

**170 E. End Ave., LLC v Hadar Family Residence,
LLC**

2007 NY Slip Op 34454(U)

February 7, 2007

Supreme Court, New York County

Docket Number: 102452/2009

Judge: Jane S. Solomon

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 102452/2009
170 EAST END AVENUE, LLC

vs
HADAR FAMILY RESIDENCE LLC

Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/19/09
MOTION SEQ. NO. _____
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

1-4
5-7
8-9

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided by the annexed memorandum decision and order.*

NB 5-10-10 conference set at end

FILED
APR 08 2010
NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/7/10


JANE S. SOLOMON 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 55

-----x
170 EAST END AVENUE, LLC,

Plaintiff,

-against-

THE HADAR FAMILY RESIDENCE, LLC,

Defendant .

-----x

Index No.: 102452/2009
DECISION and ORDER

FILED
APR 08 2010
NEW YORK
COUNTY CLERKS OFFICE

JANE S. SOLOMON, J.:

Plaintiff 170 East End Avenue, LLC (170 East) sued Defendant The Hadar Family Residence, LLC (HFR) for consequential damages resulting from a breach of a real estate purchase agreement. HFR counterclaimed for a declaration that its termination of the agreement was valid and enforceable, and for damages resulting from breach of contract and breach of fiduciary duty. HFR moves for summary judgment dismissing the complaint, granting its counterclaims, and awarding it pre-judgment interest. The motion is decided as follows.

FACTS

170 East is the sponsor of a luxury condominium located at 170 East End Avenue, in New York City, (the Building). On February 23, 2007, HFR, through its principal, Eric Hadar (Hadar), entered into a contract with 170 East (the Agreement) to purchase Units 8A, 8B and 9B in the Building. The agreement required that 170 East reconstruct and remodel the three units into a single residence (the Unit). HFR's contract deposit of

\$1.125 Million was placed in an escrow account with non-party Stroock, Stroock and Lavan, LLP (Stroock).

Paragraph 19 of the Agreement provided for an Outside Closing Date of December 30, 2008, and also addressed conditions for closing. It recites:

19. ACCEPTANCE OF CONDITION OF PROPERTY. Purchaser shall accept title . . . notwithstanding the failure to complete construction of (a) the "punch list" items in the Unit . . . provided that Sponsor delivers a temporary certificate of occupancy for the Unit. . . . The Purchaser of a Unit shall have the right to inspect such Unit prior to the Closing Date. However, the failure of Sponsor to complete "punch list" type work shall not be a ground for Purchaser delaying the Closing provided that Sponsor agrees to complete such work promptly after closing. (Agreement attached as Exhibit 1 to Motion, Ex. 2 at ¶19).

Paragraph 5.3 of Rider E to the Agreement, governing failure to close by the Outside Closing Date, provides:

In the event the closing of title does not occur by December 30, 2008 (the Outside Closing Date) and provided that such nonoccurrence is through no fault of Purchaser, Purchaser may cancel this Agreement by written notice of cancellation to Sponsor. If Purchaser so elects to cancel this Agreement, Sponsor shall within thirty (30) days after receipt of notice of cancellation from Purchaser, return to Purchaser all sums deposited by Purchaser hereunder, together with interest earned thereon, if any, and upon making such payment, this Agreement shall be terminated and neither party hereto shall have any further rights, obligations or liabilities to or against the other party under this Agreement or the Plan. (Id, at Rider, pg 2).

In the time between the contract and closing date, 170 East was represented by Stroock and HFR was represented by Dreier

LLP (Dreier). In this litigation, 170 East is represented by Dickstein Shapiro LLC (Dickstein), and HFR is represented by Herrick, Feinstein LLP (Herrick).

In connection with HFR's motion, Dickstein submitted its attorney's affidavit, which annexed 18 letters exchanged between Stroock, for 170 East, and Dreier (later Dickstein), for HFR. The correspondence took place between November 5, 2008 and February 3, 2009. Neither Dickstein nor Herrick submit affidavits of the participants to the events described in the letters.

The sequence is as follows: By letter dated November 5, 2008, Stroock scheduled the closing for December 10, 2008, and stated that inspections "should take place no earlier than one (1) week prior to the Scheduled Closing Date" (Motion, Ex. 5);¹ By letter dated November 11, Dreier requested proof that 170 East had satisfied several alleged conditions precedent to closing, including the issuance of a Temporary Certificate of Occupancy (TCO) for the Unit (Motion, Ex. 6). Stroock responded by letter dated November 18, asserting that, but for the TCO, each precondition was completed, and that the lack of a TCO did not preclude scheduling the closing (Motion, Ex. 7).²

¹ This limitation was not included in the contract.

² The TCO was eventually obtained on December 15, 2009 (Motion, Ex. 14).

According to Dreier's letter, dated December 1 (Motion, Ex. 9), on or about November 20, an unnamed representative of HFR attempted to schedule an inspection with Michael Thompson (Thompson), for 170 East; Thompson denied the request because the Apartment was not yet ready (Id.). By letter dated December 3, a week before the date set for the closing, Stroock informed Dreier that the Apartment was now available for inspection, and an appointment should be made with Thompson. Dreier responded on December 8, that on an unspecified date between December 3 and 8, Thompson again denied access (Motion, Ex. 11).

Then, by letter dated December 9, Stroock rescheduled the closing for December 16 (Motion, Ex. 12), and by a separate letter dated December 10, 2008, stated that it did so to give HFR time to inspect the Unit (Motion, Ex. 13). According to Dreier's letter of December 12, one "Mr. Bialostok," a representative of HFR, contacted Thompson on December 9 to schedule an inspection for that same day, but Thompson told him that advisors such as contractors and architects could not accompany him, and so, the inspection did not take place on December 9.

It is uncontested that the inspection eventually was set for December 17 and that Hadar arrived with two attorneys, an acoustical engineer, three contractors, and an architect. 170 East allowed Hadar, one lawyer and two contractors to enter the Unit, and refused access to the others. During the inspection,

HFR's contractors allegedly found a several defects (see, contractor affidavits, attached to Notice of Motion).

On or before December 24, Dickstein replaced Dreier as HRF's attorneys. By letter dated December 24, Dickstein informed Stroock that the Unit was "not in deliverable condition" and that HFR refused to close (Motion, Ex. 16). By letter dated December 26, Stroock disagreed, describing the issues raised in the December 24 letter as either "non-existent" or "punch list" problems that could be fixed subsequent to closing, pursuant to the contract (Motion, Ex. 17). The December 26 letter also stated "Sponsor anticipates that Purchaser will close title to the Unit on December 31, 2008 (the Rescheduled Closing Date)" (Id.) Notably, this date is after the Outside Closing Date.

Here, a gap exists in the record. In the December 24 letter, Dickstein references a December 19 letter from Stroock which, purportedly, rescheduled the closing date a second time (Motion, Ex. 16). Dickstein's letter does not contain the new date. Stroock apparently references the same December 19 letter in its Application to the Attorney General For a Determination of Deposits (Motion, Ex. 24), and states in the Application that the December 19 letter rescheduled the closing date to December 30, 2008 (Id. ¶14). Unfortunately, the December 19 letter is not submitted.

There was no closing on December 30, 2008, and

[*7]

Dickstein wrote to Stroock that day, stating "please be advised that Purchaser has elected to, and does hereby, terminate the Agreement pursuant to paragraph E of the Rider to Agreement due to the failure of Sponsor to close title to the Unit on or before December 30, 2008" and demanded the return of its contract deposit (Motion, Ex. 18). The next day, December 31, Stroock sent HFR a notice of default, giving HFR until February 2, 2009 to cure (Motion, Ex. 19). By letter dated January 6, 2009, Dickstein reiterated the substance of the December 30 letter (Motion, Ex. 20).

DISCUSSION

A. Breach of Contract

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor . . . and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980] [citation omitted; internal quotation marks omitted]).

HFR does not support its motion with evidentiary proof in admissible form. Instead, it relies entirely on an attorney affidavit that introduces a series of letters which make reference to several conversations of serious import.³ These

³ Similarly, in its opposition papers, 170 East relies solely on the affirmation of its attorney and the affidavit of its contractor.

conversations, as reported by the letters, are hearsay and are insufficient to establish the requisite proof to support a summary judgment motion (*Batista v. Santiago*, 25 AD3d 326 [1 Dept, 2006]). Similarly, HFR's unverified answer, which is consistent with the material in the letters, is insufficient.

Assuming, arguendo, that the scenario described by the letters occurred, a material issue of fact exists regarding the second rescheduled closing date. In their submissions, both parties refer to the pivotal letter of December 19 without providing a copy. This letter may contain material information regarding the controversy over whether the December 26 letter specifically scheduled a new closing date of December 31, as HFR contends, or whether it inaccurately describes the date set in the December 19 letter. There are other issues raised as well regarding the readiness for occupancy of the Apartment, all of which must abide a trial.

Accordingly, summary judgment dismissing the complaint is denied.

B. Breach of Fiduciary Duty

HFR counterclaims that 170 East owes it fiduciary duties, pursuant to General Business Law (GBL) § 352-e and 352-h, with respect to the deposit placed into escrow with Stroock. It argues that 170 East breached its fiduciary duty by preventing an inspection of the property, and by not instructing Stroock to

release the deposit immediately to HFR after failing to close title. 170 East counters that it only has a duty as a "caretaker" of the funds, and that it did not violate that duty.

GBL § 352-h states that money received in connection with securities (including real estate) "shall not be commingled with the personal moneys or become an asset of the person, partnership, corporation, company, trust or association receiving the same, and shall not be subject to attachment, levy or other encumbrance in any action by a third party against such person. . . ."

Because the funds are in escrow, pending resolution of a legitimate dispute between the parties, this counterclaim cannot be the basis for recovery by HFR. Upon searching the record, it is dismissed (CPLR 3212[b]).

Accordingly, it hereby is

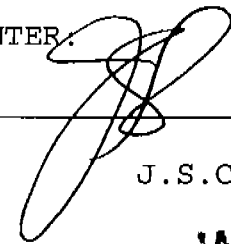
ORDERED that Defendant's motion for summary judgment is denied, except to the extent that a determination of Defendant's first counterclaim, which requests a declaration of the validity of its termination of the Agreement, is held in abeyance pending trial; and it further is

ORDERED that Defendant's third counterclaim for breach of fiduciary duty is dismissed; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY, on May 10, 2010 at noon.

Dated: April 7, 2010

ENTER.



J.S.C.

JANE S. SOLOMON

FILED
APR 08 2010
NEW YORK
COUNTY CLERK'S OFFICE