lost profits and income due to business interruption is a claim for special or consequential damages, and because the plaintiff failed to plead that its business loss was within the contemplation of the parties when the lease was entered into, its claim for special or consequential damages against the landlord was stricken by the court).

In this case, the specific language contained in section 9.03 (ii), which was contemplated and agreed to by the parties when they signed the Lease, unambiguously bars Datagram's claim for "consequential, indirect or special damages," which, as explained above, includes claims for loss of customers and business opportunities, as well as business interruptions. Accordingly, Datagram's section 9.03 claim, to the extent it seeks consequential, indirect or special damages, is dismissed.

Section 21.02

Section 21.02 provides, in relevant part, that "Landlord reserves the right without any liability whatsoever . . . to stop . . . the electric and other systems when necessary by

reason of accident or emergency . . . in case of emergency, Landlord will notify Tenant in advance, if possible, of any such stoppage . . . and will proceed diligently with the work necessary to resume such service as promptly as possible . . . ." Datagram alleges that this Lease provision was breached because Broad Financial failed to provide Datagram with advance notice of the stoppage of electricity, and to perform the necessary repair work to resume service as promptly as possible. Amended Complaint at ¶ 43.

It can hardly be disputed that the Storm constituted an emergency, despite the contrary assertion of Datagram. Thus, Broad Financial was not required to provide advance notice of the Storm and the possibility of electricity stoppage. However, as explained above in connection with section 7.04, whether Broad Financial proceeded diligently with the work necessary to resume services to the Building and the Premises after the Storm is an issue of fact that cannot be conclusively determined by simply applying the terms of the Lease. Also, Broad Financial's argument that any liability under section 21.01 "is limited to exclude claims for consequential, indirect or special damages pursuant to this § 9.03 of the Lease" is unavailing, because it has not pointed to any provision in Article 21 that excludes consequential, indirect or special damages. Accordingly, dismissal of the section 21.02 claim is unwarranted at this time.

Section 44.03

Article 44 addresses the rights and obligations of the parties with respect to the then existing generator serving the demised premises located on the roof of the Building

as well as the other ancillary installations and equipment (Back-Up Power System). Section 44.03 provides, in relevant part, as follows: "Tenant agrees that Landlord shall not be required to provide any services in connection with the Back-Up Power System . . . Tenant covenants and agrees that the operation of the Back-Up Power System . . . shall be at the sole risk of Tenant," and that "neither Landlord . . . shall be liable for any damage or inquiry thereto . . . unless the same shall proximately result from the gross negligence of willful misconduct of Landlord . . .." The amended complaint alleges, in a conclusory manner and without substantiation, that Broad Financial was "grossly negligent and engaged in willful misconduct in operating the Back-Up Power System," and thus breached section 44.03 of the Lease. Amended Complaint at ¶¶ 46-47.

The bald allegation that Broad Financial negligently operated the Back-Up Power System is without merit. Section 44.01 states, in relevant part: "Tenant shall have the right throughout the term [of the Lease] to use the Back-Up Power System to serve the demised premises on an exclusive basis" but "Tenant shall accept the Back-Up Power System in its condition and state of repair as of the Commencement Date, and Landlord shall have no responsibility for the condition thereof or for the maintenance or repair thereof." Section 44.01 further states: "Tenant shall be responsible for the maintenance and repair and if necessary, replacement [of the Back-Up Power System] at Tenant's sole cost and expense . . .." In such regard, Datagram's assertion that it is entitled to direct

damages against Broad Financial for the "procurement of a back-up generator to the Building at Datagram's own substantial expense" is unavailing.

Section 44.03 also provides that "in no event shall Landlord be liable for loss of business, lost profits or any special, indirect or consequential damages of Tenant." Thus, Datagram is not entitled to recover any damages for loss of business opportunities and business interruptions. Accordingly, dismissal of this section 44.03 claim is proper under the circumstances.

Conclusion

Based upon all of the foregoing, it is hereby

ORDERED that defendant's motion seeking dismissal of the first and second causes of action (both sounding in negligence) of the amended complaint is granted; and it is further

ORDERED that defendant's motion seeking dismissal of the third cause of action (breach of contract) of the amended complaint is granted to the extent set forth herein, and defendant is directed to serve an answer to the amended complaint within 30 days after service of a copy of this order with notice of entry.

Dated: July 21, 2015

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.