SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: **HON. JENNIFER G. SCHECTER** **PART 54**

Justice

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630 WEST 52ND LLC,

Plaintiff,

- v -

FRESH INVENTORY SERVICES, LLC,

Defendant.

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INDEX NO. 654862/2024

MOT SEQ NOS 004 005

DECISION + ORDER ON MOTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 89, 90, 91, 92, 93, 98, 99, 110, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 100, 101, 102, 103, 104, 105, 106, 107, 109, 111, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for DISQUALIFY COUNSEL.

Pursuant to CPLR 3025(b), plaintiff moves for leave to file an amended complaint. Defendant moves to disqualify plaintiff's counsel. Plaintiff's motion is granted in part and defendant's motion is denied.

Leave to Amend

The proposed amendments (1) add allegations for DOB violations between 2023 and 2025 and associated fines; (2) assert defendant's failure to maintain the passenger elevator at the premises; (3) add a claim relating to defendant's alleged failure to install a water meter or submeter under Section 28 of the lease; (4) replace the existing declaratory-judgment claim with a request for specific performance relating to insurance policies, pest-control plans, water-meter installation, Con Edison bills and other continuing obligations; and (5) reduce plaintiff's damages demand to approximately $140,000 (*see* Dkt. 93 at 7, 9; *see also* Dkt. 92 at 2).

Defendant opposes, arguing that the amendments are futile, time-barred and barred by res judicata and collateral estoppel based on the dismissal of the parties' prior 2022 action on

March 19, 2024, and further contends that specific performance is improperly pleaded (Dkt. 19).

CPLR 3025(b) provides that leave to amend "shall be freely given" unless the proposed amendment lacks merit, is palpably insufficient or would cause prejudice or surprise (*see Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]). Challenges based on res judicata, statute of limitations or futility may be raised, but the opponent bears a heavy burden (*see McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

Where an earlier action was dismissed on the merits, claims that were or could have been raised in the prior action are barred (*Matter of Hunter*,4 NY3d 260, 269-70 [2005]; *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). However, claims based on conduct occurring after the earlier judgment are not precluded, particularly where the contractual duties are continuing (*see Indosuez Intl. Fin. v National Reserve Bank*, 304 AD2d 429 [1st Dept 2003]).

Allegations regarding DOB violations between 2023 and 2025 and associated fines

The DOB violations now at issue all accrued between 2023 and 2025 (Dkt. 92 at 11-13). To the extent that the violations were issued after the adjudication of the prior action (March 19, 2024), those amendments are permitted (*Matter of Hunter*, 4 NY3d at 269 [res judicata "applies not only to claims actually litigated but also to claims that *could have been raised* in the prior litigation"] [emphasis added]; *see* Dkt. 90 at § 7). Alleged violations of the lease occurring after the prior action's adjudication are new alleged breaches. Res judicata does not bar claims based on conduct occurring after the prior adjudication.

Defendant's argument that responsibility for the passenger elevator was resolved in the 2022 action does not change the result. The prior case addressed defendant's alleged duty to "repair and replace the Building's nearly 100-year old passenger elevator . . ." (Dkt. 37 at 14). It did not adjudicate liability for future maintenance, future DOB compliance or violations issued years later (*see generally City of New York v Welsbach*, 9 NY3d 124, 127-28 [2007]). Even if defendant's submissions, such as the 2020 email, creates an issue regarding which party performed and was responsible for maintenance, the issue is factual and cannot establish futility on a motion to amend (*see* Dkt. 120).

Accordingly, the amendments relating to maintenance and DOB violations are not futile and are permitted provided they are expressly limited to violations issued after March 19, 2024, the date of dismissal of the 2022 action and are otherwise denied.

Water Meter, Submeter and § 28 of the Lease

Plaintiff alleges that defendant breached the lease by failing to install a water meter or submeter to measure its water consumption in the building pursuant to § 28 of the lease (Dkt. 92 at ¶¶ 53-57, Dkt. 88 at § 28). The lease requires defendant to install and maintain a water meter. If defendant failed to do so in 2015, that initial breach accrued at the lease's inception and is therefore time barred by the six-year statute of limitations for contract claims (*Marcal Fin. SA v Middlegate Sec. Ltd.*, 203 AD3d 467, 468 [1st Dept 2022]; *Henry v Bank of Am.*, 147 AD3d 599, 601-02 [1st Dept 2017] [where a plaintiff asserts a single breach with damages increasing as the breach continued the continuing wrong theory does not apply]). As the issue existed and could have been litigated in the prior action, it is also barred by res judicata. Here, the alleged wrong is failing to install a water meter in 2015. The monthly billings and fees that plaintiff alleges it has paid represent the consequences of that wrongful act in the form of continuing damages, not the wrong itself; thus, the continuing-wrong doctrine is inapplicable.

However, plaintiff also alleges that water charges continue to accrue and that defendant's ongoing failure to meter and pay its usage results in new, discrete damages each billing cycle. Where a contract imposes recurring performance obligations, such as paying for water obligations 20 days from when bills are received, each failure may constitute a separate breach with a separate limitations period (Dkt. 88 at § 28; *see Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 435 [1st Dept 2010]).

Therefore, the amendment is granted only to the limited extent of water usage periods after March 19, 2024.

Specific Performance

Defendant argues that specific performance is not a standalone cause of action, but rather a remedy for breach of contract. While specific performance is indeed a remedy, New York courts allow a "cause of action" labeled as such if it is, in substance, a request for equitable relief based on an underlying breach of contract (*see Cho v 401–403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]).

Here, plaintiff alleges that the lease obligates defendant to provide insurance policies, pest control plans and other operating records and that defendant failed to do so (Dkt. 92 at 20; Dkt. 88 at §§ 4[d], 8). These allegations state a viable underlying contract claim tied to a proper request for equitable relief. Whether defendant has since produced some or all insurance documents is a question of fact not resolvable on this motion.

Accordingly, leave to amend to include a request for specific performance is granted subject to the limitation that the breaches alleged must postdate March 19, 2024.

Attorneys' Fees

Defendant's argument that plaintiff cannot seek fees because it has not yet prevailed is premature and the amendment is permitted.

Prejudice

Defendant identifies no showing of prejudice, surprise, or inability to conduct discovery. Discovery remains open and the amendments narrow plaintiff's damages and clarify claims the court already held remained viable after partial summary judgment.

Motion to Disqualify

Defendant moves to disqualify plaintiff's counsel on the ground that Akerman LLP (Akerman) maintains a conflict arising from its representations of nonparty Fresh Direct, LLC (Fresh Direct), an affiliate of defendant.

The motion fails at the outset because defendant was never a client of Akerman. New York law is clear that only a current or former client has standing to seek disqualification on conflict grounds (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]). The record, including sworn affirmations from Akerman, establishes that Akerman has never represented defendant in any capacity (Dkt. 132 at ¶¶ 2-3; Dkt. 126; Dkt. 125 at ¶ 3). Defendant attempts to manufacture standing by relying on its corporate affiliation with Fresh Direct, but corporate affiliation, without more, does not transform an affiliate into a client (*see Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 13 [1st Dept 2016], *affd* 31 NY3d 1002 [2018]; *see also Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123 [1996]). This conclusion is reinforced by the February 24, 2025 engagement letter between Fresh Direct and Akerman, which expressly states that (i) Akerman's engagement was limited to a discrete matter unrelated to this litigation ("new mortgage loan with the New York City Industrial Development Agency" . . . "'[]IDA'"), (ii) the representation did not extend to any affiliate, (iii) no attorney-client relationship with affiliates was created and (iv) Akerman was permitted to act adverse to affiliates in

unrelated matters (Dkt. 135). Defendant identifies no basis upon which the court could disregard Fresh Direct's explicit agreement or collapse the corporate form to create an attorney client relationship where none existed.

Even if defendant had standing, the record does not establish that Fresh Direct was a current client when Akerman undertook the representation of plaintiff. Akerman's long running prior engagements for Fresh Direct concluded by 2022 and a formal closing letter was sent in March 2024 (Dkt. 132 at ¶¶ 7, 16-26; *see* Dkts. 133, 134). The subsequent 2025 engagement was brief, narrow, and unrelated to this dispute, which by defendant's own admission ended in April 2025 (Dkt. 132 at ¶ 23; Dkt. 104 at ¶ 12; *see* Dkts. 78, 79, 82; *see also Revise Clothing Inc. v Joe's Jeans Subsidiary, Inc.*, 687 F Supp2d 381, 389-91 [SDNY 2010] [An attorney client relationship is terminated by the accomplishment of the purpose for which it was formed in the first place]).*

Moreover, the Rules of Professional Conduct do not bar a lawyer from undertaking matters adverse to a former client absent a "substantial relationship" between the prior matter and the current litigation (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130-131 [1996]). Defendant fails to demonstrate such a relationship. The prior work for Fresh Direct concerned real estate financings and governmental approvals for unrelated properties while this action concerns alleged breaches of a commercial lease at a different premises by defendant. These are not the same transaction, nor substantially related and defendant identifies no common factual or legal issues.

Nor does the motion satisfy the requirement of showing that Akerman possesses specific, materially relevant confidential information (*Jamie v Jamie*, 309 AD2d 605, 606 [1st Dept 2003]). Defendant's assertions that Akerman acquired "highly sensitive commercial information" from Fresh Direct are generalized and speculative (Dkt. 106 at 5-7, 15; Dkt. 104 at ¶¶ 8-9, 13). The only concrete documents identified, the IDA-related term sheets and notices, were either publicly disclosed or pertain to Fresh Direct's unrelated financing arrangements (Dkt. 104 at ¶¶ 7-12; Dkt. 132 at ¶ 24). Defendant does not show how any such information could bear on the lease-compliance issues in this action. Generalized access to a former client's financial condition does not justify disqualification (*Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 632, 637-38 [1998]). That Akerman denied possessing any relevant confidential information and defendant provided no contrary evidence, further undermines the motion.

* Defendant's reliance on *Credit Index v RiskWise Intl.* is misplaced as it is clearly distinguishable. There, the court disqualified counsel from representing defendant because when its firm first appeared in the action it also represented plaintiff's majority shareholder, who though a non-party was personally involved in the litigation, which was substantially related to at least one matter on which the firm represented the shareholder in the past (192 Misc 2d 755, 764 [Sup Ct, NY County 2002], *affd* 296 AD2d 318 [1st Dept 2002]). Defendant has not come close to making such a showing here.

Defendant has not shown that Akerman ever represented defendant, has not established that Fresh Direct was a current client at the time of Akerman's engagement, has not demonstrated a substantial relationship between prior engagements and this action, and has not identified any specific, materially relevant confidential information that would be significantly harmful to it in this action (*see Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 7 [1st Dept 2015]). The extraordinary remedy of disqualification is therefore unwarranted.

Accordingly, it is ORDERED that plaintiff's motion for leave to amend is GRANTED IN PART, plaintiff shall file an amended complaint consistent with this order within one week, and the motion is otherwise DENIED.

And it is further ORDERED that defendant's motion to disqualify plaintiff's counsel is DENIED.

And it is further ORDERED that by January 13, 2026, the parties shall e-file and email the court a joint letter addressing the status of discovery and submit a stipulation with amended discovery deadlines consistent with the timeframe in place prior to the discovery stay.

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1/6/2026
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER