SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAULA J. OMANSKY Justice — PART 47

Broadwell America Inc.

- v -

Bron Wire EL LLC

INDEX NO. 603383/02

MOTION DATE 1/17/03

MOTION SEQ. NO. 001

MOTION CAL. NO. 7

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED MAR 06 2003

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 2/24/03

HON. PAULA J. OMANSKY J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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BROADWELL AMERICA, INC.

Index No.603383/02

Plaintiff,

DECISION AND ORDER

-against-

BRAM WILL EL LLC and WILLIAM MUSCHEL, LLC

Defendants.

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PAULA J. OMANSKY, J.:

Motion sequence Nos. 001 and 002 are consolidated for disposition. In this action for specific performance and other related relief, plaintiff moves (sequence no. 001), pursuant to CPLR 6301 and 6311, for a preliminary injunction against defendants enjoining them from transferring, conveying, alienating, assigning or otherwise encumbering the real property, including the land, building thereon, fixtures, equipment and other personal property attached or appurtenant to the building thereon, identified as Block 545, Lot 21 and Block 545, Lot 22, (734 and 736 Broadway, New York, New York).

In addition, plaintiff moves (motion sequence no. 001) to restrain and enjoin defendants' attorney Sol Hershkowtiz, the escrow agent under the contract of sale dated August 7, 2002, entered into by defendants, as seller, and plaintiff as purchaser, from releasing, transferring or otherwise conveying in any way, to defendants or anyone else the deposit in the amount of $50,000. Plaintiff also seeks an order compelling defendants including their

manager, Gerard Proefriedt, to provide all disclosure, information and documentation requested by plaintiff. Plaintiff also seeks to stay the expiration of the due diligence period under the agreement which was scheduled to expire on September 17, 2002.

In motion sequence No. 002, plaintiff moves' for a preliminary injunction granting plaintiff an abatement and reduction of the $600,000 additional security deposit provided for under the sales contract based upon defendants' alleged breach of the agreement.

FACTS

This action involves the sale of 734 and 736 Broadway in Manhattan by defendants to plaintiff in accordance with a sales agreement dated August 7, 2002, (the "August 2002 Sales Agreement"). The total purchase price of the building is set at $13,000,000. Plaintiff deposited with defendant's attorney, a deposit *of* $50,000 to be held in escrow by defendants' attorney, pending closing.

In negotiating the August 2002 Sales Agreement, defendants agreed to provide a plaintiff with a "due diligence" period as follows:

> [a]t the expiration of due diligence on 9/9/2002, if the purchaser does not cancel this contract, purchaser shall deposit an additional $600,000 on 9/10/2002 with sellers' attorney to be held in escrow as herein provided.

·Plaintiff also repeats some of the relief requested in motion sequence no. 001 and these branches of the motion are not repezted.

Plaintiff maintains that this due diligence period gave it time to obtain disclosure of the financial condition of the premises and its income and expenses, the structural integrity of the premises, the state and terms of the tenancies of the premises, the management and operations of the premises, environmental matters concerning the premises, title issues, liens and judgments which may affect the premises.

According to plaintiff, the rider to the August 2002 Sales Agreement required defendants' cooperation and production of documentation and information to plaintiff during the due diligence period as follows:

> 11. All documents or instruments initialed by or on behalf of the parties to this contract or incorporated in this contract by reference or referred to herein, and any and all surveys, mortgages, bonds, or notes, consolidation or extension agreements, leases, service contracts, insurance policies, rent registrations or other documents affecting the premise shall be delivered to the purchaser or its assigns at closing; and prior thereto the same may be inspected at all reasonable times at the office of the attorney for the seller.
>
> 15. The seller agrees to make available to the purchaser, prior to and/or after the closing of title at any time upon demand, all records of the seller, or the seller's agents, in connection with the management and operation of the premises during the period of the seller's ownership, and to loan to the purchaser all paid bills, vouchers, canceled checks, and other documents as may be requested by purchaser. At closing, seller will deliver to the purchaser all original leases and rent records and histories for all apartments at the premises.
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> 38. If a sprinkler system is required or is in place, in the premises, seller shall provide proof of current

certification and compliance with required laws, rules and regciations.

The August 2002 Sales Agreement also provided that, at the expiration of the due diligence period, plaintiff at its sole discretion was permitted to either (1) annul the agreement, terminate its option to purchase the premises and obtain its $50,000 deposit, minus attorney's fees or (2) post an additional deposit of $600,000 with the sellers' attorney and commit to closing on the August 2002 Sales Agreement.

Plaintiff inspected the premises, conducted public filing searches, and made requests to defendants/Proefriedt in Augusr 2002, that they provide all relevant information listed in the above paragraphs. Plaintiff claims that defendants failed to turn over the required information.

Plaintiff demanded that the due diligence period be extended to September 23, 2000 but defendants only agreed to extend the period to September 17, 2002.

Plaintiff maintains that defendants failed to turn over the requested material despite the fact that they agreec to an extension. According to plaintiff, defendants are forcing it to either to cancel the contract or to pay an additional security deposit in the amount of '$600,000 and to close on the subject transaction without having received the required financial disclosure and information regarding the management and operatior. of the premises.

In addition, plaintiff also maintains that defendants made material misrepresentations concerning the condition of the building and failed to mention various disputes with tenants and the Loft Board. In particular, plaintiff maintains that a tenant of 734 Broadway initiated a harassment complaint in 1984 against the landlord of the building alleging long-standing and serious violations as well as failure to provide heat, water, and elevator service. According to plaintiff, defendants failed to repair windows and to complete other structural repairs. Defendants allegedly interfered with the 7-A administrator's authority to manage the premises.

Defendants represented that they had a valid certificate of occupancy but plaintiff states that the building is presently occupied by both commercial and residential tenants despite the fact that the building is only zoned for commercial use. Plaintiff cor·tends that the present usage of the building does not conform with the present certificate of occupancy and it will cost substantial sums of money and years to obtain a valid certificate of occupancy. In addition, plaintiff alleges that there is a rent strike and no rent is being collected. Plaintiff contends that defendants' breach of the August 2002 Sales Agreement has decreased the market value of the building to $7,150,000 and that the purzhase price is now inconsistent with the actual worth of the prcperty.

Defendants contend that plaintiff is improperly trying to decrease the purchase price and they dispute plaintiff's allegation that they failed to cooperate in the due diligence analysis, stating that plaintiff has been provided with full access to documents required under the contract. Moreover, defendants contend that they gave plaintiff the documents set forth in the contract and that the missing documents are not in the custody of Proefriedt, but are available as public records.

Aaron Muschel, the former manager of the premises at issue, states that he personably informed plaintiff about the Loft Board harassment action instituted by the tenants of 736 Broadway, the tenants' rent strike, and the institution of the harassment proceeding. Muschel also states that he advised plaintiff about the stipulation dated August 22, 1996 and June 20, 1997 which appointed the law firm of Penn & Proefriedt as administrators

. Plaintiff commenced an action seeking specific performance of the August 2002 Sales Agreement and, in particular, tc seek enforcement of the provision requiring defendants to provide plaintiff with all required disclosure, documentation and information concerning the premises. In addition, plaintiff seeks preliminary and permanent injunctive relief.

DISCUSSION

In order to obtain a preliminary injunction, plaintiff must clearly show that there is a likelihood of success on the merits,

that they will suffer irreparable injury unless the relief sought is granted, and that the balancing of the equities lies in their favor (Faberge Intl., Inc. v DiPino, 109 AD2d 235, 240 [1st Dept 19851). A preliminary injunction should be issued only when the opposing parties might violate plaintiffs' rights regarding the subject of the action, or when the opposing parties might do something to interfere with a judgment or render it ineffectual (Leif B. Pederson, Inc. v Weber, 128 AD2d 453, 455 [1st Dept 19871; CPLE 6301 and 6312). New York courts have granted preliminary injunctions prohibiting prospective sellers from conveying title or from taking any other action with respect to the subject property that would be adverse to the prospective purchaser's interest therein (see, Gresser v Princi, 128 AD2d 752, 752 [2d Dept] appeal dismissed 70 NY2d 693 [1987]).

As to the issue of whether plaintiff will be successful on the merits, "[s]pecific performance is an appropriate remedy far breach of contract concerning goods that 'are unique in kind, quality or personal association' where suitable substitutes are unobtainable or unreasonably difficult or inconvenient *to* procure'' (Sokoloff v Harriman Estate Dev. Corp., 96 NY2d 409, 414 [2001], quoting Restatement [Second] of Contracts § 360 comment c).

New York has long permitted a cause of action for specific performance of agreements for sale of land "when all is fair, and the parties deal on equal terms" (O'Brien v Kennedv, 63 NYS2d 666,

668 '[SupCt, Onondaga County 1946], affd 27 App Div 787, lv, rearq denied 272 AD2d 960 [4th Dept 1947]; see Baumann v Picknev, 118 NY 604 [1980]). "Before specific performance of a contract for real property may be granted, a plaintiff must demonstrate that it substantially performed its contractual obligations and that it is ready, willing, and able to satisfy those obligations not yet performed, regardless of any alleged anticipatory breach by the defendant" (Johnson v Phelam, 281 AD2d 394 [2d Dept 2001]). A buyer is not entitled to specific performance where the buyer's refusal to close is based on the seller's failure to comply with a minor or insignificant term of the contract (Kraitenberqer v Aloow Realty Corp., 172 AD2d 647 [2d Dept] app dismissed 78 NY2d 1072 [1991]). Contract provisions which are "extensively negotiated and fully understood by the plaintiff buyer and the seller prior to entering intc the contract, cannot be characterized as minor'' (id. at 648).

Here, the condition. of the property and the 'financial stability of the premises were important factors in the August 2002 Sales Agreement since these items were extensively negotiated by the parties. Therefore, these items are material to the parties' August 2002 Sales Agreement and to that end the parties have adopted detailed provisions outlining the buyer's due diligence rights upon plaintiff's tender of $50,000 depcsit. The parties do not dispute that plaintiff has satisfied the condition precedent by

depositing the required sum.

However, the parties do dispute whether defendants complied with its part of the due diligence reviews by turning over the documents listed in the August 2002 Sales Agreement. The record shows that defendants permitted plaintiff to inspect the property and that certain documents were turned over. Plaintiff requested an appraisal of the property which stated that the actual worth of the building is less than the commercial price. The appraisal was based on a number of factors including the stipulation between tenants of 736 Broadway and the owner, building plans, and the "narrative statement" prepared for the Loft Board, as well as other documents from Penn & Proefriedt. The appraiser noted that the elevator was not working and that other violations of the Building Code existed. In addition, plaintiff was able to have an architect examine the premises which resulted in a report that listed the outstanding repairs.

However, defendants' opposition presents insufficient evidence that they complied with plaintiff's request for financial and business documents.

Accordingly, plaintiff has shown a likelihood of success on the merits since defendants are not entitled to frustrate the August 2002 Sales Agreement by causing a failure of a condition precedent (Lindenbaum v Rovco Procertv Corp., 165 AD2d 254, – [1st Dept 19911; see, Wells v Pleader, 192 AD2d 827, [3d Dept 19931).

The balancing of the equities also lies in plaintiff's favor because defendants are obligated by contract to provide these documents which are essential to plaintiff's due diligence analysis. Furthermore, plaintiff will suffer irreparable injury unless they are permitted to complete their due diligence review of the building. However, the court shall not let plaintiff unreasonably delay the purchase and shall limit the production to those items specifically listed in the August 2002 Sales Agreement.

Accordingly, plaintiff is entitled to review, and to copy all paid bills, vouchers, canceled checks all records of the seller, or the seller's agents, in connection with the management and operation of the premises during the period of the seller's ownership (August 2002 Sales Agreement Rider; ¶ 15). Plaintiff is also entitled to review and copy all records of the seller or its agents in connection with the management and operation of the premises during the period of the seller's ownership of the building as well as all surveys, mortgages, bonds, or notes, consolidation or extension agreements, leases, service contracts, insurance policies, and rent registrations concerning the premises (ibid. at ¶ 11). Moreover, defendants shall provide proof of current certification of the premises' sprinkler system as well as proof of compliance with required laws, rules and regulations related to this system (ibid. at ¶ 38).

The due diligence review period shall also be extended to

permit plaintiff to review and consider the presented dccuments. Cefendants and their counsel are also required to hold the initial deposit in escrow. The undertaking shall be determined at a conference.

However, the terms of the August 2002 Sales Agreement do not entitle plaintiff to lower the purchase price or the amount of the sesond deposit ($600,000) as a result of the findings of the due diligence review (see, Cohn v Mezzappa Bros., Inc., 155 AD2d 506, 507 [2d Dept 19891, appeal denied 75 NY2d 707 [1990]-). Such relief is also not contemplated by a cause of action for specific performance, an equitable remedy, since "equity will not attempt to provide for specific performance of contacts which will create [rights] by imposing additional duties upon the parties sought to be charged" (Creston Apts. Corp. v Philip Gertler Elec. Contracting Co., 229 App Div 450 [1st Dept 1930] [insertion supplied]). This ccurt shall not make a new contract for the parties and shall not fcrce defendants to perform a duty which the parties did not bargain for in the August 2002 Sales Agreement.

Plaintiff also does not state any provision of the August 2002 Sales Agreement which permit it to receive damages in the event of

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'Damages may be given in a specific performance action but they must flow "naturally" from the breach, are within the contemplation of the parties and can be proven to a reasonable degree of certainty Cohn v Mezzappa Bros., Inc., supra). For example courts have awarded lost use and occupancy/rental value and additional costs incurred as a result of a party's delay (ibid.)

misrepresentations listed in the contract.

As to any alleged oral misrepresentations about the property by defendants, New York adheres to the doctrine of caveat emptor and imposes no duty on either the seller *or* the seller's agent in a transaction involving real estate, to disclose any information concerning the premises unless there is a confidential relationship between the parties or some conduct which constitutes active concealment (Glazer v LoPreste, 278 AD2d 198 [2d Dept 20001; Stambovskv v Ackley, 169 AD2d 254, 257 [lst Dept 1991]).

Plaintiffs have not stated sufficient facts to support a claim that there was a confidential relationship between the parties. As to the alleged concealment, the terms of the August 2002 Sales Agreement were designed to provide all the information which plaintiff needed to determine the true value of the property prior to sale. In addition, plaintiff specifically reserved the right tc reject the property and to terminate the August 2002 Sales Agreement in the event that the due diligence analysis revealed factors which constituted an unacceptable business risk from the point of view of the potential buyer.

Accordingly, it is

ORDERED that plaintiff's motions for preliminary injunction (motion sequence nos. 001 and 002) are granted on the ground that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an action in violation of the plaintiffs'

rights respecting the subject of the action and tending tc render the judgment ineffectual, as set forth in the aforesaid decision; and it is further

ORDERED that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

> 1. from transferring, conveying, alienating, assigning or other wise encumbering the real property, including the land, building thereon, fixtures, equipment and other personal property attached or appurtenant to the building thereon, identified as Block 545, Lot 21 and Block 545, Lot 22, located at 734 and 736 Broadway, New York, New York (the "Premises"); and
>
> 2. transferring or otherwise conveying in any way, to defendants or anyone else the deposit in the amount of $50,000 held by Sol Hershkowtiz, the escrow agent under the parties' August 2002 Sales Agreement;

and it is further

ORDERED that defendants, their agents, servants, employees and all other personas acting under the jurisdiction, supervision and/or direction of defendants, are directed to provide plaintiff with access to and permission to copy the following dccuments within 10 days of service of notice of entry of this order:

> 4. all paid bills, vouchers, canceled checks, and all records of the seller, or the seller's agents, in connection with the management and operation of the

Premises during the period of the seller's ownership; and

5. all records of the seller or its agent in concection with the management and operation of the Premises during the period of the seller's ownership , as well as all surveys, mortgages, bonds, or notes, consolidation or extension agreements, leases, service contracts, insurance policies, and rent registrations concerning the subject premises; and

6. proof of current certification of the Premises' sprinkler system as well as proof of compliance with required laws, rules and regulations related to this system;

and it is further

ORDERED that the temporary retaining order staying of the expiraticn of the due diligence period under the agreement is hereby extended an additional 45 days, the time to commence after service of a copy of this order with notice of entry of this order; and it is further

ORDERED that the remaining branches of plaintiffs motion are denied for the reasons stated herein; and it is further

ORDERED that the parties shall confer with the court to determine the amount of the undertaking; and the parties are directed to appear for a conference on March 14, 2003, at 11 a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: February 26, 2003

ENTER:

PAULA J. OMANSKY
J.S.C.