

**Eastern Effects, Inc. v 3911 Lemmon Ave. Assoc.,  
LLC**

2022 NY Slip Op 34062(U)

November 29, 2022

Supreme Court, New York County

Docket Number: Index No. 652152/2022

Judge: Barry R. Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

EASTERN EFFECTS, INC., Plaintiff, - v - 3911 LEMMON AVENUE ASSOCIATES, LLC, ESBOND REALTY LLC, EPONYMOUS GOWANUS, LLC, and GOWANUS CANAL ENVIRONMENTAL REMEDIATION TRUST #2,

Table with 2 columns: Field Name, Value. INDEX NO. 652152/2022, MOTION DATE, MOTION SEQ. NO. 002 & 003

DECISION + ORDER ON MOTIONS

Defendants.

HON. BARRY R. OSTRAGER

The Court heard oral argument on November 29, 2022 via Microsoft Teams on two motions to dismiss this action filed by plaintiff Eastern Effects, Inc., a New York based film and television production company ("EEI"), as Tenant pursuant to a commercial Lease dated January 6, 2010, for space in the building at 210 Douglass Street, Brooklyn, NY ("the Premises"). The first motion (seq. 002) was filed by defendants 3911 Lemmon Avenue Associates, LLC Esbond Realty LLC, and Eponymous Gowanus, LLC, as tenants-in-common, as the Landlord. The second motion (seq. 003) was filed by defendant Gowanus Canal Environmental Remediation Trust #2 ("the Trust"). The Trust is a party to a written Settlement Agreement and Release among all the parties that governed the rights and obligations of the parties related to certain required remediation work at the Property (NYSCEF Doc. No. 3). Also central to the dispute is the Notice of Termination served by the Landlord on the Tenant pursuant to Section 4 of the Lease purporting to terminate the Tenant's possessory rights as of January 31, 2022 on the ground that the Premises were no longer tenantable (NYSCEF Doc. No. 4. In accordance with the November 29, 2022 transcript of proceedings, the motions are granted.

The Landlord in its motion seeks to dismiss the Third Cause of Action for declaratory relief, the Fourth Cause of Action alleging fraudulent inducement to enter into the Settlement Agreement, and the Fifth Cause of Action for conversion pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The Landlord does not seek dismissal of the First Cause of Action sounding in breach of contract; i.e., the Lease. The Trust in its motion seeks to dismiss the Second Cause of Action sounding in breach of the Settlement Agreement, which is the sole cause of action asserted against the Trust.

The Court grants the motion by the Landlord to dismiss the Third, Fourth, and Fifth Causes of Action (seq. 002). In the Third Cause of Action, the Tenant seeks a declaratory judgment that the Landlord has breached its obligations under the Settlement Agreement and Release by having failed to complete repairs at the premises so that plaintiff can return to its leased space and resume its business operations. But those same issues are at the heart of plaintiff's First Cause of Action for breach of Section 4 of the Lease which states:

If the demised premises are totally damaged or are rendered wholly untenable by fire or other cause, and if Landlord shall decide not to restore or not to rebuild the same, or if the building shall be so damaged that Landlord shall decide to demolish it or to rebuild it then or in any of such events Landlord may, within ninety (90) days after such fire or other cause, give Tenant a notice in writing of such decision ... and thereupon the term of this lease shall expire by lapse of time upon the third day after such notice is given, and Tenant shall vacate the demised premises and surrender the same to Landlord. If Tenant shall not be in default under this lease then, upon the termination of this lease under the conditions provided for in the sentence immediately preceding, Tenant's liability for rent shall cease as of the day following the casualty.

Although the two claims rely on different agreements, they both involve the same underlying issue whether the Landlord has a duty to make repairs at the premises or whether the Landlord can properly terminate the Tenant's right to possession pursuant to the Lease. A cause of action seeking a declaratory judgment must be dismissed where it seeks a declaration

of the same rights and obligations as will be determined under a contract claim. *Apple Records v Capitol Records*, 137 AD2d 50 (1st Dept 1988). To prevent unfairness to the Tenant, the Court will construe the First Cause of Action as asserting a breach of contract claim under *all* the contracts between the parties; i.e., under both the Lease and the Settlement Agreement. Thus, the Third Cause of Action for declaratory relief is dismissed with that proviso.

The Court also dismisses the Fourth Cause of Action claiming that the Landlord fraudulently induced the Tenant to enter into the Settlement Agreement. The claim centers around alleged representations regarding the timing of the EPA-mandated remediation work, plaintiff's right to compensation for vacating the Premises and for lost business during its time out of possession, and Landlord's duty to make repairs. However, in the merger clause in Section 28 of the Settlement Agreement, the Tenant expressly disclaimed reliance on any representations made outside the four corners of the Agreement. That section states that:

This Agreement contains the entire understanding among the Parties and supersedes any prior written or oral agreements between them, respecting the subject matter of this Agreement. Except as otherwise expressly provided in this Agreement, there are no representations, agreements, arrangements, or understandings, oral or written, between the Parties relating to the subject matter of this Agreement that are not fully set forth herein.

Thus, the broad merger clause, when read in the context of the Settlement Agreement as a whole, bars the Tenant's reliance on any prior written or oral representations regarding the issues addressed in the Settlement Agreement and thereby bars plaintiff's fraudulent inducement claim which depends on those very same representations. The Tenant's argument that the merger clause is too general to serve as a bar lacks merit because the clause refers back to specific terms in the Agreement that directly implicate the alleged representations. Also, the fraudulent inducement claim is

duplicative of the contract claim in the same manner as discussed in the analysis of the declaratory judgment claim. Further, allegations amounting to nothing more than a contention that a party never intended to perform its contractual obligations are insufficient to state a fraud-based claim which seeks the same damages as the contract claim. *See, e.g., Cronos Grp. Ltd. v XComIP, LLC*, 156 AD3d 54 (1st Dep't 2017).

The Court also dismisses the Fifth Cause of Action sounding in conversion of the plaintiff's property left on the Premises on the condition that the Landlord arrange for the Tenant's supervised access to the Premises to remove any of its remaining property within ten calendar days of the date of this decision. The Landlord has not absolutely refused to return the Property and has provided access, notwithstanding its initial position that only a third-party could have access to retrieve the property. Although a more reasonable alternative was and is available and direct Tenant access can and should be arranged, the circumstances do not state a claim for conversion.

Lastly, the punitive damages request is dismissed as the allegations do not evince the requisite "high degree of moral turpitude [that] demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations." *See, Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489 (2007), quoting *Walker v Sheldon*, 10 NY2d 401 (1961); *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 (1994) (punitive damages only available if fraud evinces a "high degree of moral turpitude" and demonstrates "such wanton dishonesty as to imply a criminal indifference to civil obligations," and only if the conduct was "aimed at the public generally"). However, should discovery reveal evidence of the requisite degree of moral turpitude, plaintiff may seek to reinstate the punitive damages claim.

Turning to motion sequence 003, the Court grants the motion by the defendant Trust to dismiss the sole cause of action against it; that is, the Second Cause of Action alleging breach of the Settlement Agreement and Release. The Trust's sole obligation to the Tenant was governed by Section 4 of the Agreement which required the Trust to remit \$88,000.00 monthly to the Tenant for business interruption losses during the period when the bulkhead remediation work at the heart of the Agreement was interfering with Tenant's right to occupy the premises. It is undisputed that the work was completed by May 2, 2022. It is also undisputed that the Trust paid the Tenant \$88,000 per month through May 15, 2022, even though the Landlord purported to terminate the Tenant's Lease effective January 31, 2022. Thus, the Trust fully performed its obligations under the Settlement Agreement in full, and §12(b) of the Agreement released the Trust from Tenant's claim. That Section states that:

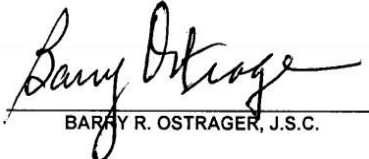
Upon full performance of Trust #2's obligations under this Agreement, Tenant, on its own behalf and on behalf of its beneficiaries, contributors, subsidiaries, affiliates, officers, directors, employees, agents, successors, assigns, and insurers, hereby releases, remises, and forever discharges Trust #2, GERT, and their respective members, grantors, parents, subsidiaries, affiliates, officers, directors, employees, agents, successors, assigns, and insurers ("Trust Parties"), from any and all actions, causes of action, claims, liabilities, demands, costs, losses, expenses, and damages of any kind ("Claims") that it may have related to or arising from the Work, including business interruption.

The Tenant contends that the Trust's obligation to make monthly payments must continue until the Tenant is restored to possession of the leased Premises and that the Landlord's purported termination of the Lease is null and void. The Court rejects the argument as it finds no support in the terms of the Settlement Agreement. The Agreement clearly provides that any repair obligations on the part of the Landlord shall not extend the defined Construction Period applicable to the bulkhead remediation work when the

Trust’s business interruption payments are payable. It is the Landlord, and not the Trust, that is responsible for any damages suffered by the Tenant as a result of the Landlord’s allegedly negligent work at the Premises. And should this Court find that the Landlord’s termination of the Lease is not valid, it will be the Landlord, and not the Trust, that will be liable for any damages incurred by the Tenant caused by the wrongful termination. However, once the bulkhead remediation work was completed within the terms of the Settlement Agreement and Release, the Trust’s obligations came to an end. Therefore, the Tenant’s claim against the Trust is dismissed, and the Trust is no longer a party to this action.

The Landlord shall Answer the remaining cause of action in the Complaint within 20 days. The parties shall then meet and confer and complete a Preliminary Conference Order using the form available on the Part 61 website and efile it by January 4, 2023 with a cover letter providing a dial-in number for the Preliminary Conference to be held January 11, 2023 at 10:00 a.m.

Dated: November 29, 2022

  
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 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: