SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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PRADERA REALTY CORP.,

Plaintiff

v

MAESTRO WEST CHELSEA SPE, LLC, and KADIMA TENTH AVENUE SPE, LLC,

Defendants.

and a third-party action

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Index No. 151113/2015

DECISION AND ORDER

MOT SEQ 002

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for injury to property and breach of a settlement agreement, the defendants move pursuant to CPLR 3211(a) to dismiss the second, fifth, and tenth causes of action for failure to state a cause of action (CPLR 3211[a][7]), and the third, fourth, sixth, seventh, and eighth causes of action for failure to state a cause of action (CPLR 3211[a][7]) and based on a defense founded on documentary evidence (CPLR 3211[a][1]). The motion is granted to the extent that the court dismisses the seventh cause of action, which is for contractual indemnification, and so much of the third cause of action, which alleges breach of contract, as seeks to recover for the defendants' alleged failure to "perform the excavation and

construction work in conformity with the code, rules, regulations and the New York City Construction Code and the New York City Department of Buildings," and the motion is otherwise denied.

II. BACKGROUND

In 2012, the defendants, Maestro West Chelsea SPE, LLC, and Kadima Tenth Avenue SPE, LLC, commenced an action against the plaintiff, Pradera Realty, Inc., in the Supreme Court, New York County, under Index No. 652142/12, seeking specific performance of a contract for the sale of real property that they wished to purchase. In June 2013, the plaintiff and the defendants entered into a settlement agreement disposing of that action. They simultaneously entered into a Zoning Lot Development Agreement (ZLDA), which granted certain easements to the defendants and governed certain conduct of the parties with regard to the defendants' construction project on the lot that they ultimately purchased, including the acquisition of municipal approvals, resolution of code violations, and the plaintiff's provision of access to its own real property in connection with certain aspects of the construction.

In an interim order dated March 21, 2016, this court granted the plaintiff's motion to dismiss the defendants' counterclaims or to compel arbitration of those counterclaims (SEQ. 001) to the extent of compelling the defendant to arbitrate the issues raised

by their first, second, third, and fifth counterclaims, and staying the prosecution of the action. The court otherwise held that motion in abeyance "pending vacatur of the stay of this action." By order dated May 22, 2017, this court granted the plaintiff's motion to lift the stay (SEQ 003), inasmuch as the defendants had yet to initiate arbitration proceedings. Since the stay is now lifted, the court will determine the merits of the instant motion of the defendants to dismiss several causes of action.

III. DISCUSSION

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, and accord it "the benefit of every possible favorable inference." Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 (2013); Simkin v Blank, 19 NY3d 46 (2012); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause

of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 275 (1977). Where, however, the court considers evidentiary material, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (Guggenheimer v Ginzburg, supra, at 275), but it must be "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it." Id.

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994); see Ellington v EMI Music, Inc., 24 NY3d 239 249 (2014).

A. SECOND CAUSE OF ACTION—GROSS NEGLIGENCE

The second cause of action alleges that the defendants' gross negligence in the course of excavating a parcel of real property adjacent to the plaintiff's parcel, and erecting a structure thereon, proximately caused injury to the plaintiff's real property. Gross negligence consists of "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." Colnaghi, U.S.A. v Jewelers Protection Servs., 81 NY2d 821, 823-824 (1993); Ambac Assur. UK

Ltd. v J.P. Morgan Inv. Mgt., Inc., 88 AD3d 1 (1st Dept. 2011).

The complaint alleges that the defendants undertook excavation activities in the absence of adequate underpinning of the plaintiff's building, and continued their excavation activities despite the issuance of a stop-work order by the New York City Department of Buildings (DOB), thus causing the plaintiff's building to sustain large structural cracks. These allegations properly state a cause of action to recover for gross negligence since such conduct, if proven, "'evinced a conscious disregard of the rights of others or [was] so reckless as to amount to such disregard.'" 11 Essex St. Corp. v Tower Ins. Co. of N.Y., 81 AD3d 516, 517 (1st Dept. 2011), quoting Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC, 71 AD3d 537, 538 (1st Dept. 2010) (citations and some internal quotation marks omitted). Moreover, the defendants' submissions of evidence beyond the four corners of the complaint do not reveal the existence of any alleged facts that are not facts at all.

B. THIRD CAUSE OF ACTION—BREACH OF CONTRACT

"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." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept 2009). The third cause of action seeks to recover damages for breach of the

settlement agreement.

Section 14 of the settlement agreement provides that any dispute under the settlement agreement is subject to the "exclusive jurisdiction of the New York State Supreme Court, New York County," while section 3 recites that "[a]ny dispute as to whether [Maestro West Chelsea SPE, LLC], has failed to satisfy any of its obligations under . . . the ZLDA shall be resolved by an expedited, single-arbitrator arbitration."

As relevant here, section 2(a)(iv) of the ZLDA imposes a contractual obligation upon the defendants "not to create or permit to exist a violation of the Zoning Resolution or any building code, fire code, or other law or ordinance or regulation" that would delay or hinder the issuance of a building permit or work license. Section 2(a)(iv)(1) of the ZLDA obligates the defendants to cure any such violation.

The third cause of action alleges that the defendants breached the settlement agreement by, among other things, failing and refusing to restore, remediate, or repair the plaintiff's real property, use adequate efforts to avoid and minimize the disturbance of that property, and ensure that the plaintiff's property was kept in a safe condition. The plaintiff further alleges that the defendants breached the settlement agreement by failing to inspect the property to ensure the reliability of shoring and bracing, provide the plaintiff an opportunity to

review and comment upon a preconstruction survey, and make future payments as required by the settlement agreement. These allegations state a cause of action to recover damages for breach of the settlement agreement. In addition, the defendants' submissions of evidence beyond the four corners of the complaint do not reveal the existence of any alleged facts that are not facts at all. Thus, these claims may be litigated in this action, and are not subject to dismissal.

However, the third cause of action also seeks to recover for the defendants' failure to "perform the excavation and construction work in conformity with the code, rules, regulations and the New York City Construction Code and the New York City Department of Buildings." That claim thus asserts a violation of the ZLDA, and consequently involves a dispute under the ZLDA that must be resolved by arbitration, and not in this action. See Kellman v Whyte, 129 AD3d 418 (1st Dept. 2015). Accordingly, the documentary evidence, consisting of the settlement agreement and ZLDA, establishes a complete defense to so much of the third cause of action as alleges that the defendants violated and failure to cure violations of City codes, rules, and regulations. That claim must thus be dismissed.

C. FOURTH CAUSE OF ACTION—ANTICIPATORY REPUDIATION OF CONTRACT

The doctrine of anticipatory repudiation applies "when a party repudiates contractual duties 'prior to the time designated

for performance and before' all of the consideration has been fulfilled.'" Norcon Power Partners, L.P. v Niagara Mohawk Power Corp., 92 NY2d 458, 462-463 (1998), quoting Long Is. R. R. Co. v Northville Indus. Corp., 41 NY2d 455, 463 (1977). Under such circumstances, the "repudiation entitles the nonrepudiating party to claim damages for total breach." Norcon Power Partners, supra, at 463, quoting Long Is. R. R. Co. v Northville Indus. Corp., supra, at 463. "A repudiation can be either 'a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach' or 'a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.'" Norcon Power Partners, supra, at 463, quoting Restatement [Second] of Contracts § 250; see II Farnsworth, Contracts § 8.21.

The fourth cause of action properly states a cause of action to recover for the anticipatory repudiation of the settlement agreement, as it alleges that the defendants "have unequivocally stated that they will not tender the next monthly settlement payment to the Plaintiff, as required by the Settlement Agreement." In connection with this cause of action, there is no evidence relied upon by the defendants that establishes that a fact alleged by the plaintiff is not a fact at all. In addition, the defendants have submitted no documentary evidence that

establishes a complete defense to this cause of action.

D. FIFTH CAUSE OF ACTION--PRIVATE NUISANCE

A claim of private nuisance arises from an interest in the use and enjoyment of property.

> "The elements of a common-law claim for a private nuisance are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.'"

Berenger v 261 W. LLC, 93 AD3d 175, 182 (1st Dept. 2012), quoting Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 570 (1977). A cause of action to recover for the creation of a private nuisance must be supported by evidence sufficient to demonstrate a "recurrence of objectionable conduct." Domen Holding Co. v Aranovich, 1 NY3d 117, 124 (2003), quoting Frank v Park Summit Realty Corp., 175 AD2d 33, 34 (1st Dept. 1991), mod on other grounds 79 NY2d 789 (1991); see Berenger v 261 W. LLC, supra; Duane Reade v Reva Holding Corp., 30 AD3d 229 (1st Dept. 2006).

> "In order to bring a cause of action for private nuisance, a plaintiff must also show that the defendant's interference was intentional. An interference is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his [or her] conduct."

Berenger v 261 W. LLC, supra, at 183. The fifth cause of action sufficiently asserts the elements of a cause of action sounding in private nuisance, inasmuch as it is based on allegations that

(a) defendants repeatedly, knowingly, and/or recklessly engaged in minimally regulated pile-driving, excavation, and construction work that they knew would cause structural damage to the plaintiff's real property, (b) the work caused such damage and interfered with the plaintiff's ability to use and enjoy its property, and (c) the defendants continued to engage in such work despite repeated requests by the plaintiff to conduct it in a proper and safe manner. See Bloomingdales, Inc. v New York City Tr. Auth., 13 NY3d 61 (2009). Additionally, the evidence submitted by the defendants does not reveal the existence of a fact alleged by the plaintiff in connection with this cause of action that is not a fact at all, and with respect to which there is no significant dispute.

E. SIXTH CAUSE OF ACTION—TRESPASS

"Trespass is the invasion of a person's right to exclusive possession of his [or her] land." Berenger v 261 W. LLC, supra, at 181; see Bloomingdales, Inc. v New York City Tr. Auth., supra. Liability for trespass may arise not only from a defendant's personal encroachment on another's land, but may also arise from the unwarranted entry of a substance onto land. See Berenger v 261 W. LLC, supra; Crown Assoc. v Zot, LLC, 83 AD3d 765 (2nd Dept. 2011); Duane Reade v Reva Holding Corp., supra. Trespass does not require an intent to produce the damaging consequences, but only an intent to perform the act that produces the unlawful

invasion. See Phillips v Sun Oil Co., 307 NY 328 (1954).

The plaintiff alleges that it initially authorized the defendants to enter upon its property to undertake certain work. The complaint asserts that, once the DOB issued a stop-work order to the defendants, the plaintiff withdrew its permission, but the defendants' employees, agents, and contractors nonetheless continued to walk onto the property for the purpose of undertaking unauthorized work that damaged the property. These allegations are sufficient to state a cause of action sounding in trespass (see Kerryville Props. v Buvis, 240 AD2d 898 [3rd Dept. 1997]), and none of the evidence submitted by the defendants suggests that a fact alleged by the plaintiff in connection therewith is not a fact at all. Moreover, the documentary evidence relied upon by the defendants does not conclusively establish a complete defense to the sixth cause of action. Hence, there is no basis upon which to dismiss the sixth cause of action.

F. SEVENTH CAUSE OF ACTION—CONTRACTUAL INDEMNIFICATION

Although the seventh cause of action sufficiently states a cause of action for contractual indemnification (see Viacom Inc. v Philips Elecs. N. Am. Corp., 16 AD3d 215 [1st Dept. 2005]), the indemnification provision relied upon is contained in the ZLDA, but not in the settlement agreement. Hence, the issues raised by the seventh cause of action are subject to arbitration, and that

cause of action must be dismissed from this action. See Kellman v Whyte, supra.

G. EIGHTH CAUSE OF ACTION—ATTORNEYS' FEES

The eighth cause of action seeks an award of an attorney's fee. Section 15 of the settlement agreement provides that "if an action or arbitration is brought to prosecute or defend any legal rights under this Settlement Agreement, the prevailing Party in such an action is entitled to recover costs and reasonable attorneys' fees from the non-prevailing Party." Where a contract, such as the settlement agreement, permits a prevailing party to recover a reasonable attorney's fee, the party alleging a breach thereof may also state a cause of action to recover those fees. See Medical Arts-Huntington Realty, LLC v Meltzer Rosenberg Devel., LLC, 149 AD3d 824 (2nd Dept. 2017); Yellow Book of N.Y., L.P. v Cataldo, 81 AD3d 638 (2nd Dept. 2011). The plaintiff has done so here. Whether the plaintiff has such a cause of action must await the determination of which party, if any, is the prevailing party in this action. Since the defendants have also not identified any document that establishes a complete defense to this cause of action, there is no basis for the dismissal of the eighth cause of action at this juncture.

H. TENTH CAUSE OF ACTION--BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Every contract is subject to an implied covenant of good faith and fair dealing. See Wood v Lucy, Lady Duff-Gordon, 222 NY

88 (1917); Jaffe v Paramount Communications Inc., 222 AD2d 17 (1st Dept. 1996). The covenant is breached "when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." Jaffe, supra, at 22-23; see Skillgames, LLC v Brody, 1 AD3d 247 (1st Dept. 2003). Thus, the parties to a contract implicitly covenant that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Dalton v Educational Testing Serv., 87 NY2d 384, 389 (1995) (internal quotation marks and citation omitted); see ABN AMRO Bank, N.V. v MBIA Inc., 17 NY3d 208 (2011).

To plead a breach of the covenant of good faith and fair dealing independent of contract claims, a "plaintiff must allege facts that tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." PJI 4:1; see Richbell Info. Servs. v Jupiter Partners, 309 AD2d 288 (1st Dept. 2003). "Whether or not the acts of the defendant[s] here were in such bad faith or in such willful or negligent disregard of the rights of the plaintiff as to constitute a breach of this implied covenant will depend upon the facts." Pernet v Peabody Eng'g Corp., 20 AD2d 781, 782 (1st Dept. 1964).

Where the claims made in connection with the covenant of good faith and fair dealing are duplicative of the plaintiff's breach of contact claims, they will be dismissed. See Parker E. 67th Assoc., L.P., v Minister, Elders & Deacons of Reformed Prostestant Dutch Church of City of N.Y., 301 AD2d 453 (1st Dept. 2003). Nonetheless, a claim for breach of the implied covenant of good faith and fair dealing can be maintained, even though it arises from the same underlying transactions and occurrences as a breach of contract claim, where it contains allegations that are not duplicative of the contract claims, but are claims that acts perpetrated by defendants deprived the plaintiff of the fruits of the contract.

The tenth cause of action, which asserts that the defendants wilfully continued to engage in excavation and construction work despite knowledge that the work was likely to damage the plaintiff's property, does not simply allege that the defendants breached the settlement agreement. Rather, it alleges facts which, if proven, will tend to show that the defendants engaged in willful or negligent conduct intended to deprive the plaintiff of the provisions of the settlement agreement that are protective of the plaintiff's property. It thus states a cause of action to recover for breach of the implied covenant of good faith and fair dealing. In addition, the defendants have not identified any

evidence beyond the four corners of the complaint that establishes that a fact alleged by the plaintiff in connection with the tenth cause of action is not a fact at all.

IV. CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion pursuant to CPLR 3211(a) to dismiss the complaint is granted only to the extent of granting those branches thereof which are to dismiss the seventh cause of action and so much of the third cause of action as seeks to recover for the defendants' alleged failure to "perform the excavation and construction work in conformity with the code, rules, regulations and the New York City Construction Code and the New York City Department of Buildings," the seventh cause of action and so much of the third cause of action as seeks to recover for the defendants' alleged failure to "perform the excavation and construction work in conformity with the code, rules, regulations and the New York City Construction Code and the New York City Department of Buildings" are dismissed, and the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: 6/20/17

ENTER: _____
J.S.C.

HON. NANCY M. BANNON