Cento Properties v Rosenberg
2008 NY Slip Op 33485(U)
December 22, 2008
Supreme Court, Nassau County
Docket Number: 008530/08
Judge: Stephen A. Bucaria
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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

CENTO PROPERTIES and GARDEN CITY HOTEL, INC.,

Plaintiffs,

INDEX No. 008530/08

MOTION DATE: Nov. 3, 2008
Motion Sequence # 003

-against-

ALLEN ROSENBERG and ALROSE LAND, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion.................................... X
Affirmation in Opposition......................... X
Reply Affirmation X

PRELIMINARY STATEMENT

This action involves the sale of the Garden City Hotel. The defendants did not appear at the scheduled closing when the contract, and contract extension, made time of the essence. The plaintiffs move for summary judgment on their complaint and for dismissal of the defendants counterclaims. The defendants contend that the plaintiffs were in substantial breach of their obligations under the contract and that the defendants were therefore excused from performance, despite the provision making time of the essence.

BACKGROUND

On January 4, 2008 Cento Properties Company and Garden City Hotel, Inc. agreed to sell the Garden City Hotel to Allen Rosenberg. Among the most pertinent provisions for the purpose of this motion are the following:

- The purchase price is $91,000,000, with a $5,000,000 deposit to be held in escrow by attorneys for the Seller;
- Seller must cure violations prior to closing if less than $50,000. If cost to cure exceeds $50,000, Seller has option to cancel;
- Seller to afford access to "Due Diligence Materials" as itemized at Exh. "M";
- Closing "shall occur at 10:00 A.M. on or about February 15, 2008 . . . , but in no event later than March 18, 2008, TIME BEING OF THE ESSENCE, . . .";
- Seller agrees ". . . that between the date of this Agreement and the Closing, Seller shall use commercially reasonable, good faith efforts to cause the Hotel to be operated and maintained consistent with prior practice, . . .";
- Among the conditions to closing is a requirement that the "Seller shall have substantially performed, observed and complied with all of the pre-Closing covenants, agreements and conditions required by this Agreement to be performed, observed and complied with by it prior to or as of the Closing".;
- "Seller shall terminate or arrange for the termination of all Hotel employees as of the Closing Date and shall make the Seller's Employee payment (defined in Section 13.E above)".;
- In the event of a default by the Purchaser, the Seller, having met the obligations in Section 11, is entitled, as its sole remedy, to terminate the agreement, and to receive and retain the deposit, and the proceeds thereof, with any interest earned thereon, as liquidated damages, and further consideration for entering into the agreement.

The agreement was amended as of March 18, 2008. The amendment noted that the original agreement had been assigned by Rosenberg to Alrose and made the following changes to the original agreement:

- Closing Date adjourned from March 18, 2008 to April 18, 2008," TIME BEING OF THE ESSENCE".;
- The $5,000,000 held in escrow was released and paid to Seller with accrued interest;
- An additional $1,000,000 deposit payable to the Seller in two payments of $500,000 each on March 21, 2008 and March 28, 2008;
- The $1,000,000 additional payment shall be credited to the purchase price, and if closing does not occur on or before April 18, 2008 for any reason other than the Seller's failure to perform its obligations under the sales agreement, it shall not be refunded by the Seller to the Purchaser or credited to the purchase price.

The closing did not occur on or before April 18, 2008. By letter dated April 17, 2008, counsel for the Purchaser notified the Seller's attorneys that they believed that the Purchaser's obligations under the agreement were "excused and/or suspended" because the Seller failed to perform certain of the obligations required under Section 11 of the Agreement. They specify seven specific violations as follows:

1. Due diligence materials not true and accurate in all material respects in violation of Section 5C of the Agreement;

2. There are open building permits in violation of Sec. 7A;

3. In violation of Sec. 9A, the Seller has failed to use commercially reasonable, good faith efforts to cause the Hotel to be maintained consistent with prior practice in the following respects:

   (i) fired or terminated employees critical to the operation of the Hotel;

   (ii) failed to properly and adequately supervise critical employees;

   (iii) failed to adequately protect critical proprietary information;

   (iv) failed to perform vital marketing and public relations;

   (v) failed to take adequate action in competitive situations to maintain existing accounts.

4. Seller has not conducted a walk-through of the Hotel or a meeting to apportion inventory and property, in violation of Sec. 9C;

[* 4]

5. Seller has not provided reliance letters describe in Section 9E of the Agreement in a form reasonably acceptable to the Purchaser or to enable the surveyor to certify the survey;

6. Seller has failed to use commercially reasonable efforts to promptly resolve pending ADA litigation;

7. Whatever deficiencies contained in the closing documents, which the Purchaser has not received or reviewed.

THE PLEADINGS

The Summons and Declaratory Judgment Complaint is dated May 8, 2008. The First Cause of Action alleges an on or about January 4, 2008 contract of sale between the plaintiffs and defendant Rosenberg to sell the Garden City Hotel, with Rosenberg thereafter assigning his right to purchase to defendant Alrose. The original closing date stated in the contract was March 18, 2008, but this was adjourned, at the defendants' request, to April 18, 2008, with time of the essence. The defendants failed to appear at the closing on that date; and on May 8, 2008 the Sellers mailed a notice of termination of the agreement and stated their entitlement to retain the cumulative down payment with interest. The complaint requests relief in the form of a Declaratory Judgment that the agreement is null and void.

The Second Cause of Action reiterates the allegations of the First and asserts the right of the Seller to retain the amount paid on account of the contract, together with accumulated interest.

The Verified Answer with Counterclaims alleges breaches of the contract on the part of the Sellers in seven respects, the same as itemized in their letter of April 17. The defendants seek specific performance in connection with the First Cause of Action, and, alternatively, in the Second Cause of Action, the return of the down payments paid on account of the contract. These total $6,000,000.

DISCUSSION

The complaint adequately alleges a cause of action for breach of contract. The First Cause of Action, seeking a declaration that the defendants' breach was such as to render the contract null and void, except as to the award of liquidated damages, alleges facts which constitute a default by the defendants, and if true, entitle the plaintiff to summary judgment. The Second Cause of Action, which reiterates the allegations of the First, is similarly sufficient to warrant summary judgment on the issue of liquidated damages.

In order to defeat the plaintiff's motion, the defendant must, by submission of evidence in admissible form, raise a legitimate question of fact, such as requires a determination by the Court, and thereby precludes a determination by the Court as a matter of law. (**Zuckerman v City of New York**, 49 NY2d 557, 560, 1980). The defendants have not done so. A review of the Verified Answer and its Counterclaims, in which they allege breaches by the plaintiff sufficient to vitiate their obligation to close the transaction, is warranted.

With respect to that which is intended to be a First Counterclaim, the unspecified lack of due diligence referred to in ¶ 1 is wholly inadequate to override the Purchaser's obligation to close under the Agreement. Section 5C is an acknowledgment that the Purchaser has had access to the documents specified in Exhibit M, and, except as expressly provided, the Seller made no representation or warranty as to their completeness. The least the Purchaser could be expected to do was specify in what manner the material was not true or accurate.

With respect to ¶ 2, Section 7C (x) of the Contract states that the Seller has no notice of Violation, but neither it, nor any other subsection relates to building permits. The existence of open building permits does not constitute breach of the Contract or an objection to closing.

Sec. 9A, referred to in ¶ 3, specifically enumerates the pre-Closing obligations of the Seller which are intended to constitute commercially reasonable and good faith efforts to cause the Hotel to be operated and maintained consistent with prior practice. These obligations are as follows:

- maintaining levels of Inventory and Supplies and paying for them;
- solicit booking of future events;
- not terminate or modify existing Equipment Leases, Service Contracts and Rooms Agreements nor enter into new Equipment Leases, Service Contracts or Rooms Agreements;
- not enter into other new agreements with respect to the Hotel, except those terminable by the Purchaser without termination fee on not more than 30 days notice;
- not transfer to a third person or remove any Furniture, Fixtures and Equipment (FF&E), except where such FF& E is being repaired or replaced with items of substantially similar quality;
- not take any action adverse to title of the property.

Section 9A makes no mention of retention or termination of employees, supervision of employees, protection of proprietary information, performance of marketing and public relations functions, or maintenance of existing accounts. These are the allegations of ¶ 3 of the defendants' counterclaim, which the plaintiffs deny. But even if they were true, they do not constitute violations of the contract.

Sec. 9C, referred to in ¶ 4, provides for a walk-through of the Hotel within 48 hours of the Closing. This is not a unilateral obligation of the Seller, rather a joint obligation of both parties to agree upon a time for the inspection and a meeting with Seller's management to apportion inventory and other items. There is no allegation that the Seller refused a request from the Purchaser to participate in such activities, or that the Purchaser even requested a walk-through.

¶ 5 claims that the plaintiff failed to provide Reliance Letters as described in Sec. 9E of the Contract. The contract provides that the Seller shall cause each person or entity that issued Environmental Documents and Property Condition Reports to issue reliance letters to the Purchaser, and cause the surveyor to certify the Survey to the Purchaser. But there is no requirement that these Reliance Letters be delivered prior to the Closing, and the failure of the Purchaser to appear is the reason for their not receiving them. The transcript of proceedings on April 18, 2008 identifies these Letters as among the documents produced for transmittal to the defendants.

In ¶ 6 the defendants allege a failure on the part of the plaintiffs to utilize commercially reasonable efforts to resolve pending litigation under the Americans with Disabilities Act. This issue is specifically dealt with in Section 44 of the Contract, and a plain reading leads to the inescapable conclusion that there was no anticipation by either party that the issue would be resolved before closing. To the contrary, ¶ 5 of Section 44 specifically provides that the terms of Section 44 shall survive the Closing.

Allegations as to the disclosure of proprietary information by an employee of the plaintiffs is not one of the enumerated breaches alleged in the Counterclaim; rather, it is contained in an Affidavit in Opposition to the Motion. These allegations are essentially apocryphal, involve actions not by the plaintiffs, but by an employee in furtherance of his own, not his employer's, economic best interests. Specifically, Mr. Rosenberg claims that Preferred Hotels advised him that the General Manager disclosed proprietary hotel information to prospective employers, and that this was done with the consent of the plaintiffs. This double hearsay is clearly insufficient to defeat a motion for summary judgment.

The allegations of the counterclaims, and the reported conduct of the General Manager, may be true, but they do not rise to the level of a substantial failure of the Seller to perform their obligations under the terms of the Purchase Sale Agreement, much less an anticipatory breach of

the contract. The latter involves an overt and unambiguous statement of intent not to perform in accordance with the contract, or the taking of actions which render performance impossible. (**Morgan v McCaffrey**, 14 AD3d 670, 671, 2nd Dept., 2005).

The defendants point to no communication or action by the plaintiffs which evidence, even in the slightest, such an intention not to perform. To the contrary, correspondence from the Plaintiffs consistently reflected their willingness and intention to convey title in accordance with the agreement. Neither has any action on the part of the Plaintiff rendered performance impossible.

The plaintiff has met its burden of establishing that the sales agreement provided that time was of the essence, and that the defendants did not appear at the scheduled closing, either in person or by counsel. Under such circumstances, the plaintiffs were not obligated to tender performance, but only establish their readiness, willingness and ability to consummate the transaction. (**Jewell v Rowe**, 119 AD2d 634, 2nd Dept., 1986). The defendants have failed to raise factual questions sufficient to preclude the grant of summary judgment.

Their efforts to do so were a creative, but ultimately unavailing, effort to avoid the inevitable. The reality is that the Contract was not contingent upon financing. The Defendants had an IDA package in place, with bank funding, but this process was derailed by the Garden City School District and the Village of Garden City which obtained a Temporary Restraining Order, and ultimately sought an injunction to prevent the consummation of the transaction so long as it included payments in lieu of taxes, the typical arrangement when IDA participates in the process. (**In Re Board of Education of the Garden City Union Free School District and the Incorporated Village of Garden City v Town of Hempstead Industrial Development Agency, et al**, Supreme Court Nassau County, Index No. 12438/2008). This proceeding appears to remain active.

CONCLUSIONS

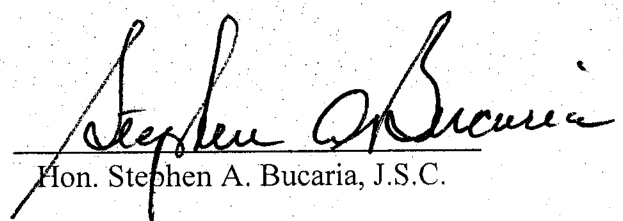
The motion for summary judgment on the plaintiffs' complaint and for dismissal of the counterclaims is **granted**. The defendants failed to appear on the law date set for closing and thereby subjected themselves to the liquidated damages provisions of the contract and its amendments. The failure to close was not the result of any anticipatory breach by the plaintiff; rather, it was caused by the failure of the defendants to retain the IDA-related financing which they initially secured. This was not a result of any wrongdoing on the defendants part. While this situation made the closing impossible as a practical matter, it was not an event against which protection in the contract was unavailable. For this reason, the failure to close is not excused by

impossibility of performance. (**Kel Kim Corporation v Central Markets, Inc.**, 70 NY2d 900, 1987).

The defendants' argument that summary judgment must await the completion of discovery is without merit. None of the bases upon which they rely as justification for their failure to close constitute anticipatory breaches of the contract, and discovery which may tend to substantiate their claims will not make them any more so. (**Bryant v City of New York**, 206 AD2d 448, 614 NYS2d 554, 2nd Dept., 1994).

This constitutes the Decision and Order of the Court.

Dated DEC 22 2008



Hon. Stephen A. Bucaria, J.S.C.

ENTERED

JAN 02 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE