Vision Development Group of Broward County, LLC v Chelsey Funding LLC
2006 NY Slip Op 30104(U)
April 25, 2006
Supreme Court, New York County
Docket Number: 0060130/2006
Judge: Richard B. Lowe
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SCANNED ON 5/2/2006

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

PRESENT: RICHARD B. LOWE III
Justice

PART 56

Vision Development Group of Broward County, LLC

- v -

Chelsea Funding LLC and TMG Service LLC

INDEX NO. 601301/2006

MOTION DATE 4/21/06

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

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	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAY 02 2006
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/25/2006

RICHARD B. LOWE III J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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VISION DEVELOPMENT GROUP OF BROWARD COUNTY, LLC,
Plaintiff,

- against -

CHELSEY FUNDING LLC and TMG SUNRISE, LLC,
Defendants.

---x

Index No. 601301/2006

DECISION AND ORDER

RICHARD B. LOWE, III, J.:

Plaintiff Vision Development Group of Broward County, LLC (Vision Development) seeks a preliminary injunction pursuant to CPLR 6301, temporarily restraining and preliminarily enjoining Defendants Chelsey Funding LLC (Chelsey) and TMG Sunrise, LLC (TMG) from selling, disposing, or otherwise compromising any Pledged Interest in Vision Development.

BACKGROUND

Vision Development is the owner of a parcel of land in the City of Sunrise, Broward County, Florida. Vision Development is redeveloping that thirty-seven acre site as a residential community called "Isles at Lago Mar."

The project is financed with two principal loans. The first, a senior loan agreement (the "senior loan") dated as of August 23, 2005, was entered into between Vision Development, as borrower, and Corus Bank, N.A. (Corus Bank), as lender, in the amount of $49,500,000. A second loan (the "mezzanine loan") was entered into among the parties in this litigation, also on August 23, 2005. Vision Development, as borrower, entered into the mezzanine loan in favor of Chelsey, as agent for itself and TMG. Vision Development "agreed to pledge and assign to the Agent . . . a first priority perfected security interest in the Pledge Interest [as defined in the mezzanine loan

agreement] as collateral security for the payment and performance of all Obligations [ ]" (*see* Complaint, Ex. A at 2). Pursuant to that agreement, Chelsey and TMG agreed to lend $5,415,000 and $5,085,000, respectively, to Vision Development.

Pursuant to the mezzanine loan agreement:

> (b) Sales of Condominium Units. Prior to the transfer of title of any condominium units, Borrower [Vision Development] shall, in addition to and not in limitation of any other requirements set forth herein, satisfy each of the following conditions:
>
> *   *   *
>
> (ii). The Borrower must close on at least ninety-two (92) condominium units as follows: (a) on thirty (30) condominium units within ten (10) business days of the first condominium unit closing; and (b) on the remaining sixty-two (62) condominium units within forty-five (45) business days of the first condominium unit closing, with (i) such condominium unit sales involved in the Mass Closing having an average price of not less than $220.00 per square foot and (ii) each and every condominium unit sale generating proceeds meeting the requirements of the Senior Loan Documents. The sale of the condominium units shall occur on or before the date which is *six (6) months* after the date of the Notes.

(*See id.*, Ex. A at 29-30 [§ 9 (b) (ii)] [emphasis added]). Similar language is found in the senior loan agreement, except that the last sentence is read "[t]he Mass Closing shall occur on or before the date which is *ten (10) months* after the date of the Note" (*see id.*, Ex. C at 37 [§ 9.3 (f)] [emphasis added]).

To date, Vision Development has allegedly sold fifty-eight condominium units. An additional eleven units have signed contracts and deposits, and forty-five units are currently in the process of being sold, that is, deposits have been received and the contracts are being prepared.

By letter dated March 9, 2006, Chelsey notified Vision Development that Vision Development breached Section 9 (b) (ii) of the mezzanine loan agreement and placed Vision

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Development on notice that the defendants would exercise all "rights, privileges and remedies" pursuant to the mezzanine loan agreement (*see id.*, Ex. B). On March 15, 1006, Vision Development responded to Chelsey's letter, indicating that it has complied with the mezzanine loan agreement (*see id.*, Ex. D).

On March 30, 2006, Chelsey purported to serve upon Vision Development a Notice of Disposition of Pledged Interest, stating that Chelsey and TMG intended to sell the Pledged Interest at a private sale. On April 3, 2006, plaintiff again restated its position that it was not in default and renewed its demand that the defendants withdraw the Notice of Disposition of Pledged Interest. On April 5, 2006, Vision Development demanded the amount the defendants claim is presently due and owing and a written explanation of how the number was calculated. Defendants have neither withdrawn the Notice of Disposition of Pledged Interest nor has provided the amount the defendants claim is presently due and owing.

Plaintiff filed by Summons and Complaint dated April 12, 2006, alleging a cause of action for a declaration as to the terms of the contractual agreements (first cause of action) and for fraud (second cause of action). By Order to Show Cause, the plaintiff requested, and the court granted, a temporary restraining order prohibiting the disposition of the Pledged Interest until after oral argument was held. The temporary restraining order remains in effect.

DISCUSSION

The plaintiff moves for a preliminary injunction restraining the defendants from selling, disposing, or otherwise compromising any Pledged Interest in Vision Development, arguing that the defendants have no authority to dispose of the plaintiff's Pledged Interest and that the plaintiff would be irreparably injured if the injunction is not granted.

A party seeking a preliminary injunction pursuant to CPLR 6301 must show "(1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in [its] favor" (*J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406 [1986]). The purpose of a motion for a preliminary injunction is to maintain the status quo until the merits of the case are heard and determined (*id.* at 402, quoting *Walker Memorial Baptist Church v Saunders*, 285 NY 462, 474 [1941]; *see also Coinmach Corp. v Fordham Hill Owners Corp.*, 3 AD3d 312, 314 [1st Dept 2004]).

The basic question revolves around the interpretation of the contractual agreements between the parties. At issue is whether Section 9 (b) (ii) noted above, with the six month time period, was a "scrivener's error" or was purposely and intentionally placed into the mezzanine loan agreement. The defendants argue that the intentions of the parties were clear in using the six month time period because the time frame would protect their collateral interests in the property. The plaintiff argues that not only is the defendants' interpretation of the provision wrong given the Corus Bank senior loan agreement, but also that the plaintiff has in any case complied with the provisions of the mezzanine loan.

Where "the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language" (*R/S Assocs. v N.Y. Job Dev. Auth.*, 98 NY2d 29, 32 [2002], quoting *Springsteen v Samson*, 32 NY 703, 706 [1865] [citing *Rodgers v Kneeland*, 10 Wend 218 (1833)]). "'[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms'" (*id.*, quoting *Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001] [quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 (1990)]). However, if there are any ambiguities in the agreement, such ambiguities are "construed against the

drafter" (*196 Owners Corp. v Hampton Mgmt. Co.*, 227 A.D.2d 296 [1st Dept 1996], citing *67 Wall Street Co. v Franklin Nat'l Bank*, 37 NY2d 245, 249 [1975]).

As noted above, Section 9 (b) (ii) provides that:

> The Borrower must close on at least ninety-two (92) condominium units as follows: (a) on thirty (30) condominium units within ten (10) business days of the first condominium unit closing; and (b) on the remaining sixty-two (62) condominium units within forty-five (45) business days of the first condominium unit closing, with (i) such condominium unit sales involved in the Mass Closing having an average price of not less than $220.00 per square foot and (ii) each and every condominium unit sale generating proceeds meeting the requirements of the Senior Loan Documents. The sale of the condominium units shall occur on or before the date which is six (6) months after the date of the Notes.

(*See* Complaint, Ex. A at 29-30).

Here, the writing is clear, at least to the extent requiring the borrower (the plaintiff) to close on at least ninety-two condominium units in the manner prescribed pursuant to the mezzanine loan agreement. As such, within ten business days of the first condominium unit closing, thirty units must be closed. The remaining sixty-two units must be closed within forty-five days of the first condominium closing. That part of the provision is plain and simple.

However, ambiguities pervade the remainder of the provision, and the court finds that the plaintiff has made a showing of likelihood of success on the merits requiring the issuance of the preliminary injunction. For one, there is an issue regarding the clear intent of the parties as to the six month provision. While the defendants argue that the date is clear and unequivocal, the court notes that both the senior loan agreement as well as the mezzanine loan agreement were signed at the same time, employed the same general language, and utilized the same definitions. In reading the contractual agreements, the court finds that there is a question of whether the intent of the parties

was to use a six month period or a ten month period of time in the closing of the condominium units.

Furthermore, there is an ambiguity in the contract as to whether Vision Development was required to "close" on the condominium units or, instead, must begin the "sale" of the units on or before the six month date. The defendants claim that the plaintiff must *close* on all the required units within six months of the date of this agreement. The plaintiff argues that only the sale must begin within six months of the signing of the mezzanine agreement. The court finds both arguments probable. Here, the defendants' argument could be considered contradictory to the language in the agreement, which specifies that the "*sale* of the condominium units shall occur on or before the date which is six (6) months after the date of the Notes" (*id.* [emphasis added]). Assuming that what the plaintiff avers is true, the plaintiff indeed started *selling* the units before the six months after the date of the mezzanine loan, and, accordingly, has complied with the provisions of this agreement.

The defendants' argument may also be incompatible with the definition of "Mass Closing." Here, the mezzanine loan agreement does not define "Mass Closing." As such, the court reviews documents contemporaneously executed to find the definition thereof (*see e.g. Nau v Vulcan Rail & Const. Co.*, 286 NY 188 [1941]). As defined in the senior loan agreement, a "Mass Closing" is the "*unconditional sale, transfer and conveyance* of not less than ninety-two (92) Condominium Units" (*see id.*, Ex. C at 9 [emphasis added]). That definition encompasses not only the sale of the units, but also the transfer and conveyance thereof. Even so, the language of the mezzanine loan agreement specifies that the borrower need only start *selling* the units on or before six months of the date of the Notes. There is nothing in that sentence that requires the borrower (the plaintiff) to also transfer and convey the units within six months of the signing of the mezzanine loan agreement. Accordingly, because the plaintiff has begun selling the units within the requisite time period, it

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could be argued that the plaintiff abided by the provisions of the mezzanine loan agreement.

Finally, the defendants drafted the document at issue. As such, if there are any issues in the interpretation of an agreement, any ambiguities are resolved against the drafters (*see 196 Owners Corp.*, 227 A.D.2d 296). Because ambiguities abound the mezzanine loan agreement, which the court at this stage construes against the drafter of the agreement, the court finds that the plaintiff has demonstrated a likelihood of success on the merits.

Another argument the defendants make is that, if the sales have occurred, Vision Development violated a second provision of the mezzanine loan agreement requiring a denial of the preliminary injunction. Defendants cite Section 9 (b) (i) of the mezzanine loan agreement, which provides that "[b]orrower shall have provided Agent with not less than ten (10) days' prior written notice of the intended transfer of title, which written notice shall be accompanied by all items provided to the Senior Lender" (*see* Complaint, Ex. A at 29). However, the court again finds ambiguity in this provision. As noted above, an argument can be made that this section only requires the plaintiff to sell a requisite number of units, and not, at the same time, transfer title. Here, the plaintiff articulates that it has sold fifty-eight units. That does not necessarily mean that the plaintiff need transfer title to those fifty-eight units. Indeed, the plaintiff avers that it has not done so, and the defendants have not shown evidence to the contrary. In construing the document against the drafter, the court finds that this provision does not warrant the denial of the preliminary injunction, and, indeed, necessitates the requirement for the status quo to remain pending a determination on the merits.

The court also finds that the plaintiff would suffer irreparable injury if the injunction is not forthcoming. The plaintiff owns in fee simple the parcel of land which is the subject of this

litigation. The plaintiff has contractual agreements not only with Cor us, but also with the defendants, third party contractors, and with the future residents of the residential community. Indeed, Vision Development stands to lose a great deal more than the defendants' $12 million stake in the project, including the loss of the business (*see e.g. Reuschenberg v Town of Huntington*, 16 AD3d 568, 570 [2d Dept 2005]). Finally, the court finds that, in balancing the equities, the plaintiff would suffer severe damages outweighing that of the defendants' $12 million in the project.

For reasons set forth above, the court grants the plaintiff's motion for a preliminary injunction.

CONCLUSION

Accordingly, it is hereby

ORDERED that Vision Development Group of Broward County, LLC's motion for a preliminary injunction is granted, and it further

ORDERED that Defendants Chelsey Funding LLC (Chelsey) and TMG Sunrise, LLC (TMG) are enjoined from selling, disposing, or otherwise compromising any Pledged Interest in Vision Development until the merits of this action are heard and determined.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: April 25, 2006

ENTER:

RICHARD B. LOWE, III, J.S.C.