SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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AFTER MIDNIGHT COMPANY LLC,

Plaintiff,

-against-

Index No.: 151014/15

MIP 145 EAST 57TH STREET, LLC,

Defendant.

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CAROL R. EDMEAD, J.

Defendant MIP 145 East 57th Street, LLC (MIP) moves, pursuant to CPLR 3211 (a) (1) and (7), and 3016 (b), to dismiss the amended complaint.

The amended complaint alleges that plaintiff After Midnight Company LLC (After Midnight), a commercial tenant in the building located at 145 East 57th Street in Manhattan, of which MIP is the landlord, suffered damages arising from MIP's construction of a penthouse directly above the 12th floor of the building, after plaintiff relocated from the 12th to the 11th floor of the building, so as to allow for the construction. The relocation was provided for by a second "Lease Amendment Agreement" (Second Lease Amendment), which provided that After Midnight would owe no rent, but only a yearly charge for electricity, for the duration of its stay on the 11th floor.

Plaintiff and MIP's predecessor in interest entered into a lease for the 12th floor of the building, commencing on October 1, 2010 and terminating on December 31, 2011 (Lease). McDonald affirmation, exhibit C. Thereafter MIP and After Midnight entered into a 10-year "Renewal Period" of the Lease (Extension). The Extension provides that, except as otherwise

provided therein, the Renewal Period is governed by the same terms as the Lease. *See id.* exhibit D, 10. On June 20, 2011, the parties entered into the Second Lease Amendment. which, similarly, provides that "[e]xcept as set forth in this Agreement, the Lease is not changed and it is hereby ratified . . .." *Id.*, exhibit E, § 10.

The amended complaint alleges the following six causes of action: (1) common-law fraud; (2) breach of contract; (3) unjust enrichment; (4) a request for a constructive trust; (5) negligence; and (6) private nuisance. The breach of contract claim will be discussed first.

MIP argues that the breach of contract claim is limited by the following exculpatory clause in the Second Amended Lease:

> "In no event shall Landlord be liable for any interruption of business, lost profits or any other damages, costs, fees or expenses of Tenant suffered or incurred in connection with either of the relocations described above [to the 11th floor, and then back to the 12th floor], except that Landlord shall reimburse Tenant for the Moving Expenses described above[],"

(*id.*, § 8) and by the following provision in paragraph 4 of the Lease:

> "There shall be no allowance to Tenant and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner or others making repairs, alterations, additions or improvements in or to any portion of the building . . .."

The first of these provisions is inapplicable to plaintiff's claims, because the claims arise from MIP's work on the penthouse, not from plaintiff's relocation to the 11th floor. However, the second of these provisions clearly applies to plaintiff's claims, inasmuch as the construction of the penthouse was an "alteration[],addition[], or improvement[]."

Plaintiff points out that paragraph 4B of the Lease provides that:

> "It is specifically agreed that Tenant shall not be entitled to any setoff or reduction of rent by reason of any failure of Owner to comply with the covenants

> of this or any other article of the lease, Tenant agrees that Tenant's sole remedy at law in such instance will be by way of an action for breach of contract"

and that:

> "In carrying out any work or other activities in the building, Landlord shall use commercially reasonable efforts not to disrupt Tenant's business."

Plaintiff argues, citing *Duane Reade v Reva Holding Corp.* (30 AD3d 229 [1st Dept 2006]) and *Union City Union Suit Co. v Miller* (162 AD2d 101 [1st Dept 1990]), that such provisions must be given effect, notwithstanding the presence of an exculpatory clause in the lease, and that these provisions would be nugatory if interpreted to bar plaintiff's claim. However, in both of the cases that plaintiff cites, the exculpatory clause in the governing lease provides that its reach does not extend to matters specifically provided for elsewhere in the lease. *See also Bowlmor Times Sq. LLC v A1 229 W. 43rd St. Prop. Owner, LLC*, 106 AD3d 646, 647 (1st Dept 2013). Here, by contrast, ¶ 4 of the Lease includes no such provision. Accordingly, these provisions are limited by the exculpatory clause, and plaintiff is barred from recovering for "inconvenience, annoyance or injury to business."

However, as defendant acknowledges, these provisions allow plaintiff to recover for other injuries, including property loss. The amended complaint alleges that, in the spring of 2013, a substantial water leak, caused by work on the roof of the building, damaged the 12th floor office and resulted in the loss of certain original photographic art works, and that, subsequently, MIP "gutted" the 12th floor offices and caused leaks in plaintiff's 11th floor office. The 2013 water leak preceded the commencement of work on the penthouse (*see* amended complaint, ¶ 21), and the Second Lease Amendment provides that MIP will reimburse plaintiff for any damage to the 12th floor, caused by work on the penthouse. However, the breach of

contract claim is viable to the extent that plaintiff seeks to recover for property damage caused by the alleged leaks on the 11th floor.

The fraud claim rests on the allegations that MIP induced After Midnight to agree to enter into the Second Lease Amendment and to move temporarily to the 11th floor, by making false representations about the construction of the penthouse. This claim is limited by the exculpatory clause in the Lease. Accordingly, it is redundant with the cause of action alleging breach of contract.

Unjust enrichment is a quasi-contractual remedy. It is not available where, as here, a written agreement governs the dispute at issue. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009). "'[T]he purpose of constructive trust is prevention of unjust enrichment.'" *Genger v Genger*, 121 AD3d 270, 278 (1st Dept 2014), quoting *Simonds v Simonds*, 45 NY2d 232, 242 (1978). Inasmuch as the unjust enrichment claim is not viable, neither is the cause of action for a constructive trust. Like the fraud claim, the cause of action alleging nuisance is limited by the above-quoted exculpatory clause and is redundant with the breach of contract claim.

The amended complaint alleges that MIP was grossly negligent in constructing the penthouse. "'Gross negligence is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing.'" *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 118 AD3d 428, 433 (1st Dept 2014), quoting *Hartford Ins. Co. v Holmes Protection Group*, 250 AD2d 526, 527 (1st Dept 1998). Accordingly, for reasons of public policy, a party cannot contractually insulate itself against a claim of gross negligence. *Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.* 18 NY3d 675, 683 (2012); *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554

(1992).

The amended complaint alleges that MIP allowed water to leak from the roof to plaintiff's 11th floor offices in September and November 2014, and in February and June 2015, and repeatedly allowed the noise of construction to reach levels exceeding the maximum noise level allowed by New York City noise laws and regulations. These allegations fall far short of stating a claim for gross negligence, and in any event, the claim must be dismissed both because plaintiff has failed to establish a legal duty independent of MIP's contractual obligations (*see Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC,* 116 AD3d 506, 507 [1st Dept 2014], citing *Clark-Fitpatrick, Inc. v Long Is. R.R. Co.* 70 NY2d 382, 389 [1987]), and because the claim arises from the same facts as the latter claim. *See Gale v Animal Med. Ctr.*, 108 AD3d 497, 498-499 (2d Dept 2013).

Accordingly, it is hereby

ORDERED that the motion of defendant MIP 148 East 57th Street LLC to dismiss the complaint is granted to the extent that the first, third, fourth, fifth and sixth causes of action are dismissed, and the second cause of action is dismissed except to the extent that plaintiff claims damage to property as a result of leaks onto the 11th floor of the building located at 145 East 57th Street in Manhattan.

Dated: November 16, 2015

ENTER:

J.S.C.

HON. CAROL EDMEAD