

**Emanuel Dev. Corp. v Spring Road
LJR/NIBA Assoc., LLC**

2008 NY Slip Op 31239(U)

April 15, 2008

Supreme Court, Nassau County

Docket Number: 3456-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

EMANUEL DEVELOPMENT CORP.,
Plaintiff,

- against -

SPRING ROAD LJR/NIBA ASSOCIATES, LLC
and BRADFORD J. MARTIN, ESQ.,
Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 3456/07

Motion Sequence No. 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves for an order granting the plaintiff's motion to reargue its request for summary judgment pursuant to CPLR 3212, as it is respectfully submitted the Court misinterpreted, misconstrued and/or misapplied the facts and law; and granting the plaintiff's motion to renew for summary judgment pursuant to CPLR 3212 based upon the fact the Court apparently was not provided with the plaintiff's affidavit in reply to the prior motion for summary judgment pursuant to CPLR 3212 and in opposition to the defense cross-motion which was submitted to the Court at the return date of this motion. The defendant Spring Road LJR/NIBA Associates, LLC is opposed to this instant motion.

Robert N. Cohen, a member of the law firm of Weinstein, Kaplan & Cohen, P.C., the attorneys for the plaintiff states, in a supporting affidavit January 31, 2008, he is fully familiar with the facts and circumstances of this matter, and maintains this is an action for a breach of a real estate contract where the plaintiff, as purchaser, has demanded the return of its contract deposit since defendants, Spring Road LJR/NIBA Associates, LLC failed to perform a material condition precedent in the contract of sale, to wit obtaining approval from the Town of Huntington to construct condominium units at the property. This affiant details the procedural history stating this action was commenced by service of a summons and verified complaint by service on defendant, Bradford J. Martin, Esq. on March 9, 2007 and upon co-defendant, Spring Road LJR/NIBA Associates, LLC, on March 15, 2007; and answers were duly interposed on April 11, 2007, and the reply to counterclaim was served on May 2, 2007.

The attorney for the plaintiff states on or about July 26, 2007, the plaintiff moved by notice of motion for summary judgment, pursuant to CPLR §3212, alleging no triable issues of fact existed and judgment should be entered in favor of the plaintiff ordering the defendants to return the sum of \$87,500.00, plus interest from August 14, 2006 to the plaintiff, and on or about September 7, 2007, defendant Spring Road LJR/NIBA Associates, LLC cross-moved for summary judgment and submitted opposition papers to plaintiff's motion. The attorney for the plaintiff states on or about October 2, 2007, counsel for the plaintiff submitted a reply affidavit to defendant's opposition, and in

opposition to the cross-motion, which was hand delivered to the Court with a letter to the motion clerk indicating that it was to be submitted at the call of the Court's calendar on Wednesday, October 10, 2007 at 9:30 A.M. The attorney for the plaintiff notes on or about December 5, 2007, the Court issued a decision denying the motion and the cross-motion, and the Clerk of the Court that decision entered on December 13, 2007. The attorney for the plaintiff postulates a review of the first page of that Order reveals the Court neither reviewed nor considered the plaintiff counsel's reply affidavit which was submitted to the Court and is annexed as an exhibit to the instant motion.

The attorney for the plaintiff argues the factual background of this action is undisputed, to wit on or about September 19, 2005, the plaintiff and the defendant entered into a written contract of sale regarding the purchase of the commercial premises located at 24 Spring Road, Huntington, New York. The attorney for the plaintiff points out, pursuant to paragraph "I" of the second rider to contract of sale, the contract was subject to and conditioned upon the approval of defendant's application to the Town Board of the Town of Huntington for the re-zoning of the subject parcel to allow for the construction of no less than seven residential condominium units. The attorney for the plaintiff states, on or about June 6, 2006, the Huntington Town Board adopted a local law permitting the construction of affordable townhouse units at the subject premises, but specifically indicated that the project will not be approved as a condominium development. The attorney for the plaintiff maintains on or about August 2, 2006, the attorney for Spring

Road LJR/NIBA Associates, LLC, sent a written notice by certified mail, return receipt requested, to plaintiff's then attorney, Thomas J. Vicedomini, Esq., advising of the decision of the Town Board of Huntington, and indicating it was effective as of the date of filing with the New York Secretary of State which was July 25, 2006. The attorney for the plaintiff contends paragraph "25(b)" of the printed form contract of sale, provided that "Notice" mailed to a party shall be deemed given on the third business day following the date of mailing the same, meaning that "Notice" was given by defendant Spring Road LJR/NIBA Associates, LLC's attorney to plaintiff's attorney on August 7, 2006. The attorney for the plaintiff states on or about August 14, 2006, within the ten day period of giving notice to terminate this transaction pursuant to paragraph "I" of the second rider to contract of sale, the plaintiff's attorney, Thomas J. Vicedomini, Esq., made a written demand for return of the contract deposit of defendant's attorney. The attorney for the plaintiff insists that pursuant to the notice given by plaintiff's attorney, the defendant was obligated to direct the escrow holder to refund the contract deposit to the plaintiff because of Spring Road LJR/NIBA Associates, LLC's inability to comply with its contractual representation.

The attorney for the plaintiff quotes the second rider to the contract of sale further stating:

In the event seller has failed to obtain Town Board approval for the re-zoning of the parcel within nine (9) months of the date of this agreement, either party may terminate the agreement by agreement providing written notice of termination to the other party's attorney. In the event the

agreement is terminated in accordance with this section, seller's sole obligation shall be to refund to purchaser the contract deposit paid hereunder. Upon payment of the contract deposit to purchaser, the parties shall be relieved of all obligations to one another.”

The attorney for the plaintiff reasons, since the contract of sale was dated September 19, 2005, the nine month period expired on June 19, 2006, and since Spring Road LJR/NIBA Associates, LLC was unable to obtain the Town Board approval for the re-zoning of the parcel within nine month period, the defendants were duty bound pursuant to the terms of the contract to return plaintiff's contract deposit upon written notice.

The attorney for the plaintiff notes the plaintiff counsel's reply affidavit responded to two arguments raised by defendants, to wit the deponent, the plaintiffs attorney, had no personal knowledge of the facts and circumstances of this matter and as such, his affidavit in support could not support the plaintiffs motion, and the word “condominium” as used in the rider was used in its “generic sense” to describe attached housing units. The attorney for the plaintiff asserts, as to defense attorney's first argument, it was pointed out to this Court that in the Court of Appeals decision in *Zuckerman v. City of New York* (49 N.Y.2d 557, 563, 427 N.Y.S.2d 595 [1980]), the Court stated: “The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide “evidentiary proof in admissible form”, e.g., documents, transcripts.” The attorney for the plaintiff concludes, despite the fact plaintiff's counsel did not personally represent the plaintiff at the time of contract and shortly thereafter, it is of no moment that

his affidavit is not submitted on the basis of personal knowledge, but rather based upon the submission of admissible documents signed by the parties to be charged, so such affidavit, along with its exhibits, is sufficient to provide a basis for summary judgment if the documents reflect that no triable issues of fact remain.

The attorney for the plaintiff submits, as to defendant's second argument, there is nothing "generic" about the use of the legal term, to wit condominium. The attorney for the plaintiff cites Black's Law Dictionary (6th Ed., 8th Reprint, 1994, at p. 295), as defining Condominium as a: "[s]ystem of separate ownership of individual units in multiple-unit building. A single real property parcel with all the unit owners having a right in common to use the common elements with separate ownership confined to the individual units which are serially designated," and the requirements for qualifying as a condominium are specifically provided for in the law and must be complied with strictly (*Susskind v. 1136 Tenants Corporation*, 43 Misc.2d 588, 251 N.Y.S.2d 321 [Civ. Ct. 1964]). The attorney for the plaintiff additionally critiques, the New York Condominium Act as enacted in March, 1964, as setting forth the statutory frame work of condominium ownership in New York State, to wit Article 9-B of the Condominium Act of the Real Property Law states in part: "§339-g Status of Units. Each unit, together with its common interest, shall for all purposes constitute real property. 'Section 339-e(15) reads as follows: "Unit owner' means that 'the person or persons owning a unit in fee simple absolute.'" The attorney for the plaintiff notes there is no mention of the word

“townhouse” in Article 9-B of the Real Property Law, that is townhouses are defined as dwelling units of two or three stories usually connected to a similar structure by a common wall, however condominiums are governed by Article 9-B of the Real Property Law and are a creature of statute. The attorney for the plaintiff asserts the Huntington Town Board specifically precludes the project from being owned as a condominium or as a cooperative development, so the Board specifically excluded the type of ownership called for in the instant contract and, therefore, the seller had not met its condition precedent to transfer the property pursuant to the contractual terms. The attorney for the plaintiff contends the defendants have not raised a single issue of fact to preclude the entry of summary judgment in the plaintiff’s favor. The attorney for the plaintiff instant asserts the contract is complete, clear and unambiguous on its face, and it must be enforced according to the plain meaning of its terms. The attorney for the plaintiff mentions case law which states, if the agreement on its face is reasonably susceptible of only one meaning, a Court is not free to alter the contract to reflect its personal notions of fairness and equity (*Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 750 N.Y.S.2d 565 [2002]; *see also Ungar v. Bleakley, Supreme Court, Westchester County*, NYLJ, 9/25/07, p. 28, col. 3).

The attorney for the plaintiff requests the Court re-examine the plaintiff’s papers, including the reply affidavit which the attorney for the plaintiff claims was omitted from the decision, and reconsider the Court’s position regarding whether or not there are any

triable issues of fact presented. The attorney for the plaintiff states no such triable issues of fact are mentioned in the Court's decision, and submits no such triable issues of fact exist.

Bradford J. Martin, Esq., a partner of the firm of LoTurco & Martin, attorneys for Spring Road LJR/NIBA Associates, LLC., as well as one of the defendants states, in an opposing affirmation dated February 21, 2008, he is familiar with the facts and circumstances of this action, in the event the Court did not consider the plaintiff's reply affirmation in its prior decision, the defendant has no objection to the Court's reconsideration of the original motion taking into consideration that document, however, if the Court did in fact receive and consider plaintiffs Reply Affirmation in its original decision, there is no basis for re-argument and this matter should proceed accordingly. The defense attorney notes the plaintiff's reply affirmation, as well as the affidavit in support of the instant motion to re-argue misstate the facts as well as the Defendant's opposition to the original motion which are much more involved than the Plaintiff is willing to admit. The defense attorney contends the plaintiff would like the Court to believe the Town of Huntington denied the defendant's application for the construction of condominiums on the subject parcel, when in reality, the Town of Huntington never denied any portion of the Defendant's application. The defense counsel points out the application which was reviewed in detail by the plaintiff and its experts prior to the execution of the contract of sale was for the construction of town homes, and hat

application was granted by the Town of Huntington within the time period set in the contract of sale. The defense counsel points to his affirmation dated September 7, 2007, which is attached to the defendant's cross motion, and clearly spells out the events and circumstances leading up to the execution of the contract of sale. The defense attorney claims the plaintiff and its original attorney are all aware the plaintiff and its experts diligently reviewed the Defendant's application for the re-zoning of the property and labored over its decision to sign the contracts. The defense attorney alleges the plaintiff negotiated fiercely in an attempt to have the contract be subject to and contingent upon both the application for a re-zone, as well as a final Planning Board approval for units of a specific size and layout, and the defendants were unwilling to incur the costs, delays and risks associated with the Planning Board application and refused to make the contract contingent upon such an approval. The defense counsel states, despite his attempt to help plaintiff's attorney understand the Town Board would not consider the size and layout of the homes to be built on the premises, they insisted on language in the contract that allowed them to cancel if the Town Board limited the size and layout of the approved units, and knowing full well the Town Board would not consider such issues, the defendant consented to the language and the contracts were executed.

The defense attorney notes, after the Town of Huntington approved the defendant's application, the plaintiff's attorney attempted to stall the closing so they could try to verify the Planning Board and Building Department would allow the plaintiff to

build units of a certain size and layout. The defense attorney maintains the plaintiff never raised any objection to the approval for town homes rather than condominiums because they knew all along the original application was for the construction of town homes. The defense attorney indicates they were also clearly aware of the fact, as confirmed by the plaintiff counsel's affidavits, the requirements for qualifying as a condominium and the costs and delays associated was adverse to their interest as the developer of the site. The defense counsel avers it was not until the plaintiff's attorney was hired as litigation counsel and astutely hung his hat on the word "condominium" that it became an issue, and the defense counsel's objection is not that an attorney cannot submit documentary evidence to support a motion for summary judgment if that documentation alone is sufficient to eliminate any triable issues of fact, but the objection is the documentary evidence does not paint the entire picture and does not eliminate the issues raised by the defendant. The defense counsel postulates, if it was the plaintiff's position it was unaware the defendant's application was always for the construction of town homes, and that they did not diligently review that application and discuss the circumstances with Town of Huntington personnel prior to signing the contract, why has there not been an affidavit submitted to that effect. The defense counsel also presents the question, if Vicedomin, plaintiff's then attorney, legitimately believes he sent letters to the defense counsel's office demanding the termination of the contract as a result of the Town's approval of town homes rather than condominiums, why haven't we seen an affirmation

from him. The defense counsel states the answer is simple, because neither the defendant nor its original attorney would be able to do so without perjuring themselves to the Court, and that is why we only have a theoretical affidavit with distorted explanations of the documents submitted to support the Plaintiffs claims.

The defense counsel avers, in an effort to distort the facts of this case, the plaintiff has raised a question as to the interpretation of the contract of sale. The defense counsel asserts there is a dispute over the use of the word “condominium” and a question as to what the parties understood that word to mean at the time of execution, and in the case of such an ambiguity, the Court may look to parole evidence to explain the intention of the parties. The defense counsel states here, parole evidence is necessary to establish the circumstances surrounding the execution of the contract of sale, and cites *In Geary v Dade Development* (62 AD2d 1083, 403 NYS2d 600), where the Appellate Division stated parole evidence of the circumstances leading up to, and attending, the execution of the writing is admissible to explain a doubtful meaning, and notes in no other way may it be possible to ascertain the intention of the parties as the Court of Appeals indicated in *Middleworth v Ordway* (191 NY 404, 84 NE 291) and *United States Printing and Lithographing v Powers* (233 NY 143, 135 NE 225). The defense counsel insists, having reviewed the Defendant's application, discussing the application in detail with architects, engineers and employees of the Town of Huntington Planning and Building Departments, and having had ample time to consider that application prior to executing the contract of

sale, it is disingenuous for the plaintiff to now claim that it contracted for the construction of “condominiums” as defined by Black’s Law Dictionary. The defense counsel asserts his Court decided there are triable issues of fact, it is time this matter move forward and that discovery be completed, so the plaintiff, its attorney and experts testify at depositions and trial as to their intimate understanding of the defendant’s application to the Town of Huntington prior to signing the contract; their attempts to confirm the ability to build units of a certain dimension and layout after receiving the Town’s approval; their objections to the fact that one of the units was required to be designated affordable housing; and their objection to a letter written to the Town Board by the Historic Preservation Committee. The defense attorney argues, after the completion of those depositions, it is the Defendant’s belief it will be clear that plaintiff’s refusal to close title as demanded was a breach of the contract of sale, and there are no true triable issues of fact, so another motion for summary judgment will be appropriate. The defense counsel states, if, however, this Court believes the prior decision should be reconsidered, the defense request the decision revisits the parole evidence submitted with the defendant’s original papers; takes into consideration the fact that nobody with knowledge of the actual facts and circumstances of the transaction has sworn to anything for the plaintiff and realizes that the plaintiff’s papers do not tell the true story. The defense counsel contends, if the Court allows re-argument, the defendant suggests that summary judgment in its favor is appropriate.

The plaintiff's counsel states, in a reply affidavit dated February 28, 2008, he takes strenuous issue with the allegation made by the defense counsel in paragraph "4" of his affirmation in opposition that plaintiff's counsel misstates the facts in this matter. The plaintiff's counsel states, quite to the contrary, every fact represented by the plaintiff's attorney is backed up by a document either prepared by the defense counsel or obtained by the defense counsel from the Town of Huntington, and every fact and document on which the Court needs to make a decision is contained in plaintiff's motion presently before the Court.

The plaintiff's counsel points out, in paragraph "5" of the affirmation in opposition, where the defense attorney states: "defendants' application which was reviewed in detail by the plaintiff and its experts prior to the execution of the Contract of Sale was for the construction of Town Homes." The plaintiff's counsel states, however, paragraph "20" of the second rider to the contract of sale, designated as "Re-zoning Approval", states: "This agreement is subject to and conditioned upon the approval of Seller's application to the Town Board of the Town of Huntington for the re-zoning of the subject parcel to allow for the construction of residential condominium units." The plaintiff's counsel opines, therefore, it appears the defense attorney has admitted the defendant breached the contract by not making the appropriate application to the Town of Huntington for the approval to build residential condominium units as required by paragraph "20" included in the second rider to contract of sale. The plaintiff's attorney

asserts the decision of the Town Board of Huntington made it clear that: “(2) the dwelling units will be developed as town houses with ownership by a Homeowners’ Association, and the project will not be owned as a condominium or cooperative development...” The attorney for the plaintiff contends the Town Board of Huntington failed to approve the construction of condominium units regarding defendants’ application, and, therefore, pursuant to the contract, the contract deposit was to be returned to the plaintiff upon termination of this agreement. The plaintiff’s counsel notes, although the defense counsel requests the Court be made aware of events and circumstances leading up to the execution of the contract of sale, it should be pointed out that pursuant to that contract, specifically paragraph “28”:

All prior understandings, agreements, representations and warranties, oral or written, between the Seller and the Purchaser are merged in this Contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this Contract.

The plaintiff’s counsel avers, pursuant to this merger clause, none of that information is relevant to the Court’s determination whether or not there are any triable issues of fact to be determined in this matter.

The plaintiff’s counsel asserts, in a case decided by the Court of Appeals on November 27, 2007, the Court once again set forth the following rule: “It is well settled that a contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and

concerning which there is no reasonable basis for a difference of opinion” (*White v. Confidential Casualty Company*, 9 N.Y.3d 264, 848 N.Y.S.2d 603 (2007)). The plaintiff’s counsel states the Court goes on further to state if the agreement on its face is reasonably susceptible of only one meaning, a Court is not free to alter the contract to reflect its personal notions of fairness and equity (*White V. Confidential Casualty Company, supra*, 848 N.Y.S.2d at 605, citing *Greenfield v. Philly’s Records*, 98 N.Y.2d 562, 750 N.Y.S.2d 565 (2002)). The plaintiff’s attorney states there is nothing ambiguous by this straightforward real estate contract because there was a condition precedent requiring the seller to obtain Town Board approval for the construction of residential condominium units, and the seller did not obtain that approval, as a result, after due notice by the plaintiff to terminate the agreement and obtain a refund of the contract deposit, that contract deposit should have been returned to the purchasers pursuant to the contract. The plaintiff’s attorney submits, by reason of these circumstances, there are no triable issues of fact in this case, and the plaintiff’s motion should be granted in all respects.

The Court has carefully re-examined and considered every paper submitted by the parties with respect to the instant motion for an order granting the plaintiff’s motion to reargue and to renew its request for summary judgment pursuant to CPLR 3212, and in opposition to the defense cross-motion which was submitted to the Court at the return date of this motion. CPLR 2221(d) (2) provides: “[a] motion for leave to reargue: shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court

in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” While CPLR 2221(e) (2), (3) provide:

[a] motion for leave to renew: shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion.

The Court, after thorough examination and consideration, determines the plaintiff has not met those statutory requisites contained in CPLR 2221(d) (2), and CPLR 2221(e) (2), (3), hence the Court adheres to the prior decision and order entered on December 13, 2007 by the Clerk of the Court.

Accordingly, the motion is denied in all respects.

So ordered.

Dated: April 15, 2008

ENTER:



J. S. C.

HON. ANTONIO I. BRANDVBEN

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

APR 22 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**