

**Baystone Equities, Inc. v Gerel Corp.**

2002 NY Slip Op 30109(U)

January 2, 2002

Supreme Court, New York County

Docket Number: 601235/01

Judge: Martin Schoenfeld

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 28

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BAYSTONE EQUITIES, INC.,

Plaintiff,

Index No. 601235/01

- against -

DECISION AND ORDER

GEREL CORPORATION, RURADAN CORPORATION,  
and TIMSTON CORPORATION,

Defendants.

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**SCANNED**

JAN 10 2002

MARTIN SCHOENFELD, J.:

In this action plaintiff Baystone Equities, Inc. alleges that defendants Gerel Corporation ("Gerel"), Rurudan Corporation ("Rurudan"), and Timston Corporation ("Timston") breached three contracts to sell three parcels of real estate to plaintiff for a total of \$100,000,000. Defendants now move, pursuant to CPLR 3211(a) (1) and (7), to dismiss the complaint. For the reasons set forth herein, the motion is granted pursuant to CPLR 3211(a) (1).<sup>1</sup>

Background

The subject contracts (Moving Exhibits A, B, and C) were all dated June 9, 2000. The terms and conditions were, for present

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<sup>1</sup> The motion would have been denied if made solely pursuant to CPLR 3211(a) (7), as the complaint states valid causes of action.

purposes, identical,<sup>2</sup> except for the parties, the properties, and the prices. Plaintiff contracted with Gerel (Moving Exhibit A) to purchase the building at 1100 Madison Avenue for \$55,000,000. Plaintiff contracted with Rurudan (Moving Exhibit B) to purchase the building at 8 East 48<sup>th</sup> Street for \$15,000,000. Plaintiff contracted with Timston (Moving Exhibit C) to purchase the building at 250 East 39<sup>th</sup> Street for \$30,000,000.<sup>3</sup>

Plaintiff paid a total "initial deposit" of \$100,000 to Commonwealth Land Title Insurance Company ("Commonwealth"), as escrowee, upon the signing of the three contracts. Pursuant to ¶ 2(a)(ii) of the contracts, plaintiff was to pay a total "additional deposit" of \$900,000 to Commonwealth by July 31, 2000, "time being of the essence." Paragraph 2(a)(iii) of the contracts provided as follows:

In the event Purchaser shall fail to make the Additional Deposit . . . by 2 P.M., July 31, 2000 . . . TIME BEING OF THE ESSENCE, [the contracts] shall thereupon immediately terminate and be of no further force and effect and Escrowee shall disburse the Initial Deposit to Seller . . . within three (3) business days thereafter; and same shall be considered liquidated damages . . . .

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<sup>2</sup> Indeed, this Court has roamed freely among the three contracts in quoting contractual language, which, the parties agree, may vary in wording but not in substance.

<sup>3</sup> The defendants are overlapping entities, united in interest, and represented by the same attorneys.

It is undisputed that plaintiff failed to make the "additional deposit" by July 31, 2000.

Instead, by a letter of that date (Moving Exhibit D), the parties entered into a modification agreement extending the deadline for payment of the "additional deposit" to 2:00 p.m. on August 29, 2000. The consideration for this extension was \$1000 per day for 30 days (\$30,000 total), paid up front by plaintiff to Commonwealth as escrowee. The modification agreement also provided as follows:

In the event the Additional Deposit of \$900,000 is not made by 2:00 p.m. on August 29, 2000, the Initial Deposit plus the Extension Fee . . . shall be released by Commonwealth to Gerel Corporation . . .

Except as expressly modified hereby, all of the provisions of the Contracts are hereby ratified and confirmed.

It is undisputed that plaintiff also failed to make the "additional deposit" by August 29, 2000.

By letter of that date (Moving Exhibit E), defendants wrote to plaintiff<sup>4</sup> as follows:

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<sup>4</sup> Plaintiff complains that this letter was not sent to plaintiff's attorneys, Szegda & Gerbing, as required by the "Notices" requirement of ¶ 23 of the contracts. It is clear that plaintiff itself received notice. Furthermore, plaintiff's response (Opposition Exhibit 11) was signed by Michael Szegda, Vice President of plaintiff, and was sent by "Baystone Equities, Inc., c/o Szegda & Gerbing." In fact, the contracts list plaintiff's address as c/o Szegda & Gerbing. Thus, Szegda & Gerbing obviously

In connection with the [June 9 contracts] and the Extension Letter dated July 31, 2000, the contract[s] . . . ha[ve] been terminated due to the fact that you have failed to deposit the additional \$900,000 with Commonwealth . . . .

. . . .  
We are sending a copy of this letter to Commonwealth . . . requesting that they forward the \$130,000 in escrow they are holding . . . to Gerel Corp.

In the ensuing months, the parties continued to discuss a possible conveyance of the properties; defendants continued to demand that Commonwealth forward to defendants the \$130,000 that Commonwealth was holding in escrow; and plaintiff refused to permit Commonwealth to forward the money. Finally, as evidenced by a letter dated December 14, 2000 (Moving Exhibit F), a real estate broker named Benjamin Shafran, who stood to make part of the brokers' fee of \$1,000,000 on the deal, sent defendants \$130,000, contingent upon their agreeing to have Commonwealth return to plaintiff the \$130,000 that plaintiff had paid to Commonwealth as escrowee.<sup>5</sup> Defendants agreed and kept Shafran's \$130,000. With

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received notice; defendants' non-compliance, if any, was not substantial; and plaintiff has long since waived any defect by not raising it until now.

<sup>5</sup> Shafran stated that the \$900,000 that was due on August 29, 2000 "was never paid and, therefore, the Contract[s] between [defendants] and [plaintiff] w[ere] voided." Plaintiff is not bound by Shafran's statements, but his view, and the fact that no money is currently being held in escrow (plaintiff and defendants both having received \$130,000), strongly suggest that the contracts

defendants' permission (Opposition Exhibit 19), plaintiff received its \$130,000 back from Commonwealth (Moving Exhibit G). Thereafter, defendants ceased negotiating (see, e.g., Moving Exhibit I), and plaintiff commenced the instant litigation.

The complaint's first cause of action seeks specific performance of the contracts; the second seeks parallel declaratory relief; the third seeks \$10,000,000 in damages; the fourth seeks specific performance of an alleged agreement, supposedly reached in or about December 2000, for a "triple net lease" of Gerel's property on Madison Avenue; and the fifth seeks damages for breach of the alleged lease agreement.

### Discussion

CPLR 3211(a) (1) provides that a motion to dismiss may be made on the grounds that "a defense is founded upon documentary evidence." Defendants' documentary defense is simple: the contracts, as modified on July 31, 2000, required plaintiff to pay \$900,000 to Commonwealth by August 29, 2000; and the parties' respective letters of that date, as well as other documents, prove that plaintiff failed to make the payment (which plaintiff does not

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were terminated. However, the instant decision is not dependent on Shafran's opinion, letter, or payment.

controvert). Plaintiff makes several arguments in response; some are better than others, but all are unavailing.

Plaintiff argues that "time was not of the essence" when the "additional deposit" was due on August 29, 2000. However, the contracts, e.g., ¶ 2(a) (ii), (iii), made clear that time was of the essence. The July 31, 2000 modification agreement confirmed the contracts except as "expressly" modified. There was no express modification of the "time of the essence" provisions in the contracts.<sup>6</sup> Thus, this Court finds that time was still of the essence.

Plaintiff also argues that defendants were required to send a five-day notice to cure before terminating the contract. This argument is based on ¶ 15(a) (i), which provides as follows:

If (1) Purchaser shall default in the payment of the

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<sup>6</sup> It is said that "no good deed goes unpunished." However, this court will not attribute to defendants a willingness (albeit for a fee) not only to extend the deadline for payment of the "additional deposits" but also to relinquish their right to a prompt payment on the date specified. Certainly, there is no extrinsic evidence suggesting that defendants, contrary to intuition and everyday experience, did not much care when they were paid almost a million dollars, or that time was less of the essence the later time got. In a volatile city with a volatile real estate market, the value of \$100,000,000 worth of property can change rather quickly. As defendants note, the "initial deposit" and "additional deposit," 0.1% and 1% of the contracts' price, respectively, were, based on common experience, relatively modest.

Purchase Price;<sup>7</sup> or (2) Purchaser shall otherwise default in the performance of any of the other terms and provisions of this Agreement . . . , and the Closing does not occur as a result thereof, and such default shall continue for five (5) business days after written notice to Purchaser . . . , or (3) Purchaser shall default, beyond the expiration of any applicable notice and cure period, under the [other two contracts], Seller may terminate this Agreement' and retain the Initial Deposit and Additional Deposit.

As defendants argue, it is clear from the wording and structure of the sentence--'if A or B or C, then seller may terminate"--that the five-day cure period applied to B and C, but not to defaults in payment, A.<sup>9</sup>

Plaintiff also argues that defendants' August 29, 2000 termination letter was a nullity because it was vague. However, termination was, by the better argument, automatic, and in any event,

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<sup>7</sup> Pursuant to ¶ 2, the "Purchase Price" included the "additional deposit."

<sup>8</sup> There was something of an inconsistency between ¶ 2's automatic termination for failing timely to pay the "additional deposit" and ¶ 15's discretionary termination for a default. Presumably, the specific ¶ 2 would control the general ¶ 15. In any event, defendants informed plaintiff, assuming it was necessary, that they were exercising their discretion to terminate the contracts.

<sup>9</sup> This is consistent with ¶ 2(a)(iii), supra, which provides that a default in payment of the "additional deposit" results in "immediate" termination of the contracts and payment of the "initial deposit" to defendants within three [note - fewer than five] business days thereafter.

the termination letter was crystal clear in context.<sup>10</sup>

Plaintiff also argues that the parties' discussions after August 29, 2000 demonstrate that the contracts were still in effect, and/or that they operated as a waiver of or estoppel as to any termination. However, there is nothing inconsistent between a termination on August 29 and discussions about entering into new contracts, or reviving the old ones. The documentary evidence (e.g., Moving Exhibits H, I, M, Q; Reply Exhibit A) shows that the parties did not enter into any new agreements.<sup>11</sup> And ¶ 24 of the contracts, which requires that any modification be in a writing signed by all parties, demonstrates that the contracts were not revived.

Plaintiff also argues that defendants' acceptance of the \$130,000 from Shafran operated as a waiver of any claim that the contracts had terminated. However, the \$130,000 was exactly what defendants were entitled to as liquidated damages for breach of the agreement (\$100,000) (¶ 2 (a)(iii)) and as payment for the extension contained in the modification agreement (\$30,000) (Moving Exhibit

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<sup>10</sup> In making arguments to a court, discretion is often the better part of valor.

<sup>11</sup> Any "new agreement,, would, in any event, almost certainly have been unenforceable because of the Statute of Frauds.

D).

Plaintiff's most colorable argument is that plaintiff was relieved of the obligation to pay the "additional deposit" on August 29, 2000 because defendants failed to fulfill their ¶ 19(e) obligation "that between the date of this Agreement and the Closing [October 31, 2000], Seller shall allow purchaser . . . reasonable access to the Premises and Seller's records pertinent to Purchaser's due diligence." Simply put, plaintiff argues that defendants denied plaintiff and its agents physical access to the buildings ("access"), which hindered plaintiff's search for investment partners, and denied plaintiff a chance to inspect the rent rolls and other documentary records ("disclosure"), which hindered plaintiff's attempts to determine whether plaintiff would be liable to tenants for rent overcharges by defendants. Defendants make several arguments in opposition.

Defendants argue that there were no obligations of access and/or disclosure. Paragraph 8(b) of the contracts provided as follows:

Purchaser represents that it has . . . investigated and completed its due diligence of the Property, including, without limitation, physical inspections of the property . . . and is satisfied with, the Property and the physical condition . . . .

Paragraph 8 is entitled "Condition of the Property." In context,

the quoted language and the subparagraph of which it is part are simply a "taken as is" clause as to the physical condition of the buildings. To construe ¶ 8(b) to preclude any further access or disclosure would be to render ¶ 19(e) meaningless, in contravention of the well-settled rule of contract interpretation that "no provision of a contract should be left without force or effect," Muzak Corp. v Hotel Taft Corp., 1 NY2d 42, 46 (1956).

Defendants also argue that ¶ 19(e) permitted defendants to allow access and disclosure at any time of defendants' choosing prior to the closing. This narrow reading is simply inconsistent with the wording of the contracts, which, even assuming any ambiguity, would have to be construed against defendants as their drafters, 67 Wall St. Co. v Franklin Nat. Bank, 37 NY2d 245, 249 (1975).<sup>12</sup>

However, in the final analysis, plaintiff's access/disclosure argument is unavailing for two independent reasons. First, all of the contemporaneous evidence indicates that defendants provided access and disclosure. Second, and most important, plaintiff failed to serve any notices to cure.

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<sup>12</sup> One is reminded of the "Dennis the Menace" cartoon in which Dennis has a 5¢ "All You Can Drink" lemonade stand and tells a distraught Mr. Wilson, "I said that's all you can drink."

There is no contemporaneous evidence, in the form of letters, notices, or complaints, that defendants were denying plaintiff access. In opposition to the instant motion plaintiff has submitted affidavits dated June 29, 2001 from two real estate brokers who claim that, with potential investors in tow, they were "denied access" to the buildings. There are no indications as to whether they informed defendants in advance that they desired such access; what part of the buildings they wished access to; who denied them access; and on what grounds. One broker claims that he was denied access three different times, along with three different potential investors: the Manocherian Brothers, Roy Kalimian, and "Issac" ("Isaac"?) Hakim. Surely a broker would not bring wealthy, sophisticated real estate investors on a "fool's errand" three times without any record thereof, in the form of requests or complaints, unless the visits were spur-of-the-moment. Such visits, which likely would require personnel to show the visitors around, are not "reasonable," as required by ¶ 19(e).<sup>13</sup>

All the contemporaneous evidence indicates that defendants

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<sup>13</sup> Defendants have submitted two affidavits (Moving Exhibits K, L) from the spring of 2001 indicating that their building personnel escorted numerous agents of plaintiff around the buildings. The instant decision is not dependent on these affidavits.

were receiving disclosure (see Moving Exhibit P, consisting of numerous letters from the spring and summer of 2000, plus attachments), and no evidence indicative of dissatisfaction. Courts may not resolve disputed issues of fact in the context of resolving motions to dismiss; but here the contemporaneous evidence all points in one direction.

Most telling, as to access and disclosure, is the correspondence of August 29, 2000. Defendants "termination letter" (Moving Exhibit E) asks for the return of "all our leases, rent rolls, DHCR papers and all of the documents we have given you." Plaintiff's response (opposition Exhibit 11) is not that defendants did not provide these documents (or denied access to the buildings). Rather, plaintiff simply states its "position" that time was not of the essence as to the \$900,000 payment due that day; that therefore the contracts did not terminate, and that therefore defendants' "demand for return of documents is premature." If the payment was not made because of a lack of disclosure or access, plaintiff surely would not have said that the documents would not be returned just yet, and/or surely would have complained about the lack of access.<sup>14</sup>

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<sup>14</sup> In light of this contemporaneous evidence that defendants had provided plaintiff with rent rolls and other records,

The strongest, and dispositive, argument against plaintiff's position that defendants' failure to provide access and disclosure absolved plaintiff from having to pay the "additional deposit" on August 29, 2000 is that any such failure was subject to a notice to cure requirement. Paragraph 15(b) of the contracts provides as follows:

If [defendants], as of the Closing Date, shall default hereunder for any reason and such default shall continue for five (5) business days after written notice to [defendants], [plaintiff] may, as its sole remedy, elect to either (i) terminate this Agreement . . . or, (ii) prosecute an action for specific performance . . . .

Read in isolation, this language could suggest that it only governs what happens if defendants default "as of the Closing Date."<sup>15</sup>

However, ¶ 15 is entitled "Default by Purchaser or Seller." It provides a detailed scheme for what happens if plaintiff, ¶ 15(a), or defendants, ¶ 15(b), default at various times and in various ways. Read in this context, what the opening language of ¶ 15(b) provides is that defendants had until the time of the closing, and had five days after a notice to cure, in which to cure any default,

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plaintiff's statements to the contrary (Slabakis Affidavit ¶¶ 24, 40; Opposition Memorandum at 6) are enigmatic, if not disturbing.

<sup>15</sup> Logically, a party to a real estate contract that is entitled to a notice to cure at the time of closing most likely would be entitled to a notice to cure prior to the closing, because a default at closing would be most deleterious to the other party.

or plaintiff could terminate or seek specific performance. As alluded to above, other than in paying the purchase price, plaintiff was entitled to a five-day notice to cure for any of defaults. Indeed, plaintiff (Opposition Memorandum at 14, fn. 7) considers ¶¶ 15(a) and 15(b) to be "reciprocal" five-days-to-cure provisions. This court heartily agrees,<sup>16</sup> except that plaintiff's purchase price obligations were expressly exempted by ¶¶ 2(a)(iii) and ¶ 15(a)(i)(1). There is nothing unreasonable in providing a five-day cure period for all defaults except the purchaser's significant monetary defaults. Whether or not significant monetary obligations, in and of themselves, have been fulfilled is rarely subject to argument or interpretation: the contour of other obligations, such as providing access to buildings and disclosure of records, and proof related thereto, is not so clear, and may be subject to endless debate.

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<sup>16</sup> It is inconceivable that defendants, whose astute counsel drafted the documents, would have subject plaintiff's possible defaults (with a notable exception for payment of the purchase price), to a notice requirement and cure period, but would not have done the same for defendant's possible defaults. See, for example, the last sentence of ¶ 15(b), which limits plaintiff's remedies if plaintiff closes with knowledge that defendants have "default[ed] in the performance of any of its covenants under this Agreement . . . without having first given Seller the opportunity to cure such breach."

Summary

Plaintiff claims (Opposition Memorandum at 10) that

[t]he \$900,000 payment which was due on August 29, 2000, was not made because defendants breached their obligations under paragraph 19 (e) of the Contracts by denying [plaintiff] and the two real estate brokers access to the Buildings<sup>17</sup> and refusing to provide plaintiff with the [records] for the apartments . . . .

However, the letter plaintiff wrote on August 29, 2000 (Opposition Exhibit 11) merely states as follows:

This will acknowledge receipt of your letter of today's date purporting to terminate the contracts between us. It is our position that the letter agreement dated July 31, 2000, did not make the time for payment additional [sic] deposit "of the essence" and therefore we have a reasonable period of time after today's date to do so. We will endeavor to do so as promptly as practicable.

There is nothing about access to buildings, nothing about disclosure of records.

Nonetheless, the instant decision is not primarily based on facts or evidence, or even contractual language and interpretation. It is based on the policy that when the parties to a contract manifest a desire and understanding that their compliance, or lack

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<sup>17</sup> Plaintiff also somewhat undermines this argument by stating (Slabakis Affidavit ¶ 25; see Opposition Exhibit 5) that funds were available to make the \$900,000 payment on August 29, 2000. Thus, any failure to allow access did not prevent plaintiff from lining up enough investor support at least to make the "additional deposit" on time.

thereof, can be objectively and easily verified or belied, courts should not defeat this scheme by allowing lengthy, expensive litigation based merely on un contemporaneous, undocumented, unlikely (indeed, largely contradicted) ipse dixit assertions. Both the parol evidence rule and the Statute of Frauds, for all their differences, are meant to prevent law from impeding, or subverting, business. If allowed to proceed through liberal disclosure and a full-blown trial, the instant litigation could take years. Meanwhile, a cloud would hover over defendants' titles,<sup>18</sup> perhaps costing defendants millions of dollars.

Had the parties hereto opted, or even allowed, for such a possibility, then so be it, and this Court would have denied the instant motion. However, by providing for notices to cure and that any modifications be in writing, and by the general tenor of the agreements, the parties evinced a desire that disputes as to compliance vel non could be resolved in a simple, objective manner. This Court has examined the documents and finds that, as a matter of law, plaintiff breached, defendants did not, and the instant complaint must be dismissed.

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<sup>18</sup> This notwithstanding the fact that plaintiff apparently has not filed any notices of pendency against the properties.

Conclusion

Thus, for the reasons set forth herein, defendant's motion to dismiss is granted pursuant to CPLR 3211(a)(1), and the clerk is hereby directed to enter judgment dismissing the complaint.

This opinion constitutes the decision and order of the Court.

Dated: January 2, 2002



J.S.C.