Marion Scott Real Estate, Inc. v Riverbay Corp.
2016 NY Slip Op 31216(U)
June 20, 2016
Supreme Court, New York County
Docket Number: 653953/14
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

MARION SCOTT REAL ESTATE, INC.,

Plaintiff,

- against-

RIVERBAY CORPORATION,

Defendant.

INDEX NO. 653953/14

MOTION SEQ. NO. 002

The following papers were read on this motion by defendant for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

This is an action sounding in breach of contract, defamation, preliminary injunction, and trespass commenced by Marion Scott Real Estate, Inc. (plaintiff or MSI) against Riverbay Corporation (defendant or Riverbay) for suspending its role as the Managing Agent of Cooperative City (Co-Op City). Before the Court is a motion by the plaintiff, pursuant to CPLR 3212, for partial summary judgment on its second cause of action in the Verified Complaint for breach of contract awarding plaintiff: (i) unpaid management fees in the amount of $641,557.00; (ii) management fees for each successive month after March 2015 until defendant obtains the requisite approval from the New York State Division of Housing and Community Renewal (DHCR) with respect to defendant's termination of MSI as Managing Agent; and (iii) attorneys' fees and litigation costs incurred by plaintiff in commencing the instant action necessitated by defendants' willful and material breach of contract. Defendant is in opposition to the motion. Discovery in this matter is not complete and the Note of Issue has not yet been filed.

BACKGROUND

Riverbay is the cooperative housing corporation of the housing development known as Co-Op City, located at 2049 Bartow Avenue, Bronx, New York (Pl Aff in support ¶ 4). Co-Op City is a Mitchell-Lama whose operation is governed by regulations promulgated by the DHCR. "Co-Op City is comprised of 15,372 apartment units, in 25 high-rise buildings, and seven townhouses, accommodating approximately 60,000 residents" (*id.* at 5). In 1998 plaintiff and Riverbay entered into a contract for a period of one year, which incorporated by reference the "General Conditions of the Contract for Managing Agent", wherein plaintiff was hired as the Managing Agent for Co-Op City (collectively, the Contract) (plaintiff exhibit A). Plaintiff notes that the DHCR's Mitchell-Lama regulations are incorporated by reference into the Contract, specifically §§ 1729-1.1. through 1729-1.2 (plaintiff exhibit A at 5). Section 5 of the Contract states that the Contract term shall be for one year and thereafter, "it shall continue in full force and effect from month-to-month unless renewed or terminated as provided in the General Conditions of the Contract for Managing Agent" (plaintiff exhibit A, p. 2).

Plaintiff states that as Managing Agent of Co-Op City its duties are as follows:

> "as Managing Agent, oversees all aspects of the day to day running of Co-Op City including, but not limited to: physical maintenance of the development, overseeing the safety officers, negotiating and administering construction contracts, providing for utility services, overseeing the financial administration of the development, ensuring appropriate vetting process for new hires, handling requests for service and overseeing construction, repair, maintenance and replacement of heating plants and all other mechanic systems and equipment in the development" (Plaintiff Aff in Support ¶ 9; Freedman Aff. ¶ 8).

Plaintiff avers that in May of 2014, Riverbay held a board election which resulted in the election of new board officers and members, including Cleve Taylor (Taylor), who was elected President (plaintiff Aff in Support ¶10; Affidavit of Herbert D. Freedman [Freedman Affidavit], Secretary of MSI, ¶ 9). After Taylor was elected President, plaintiff claims that he "began a systematic campaign to oust [plaintiff] by falsely maligning and disparaging [plaintiff] to the

board members and tenants of Co-Op City . . . and to the public at large" (Freedman Affidavit ¶ 10). Specifically, according to plaintiff, Taylor terminated plaintiff by directing Riverbay security officers to stop plaintiff's employees from entering their offices at Co-Op City "under the guise that it was indefinitely suspending [plaintiff]) (*id.* at 11). On November 17, 2014, upon arriving at their office at Co-Op City, Freedman claims that plaintiff's employees were blocked from access to their office, corporate files, documentation and computers (*id.* at 12). Plaintiff maintains that this action can be considered the equivalent of a termination. Plaintiff further avers that these actions were undertaken by Riverbay without the required authorization from DHCR, United States Department of Housing and Urban Development (HUD) or Wells Fargo to terminate plaintiff, and Riverbay failed to abide by the termination process set forth in the Contract and in DHCR regulation 9 NYCRR § 1729-1.2(l), as well as HUD's Multi-Party Coordination Agreement (MPCA) § 6(a) (Freedman Affidavit at ¶ 13; plaintiff Aff in Support at ¶12).

Article 9 of the Contract, which sets forth the circumstances in which Riverbay may terminate MSI, states the following:

> "The Contract between the Managing Agent and Riverbay Corporation may be terminated as follows:
>
> a. by mutual consent upon thirty (30) days written notice to DHCR;
>
> b. by DHCR, with cause, such termination to be effective immediately upon notice to Riverbay Corporation and Managing Agent;
>
> c. by DHCR, without cause, upon thirty (30) days written notice to Riverbay Corporation and Managing Agent;
>
> d. by Riverbay Corporation or DHCR effective immediately upon notice in the event a petition in a bankruptcy is filed by or against either Riverbay Corporation or Managing Agent, or in the event that either should make an assignment or the benefit of creditors or take advantage of any insolvent act;
>
> e. e. by Riverbay Corporation or Managing Agent effective immediately upon notice if Riverbay Corporation or Managing Agent shall fail or refuse to comply with or abide by any rule, order, determination, ordinance or law of any Federal,

State or Municipal Authority, upon giving twenty-four hours written notice mailed to Riverbay Corporation or Managing Agent at its address first hereinabove set forth or;

f. by Riverbay Corporation upon not less than thirty (30) days written notice to the Managing Agent in the event of a bona fide sale or demolition of property" (Freedman Aff. ¶6, The Contract at plaintiff's plaintiff's exhibit A, p. 12, Article 9).

In support of its motion plaintiff submits an affirmation of its attorney, Steven E. Spada, Esq. (Spada Aff.), and the Freedman Affidavit. Plaintiff also attaches the 1998 Contract, as well as a letter dated November 18, 2014 from the Assistant Commissioner of DHCR, Richmond McCurnin (McCurnin), to Taylor, Riverbay's President, which, *inter alia*, directs Taylor to reinstate plaintiff as managing agent of Co-Op City, pending the completion of the DHCR's investigation (plaintiff exhibit B). Lastly, plaintiff attaches the "AMENDED EMERGENCY Resolution #14-72 CONDUCT OF MANAGING AGENT" dated November 19, 2014, by the Board of Riverbay, wherein the Board resolved to have both Riverbay's General Counsel and DHCR investigate the plaintiff, and if DHCR finds after a review "that [plaintiff] failed to comply with the management agreement, or that [plaintiff]'s performance is not satisfactory, or that [plaintiff] failed to comply with any law, regulation or [D]HCR directive, that [D]HCR should terminate the expired management agreement between Riverbay and [plaintiff]" (plaintiff exhibit C).

In opposition, defendant proffers that plaintiff's motion must be denied because: 1) it failed to attach the pleadings to its motion, as required by CPLR 3212(b); 2) it is premature; 3) it fails to demonstrate or even address the proper measure of damages; and 4) even if the plaintiff were otherwise entitled to partial summary judgment on its breach of contract claim, the doctrine of setoff would preclude such relief. It is uncontested by the parties that pursuant to DHCR provision 9 NYCRR § 1729-1.2(l), DHCR must approve any termination of plaintiff as its managing agent.

It is Riverbay's position that its annexed documentary evidence and plaintiff's own admissions either confirm or raise substantial questions of fact as to whether plaintiff has engaged in serious misconduct, warranting denial of the plaintiff's motion. Specifically, Riverbay avers that the above shows that plaintiff has failed to comply with the management agreement, raises substantial questions of fact as to whether plaintiff's performance was satisfactory, and whether plaintiff failed to comply with any law, regulation or DHCR regulation. Additionally, Riverbay contends that it has not had the opportunity for discovery on its defense that plaintiff forfeited its right to payment under the contract through such alleged misconduct. It also avers that discovery of these matters would lead to evidence that would successfully allow it to defeat this motion.

Additionally, it is in deference to 9 NYCRR § 1729-1.2(l) that Riverbay asserts that it suspended plaintiff from performing any duties as Managing Agent of Co-op City, and suspended payments to plaintiff, pending completion of the investigations of DHCR and Riverbay's General Counsel. Riverbay contends that plaintiff has engaged in the following alleged misconduct: mishandling employment matters for Riverbay in violation of the management contract and federal and state laws; misclassifying employees as independent contractors and more as exempt management employees in violation of the Management Contract; binding Riverbay to not less than $8,300,000.00 a year of insurance premium contracts without public bidding, Board authorization, or New York State approval and failing to comply with New York State regulations requiring fidelity bonds; utilizing a paid employee of Riverbay for plaintiff's benefit, without authorization or knowledge of Riverbay; and mismanaging capital projects (Affidavit of Cleve Taylor [Taylor Affidavit] ¶ 7).

In support of its opposition, Riverbay submits a Memorandum of Law and the Taylor Affidavit. Riverbay also submits a plethora of documentary evidence, which it contends evidences or raises substantial questions of fact as to plaintiff's misconduct in its role as Managing Agent of Co-Op City, which includes, *inter alia*, two decisions in a matter entitled

Ramirez, et al., v Riverbay Corp., et al., 13 Civ. 2367, before District Judge John G. Koeltl of the United States District Court, Southern District of New York, brought by employees for minimum wage and overtime compensation violations under the Fair Labor Standards Act and the New York Labor Law, wherein both plaintiff and Riverbay were named as defendants (*see* Taylor Affidavit p. 4-5; Riverbay's exhibits A and B). The August 1, 2014 decision, *inter alia*, granted partial summary judgment to two of the individual plaintiffs on two of their claims for unpaid overtime, preserving the remaining claims and the issue of liability for trial (Taylor Affidavit p. 4; Riverbay exhibit A). The second decision, dated also August 1, 2014, certified a class action, composed of approximately 1,700 current and former employees for alleged unpaid overtime and related wage and hour claims (Taylor Affidavit p. 4; Riverbay exhibit B). Riverbay also submits "A Basic Management Plan for Riverbay Corp. Inc. Submitted By: Marion Scott Real Estate, Inc." (Management Plan), which Riverbay states is a contractual agreement between it and plaintiff, which states, *inter alia*, that plaintiff "and its site employees are responsible for compliance with all applicable laws" (Taylor Affidavit p. 5; Riverbay exhibit C). Riverbay contends that the Ramirez decisions "unequivocally establish that [plaintiff] breached its contractual obligations under the management agreement with Riverbay. According to Judge Koeltl, the employment practices at Riverbay for which [plaintiff] was responsible under the Management Plan violated State and Federal Law" (Taylor Affidavit at p. 5).

Riverbay also attaches to its opposition a series of email correspondence, dated November 19, 2014, between Riverbay's General Counsel Jeffrey Buss (Buss) and, *inter alia*, Freedman, wherein Buss sent three written information requests to plaintiff regarding plaintiff's current employment policies (Riverbay exhibit D). In one such email, Buss asks Freedman whether plaintiff was using any Riverbay employees to provide services for non-Riverbay matters, and if so, directing that such practice must cease immediately (Riverbay exhibit D). Freedman's email responses to Buss is also attached, dated November 19, 2014, wherein Freedman states that plaintiff does not use Riverbay employees working on Riverbay time to

provide services for plaintiff or other housing companies, and that plaintiff "believe[s] that all current employment practices (before we were suspended) are in accordance with law but it would be prudent to have legal counsel review" (*id.*). It is Riverbay's position that plaintiff's response to these information requests was that it did not know whether its current employment practices are in accordance with State and Federal law, and that they failed to comply with the advice of labor counsel and failed to acknowledge to Buss that it had done so, which is evidence of "on-going, improper management" (Taylor Affidavit, p. 8). Riverbay also attaches an email to Freedman from special labor counsel Scott Trivella (Trivella) regarding the classification of certain employees, advising Freedman that they should be classified as W-2 employees, not independent contractors (Riverbay exhibit E).

Additionally, Riverbay attaches the minutes of a Riverbay Board meeting, dated November 6, 2014, wherein Riverbay avers that in "an effort to understand why Riverbay had no insurance coverage for the Ramirez matter, the Board invited Riverbay's Director of Risk Management to attend and provide a presentation on insurance coverage to the board" wherein plaintiff also attended (Taylor Aff., p. 9-10; Riverbay exhibit F). Also attached to Riverbay's opposition are a series of emails, and a spreadsheet, which Riverbay avers evidence the fact that Riverbay's Director of Risk Management was working on negotiations for insurance coverage for non-Riverbay properties, for the benefit of plaintiff, during the workday for all instances of this practice (*see* Riverbay exhibits H and I).

In reply, plaintiff attaches, *inter alia*, a reply Affidavit of Freedman, a copy of the pleadings (Reply exhibit D), and an amendment to the Contract dated March 6, 2013, entitled Extension of the Contract for Managing Agent (2012-2013 Extension), wherein plaintiff's monthly fee was increased to $128,315.00 (Plaintiff Reply exhibit E).

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect*

Hosp., 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

As a threshold matter the Court will not dismiss plaintiff's motion for failure to attach the pleadings. "Although CPLR 3212 (b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete'" (*Washington Realty Owners, LLC v 260 Wash. St., LLC*, 105 AD3d 675, 675 [1st Dept 2013], quoting *Welch v Hauck*, 18 AD3d 1096, 1098 [3d Dept 2005] *lv denied* 5 NY3d 708 [2005]). "The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted" *(Washington Realty Owners, LLC v 260 Wash. St., LLC*, 105 AD3d at 675). Here, while the plaintiff failed to annex the pleadings to its initial moving papers, the pleadings were attached to the reply, and as such this Court has a complete set of papers upon which to decide the motion (*see Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590, 591 [1st Dept 2008] ["we reject the contention that the court should have dismissed defendants' motion for failure to annex their answer to the initial moving papers, inasmuch as the responsive pleading was attached to the reply papers"]).

Now in turning to the merits, the Court finds that plaintiff has met its prima facie entitlement to summary judgment on its breach of contract claim. Pursuant to DHCR Regulation 9 NYCRR § 1729-1.2(l), The agreement between the managing agent and the housing company may be terminated as follows:

> "(1) by mutual consent upon 30 days' written notice to the division;
> (2) by the division, with cause, such termination to be effective immediately upon notice to the housing company and agent;
> (3) by the division, without cause, upon 30 days' written notice to the housing company and agent;
> (4) by the housing company or the division effective immediately upon notice, in the event a petition in bankruptcy is filed by or against either the housing company or agent, or in the event that either should make an assignment for the benefit of creditors or take advantage of any insolvency act;
> (5) by the managing agent effective immediately upon notice if the housing

> company shall fail or refuse to comply with or abide by any rule, order, determination, ordinance or law of any Federal, State or municipal authority, upon giving 24 hours' written notice mailed to the housing company at its address;
> (6) by the housing company upon not less than 30 days' written notice to the agent in the event of a bona fide sale or demolition of the property;
> (7) by the housing company with cause upon prior approval by the division."

It is undisputed between the parties that the last extension to the Contract had expired and plaintiff was serving as Managing Agent on a month-to-month basis at the time that plaintiff was denied access to its Co-Op City offices. The parties' 1998 contract establishes a 12–month duration period, and in the event the contract is not extended, "it shall continue in full force and effect from month-to-month unless renewed or terminated as provided in the General Conditions of the Contract for Managing Agent" (plaintiff exhibit A, p. 2). According to Riverbay, plaintiff and Riverbay last contracted, for a one-year term in October 2012 (Taylor Affidavit at 2). However, the documentary evidence before the Court shows establishes that the 2012-2013 Extension was the latest extension to the Contract, for a term of twelve months from July 1, 2012 to June 30, 2013 (plaintiff reply exhibit E). In the 2012 Extension the plaintiff's monthly fee was increased to $128,315.00 (Plaintiff Reply exhibit E). Thus, after June 2013, the duration period became month-to-month, and the parties' agreement could only be terminated pursuant to the DHCR's termination provisions, which were incorporated into the parties' agreement

The Court also turns to November 18, 2014 letter from McCurnin, the DHCR's Assistant Commissioner, directed Taylor to

> "immediately reinstate [plaintiff]'s employees, pending the completion of [DHCR's] investigation" (plaintiff's exhibit B). McCurnin also stated that Taylor's "unilateral decision to indefinitely 'suspend' all of the managing agent's employees at Riverbay, pending a review by the Board and [D]HCR . . . is in violation of [D]HCR regulations and Riverbay's obligations under their Wells Fargo/HUD loan documents" (*id.*).

McCurnin notes that whether or not Riverbay's suspension of plaintiff

> "can be considered the equivalent of a termination, HUD's Multi-

> Party Coordination Agreement ("MPCA") states that ***"all changes to the managing agent will require approval by HUD...and DHCR"*** (see, MPCA §6(a)). In addition, HUD's regulatory agreement prohibits Riverbay from "...***chang[ing] any arrangement for managerial sevices***..." without HUD's prior written approval (see Reg. Agr. §36)" (emphasis in original) (*id.*).

In opposition, Riverbay has failed to raise a triable issue of fact. Notwithstanding the serious allegations of misconduct by Riverbay against plaintiff, Riverbay's immediate suspension of plaintiff in November 2014 was a change to the arrangement for managerial services in violation of the month-to-month contractual agreement with plaintiff, and which failed to comply with the termination provisions set forth in Article 9 of the Contract's General Conditions (plaintiff's exhibit A and E; 9 NYCRR 1729-1.2(l); *see e.g. Marion Scott Real Estate, Inc. v Rochdale Village, Inc.*, 23 Misc3d 1129[A], 2009 NY Slip Op 50997[U], *1-5 [Sup Ct, Queens County 2009]).

Plaintiff's compensation under the 2012-2013 Extension was $128,315.00 a month (Reply exhibit E), and it is undisputed that since October 2014 Riverbay has failed to make any payments to plaintiff (Freedman Aff in reply ¶ 22; Taylor Aff ¶ 4). Since plaintiff was Riverbay's managing agent on a month-to-month basis, the measure of damages is the duration of its suspension, from November 2014 through the present, or until such time as there is a finding of termination by the DHCR. Additionally, Section 6 to the Contract, entitled "Compensation", states that "[t]he Managing Agent shall be compensated on a lump sum basis that has been proposed by the Managing Agency and accepted by Riverbay Corporation" (plaintiff's exhibit A, p. 2).

To the extent that plaintiff in its first cause of action seeks attorney's fees, this claim is denied for plaintiff's failure to establish entitlement to same (*see Atlantic Development Group, LLC v 296 East 149th Street, LLC*, 70 AD3d 528, 529 [1st Dept 2010] ["[A]ttorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule"]; *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3

NY3d 592, 597 [2004] [In New York, "a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule"]; *Chapel v Mitchell*, 84 NY2d 345, 349 [1994]). Plaintiff has not established that its contract with Riverbay included the payment of legal fees, and such payments are not authorized by any statute or court rule. Accordingly, plaintiff's motion for summary judgment on the first cause of action for breach of contract is granted to the extent stated above.

CONCLUSION

Accordingly it is,

ORDERED that plaintiff Marion Scott Real Estate, Inc.'s motion, pursuant to CPLR 3212, for partial summary judgment on its second cause of action in the Verified Complaint against the defendant for breach of contract is granted; and it is further,

ORDERED that the amount of damages to which Marion Scott Real Estate, Inc. is entitled as a result of said breach is hereby referred to a Special Referee to Hear and Determine except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further,

ORDERED that the portion of plaintiff Marion Scott Real Estate, Inc.'s motion for summary judgment seeking attorneys' fees and litigation costs is denied; and it is further,

ORDERED that counsel for plaintiff Marion Scott Real Estate, Inc. is directed to serve a copy of this Order with Notice of Entry upon the defendant, on the Clerk of the General Clerk's Office to arrange a date for the reference to a Special Referee, and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 6/20/16 **Enter:**

PAUL WOOTEN, J.S.C

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**
Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**