

Walsam 316, LLC v 316 Bowery Realty Corp.

2023 NY Slip Op 31780(U)

May 25, 2023

Supreme Court, New York County

Docket Number: Index No. 153318/2017

Judge: Margaret Chan

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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

Plaintiff,

- v -

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

Defendant.

INDEX NO. 153318/2017

MOTION DATE 04/15/2023,
 04/16/2023,
 07/02/2023

MOTION SEQ. NO. (MS) 014 015
 016

**DECISION + ORDER ON
 MOTION**

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 795, 796, 797, 803, 804, 805, 806 were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 015) 798, 799, 800, 801, 802, 807 were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 016) 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819 were read on this motion to/for HEARING

The above-captioned plaintiffs (collectively, Walsam) commenced this action concerning a building at 4-6 Bleecker Street in Manhattan. The background of this matter has been addressed at length multiple times (NYSCEF #'s 187, 653, 723) and is omitted here. Briefly stated, the motions here are connected to an overcharge proceeding brought by residential tenants against defendants 316 Bowery Realty Corp. (316 Bowery) and Walsam. The residential tenants prevailed and this resulted in a settlement among the defendants whereby 316 Bowery paid \$1.35 million over the indemnification cap that it had negotiated with Walsam (NYSCEF # 681 – 2014 PSA, § 14.1). 316 Bowery's various amended counterclaims sought to recover the excess. This court's decision (MS 012) dated April 8, 2022, found that 316 Bowery voluntarily settled without a right to reimbursement from Walsam for the excess under the terms of the parties' agreement (NYSCEF # 727 at 3-4; see NYSCEF # 779 – Settlement Agreements).

In that prior motion (MS 012), 316 Bowery moved for (i) leave to amend its counterclaims and (ii) partial summary judgment dismissing Walsam's second cause of action. The court denied 316 Bowery's motion, except for two amended counterclaims that Walsam did not oppose (NYSCEF # 727 – the April 8 decision).

In MS013, 316 Bowery moved for reargument as to its motion for leave to amend its answer to add amended counterclaims seeking to recover \$1.35 million on the basis that such funds exceeded an indemnification cap it had negotiated with Walsam. The court had denied the motion in the prior motion because, among other reasons, the court had no opportunity to then consider, on 316 Bowery's motion to reargue, a certain statement of Walsam's that 316 Bowery improperly raised for the first time in reply (NYSCEF # 775 – the December 12 decision at 4).

Now in MS014, 316 Bowery moves for renewal based on that certain statement of Walsam's that was ignored in the previous motion. And in MS015, 316 Bowery seeks to strike Walsam's opposition to MS014 as being untimely. Walsam opposes both motions.

Finally, in MS016, 4-6 Bleecker Street, LLC (Bleecker) seeks an immediate trial or hearing, by appointment of a referee, to calculate damages, attorneys' fees, and costs. The motion is unopposed.

MS015 – Motion to Strike

316 Bowery moves for an order pursuant to CPLR 3024 (b) striking Walsam's untimely opposition for MS014 and, upon doing so, granting the relief sought in MS014 as unopposed. The original return date for MS014 was January 17, 2023, but it was extended to February 7, 2023. Walsam filed its opposition on February 6, 2023, one week past the extended deadline the court set (NYSCEF # 801).

CPLR 3024 (b) provides: "A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." 316 Bowery asserts that Walsam's "untimely submission unquestionably prejudiced 316 Bowery's ability to address said arguments on reply" (NYSCEF # 799, ¶ 13). 316 Bowery has nonetheless filed a reply in MS014 (NYSCEF # 803), which Walsam consents to the court considering (NYSCEF # 807, ¶ 4). Walsam argues: "the Court's discretion to grant an extension of time after the passing of the deadline is established by CPLR § 2004, especially where, as here, the delay is brief; there is no claim that the substance of my opposition lacks merit; there was no willful default; and any claimed prejudice (which arises solely from Bowery's claimed deprivation of a reply it did not reserve) can be readily ameliorated" (*id.*, ¶ 5).

316 Bowery's motion to strike is denied. The court accepts Walsam's excuse as sufficiently reasonable and, given that the court will consider 316 Bowery's reply, rejects the argument that it has been prejudiced (*compare Mosheyeva v Distefano*, 288 AD2d 448 [2d Dept 2001] [supreme court improvidently exercised discretion in accepting untimely opposition where it also rejected reply]).

MS014 – Motion for Renewal

316 Bowery bases its renewal motion on a statement made by Walsam that “316 Bowery paid \$1.6 million subject to a reservation of right to claw back from Walsam all payments in excess of the \$250,000” (NYSCEF # 778 – MS014 Affirmation in Support, ¶ 2, quoting NYSCEF # 784 – Copy of Walsam’s Amended Complaint in their action against non-party Rosenberg & Estis, P.C. (R&E), ¶ 100). 316 Bowery argues: “this new admission of fact is remarkable insomuch as Walsam (now) agrees with 316 Bowery that the reservation of rights provisions in the Settlement Agreement enables it to claw back all payments made to settle the Overcharge Proceeding in excess of the \$250,000 limitation in the 2014 PSA . . . *i.e.*, \$1,350,000.00” (NYSCEF # 778, ¶ 19 [emphasis in original]). 316 Bowery adds that its motion to renew only became ripe when Walsam filed its Amended Complaint on December 19, 2022, after 316 Bowery’s prior motion to reargue (*id.*, ¶ 20; 42).

In opposition, Walsam argues that the Amended Complaint, against prior counsel R&E, and being “unverified and drafted by counsel who had no involvement in negotiating and drafting the agreements that are the subject of the instant motion, naturally recited as an item of damages [316] Bowery’s claim, still not finally disposed of, to claw back the \$1.35 million it paid above the \$250,000 indemnification cap” (NYSCEF # 795 – MS014 Opp, ¶ 4). Walsam asserts that “it is difficult to see how the allegation could have been made based on actual knowledge rather than information and belief – and, had the allegation been made on information and belief, it would simply be entirely inadmissible” (*id.*, ¶ 8). Walsam continues that the parties’ agreement did not “‘expressly reserve’ anything [beyond a declaratory judgment claim] – and certainly not the right to ‘claw back’ payment” (*id.*, ¶ 7). And Walsam maintains that “whatever significance [316] Bowery may wish to attach to a statement by counsel in an unverified pleading . . . that admission remains inadmissible parol evidence. . . . And while a statement contained in an unverified pleading in a separate action may constitute an informal judicial admission, such an informal admission is neither conclusive nor immune from exclusion under the parol evidence rule” (*id.*, ¶ 8).

In reply, 316 Bowery asserts: “Had there been any doubt as to the accuracy of this critical factual admission, Walsam would have pled same ‘upon information and belief’ or removed this admission entirely from its operative pleading in the R&E Malpractice Action. Walsam’s failure to do so, however, underscores its current acknowledgment and concession” (NYSCEF # 803, ¶ 8). 316 Bowery also points out that Walsam’s statement is located in the Amended Complaint in a section titled “Factual Allegations” (*id.*, ¶ 9 citing NYSCEF # 784 at 4).

CPLR 2221 (e) (2) and (3) provide that a motion to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion.” A motion for renewal “is intended to draw the court’s attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore

not brought to the court's attention" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). At the same time, it has been held that renewal "may sometimes encompass new matter that was not available prior to the court's decision" (*Haenel v November & November*, 144 AD2d 298, 299 [1st Dept 1988] [internal citations omitted]).

316 Bowery's motion to renew is denied as it has not shown that Walsam's statement would change the court's prior determination. Even accepting for argument's sake that the statement constitutes an informal judicial admission, still 316 Bowery fails to explain why such parol evidence should be considered in interpreting the parties' agreement. Instead, 316 Bowery claims that Walsam's reference to the parol evidence rule "makes no sense, considering that Walsam's admission . . . is a new fact that was unavailable when the Prior Motion was filed" (NYSCEF # 803, ¶ 16). This misses the point; whether the statement is a new fact such that it may be considered on a motion to renew does not address the parol evidence issue.

In MS013, the court previously rejected 316 Bowery's motion to reargue focused on its subjective intentions as to the right to claw funds back: "against the court's analysis of the objective language of the contract, 316 Bowery fails to establish the relevance of extrinsic evidence respecting 316 Bowery's expectations (*see Ashwood Cap., Inc. v OTG Mgmt., Inc.*, 99 AD3d 1, 6 [1st Dept 2012] ["in order to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it"])" (NYSCEF # 775 at 4). In light of the court's prior analysis of the terms within the four corners of the contract, 316 Bowery's attempt "[o]nce again" to rehash its interpretation of the "plain language in the subject reservation of rights provisions in the Settlement Agreements" (NYSCEF # 803, ¶ 16) is unavailing, notwithstanding Walsam's new statement. Furthermore, 316 Bowery does not respond to Walsam's charge that "the proposed counterclaims themselves, for all the reasons set forth in previous submissions and in the Court's previous decisions, do not even set forth cognizable claims," for instance that "Money Judgement" is not a cause of action but a prayer for relief (NYSCEF # 795, ¶ 9).

MS016 – Motion for Immediate Trial/Hearing on Damages

Bleecker asserts that "Walsam's liability having been already established by this Court and the Appellate Division, Bleecker is entitled to damages, including but not limited to rent overcharge and attorneys' fees associated with this action, as well as the related tenant commenced rent overcharge action" (NYSCEF # 811 at 4). Bleecker ties its right to attorneys' fees to Section 10.9 of the 2012 Purchase and Sale Agreement (*id.* at 3 citing NYSCEF # 814 at 28-29 ["In the event of any litigation between the parties hereto with respect to their rights and obligations hereunder, reasonable attorneys' fees and costs of the party successful in such action will be borne by the party which is the losing party in such litigation"]).

CPLR 3212 (c) provides: “If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when of appropriate for the expeditious disposition the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.”

There is no opposition, and the court grants Bleecker’s motion, with damages to be heard and reported on by a Special Referee.

Conclusion


In light of the foregoing, it is

ORDERED that motion sequence 014 of 316 Bowery Realty Corp. for renewal is denied; and it is further

ORDERED that motion sequence 015 of 316 Bowery Realty Corp. to strike certain opposition is denied; and it is further

ORDERED that motion sequence 016 of 4-6 Bleecker Street LLC for an immediate trial or hearing is granted and the issue of the amount of damages, reasonable attorneys’ fees, and reasonable costs that 4-6 Bleecker Street LLC may recover against Walsam 316, LLC, Walsam 316 Bowery LLC, Walsam Bleecker LLC, Lawber Bowery LLC, and 316 Bowery Next Generation LLC is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for 4-6 Bleecker Street LLC 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,¹ upon the Special Referee Clerk, who is directed to place the matter on the calendar of the Special Referee’s Part for the earliest convenient date.

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| <u>05/25/2023</u> DATE |  MARGARET CHAN, J.S.C. | | | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> GRANTED | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> SUBMIT ORDER | <input checked="" type="checkbox"/> REFERENCE |
| | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> FIDUCIARY APPOINTMENT | |

¹ Bleecker may find a copy of the Information Sheet at <https://ww2.nycourts.gov/courts/ljd/supctmanh/References.shtml>
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