

Whitestone-Triangle, L.P. v Triangle Plaza II Manager
2006 NY Slip Op 30438(U)
October 5, 2006
Supreme Court, New York County
Docket Number: 601708/2005
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED PART 60
Justice

WHITESTONE-TRIANGLE, L.P.,

Plaintiff,

- v -

TRIANGLE PLAZA II MANAGER,

Defendants.

INDEX NO. 601708-2005

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

h

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION

Dated: 10/5/06

Bernard J. Fried

J.S.C.

BERNARD J. FRIED

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----X
WHITESTONE-TRIANGLE, L.P.,

Plaintiff,

Index No. 601708/2005

-against-

TRIANGLE PLAZA II MANAGER,

Defendants.

-----X
Appearances:

For Plaintiff:

For Defendants:

FEERICK LYNCH MACCARTNEY
96 South Broadway
South Nyack, NY 10960
By: Donald J. Feerick, Jr., Esq.

WACHTEL & MASYSR, LLP
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By: John H. Reichman, Esq.

FRIED, J.:

The dispute in this action arises from a contract for sale of an interest in a shopping center. The Buyer of the interest sought specific performance of the contract, which I granted. Buyer now moves for an order, (1) pursuant to CPLR 3212 granting it summary judgment and awarding it damages in the amount of \$340,869 with prejudgment interest; (2) pursuant to CPLR 2221 modifying the decisions dated October 28, 2005 and March 6, 2006, to the extent which they could be interpreted to preclude the Buyer from collecting damages; and (3) granting such other relief as the Court deems just and proper. The Seller claims it is entitled to withhold distributions arising from the sale of the interest, because (1) the buyer is not entitled to make a second motion for summary

judgment in the same action; (2) the parties had not established a time of the essence closure for the sale; and (3) the Buyer has benefited from the Seller's monthly mortgage payments, which reduce the outstanding mortgage balance on the interest.

The parties to this action include Buyer, Triangle Plaza Manager Inc. ("Triangle"), and Seller, Whitestone-Triangle ("Whitestone").

On January 2, 1998, Triangle and Whitestone entered into an amended and restated operating agreement ("Operating Agreement") for Triangle Plaza II, LLC. ("LLC"). The Operating Agreement states, in Section 3.02, "Any Member may Dispose of its Membership Interest to a Person provided such Member provides the other Members with a written request seeking the prior written consent of the Majority,...written consent may be withheld by such Majority of the Members, at their sole and absolute discretion." *Aff. Robert Ambrosi, Ex. A, at 14 (Apr. 13, 2006).*

Section 3.09 of the Operating Agreement states,

The non-transferor Member shall have thirty (30) Business Days to determine whether to exercise its right of first refusal, which shall be for the same terms and conditions as set forth in the Written Request. If the non-transferor Member delivers, in writing, its election to exercise its right of first refusal on or before the expiration of such 30 business Day period, the transferor Member shall Dispose of the subject Membership Interest in accordance with the terms and conditions of the Written Request.

Id. at Ex. A, at 16-17.

On January 3, 2005, Whitestone notified Triangle of its intention to sell its membership interest in the LLC to a third party for \$5,469,540.00. This price was calculated based on an error which allocated a lesser value to the property, with respect

to the partners' interests. A closing was noticed for on or about March 31, 2005. *See id.* at ¶ 12, 14.

Pursuant to the Operating Agreement, Whitestone's Written Request stated that Triangle "ha[d] a period of 30 business days from the date of its receipt of this notice to notify [Whitestone] in writing of [Triangle's] election to exercise its right of first refusal and its acceptance of such terms and conditions of sale." *Id.* at Ex. C.

On February 8, 2005, Triangle exercised its right of first refusal and notified Whitestone of its intention to purchase the interest, pursuant to the terms of the purchase agreement. *See id.* at ¶ 13.

Whitestone declined to sell the interest to Triangle, citing that it could not obtain parent board and shareholder approval of the sale because of the valuation error. *See id.* at ¶ 14. Whitestone commenced an action seeking to reform the terms of sale, and Triangle commenced the separate action seeking specific performance. As discussed, specific performance was granted, and I denied Whitestone's cross-motion for summary judgment. I also denied Triangle's request for damages and attorney's fees because attorney's fees were not provided for in the contract for the sale of the interest. *See Triangle Manager Plaza, Inc. v. Whitestone-Triangle, L.P.*, 9 Misc.3d 1129(A) (N.Y. Sup. 2005).

During the time subsequent to March 31, 2005, the date on which the contract was to be performed, Whitestone received \$340,869 in monthly distributions as a result of its retention of the interest. *See Aff. Lester Petracca* ¶ 2 (Apr. 27, 2006). Triangle now seeks to recover this amount in damages.

Whitestone first claims that Triangle's second motion for summary judgment goes outside the bounds drawn by proper procedure. *See* Pl.'s Amend. Ans. ¶¶ 12-13 (Apr. 13, 2006). There is abundant caselaw supporting the notion that multiple summary judgment motions in the same action should be discouraged, unless new evidence is discovered, or circumstances change so as to create sufficient cause. *See, e.g., Public Service Mutual Insurance Co. v. Windsor Place Corp. et al.*, 238 A.D.2d 142, 143 (1st Dept. 1997). However, in almost all such cases, the party making a second summary judgment motion had its first motion regarding the same issue denied, and subsequently made a second motion in an attempt to cure the defects of the prior motion. Equity counsels against allowing a second motion for summary judgment in instances where no new evidence has come into play since the first motion was made. Often the second motion includes theories or arguments that the moving party could have included in its first motion. Furthermore, allowing a second motion for summary judgment, absent new evidence, forces the non-moving party to defend itself against fragmented attacks. *See Marine Midland Bank v. Fisher*, 85 A.D.2d 905, 906 (4th Dept. 1981).

In the instant case, however, Triangle was granted summary judgment on its prior motion. In the second motion for summary judgment, Triangle seeks damages not considered in the first motion – namely the distributions Whitestone received after March 31, 2005, for its interest in the LLC (“LLC distributions” or “distributions”). Whitestone claims that Triangle should be estopped from seeking these distributions through summary judgment since Triangle failed to seek them in its original motion for summary judgment. *See* Oral Arg. Trans. 12:8-14:5 (May 11, 2006). Triangle, in turn, claims that

the amount of lost distributions was unknown until specific performance was ordered, and therefore could not be included in its original motion for summary judgment. *See* Def.'s Reply ¶ 4 (Apr. 27, 2006). Although Triangle could not be sure of the exact amount, clearly it was aware that it would incur damages in the form of LLC distributions since it sought such damages in its original complaint. Def.'s Amend. Compl. ¶ 19 (May 25, 2005) (“By reason of the foregoing, [defendant] is entitled to...(ii) *damages arising from Whitestone’s failure to convey the Interest on or about March 31, 2005...*”) (emphasis added).

Since Triangle sought damages that include LLC distributions in its original complaint, it is entitled to make its case for such damages in this action. But, because LLC distributions were not considered in Triangle’s first motion for summary judgment, it has not yet made its case. Therefore, by entertaining a second motion for summary judgment which, this time, seeks LLC distributions, I am not allowing Triangle two bites at the apple. Furthermore, if Triangle is indeed entitled to such damages as a matter of law, then not allowing a second motion for summary judgment would prove wasteful, and make little sense because there would be no substantial issue of triable fact. As such, I turn to the merits of the motion.

Whitestone asserts that Triangle “failed to specify when it sought to close on the sale or otherwise substantiate any time of the essence claim.” Pl.’s Amend. Ans. ¶ 16 (Apr. 13, 2006). Therefore, Whitestone claims that the date after which LLC distributions should have been directed to Triangle rather than Whitestone is a disputable issue of fact, and thus summary judgment is inappropriate. *See id.*

Whitestone, of course, set the terms of the contract in its original notice to Triangle. Included in those terms was “an anticipated closing date of on or about March 31, 2005”. Aff. Robert Ambrosi ¶ 12 (Apr. 13, 2006). Triangle accepted Whitestone’s offer to purchase its interest in the LLC according to Whitestone’s terms, and now continues to assert that March 31, 2005 is the date on which closing should have occurred. See Or. Granting Def.’s Mot. S.J. 4 (Oct. 28, 2005); Def.’s Amend. Mot. S.J. ¶ 8 (Apr. 27, 2006); Aff. Lester Petracca ¶ 2 (Apr. 27, 2006). Thus, there is no dispute as to the date on which the contract was to be performed.

I turn now to Whitestone’s “time of the essence” claim. In equitable actions for specific performance, time is not of the essence unless it is clear that both parties regarded it as such. See *GDJS Corp. et al. v. 917 Properties, Inc.*, 99 A.D.2d 998 (1st Dept. 1984). This is so notwithstanding the fact that a closing date is specified in the terms of the contract. *Lusker v. Tannen*, 90 A.D.2d 118, 124 (1st Dept. 1982) (quoting *Hun v. Bourdon*, 57 A.D. 351, 354 (3rd Dept. 1902)) (“The mere insertion in the contract of a day for its completion does not make such time the essence of the contract...”).

However, there are well established exceptions to this general rule. In equity, time is not of the essence despite a stipulated date of performance, only when the situation of both parties remains unchanged by delay. *Schmidt v. Reed*, 132 N.Y. 108, 113 (N.Y. 1892). More specifically, a stipulated date of performance does imply time is of the essence “where the subject of the sale has a fluctuating value, or where the object of the contract is a commercial enterprise, or the delay in completion would involve one of the parties in a serious loss.” *Lusker*, 90 A.D.2d 118, 124 (1st Dept. 1982) (quoting *Hun v.*

Bourdon, 57 A.D. 351, 354 (3rd Dept. 1902)); *see also Mercantile Nat'l Bank v. Heinze*, 75 Misc. 551, 560-561 (N.Y. Tr. Term 1912). Given that the contract between Triangle and Whitestone involves a commercial enterprise (the LLC), and delay would, and has, caused Triangle a loss of \$340,000 in distributions, the March 31, 2005 date stipulated in the contract gives rise to an inference that time was of the essence. Thus, Triangle is entitled to any distributions from the LLC to Whitestone after that date.

Whitestone's final claim is that granting Triangle the LLC distributions will result in a windfall to Triangle since mortgage payments by the LLC have continued to be made since March 31, 2005. With regard to the distributions, they would have been paid out to Triangle if Whitestone had performed on time. Thus, Whitestone can hardly complain that Triangle is not entitled to recover these monies when it wrongly withheld its interest. Finally, with regard to the complaint that there was an amortization of the mortgage, to the extent that this argument is understandable, it is also undisputed that the pay down of the mortgage was by the LLC out of its own revenue. *See Aff. Lester Petracca* ¶ 2 (Apr. 27, 2006). Thus, Whitestone has no harm to complain of.

Therefore, Triangle's motion for summary judgment as to damages in the form of \$340,000 in distributions, with prejudgment interest from March 31, 2005, is granted.

Submit judgment.

DATED: 10/5/06



J.S.C.

BERNARD J. FRIED
J.S.C.