

Walsam 316, LLC v 316 Bowery Realty Corp.

2018 NY Slip Op 32476(U)

October 2, 2018

Supreme Court, New York County

Docket Number: 153318/2017

Judge: Margaret A. Chan

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN

PART 33

Justice

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WALSAM 316, LLC, WALSAM 316 BOWERY LLC, WALSAM
BLEECKER LLC, LAWBER BOWERY LLC, 316 BOWERY NEXT
GENERATION LLC,

INDEX NO 153318/2017

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO 001 002 004

- v -

316 BOWERY REALTY CORP., LEONARD TAUB, EVA TAUB,
4-6 BLEECKER STREET LLC, DOUGLAS BALLINGER, GRJ
LLC, GREGORY JONES

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 32, 33, 34, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 102

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 136, 138, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 004) 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

were read on this motion to/for VACATE LIS-PENDIS

Upon the foregoing documents, it is ordered as follows: motion sequence 1 – plaintiffs’ motion is granted; defendant Ballinger’s cross-motion is granted; motion sequence 2 – defendants 316 Bowery Realty Corp., and Eva and Leonard Taub’s motion is denied; motion sequence 4 – plaintiffs’ motion is granted.

The focus of this action is a building located at 4-6 Bleecker Street in the city, state, and county of New York (the Bleecker building). The backdrop of this suit begins with the former owners of the Bleecker building – defendant 316 Bowery Realty Corp. (316 Bowery) whose principals, Leonard Taub and Eva Taub, entered into a Purchase and Sale Agreement on August 10, 2012 (the 2012 PSA) with defendant 4-6 Bleecker Street LLC (4-6 Bleecker), whose principal was defendant

Douglas Ballinger. Under the 2012 PSA, 316 Bowery agreed to convert the Bleecker building into two condominium portions (NYSCEF doc no 55 – 2012 PSA).

Pending the completion of the condo conversion, 316 Bowery agreed to net lease the residential portion to 4-6 Bleecker. On April 16, 2013, 316 Bowery and 4-6 Bleecker executed the 1st Amendment of the 2012 PSA; the 1st Amendment survives the 2012 PSA (NYSCEF doc no 62). Thus, 4-6 Bleecker was granted a leasehold that was equivalent to a fee simple ownership of the residential portion of the building, with the right to set and receive rents from the existing tenants (NYSCEF doc no 61 – Apr 16, 2013 PSA).

On September 18, 2013, the residential tenants of the Bleecker building brought a rent overcharge proceeding against 4-6 Bleecker and 316 Bowery (*Arnold v 4-6 Bleecker Street LLC*, Index No 15841/2013) in Supreme Court, New York County. While the overcharge proceeding was pending, 316 Bowery entered into an agreement to sell the building to plaintiff Walsam 316 LLC, wherein Walsam 316 assumed the rights and obligations of 316 Bowery under the Master Lease. Walsam 316, together with the remaining plaintiffs, took title to the building on June 30, 2014. On October 27, 2015, a 2nd Amendment to the 2012 PSA and Master Lease extended the deadline for the condo conversion to April 16, 2017 (NYSCEF doc no 63). In 2016, Ballinger sold his interest in 4-6 Bleecker to defendant GRJ LLC whose principal is Gregory P. Jones.

On October 14, 2015, another justice of this court, Hon. Joan Madden, rendered a decision and order in the rent overcharge proceeding, *Arnold v 4-6 Bleecker Street LLC*, declaring that the residential rental apartments are subject to the protections of the Rent Stabilization Law (NYSCEF doc no 110). Hon. Madden granted 4-6 Bleecker's motion to add the Walsam entities, Lawber Bowery LLC, and 316 Bowery Next Generation LLC, as defendants in the *Arnold v 4-6 Bleecker Street LLC* case on October 19, 2015, (NYSCEF doc no 111). The newly added defendants and 316 Bowery unsuccessfully moved to reargue and renew Justice Madden's October 14, 2015 decision and order (NYSCEF doc no 112). An appeal was taken (NYSCEF doc no 113) and is currently pending at the time of this writing.

In the instant case, plaintiffs – the Walsam entities, Lawber Bowery LLC, and 316 Bowery Next Generation LLC (collectively, Walsam), who are the current owners of the building, brought suit against the former owners – 316 Bowery, Leonard Taub, and Eva Taub; the former master landlord – 4-6 Bleecker and Douglas Ballinger; and the current master landlord – GRJ LLC and Gregory P. Jones, alleging causes of action against the former owner for (1) fraudulent inducement; (2) breach of contract; (3) contractual and common law indemnification; (4) contribution; and against the landlord for (5) contractual and common law indemnification; (6) contribution; (7) breach of the Master Lease; (8) breach of implied covenant of good faith and fair dealing; (9) a declaratory judgment that the

landlord has no right to terminate the Master Lease; (10) a declaratory judgment that the current landlord has no right to terminate the Master Lease; (11) injunctive relief; and (12) attorney's fees.

Before this court are three motions. In motion sequence 1, plaintiffs move for a preliminary injunction to enjoin 4-6 Bleecker and its successor, GRJ LLC (GRJ), whose principal is Gregory P. Jones (Jones), from terminating the April 16, 2013 Master Lease between 316 Bowery and 4-6 Bleecker. Defendants cross-move to dismiss the complaint against Douglas Ballinger. In motion sequence 2, 316 Bowery and its principals, Leonard and Eva Taub, move to dismiss the complaint, which plaintiffs oppose. And in motion sequence 4, plaintiffs move to cancel or vacate the Notice of Pendency filed by 4-6 Bleecker, which 4-6 Bleecker opposes.

DISCUSSION

Motion Sequence 1

Plaintiffs seek to enjoin the landlord defendants, 4-6 Bleecker, Jones, and GRJ, from terminating the Master Lease dated April 16, 2013, as amended on October 27, 2015 (the Amended Master Lease) (NYSCEF doc no 63). Plaintiffs were previously granted a temporary restraining order on April 11, 2017 (NYSCEF doc no 33). Plaintiffs claim that 4-6 Bleecker refused to cooperate and failed to comply with its contractual obligations under the Amended Master Lease. Plaintiffs further claim that 4-6 Bleecker failed to provide access to the tenants' apartments for plaintiffs to install sprinklers so to complete the condo conversion; that Jones threatened to terminate the Amended Master Lease because the condo conversion had not been completed; and that the transfer of Ballinger's interest in 4-6 Bleecker to Jones was improper.

To be granted a preliminary injunction, plaintiff must establish with clear and convincing evidence that they (1) have a likelihood of success; (2) will suffer irreparable harm without the injunction; and (3) that the equities are in their favor (*see Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]). To establish a likelihood of success on the merits, "[a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's claims should be left to a full hearing on the merits" (*Barbes Restaurant Inc., v ASRR Suzer, 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016] quoting *Weissman v Kubasek*, 112 AD2d 1086, 1086 [2d Dept 1985]).

The argument starts with Jones' threat to terminate the Amended Master Lease. With the deadline of April 16, 2017 under the Master Lease approaching, plaintiffs requested Jones of 4-6 Bleecker to grant them an extension. Jones denied the request and threatened to terminate the Amended Master Lease because the condo conversion is still not done, and plaintiffs still had not completed the

sprinkler work despite two prior extensions (NYSCEF doc no 30 – Weiss aff at ¶ 48). Jones believed two extensions that amounted to more than four years was enough (NYSCEF doc no 77 – Jones aff at ¶ 44).

Plaintiffs claim that their efforts to move forward on the condo conversion was stymied by 4-6 Bleecker's failure to obtain access to the tenants' apartment for plaintiffs to install the sprinklers, and its obstruction, after Jones took over 4-6 Bleecker. Plaintiff's managing agent, Mark Torres, charged that "not only did Jones refuse Plaintiffs access to the tenants' apartments to perform the Sprinkler Work, but he went so far as to intentionally change the locks of the Bleecker Building to prevent Plaintiffs from having access to the common areas" (NYSCEF doc no 29 – Mark Torre aff, ¶¶ 9-14, 16-19; NYSCEF doc nos 19 and 26).

4-6 Bleecker, in turn, argues that gaining access to the tenants' apartments was plaintiff's responsibility, and in any event, because of the rent overcharge proceeding, the tenants would not grant access (NYSCEF doc no 30 – Weiss aff, ¶ 46). 4-6 Bleecker suggests that it would be more appropriate for plaintiffs to contact the tenants directly to gain access (NYSCEF doc no 77 – Jones Aff at ¶ 26; NYSCEF doc no 75). Nonetheless, Jones states that he was "happy to do what [he could] to help" and would provide access to the apartments of the tenants that were not part of the overcharge proceeding (NYSCEF doc no 77 – Jones Aff at ¶¶ 26-27). As for changing the locks, Jones explained that it was routine for GRJ to change the locks in any property it acquires. Jones added that he informed plaintiff's Management Supervisor, Mark Torre, that arrangements can be made to give plaintiffs' access to the building (*id.* at ¶¶ 32-33).

Plaintiffs sufficiently showed that, pursuant to the Master Lease, 4-6 Bleecker, which was granted essentially a fee simple ownership of the residential portion of the building, with the right to set and receive rents from the existing tenants, was to gain access to its tenants' apartments for plaintiffs' sprinkler work. 4-6 Bleecker's inability and/or refusal to gain access the its tenants' apartments impeded on plaintiffs' work needed for the condo conversion. Jones' explanation about changing of the locks as a routine function for GRJ is of no moment when plaintiffs' workmen were barred from entering the common areas especially when Jones was aware of the need for access. Thus, plaintiffs should not be penalized for 4-6 Bleecker's impediment.

To allow 4-6 Bowery, whose obligation as the net lease landlord under the Master Lease was to provide access to the tenants' apartments so to facilitate the condo conversion, reverse course and put the onus of that obligation on plaintiffs is not equitable. Access to the tenants' apartments is stymied by the overcharge proceeding. The overcharge proceeding rose from the rent 4-6 Bowery and/or 316 Bowery's charged its tenants, and it presents an issue only the landlord can address. Hence, plaintiffs will suffer irreparable harm if 4-6 Bowery were to

terminate the Master Lease for events not caused by plaintiffs and beyond plaintiffs' control.

The argument continues to plaintiffs' allegation that Ballinger improperly assigned his interest in 4-6 Bleecker to Jones without first getting a written consent from the former owner, 316 Bowery, or plaintiffs, as the successor-in-interest, in violation of § 10.3 of the 2012 PSA (*id.* at ¶ 39; NYSCEF doc no 55 – PSA). Plaintiffs did not consent to the assignment (Jones Aff at ¶ 40; NYSCEF doc no 25). This argument brings up defendants' cross-motion to dismiss the complaint against Ballinger, who had assigned 4-6 Bleecker's interest.

Section 10.3 of the 2012 PSA on "Successors And Assigns" provides as follows:

This Agreement shall be binding in all respects on and shall inure to the benefit of the Seller and Purchaser and their respective successors and permitted assigns. Purchaser shall not assign this Agreement without the prior written consent of Seller in each instance. Any attempted assignment without the prior written consent of Seller shall be null and void. This Agreement is made for the sole and exclusive benefit of the parties hereto and their respective successors and permitted assigns; no third party is intended to have or shall have any rights under this Agreement.

(NYSCEF doc no 25.)

The provision bars purchaser, 4-6 Bleecker Street LLC, from assigning the Agreement. The provision does not prohibit Ballinger from assigning his interest in 4-6 Bleecker. 4-6 Bleecker remains the purchaser under the Agreement. And the Agreement continues to bind 4-6 Bleecker to the obligations in the Agreement even if Jones, and not Ballinger, is now the interested party in 4-6 Bleecker. Hence, defendant Douglas Ballinger's cross-motion to dismiss the complaint as against him is granted.

Motion Sequence 2

316 Bowery and its principals, Leonard and Eva Taub (the Taubs), move to dismiss the complaint as against them. The Taubs' assertions, as gleaned from their respective affidavits and their attorney's affirmation, boil down to the alleged misrepresentation that the rent 316 Bowery charged its tenants was lawful and the failure to inform plaintiffs of their inability to access the tenants' apartments due to the rent overcharge matter. The problems from this rent overcharge matter in turn impeded plaintiffs' access and prevented plaintiffs from completing the sprinkler installation (NYSCEF doc no 114 – Eva Taub aff, ¶ 3). The Taubs claim that plaintiffs failed to assert their fraud claim against them with specificity.

Eva Taub, the president of 316 Bowery, averred that plaintiffs' principals

were sophisticated investors with vast experience in converting buildings into condominiums. Leonard Taub, an officer of 316 Bowery, submits an affidavit (NYSCEF doc no 116) that is duplicative of Eva Taub's. They were both informed by their attorney that pursuant to section 5.2 of the April 9, 2014 PSA (NYSCEF doc no 117), they should not be held personally liable for anything (*id.*, ¶ 10).

The Taubs base their understanding and averments on their attorney's representation of the facts. Hence, they understood that plaintiff Walsam 316 would conduct its own diligence investigation including rent overcharge issues and the likelihood of completing the sprinkler system (*id.*, ¶ 6). The Taubs understood that since the rent overcharge proceeding commenced in 2013, plaintiffs had knowledge of the overcharge proceeding before they signed the 2014 PSA. Indeed, Walsam 316 expressly negotiated a contractual indemnification from 316 Bowery on the overcharge proceeding, thereby exhibiting an understanding of the risk inherent in doing this condo conversion (*id.*, ¶¶ 12-13). As to the sprinkler system, the 2014 PSA granted Walsam 316 an opportunity to examine the sprinkler work so Walsam 316 had a chance to investigate whether the tenants would grant them access to their apartments (*id.*, ¶¶ 15-16). The Taubs deny concealing any information that would have prevented Walsam 316 from conducting its own due diligence. As advised by their attorney, they state that pursuant to section 5.4.3 of the 2014 PSA, Walsam 316 purchased the Bleeker building "AS IS, WHERE IS, WITH ALL FAULTS." (*id.* ¶¶ 18, 22-23 [emphasis in original]).

On a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448 [1st Dept 2009]). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

Plaintiffs' first cause of action against the Taubs is for fraudulent inducement. A claim for fraud must be pleaded with specificity (CPLR 3016[b]). Here, plaintiffs' allegations against 316 Bowery and its owners, the Taubs, were that the Taubs represented that the sprinkler system was the only condition that stood in the way of the condo conversion; that the Taubs never disclosed that "the Residential Tenants in the Overcharge Proceeding had already refused to provide 316 Bowery with access to their apartments"; and that the Taubs represented that the rents charged were lawful. The court ultimately determined those to be unlawful (NYSCEF doc no 106 – complaint, ¶¶ 4, 8).

As this is a motion to dismiss, the court is to examine only the adequacy of the pleadings (*see Davis v Boehem*, 24 NY3d 262, 268 [2014]). While the Taubs

mention situations that would lead plaintiffs to know or uncover the difficulties they now face, they do not address the alleged misrepresentations or explain how plaintiffs should have known in June 2014 what the court's October 2015 decision regarding the overcharge proceeding would be or that the tenants had denied the landlords access to their apartments prior to June 2014. But plaintiffs did act on the knowledge of the overcharge proceeding as evidenced by the inclusion of the indemnification provision in the 2014 PSA. Plaintiffs' first cause of action sufficiently states a cause of action for fraud. Hence, the Taubs' motion to dismiss the complaint is denied.

Motion Sequence 4

Defendant 4-6 Bleecker filed a notice of pendency on the Bleecker building on February 9, 2018, after plaintiffs commenced this action in April 2017. 4-6 Bleecker is the master lessee and the residential landlord of the Bleecker building. 4-6 Bleecker's reason to encumber title to the Bleecker building is unclear given its threat to cancel the Master Lease to plaintiffs' detriment. At oral arguments, it appears that the parties contemplated cancelling the notice of pendency. To the extent that 4-6 Bleecker has not done so, plaintiffs' motion to cancel the notice of pendency is granted.

Accordingly, it is ORDERED that plaintiffs motion for a preliminary injunction in motion sequence 1 is granted; it is further

ORDERED that defendant Douglas Ballinger's cross-motion to dismiss the complaint as against him is granted; it is further

ORDERED that defendants Eva Taub, Leonard Taub, and 316 Bowery Realty Corp.'s motion to dismiss the complaint against them in motion sequence 2 is denied; and it is further

ORDERED and DECREED, that plaintiffs' motion to cancel the notice of pendency filed by defendant 4-6 Bowery Street LLC, in motion sequence 4 is granted; the Clerk of the Court is directed to cancel the notice of pendency in this case.

10/2/2018
 DATE


 MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER