SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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EASTERN EFFECTS, INC.,

Plaintiff,

- v -

3911 LEMMON AVENUE ASSOCIATES, LLC,ESBOND REALTY LLC,EPONYMOUS GOWANUS, LLC,GOWANUS CANAL ENVIRONMENTAL REMEDIATION TRUST #2

Defendants.

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INDEX NO. 652152/2022

MOTION DATE 12-12-24

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229

were read on this motion to/for LEAVE TO FILE.

The plaintiff, a film and television production company and former commercial tenant of the defendant entities, seeks money damages and other relief for breach of a settlement agreement arising from a dispute over the lease. The defendants now move pursuant to CPLR 3025(b) to amend their answer to add two counterclaims.

The action was commenced in May of 2022, and an amended complaint was filed the following month, alleging causes of action for breach of contract, fraudulent inducement and conversion of property. Discovery has been ongoing and motion practice conducted for more than two years. The preliminary conference was held on January 6, 2023, and the Note of Issue filing deadline was set as October 6, 2023. After several extensions, in a status conference order dated October 3, 2024, this court set the Note of Issue deadline as January 7, 2025, and, in light of extensive unexcused delays by the parties, directed them to complete all remaining discovery by December 23, 2024.

By way of background, the plaintiff maintains that it had been excluded from the leased premised on September 3, 2021, with only three days' notice for structural integrity issues caused by the defendants' own construction work, not by any event covered by the lease terms, and that the defendants thereafter re-leased the premises to another tenant at higher rent and with the added benefit of a tax exemption. In the meantime, the parties had entered into a Settlement Agreement, which was signed on September 15, 2021, provided for a rent

abatement during the construction period, which was expected to continue until February of 2022, and required the defendants to indemnify the plaintiff for any damage caused during the construction. The plaintiff vacated the premises and moved operations to another location, planning to return. However, on January 31, 2022, the defendants unilaterally terminated the lease, claiming, without proof, that experts had found the entire property to by untenantable when only a small portion was impacted. At that point, there were 29 months left on the lease. The plaintiff was not compensated for its business interruption through the Gowanus Canal Environment Remediation Trust #2, which was established by the Settlement Agreement for that purpose, and claims to have suffered additional losses, totaling $7 million. While the action was pending, and after a TRO was vacated, the defendants demolished the building which was on property near the Gowanus Canal in Brooklyn, alleging that contaminants rendered it untenantable.

In an order dated April 27, 2023, the court (Ostrager, J. [Ret.]) dismissed the defendants' counterclaim for declaratory relief as it was merely an argument in opposition to the plaintiff's breach of contract claim but left the second counterclaim for contractual attorney's fees (MOT SEQ 005). In an order dated January 23, 2024, the Appellate Division, First Department, modified a prior order of Justice Ostrager and reinstated a breach of contract claim as against defendant Gowanus Canal Environment Remediation Trust #2 (MOT SEQ 003).

The defendants now move pursuant to CPLR 3025(b) to amend their answer to add two counterclaims, alleging fraud and abuse of process by the plaintiff in commencing this action and in making false representations and omissions in its motion to enjoin the demolition (which took place after the TRO was vacated) and in certain letters to the court (which are not considered per Part Rules). The defendants assert that they had only recently "become aware of evidence giving rise to" those claims, after taking the depositions of the two co-owners of the plaintiff (MOT SEQ 009). The plaintiff opposes. The motion is denied.

It is well settled that leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013); Cherebin v Empress Ambulance Serv., Inc., 43 AD3d 364, 365 (1st Dept. 2007). A court "must examine the merit of the proposed amendment in order to conserve judicial resources." 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552, 553 (1st Dept. 2011). Therefore, "leave to amend will be denied where the

proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law." Davis & Davis v Morson, 286 AD2d 584, 585 (1st Dept 2001) (internal citations omitted). Moreover, "where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay." Oil Heat Inst. of Long Island Ins. Tr. v RMTS Assocs., LLC, 4 AD3d 290, 293 (1st Dept. 2004) (internal quotation marks omitted). Conversely, the burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015).

The defendants have not met their burden on the motion, while the plaintiff has met its burden of establishing prejudice, as set forth in the plaintiff's opposition papers. Although in their memorandum of law the defendants recite the elements of the two proposed counterclaims, no *prima facie* cause of action of either claim is demonstrated in the supporting papers. The defendants rely upon references to unspecified portions of deposition testimony of the plaintiff's two owners in their memorandum of law which, they aver, show that the plaintiff fabricated financial documents and made false representations in order at obtain rent abatements as per the parties' Settlement Agreement and in order to obtain the TRO. This falls far short of establishing "a material misrepresentation of a fact, and knowledge of its falsity, an intent to induce reliance, and justifiable reliance by the plaintiff and damages.'" Epiphany Community Nursery Sch. v Levey, 171 AD3d 1, 8 (1st Dept. 2019) *quoting* Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009). As noted by Justice Ostrager in his order dated November 29, 2022 (MOT SEQ 002, 003), the parties' Settlement Agreement includes a merger clause wherein the parties "disclaimed reliance on any representations made outside the four corners of the Agreement." Nor do the defendants demonstrate any abuse of process in the commencing of this action or at any time in the course of the litigation, as that claim requires "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." Curiano v Suozzi, 63 NY2d 113, 116 (1984) *citing* Board of Educ. v Farmingdale Classroom Teachers Assn., 38 NY2d 397 (1975). Indeed, the plaintiff successfully obtained a TRO after a review of its papers by the court, and has alleged viable claims against the defendants, at least as to the breach of contract claims.

Essentially, the defendants' proposed counterclaims are patently meritless, unsupported by detail as required, and, as best can be discerned, arise from the same set of facts as the

breach of contract claim, much like the defendants' counterclaim seeking declaratory relief which was dismissed by Justice Ostrager in early 2023. The court presumes that its "determination of the breach of contract claim will 'sufficiently guide the parties on their future performance of the contract[ ], thereby obviating any need for' other alternative relief." 204 Columbia Hgts., LLC v Manheim, 148 AD3d 59, 70-71 (1st Dept. 2017), *quoting* Apple Records v Capitol Records, 137 AD2d 50, 54 (1st Dept. 1988). Further, "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Dormitory Authority v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted). No such showing was made.

Moreover, even if the proposed counterclaims had merit, they are being asserted after more than two years of discovery, with delays occasioned largely by the defendants, and just weeks before the final Note of Issue filing deadline. Nor are the delays in taking the two depositions, as reflected in the court's discovery conference orders, adequately explained or justified by defendants. To allow this amendment at this juncture would unduly prejudice the plaintiff, add yet a further delay in the litigation and constitute a waste of judicial resources.

The parties are encouraged to explore settlement.

Accordingly, upon the foregoing papers and this court's prior orders, it is

ORDERED that the defendants' motion to amend (MOT SEQ 009) is denied, and it is further

ORDERED that counsel shall appear for the final status conference on December 19, 2024, at 11:00 a.m., as previously scheduled.

This constitutes the Decision and Order of the court.

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12/12/2024
DATE

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