47 E. 34th St. (NY), L.P. v Bridgestreet Corporate Hous., LLC
2019 NY Slip Op 32038(U)
July 12, 2019
Supreme Court, New York County
Docket Number: 653320/2015
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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47 EAST 34TH STREET (NY), L.P.

Plaintiff,

- v -

BRIDGESTREET CORPORATE HOUSING, LLC,

Defendant.

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INDEX NO. 653320/2015

MOTION DATE 07/10/2019

MOTION SEQ. NO. 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 128, 130, 131, 132, 133, 134, 135, 136, 138, 140, 142, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

This is an action for breach of contract and indemnification brought by 47 East 34th Street (NY), L.P. (**47 East**) against BridgeStreet Corporate Housing, LLC (**BridgeStreet**). BridgeStreet moves for partial summary judgment pursuant to CPLR § 3212 dismissing the first cause of action for breach of contract to the extent that it seeks damages for lost tax benefits and dismissing the remaining causes of action in the complaint. 47 East cross-moves for summary judgment pursuant to CPLR § 3212 and to strike the affidavit of Sean Worker and the Rule 19-A Statement filed by Bridgestreet. For the reasons set forth on the record (7.12.19) and as otherwise set forth below, BridgeStreet's motion is denied and 47 East's cross-motion is granted to the extent set forth below.

THE RELEVANT FACTS AND CIRCUMSTANCES

This case arises out of a Lease Agreement (the **Lease**), dated as of March 1, 2012, between 47 East and BridgeStreet, pursuant to which 47 East agreed to lease to BridgeStreet 110 residential apartment units in the building located at 47 East 34th Street, New York, New York (the **Building**), for a term of twenty-four months, commencing March 1, 2012 through and including February 28, 2014 (Schenker Aff., Exhibit L, NYSCEF Doc. No. 106 [hereinafter, the **Lease**], Art. I). Pursuant to the Lease, BridgeStreet agreed to pay 47 East at the fixed rate of $4,900,000 per year, payable in installments of $408,333.33 per month (*id.*). BridgeStreet was an existing tenant under a prior lease with 47 East's predecessor in interest (Complaint, ¶ 9). The Building has received tax abatements under Section 421-a of the New York Real Property Tax Law since July 1, 2009 (Complaint, ¶ 10). In order to maintain the Building's 421-a program eligibility, units in the Building may not be rented for periods of less than six months (28 RCNY § 6-01 [c]).

Article 8 of the Lease sets forth provisions concerning the Building's eligibility for 421-a tax abatements. In Section 8.1 of the Lease, BridgeStreet acknowledges that the Building is subject to restrictions regarding its use and operation pursuant to Section 421-a and its implementing regulations (Lease, § 8.1 [a]). BridgeStreet further acknowledged and agreed that the Building's continued eligibility under the 421-a program was of paramount importance to 47 East (*id.*, § 8.1 [b]). Pursuant to Section 8.2 of the Lease, BridgeStreet agreed to cooperate and work with 47 East to maintain the building's 421-a eligibility as a material inducement for 47 East to enter into the Lease with BridgeStreet, including, among other things, causing all leases to have minimum terms of six consecutive months (*id.*, § 8.2). Section 3.1 of the Lease expressly states that BridgeStreet shall use the premises for permitted uses only, and that, upon notice of any other

use that causes the building to be in violation of any statutory or regulatory requirements or any use that violates Section 8.2 of the Lease, BridgeStreet shall immediately discontinue such use. In 2014, the New York State Office of the Attorney General (**OAG**) commenced an investigation into the Building's 421-a tax benefits (Complaint, ¶ 17). The OAG alleged that the Building was being operated as a "hotel" in that BridgeStreet had been leasing units for terms of less than six months (*id.*). On February 18, 2015, 47 East entered into an Assurance of Discontinuance (**AOD**) with OAG, pursuant to which 47 East was required to repay all of the taxes for which it had been exempted under the 421-a program since the date on which 47 East acquired the Building (*id.*, ¶ 18; NYSCEF Doc. No. 151). Specifically, the AOD concludes that, by renting units for periods of less than six months, BridgeStreet was effectively "operat[ing] an extended-stay hotel at [the Building]" in violation of Section 421-a of the Real Property Tax Law and Chapter 6 of Title 28 of the Rules of the City of New York (NYSCEF Doc. No. 151, ¶¶ 30-34). 47 East agreed to pay $4,446,153 to the City of New York pursuant to the AOD, as well as $275,000 to cover the OAG's investigations expenses (Complaint, ¶ 21). 47 East also alleges that it incurred in excess of $600,000 in attorneys' fees and costs in connection with the OAG investigation (*id.*, ¶ 22).

BridgeStreet's Lease expired on March 11, 2015, but it did not fully vacate the Building until March 17, 2015 (*id.*, ¶ 23). 47 East asserts that BridgeStreet failed to pay rent for the period of March 1, 2015 through March 17, 2015 and failed to pay required holdover charges for that period pursuant to Section 23.2 of the Lease totaling $242,204.86 (*id.*, ¶¶ 23, 25). Moreover, 47 East alleges that, despite BridgeStreet's obligations to maintain and repair the Building during its tenancy pursuant to Section 7.1 of the Lease, the Building was not maintained in the required

state of repair (*id.*, ¶¶ 26-27). Specifically, 47 East alleges that several required inspections, including boiler inspections and Local Law 87 inspections, had not been completed as required, and 47 East had to incur the added expenses of performing the required inspections and making all necessary repairs (*id.*, ¶¶ 26-27). In addition to reimbursement for its loss of 421-a tax benefits, 47 East asserts that BridgeStreet is required to reimburse 47 East for the costs of the inspections and repairs incurred as a result of BridgeStreet's default pursuant to Sections 21.1 and 21.2 of the Lease (*id.*, ¶ 28).

PROCEDURAL HISTORY

47 East commenced this action by filing a summons and complaint on October 5, 2015 (NYSCEF Doc. No. 122). 47 East asserted causes of action for breach of contract, indemnification, unjust enrichment, and declaratory judgment (*id.*, ¶¶ 29-49). BridgeStreet moved to dismiss the complaint pursuant to CPLR §§ 3211 (a) (1) and (7). By Order dated April 20, 2016, the Court (Ramos, J.) denied the motion (NYSCEF Doc. Nos. 24, 25). BridgeStreet filed its answer on May 23, 2016 (NYSCEF Doc. No. 28). BridgeStreet's motion for partial summary judgment and 47 East's cross-motion for summary judgment are now before the court.

DISCUSSION

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a

matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). Failure to make such a *prima facie* showing requires denial of the motion (*id.,* citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

Breach of Contract

BridgeStreet moves for summary judgment dismissing 47 East's breach of contract cause of action for lost tax benefits. To prevail on a cause of action for breach of contract, the plaintiff must establish: (i) the existence of a contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). A clear and complete document setting forth an agreement should be enforced according to its terms (*Gladstein v Martorella*, 71 AD3d 427, 429 [1st Dept 2010]). Extrinsic evidence is not admissible where an agreement is clear and unambiguous on its face (*id.*). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*id.*, citing *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). A merger clause in a contract that specifically proscribes all oral agreements precludes reference to any other alleged agreements between the parties not reduced to writing in the contract (*Torres v D'Alesso*, 80 AD3d 46, 57 [1st Dept 2010]).

In this case, 47 East has met its burden in establishing its entitlement to judgment as a matter of law on its cause of action for breach of contract. Based on the evidence put forth by 47 East,

there are no triable issues of material fact as to the existence of the Lease, 47 East's performance under the Lease by leasing the units to BridgeStreet according to its terms, BridgeStreet's breach by, among other things, writing leases for terms shorter than six months and failing to make certain repairs, and resulting damages, including a substantial tax liability and the costs of building repairs. The language of the Lease is clear and unambiguous. The Lease required BridgeStreet to operate in compliance with the rules of the 421-a program and specifically required BridgeStreet to write leases for terms not less than six months as a material inducement to 47 East entering into the Lease (Lease § 8.2). BridgeStreet admits that it regularly wrote short-term corporate housing leases for terms of less than six months (Answer, ¶¶ 2, 16, 32; Worker Aff. ¶ 3). In fact, a former employee of BridgeStreet, Walter F. Dembiec, Jr., testified during his deposition that BridgeStreet routinely leased units in the Building for less than thirty days, and that he did not recall writing a single lease for a term of six months or more as required under the Lease (Dembiec Tr. 144:3-148:2).

To the extent that BridgeStreet relies on prior discussions or agreements between the parties to suggest that 47 East was aware of and implicitly allowed or acquiesced to BridgeStreet's practice of engaging in short term rentals for less than six months, reference to any such agreements or discussions is precluded by the clear and unambiguous language of the Lease and, in particular, the merger clause, which expressly states that the Lease constitutes the "entire agreement" of the parties and supersedes all prior negotiations and agreements (Lease § 32.4). But even if the court were to consider extrinsic evidence as to the understanding of the parties outside of the four corners of the Lease itself, the deposition testimony of BridgeStreet's General Counsel, Alicia Kabiri, who negotiated the Lease for BridgeStreet, demonstrates that BridgeStreet knew that its

failure to write six-month leases would be a breach of the Lease and would run afoul of 421-a eligibility requirements. Specifically, Ms. Kabiri testified that she understood at the time that the Lease was executed that failure to write leases for minimum terms of six months was considered to be a "prohibited use" under the Lease (Kabiri Tr. 101:17-25, 102:1-4), and that she instructed BridgeStreet employees charged with negotiating leases that all leases had to be for terms of at least six-months (*id.*, 207:22-25, 208:1-8). The evidence demonstrates that BridgeStreet was fully aware of the Lease's requirements, understood them, and knowingly breached them.

47 East also submits the AOD, which sets forth the OAG's written findings of its investigation of the Building's 421-a tax eligibility (NYSCEF Doc. No. 151). The OAG's report makes it abundantly clear that it was BridgeStreet's conduct in writing short-term leases that caused the Building to fall out of compliance with the 421-a program requirements. The OAG's report states that, beginning on September 30, 2009, "BridgeStreet operated an extended-stay hotel at the 47 East 34th Street property" and that it "rented units at the property for periods of less than six months" (*id.*, ¶ 30). The OAG found that "[47 east]'s foregoing conduct . . . violates Section 421-a of the Real Prop. Tax Law, and Chapter 6 of Title 28 of the Rules of the City of New York" (*id.*, ¶ 34).

BridgeStreet argues that, even it if it had not breached the Lease by writing leases for terms of less than six months, 47 East would still have lost its 421-a tax benefits because 47 East was aware that writing six month "freely cancelable" leases, as the parties allegedly contemplated, would have no impact on the actual length of BridgeStreet's tenants' occupancies. This argument misses the point. Any building used as a hotel is ineligible for tax abatements under

the 421-a program (28 RCNY 6-02 [c] [3]). The definition of "hotel" for the purposes of the 421-a program includes "any structure or part thereof which is used to provide short term rentals or owned or leased by an entity engaged in the business of providing short term rentals" (28 RCNY 6-01 [c]). A "short term rental" includes "a lease, sublease, license or any other form of rental agreement for a period of less than six months" (*id.*). Thus, the issue of whether a building's use meets the definition of a hotel focuses on the terms of the rental agreements themselves, not on the actual length of each occupant's stay. In other words, if BridgeStreet had written leases for minimum terms of six months—irrespective of whether those leases were cancelable without penalty—those leases presumably would not constitute short-term rentals and would not have caused 47 East to run afoul of the 421-a program's eligibility requirements. For this reason, BridgeStreet's argument that 47 East cannot establish causation because the Building would have lost its 421-a exemption even if BridgeStreet had not breached the Lease fails.

As to 47 East's claimed damages for unpaid rent and building repairs, BridgeStreet does not dispute the amount due for unpaid rent, but 47 East has failed to offer sufficient proof in admissible form in support of the damages it seeks for building repairs. 47 East submits a demand letter, dated May 28, 2015, but provides no supporting documentation regarding the amount of back rent. 47 East submits a spreadsheet setting forth proposals for repairs, (Schenker Reply Aff., Exhibits D, E), but submits no evidence regarding whether such costs were actually incurred. The demand letter references $65,000 for "possible" elevator repairs (NYSCEF Doc. N0. 194). 47 East submits a proposal to complete the elevator repair work, dated April 15, 2015, by City Elevator, for the price of $70,800 (NYSCEF Doc. No. 204). The proposal is not signed by City Elevator or 47 East, however, and there is no evidence that 47 East actually paid this

amount. And by 47 East's own admission as reflected in its notes on the spreadsheet, it is unclear whether such repairs were necessary and whether the condition of the elevator was a construction defect not attributable to BridgeStreet (Schenker Reply Aff., Exhibit D). There is also an issue of fact regarding whether the claimed repairs fall into the category of capital repairs for which 47 East would be responsible under Section 7.1 of the Lease. There is simply no evidence in the record on this point. Accordingly, there are issues of fact regarding the amount of damages to which 47 East is entitled for building repair costs and related expenses.

Indemnification

Section 30.1 (a) of the Lease requires BridgeStreet to indemnify 47 East against any and all losses that 47 East may suffer as a result of, *inter alia*, any default by BridgeStreet in its performance of any provision of the Lease. 47 East has established that BridgeStreet defaulted on its obligations under the Lease by writing short-term leases for terms of less than six months. 47 East has also established that it incurred losses as a result of BridgeStreet's breach including lost 421-a tax benefits, the costs and expenses of the OAG investigation that 47 East was compelled to pay, and 47 East's attorneys' fees and costs incurred in connection with the OAG investigation. These costs constitute a "loss" as defined in Section 30.1 (c) of the Lease. Accordingly, there are no triable issues of material fact as to 47 East's entitlement to indemnification pursuant to Section 30.1 of the Lease.

To the extent that BridgeStreet argues that it was entitled to notice of the Attorney General's investigation and the right to direct and control the defense, this argument is unavailing for two reasons. First, 47 East seeks indemnification pursuant to Section 30.1, which does not contain a

notice requirement. Further, even if Section 30.2 were the operative section of the Lease, this section does not confer an unqualified right to control the defense. Rather, Section 30.2 provides that the indemnifying party is obligated to defend against any claim, action, or proceeding "upon demand by the indemnified party." The right to direct and control the defense is only implicated if the indemnified party makes a demand for the indemnifying party to resist or defend the action, and there is no evidence in the record that any such demand was made in this case. Therefore, 47 East is entitled to summary judgment on its cause of action for indemnification.

Unjust Enrichment

In light of the foregoing, BridgeStreet's motion for summary judgment dismissing 47 East's cause of action for unjust enrichment is denied as moot.

Declaratory Judgment

47 East is entitled to a declaration that 47 East is entitled to receive (1) indemnification and/or reimbursement from BridgeStreet for $4,446,153 in lost tax benefits, (2) as well as the costs, expenses, and other losses that 47 East incurred in connection with the OAG investigation including the sum of $275,000 that 47 East was compelled to pay the OAG, (3) reimbursement of all costs that 47 East incurred in carrying out the inspections and making the repairs that were the responsibility of BridgeStreet, (4) payment of all fixed rent and holdover charges in the amount of $242,204.86 and (5) reasonable attorneys' fees and disbursements.

Accordingly, it is

ORDERED that BridgeStreet's motion for partial summary judgment is denied in its entirety; and it is further

ORDERED that 47 East's cross-motion for summary judgment is granted as to the first cause of action for breach of contract with regard to liability, granted as to the second cause of action for indemnification with regard to liability, granted as to the fourth cause of action for declaratory judgment, and as to the third cause of action for unjust enrichment, the motion is denied as moot; and it is further

ORDERED that this matter is referred to a Special Referee to hear and determine on the issues regarding the total amount of damages to which 47 East is entitled, which shall include the undisputed sum of $4,446,153 in taxes that 47 East was required to pay to the City of New York for its improper receipt of 421-a tax abatements, the undisputed sum of $275,000 that 47 East was compelled to pay the OAG, the undisputed sum of $242,204.86 in unpaid rent and holdover charges, together with building inspection and repair costs and related expenses and the amount of reasonable attorney's fees and disbursements in connection with the foregoing; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ADJUDGED and DECLARED that 47 East is entitled to receive (1) indemnification and/or reimbursement from BridgeStreet for $4,446,153 in lost tax benefits, (2) as well as the costs, expenses, and other losses that 47 East incurred in connection with the OAG investigation including the sum of $275,000 that 47 East was compelled to pay the OAG, (3) reimbursement of all costs that 47 East incurred in carrying out the inspections and making the repairs that were the responsibility of BridgeStreet, (4) payment of all fixed rent and holdover charges in the amount of $242,204.86 and (5) reasonable attorneys' fees and disbursemets; and it is further

ORDERED that 47 East's motion to strike the affidavit of Sean Worker and BridgeStreet's Rule 19-A statement is denied as moot.

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7/12/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE