

Durst Can't Make Amazon Sign Lease In \$25M Contract Row

By **Stewart Bishop**

Law360, New York (June 25, 2015, 9:28 PM ET) -- A New York judge on Thursday trimmed a claim from One World Trade Center developer The Durst Organization's \$25 million breach of contract action against an Amazon.com Inc. subsidiary for backing out of a \$20 million-per-year lease, saying there's no actual lease on which to base the claim.

New York Supreme Court Judge Shirley Werner Kornreich tossed a cause of action from Durst that sought to force Amazon into signing a lease, finding a letter of intent Amazon signed doesn't compel the online retailer into executing a lease.

Durst claims Amazon agreed to exclusive negotiations for 310,000 square feet of office and commercial space at 1133 Avenue of the Americas at 44th Street in July, but secretly engaged in talks with other landlords. Amazon eventually signed a deal to rent space at 7 W. 34th St., according to the suit.

Durst spent \$1.6 million in renovation and legal fees after Amazon signed an exclusive letter of intent, preparing 10 floors of privately accessible space, according to the complaint. But Amazon blindsided Durst "at the eleventh hour by executing a commercial lease deal with a third-party landlord on the eve of lease-signing," Durst has said.

During oral arguments Thursday in a Manhattan courtroom, an attorney for Amazon sought to dismiss the case on jurisdictional grounds, arguing Durst already agreed that any litigation arising out of the deal would be litigated in Washington state. The online retailer further sought to pare down the suit, saying Durst's claims for breach of the implied covenant of good faith and fair dealing and fraud were the same as the developer's central breach of contract claim.

"They are the exact same facts, the exact same breach of duty pled, the exact same damages," Amazon attorney Kenneth A. Philbin of Greenberg Traurig LLP said. "Both are entirely duplicative of the breach of contract claims."

As for the specific performance claim that sought to compel Amazon to sign a lease, Philbin said Durst can't bind it to a lease that's not even signed.

"There is no lease unless the lease is signed by both parties," he said.

The deal between Amazon and Durst would have had Amazon lease part of the ground floor and floors two through 11 of the 44th Street building for 11 years. The rent would have been \$64 per square foot

and would have jumped to \$69 per square foot by the sixth year, according to the suit.

To meet Amazon's needs, Durst installed a private escalator on the ground floor, agreed to pay a prior tenant to move out early, put in new bathrooms and reinforced the space, Durst claims.

An attorney for Durst, Deborah Riegel of Rosenberg & Estis PC, told Judge Kornreich that the breach of the duty and fraud claims are separate from the contract claim. She said that during negotiations between Durst and Amazon, the retailer told Durst to spend money on the space, despite being in talks with another landlord.

"The breach of the good faith and fair dealing is not the same," Riegel said. "They were simultaneously negotiating with a third party and saying to my client, 'start construction and order escalators.'"

Riegel further argued the fraud claim arises from when someone at Durst called Amazon's broker and said they had heard Amazon was negotiating with someone else, and the deal between Durst and Amazon might not happen.

"The response is, 'keep going, keep spending money,'" Riegel said. "It's an affirmative misrepresentation."

Representatives for Durst and Amazon did not immediately respond to requests for comment.

Vornado Realty Trust said in November it was leasing 470,000 square feet to Amazon at the 34th Street building as part of a 17-year lease. Amazon occupies more than 92,000 square feet at 1350 Avenue of the Americas.

Amazon is represented by Daniel J. Ansell, Kenneth A. Philbin and Hal N. Beerman of Greenberg Traurig LLP.

Durst is represented by Deborah E. Riegel and Joseph Goljan of Rosenberg & Estis PC.

The case is DOLP 1133 Properties II LLC v. Amazon Corporate LLC, case number 653789/2014 in the Supreme Court of the State of New York, County of New York.

--Editing by Chris Yates.