

Third Ave. Devs., LLC v Atlantic Dev. Group
2009 NY Slip Op 32118(U)
September 14, 2009
Supreme Court, New York County
Docket Number: 650315/08
Judge: Charles E. Ramos
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: CE Ram

PART 55

Index Number : 650315/2008
THIRD AVENUE DEVELOPERS LLC
VS.
ATLANTIC DEVELOPMENT GROUP
SEQUENCE NUMBER : 002
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

Is decided in accordance with
accompanying memorandum decision and order.

FILED

SEP 16 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/14/09

[Signature]
HON. CHARLES E. RAMOS, S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X

THIRD AVENUE DEVELOPERS, LLC,

Plaintiff,

Index No. 650315/08

-against-

ATLANTIC DEVELOPMENT GROUP,

Defendant.

-----X

Charles Edward Ramos, J.S.C.:

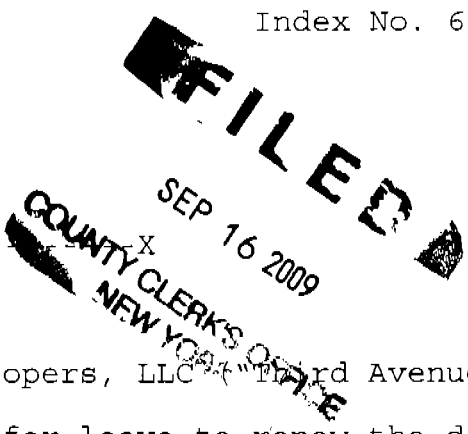
Plaintiff Third Avenue Developers, LLC ("Third Avenue") moves, pursuant to CPLR 2221(a), for leave to renew the denial of its summary judgment motion, and the granting of defendant Atlantic Development Group's ("Atlantic") summary judgment cross-motion.¹

Background

On March 14, 2008, the parties entered into a Purchase Agreement (the "Purchase Agreement") whereby Third Avenue agreed to sell, and Atlantic agreed to purchase certain certificates conferring real estate tax benefits under the Department of Housing Preservations Section 421-a Program (the "Certificates"), for a price of \$9,120,000 (the "Purchase Price") (Complaint ¶ 5, Masheb Aff. Exhibit A).

In accordance with Article 3(b) of the Purchase Agreement, Atlantic delivered to the escrow agent the deposit of \$912,000 (Complaint ¶ 6, Masheb Aff. Exhibit A). At the closing,

¹ On November 25, 2008, oral argument was heard and a decision was rendered from the bench. Thereafter, orders were entered on January 29, 2009 and March 18, 2009 effectuating the decision.



Atlantic was required to deliver to Third Avenue the balance of the Purchase Price, \$8,209,000 (Complaint ¶ 8, Masheb Aff. Exhibit A). Article 3(c) of the Purchase Agreement provided that the closing was to take place on June 1, 2008 (the "Delivery Date"), which was at all times "subject to [Third Avenue's] right to adjourn the Delivery Date, from time to time on at least twenty-five days of advance notice given to [Atlantic]" (Complaint ¶ 10, Masheb Aff. Exhibit B). The provision also provides that "TIME SHALL BE OF THE ESSENCE as to [Atlantic's] obligation to close on the Delivery Date" (Complaint ¶ 11, Masheb Aff. Exhibit C).

On July 14, 2008, Third Avenue notified Atlantic that it was exercising its right to adjourn the Delivery Date from July 23, 2008 to August 11, 2008. Atlantic allegedly consented to the adjournment, notwithstanding Third Avenue's breach of the twenty-five day advance provision in the Purchase Agreement. On July 25, 2008, Atlantic's counsel notified Third Avenue's counsel that "I will be on vacation until August 11th. Please be in touch with Ericka Jungblut...to make arrangements for the closing" (Notice of Motion for Renewal, Exhibit C, Plaintiff's Reply to Counterclaims, ¶ 14).

On August 11, 2008 (the "Closing Date"), Third Avenue appeared for the scheduled closing and alleges it was ready, willing, and able to close. Atlantic failed to appear on the Closing Date, and failed to pay the remainder of the Purchase Price, thereby forfeiting the Deposit under Article 5(a) of the

Purchase Agreement (Id). On August 13, 2008, Third Avenue notified Atlantic that the Purchase Agreement was terminated and delivered a letter to the Escrow Agent demanding the delivery of the Deposit to Third Avenue (Id).

Atlantic alleges that it sent an email on August 10, 2008, and a letter dated August 11, 2008, through counsel, to Third Avenue advising of its breach of the advance notice provision required by Article 3(c). Further, Atlantic advised Third Avenue that per Article 5(c) of the Purchase Agreement, Atlantic became entitled to a return of the Deposit (including any interest earned thereon) (Id). Atlantic then requested payment (Id).

On September 11, 2008, Third Avenue moved for summary judgment against Atlantic for breach of contract and a declaratory judgment, and to dismiss Atlantic's counterclaims and affirmative defenses. Atlantic cross-moved for summary judgment on its counterclaims,² and to dismiss Third Avenue's complaint.

On March 18, 2009, this Court issued an order denying Third Avenue's motion and granting Atlantic's cross-motion to the extent and for the reasons set forth in the transcript of the proceedings on November 25, 2008. The Court did so without prejudice to either party renewing its motion with respect to the issue of waiver after the completion of discovery.

Third Avenue now purports to have new facts that will supplement the Court's understanding of Article 3(c) of the

² Atlantic counterclaims for declaratory judgment and breach of contract.

Purchase Agreement. Atlantic argues that these new facts constitute extrinsic evidence, outside the four corners of the Purchase Agreement (Memo in Opp. ¶ 15).

Discussion

"A motion for leave to renew is intended to direct the court's attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention" (*Garner v Latimer*, 306 AD2d 209 [2003]). "This requirement, however, is not inflexible and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts known to the movant at the time the original motion was made" (Id). "[E]ven if the vigorous requirements for renewal are not met, such relief may still be properly granted so as not to 'defeat substantive fairness'" (Id).

Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (see CPLR 2221[e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice (See e.g. *Daniels v City of New York*, 291 AD2d 260 [2002]; *Strong v Brookhaven Mem. Hosp. Med. Ctr.*, 240 AD2d 726 [1997]. *Mejia v Nanni* 307 AD2d 870 [2003]).

This is not a circumstance where the need to achieve justice and substantive fairness warrants the Court relaxing the requirements of CPLR 2221(e). Third Avenue has not demonstrated that it will suffer unfairness in some way, much less substantial

prejudice, if the Court enforces the requirements of CPLR 2221(e). Moreover, it is unlikely Third Avenue can make such a showing, considering that the Court did not find Article 3 of the Purchase Agreement ambiguous, and accordingly interpreted that provision without considering extrinsic evidence.³

Third Avenue submits "new evidence" in the form of an affidavit from Lawrence B. Finkelstein,⁴ that purports to opine on "[t]he process for the issuance of Section 421-a Negotiable Certificates," and the claimed lack of control over when the New York City Department of Housing Preservation and Development ("HPD") will issue the certificates after a "Certificate of Occupancy" is obtained. He further opines on the supposed "standard industry practice" that grants sellers a right to adjourn the "Delivery Date" of any certificate sales, and speculates on Atlantic's knowledge of "industry norms regard to the timing of adjournments of certificate delivery dates." (Finkelstein Affidavit ¶5-6, 8-9, 10-12).

This Court finds that the Finkelstein Affidavit has no bearing on the interpretation of Article 3(c) in the Purchase Agreement. Moreover, the information contained in Mr. Finkelstein's affidavit does not alter the prior determination

³ THE COURT: " I don't go to the parol until I find ambiguity in the agreement, and I just don't find the ambiguity..." (Transcript of Proceedings, pg. 8) THE COURT: "It's not an ambiguous provision." (Transcript of Proceedings, pg. 14)

⁴ Lawrence B. Finkelstein is the principal of a New York real estate tax consulting firm, and former counsel to and director of the Tax Incentive Programs at the New York Department of Housing Preservation and Development.

reached by the Court, and is not deemed new facts or evidence to support a motion to renew. Given the clear and unambiguous nature of Article 3(c), there is no basis for the Court to consider extrinsic evidence regarding the meaning and operation of that provision.

Accordingly, it is

ORDERED, that the motion for leave to renew by Third Avenue is granted; and it is further

ORDERED that upon renewal, Third Avenue's motion to renew its prior summary judgment motion is denied.

Dated: September 14, 2009



J.S.C.

WON. CHARLES E. RAMOS

FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK