Avramides v 319 E. 50th St. Owners Corp.
2017 NY Slip Op 31432(U)
June 29, 2017
Supreme Court, New York County
Docket Number: 653778/2016
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART 58
Justice

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MICHAEL AVRAMIDES, ANNE BASCOVE

Plaintiff,

- v -

319 EAST 50TH STREET OWNERS CORP., BEEKMAN HILL CONDOMINIUM,

Defendant.

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INDEX NO. 653778/2016

MOTION DATE 1/6/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this application to/for Dismiss

Upon the foregoing documents, it is

Defendants' motion to dismiss pursuant to CPLR § 3211(a)(5) and (7) is denied. As plaintiffs have withdrawn the third and fifth causes of action in the Complaint, all that remains is the first, second and fourth causes of action.

In the Complaint, plaintiffs alleged that in connection with separate litigation Beekman Hill Condominium ("Beekman") entered into a settlement agreement in 2009 (the "2009 Settlement Agreement"). That matter involved the fact that plaintiff was being deprived of certain use of the roof (the "Roof Lease Area") under a Roof Lease. Under the 2009 Settlement Agreement the parties agreed Beekman would perform work in the Roof Lease Area and that plaintiffs would be compensated for any deprivation of the Roof Lease Area caused by

Beekman's required work on the roof in excess of 75 days in the form of a per diem rent abatement. Plaintiffs allege that they were deprived of the use of the "Roof Lease Area" for more than150 days in excess of the 75-day limit and have yet to be compensated for this loss as required by the 2009 Settlement Agreement. Plaintiffs further states that Beekman has removed the recreational surface of the "Roof Lease Area" and erected a fence around the "Roof Lease Area", permanently depriving them the use of the leased space in breach of the parties' agreements.

The Complaint further alleges that plaintiffs and 319 East 50th Street Owners Corp ("The Cooperative") are parties to another settlement agreement entered into in 2015 (the "2015 Settlement Agreement"). In that agreement, the parties agreed that the plaintiffs would be responsible for certain work on a Greenhouse portion of the apartment unit, and the Cooperative would be responsible for certain work on adjoining walls. The 2015 Settlement Agreement further provided that the parties agreed to communicate and work in a good-faith manner to complete the work quickly. Plaintiffs allege that they fulfilled their obligations as required by the 2015 Settlement Agreement, but that the Cooperative refused to coordinate with plaintiffs and did not complete the work required in the agreement, causing plaintiffs to incur additional expenses.

Defendants argue that, in a breach of contract action, "the complaint must, inter alia, set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract" (*Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987]). However the authorities supporting this statement in the *Chrysler Capital Corp* opinion expressly contradict defendant's position, holding that "plaintiff [is] not required to attach a copy of the contract or plead its terms verbatim" (*Griffin Bros. v*

Yatto, 68 AD2d 1009 [3d Dept 1979]; *see also Lupinski v Vil. of Ilion*, 59 AD2d 1050 [4th Dept 1977]). In opposition to the motion, plaintiffs submitted a copy of the 2009 Settlement Agreement, the 2015 Settlement Agreement and original roof lease. The attachment of the various settlement agreements and contracts put to rest any challenge to plaintiffs' claims in the complaint regarding the existence and the terms of the parities contracts.

Defendants argue that plaintiffs' claim that Beekman breached the 2009 Settlement Agreement is time barred. Defendants base this argument solely on a reading of the 2009 Settlement Agreement that presumes work was to begin immediately after execution.[1] If true, the deadline for work on the roof to be completed was 75 days after September 15, 2009 and, since this action was filed more than six-years after that date, it is time barred under CPLR § 213(2). However, defendants' argument is without merit. Paragraph 8 of the agreement does not set a start date for the work, and a simple reading of Paragraph 8(a) indicates that work did not commence immediately. Specifically, Paragraph 8(a) states "[plaintiffs], upon forty (40) days prior written notice from [Beekman], will remove, at plaintiffs' cost, the fence and air conditioning compressor unit located on the [roof lease area]". Clearly, work was not to start for at least forty days and work would only begin after the parties coordinated the air conditioning unit removal. Only then would the 75-day period for work run. Accordingly, any accrual of a breach cause of action would occur 75 days after the start of work. As defendants have not presented any evidence of the actual start or completion date, at this juncture, the Court cannot determine that the work was completed more than six years prior to filing the Complaint. In addition, in opposition, plaintiff submitted an affidavit that the work started in 2011 and ended in

[1] Defendant did not submit any evidence of the actual start date and based its argument on its assumption of the start date.

2014, which both fall squarely within the applicable six-year statute of limitations. Accordingly, the motion to dismiss under CPLR § 3211(a)(5) is denied.

When deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *see Faison v Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Assoc., P.C. v Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]).

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*El-Nahal v FA Mgmt., Inc.*, 126 AD3d 667, 668 [2d Dept 2015]). Plaintiffs have clearly plead, in the Complaint, the necessary elements for each of the three breach of contract claims. Plaintiffs have properly plead the the existence of the 2009 and 2015 Settlement Agreements, and pled the applicability of the Roof Lease Agreement. In the 2009 Settlement Agreement, plaintiffs and Beekman specifically agreed that they were parties to a lease agreement which granted the plaintiffs use of a section of the condominium roof and further agreed to renew the roof lease. Specifically, the 2009 Settlement Agreement references the Roof Lease Agreement and states "whereas, the [roof] Lease was assigned to, and assumed by [Plaintiffs]" and the parties agreed to renew the Roof Lease Agreement.

Plaintiffs also properly plead breach and point to specific conduct which they allege constitutes a breach of the various agreements. For the 2009 Settlement, plaintiffs claim the failure to reimburse plaintiffs for deprivation of the roof lease area in excess of 75 days.

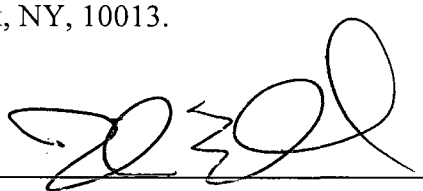
Plaintiffs also allege in the Affidavit in Opposition that the work began in 2011 and ended in 2014, depriving them of the use of the roof lease area during that time. Furthermore, plaintiffs allege that after the work was complete, defendants removed the "recreational surface" on the roof lease area and erected a permanent fence in front of plaintiffs' access stairway, preventing access to the roof lease area in breach of both the 2009 Settlement Agreement and Roof Lease Agreement. Similarly, plaintiffs allege specific conduct — failure to cooperate in good faith — which they argue constitutes a breach of the 2015 settlement. Plaintiffs properly plead monetary damages associated with each instance of breach.

Since plaintiffs have alleged sufficient facts to constitute a breach of contract action for each of the three contracts, the motion to dismiss pursuant to CPLR § 3211(a)(7) is denied. Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is denied; and it is further

ORDERED, that the parties shall appear for a preliminary conference on August 16, 2017 at 9:30 AM, Part 58, Room 1164A, 111 Centre Street, New York, NY, 10013.

This constitutes the decision and order of the Court.



6/29/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE