

Latipac Corp. v BHM Realty LLC

2010 NY Slip Op 31239(U)

May 18, 2010

Supreme Court, New York County

Docket Number: 101213/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: _____ J.S.C.

PART 11

Justice

Index Number : 101213/2009
LATIPAC CORP.
VS.
BHM REALTY LLC
SEQUENCE NUMBER : 003
AMEND SUPPLEMENT PLEADINGS

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 determined in accordance with the annexed decision and order.

FILED
MAY 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 18, 2010


HON. JOAN A. MADDEN
J.S.C.
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 11

-----X
LATIPAC CORP.,

Plaintiff,

INDEX NO. 101213/09

-against-

BHM REALTY LLC and GREENBLATT &
AGULNICK, P.C.,

Defendants.

-----X

JOAN A. MADDEN, J.:

In this action for the return of a real estate contract deposit, plaintiff moves for leave to amend its complaint and defendants oppose.

Although motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise, where the proposed amendment is plainly lacking in merit and legally insufficient, leave to amend should be denied. See Thompson v. Cooper, 24 AD3d 203 (1st Dept 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352 (1st Dept 2005); Heller v. Louis Provenzano, Inc., 303 AD2d 20, 25 (1st Dept 2003); Monteiro v. R.D. Werner Co, Inc, 301 AD2d 636 (2nd Dept 2003); Zabas v. Kard, 194 AD2d 784 (2nd Dept 1993). As the party seeking amendment, plaintiff has the burden of making an evidentiary showing establishing the merits of its proposed amendments, by submitting “an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.” Zaid Theatre Corp. v. Sona Realty Co., supra at 355; accord Hynes v. Start Elevator, Inc., 2 AD3d 178 (1st Dept 2003); Monteiro v. R.D. Werner Co, Inc, supra.

In support of the motion to amend, plaintiff relies solely on an attorney's affirmation and a proposed amended complaint. Plaintiff does not submit an affidavit of merit, a copy of its original complaint, or any evidentiary proof. Even though plaintiff's motion is not supported by the requisite affidavit and accompanying documents, the court will consider the attorney's affirmation and the underlying record, in determining whether the proposed amendments have merit.

Plaintiff's proposed amended complaint includes the two causes of action for breach of contract and misrepresentation that were asserted in the original complaint, and adds three new causes of action to "nullify" the contract based on the doctrines of frustration of purpose and impossibility (proposed second cause of action), and for return of plaintiff's deposit based on defendant BHM Realty LLC's (BHM) improper notice of the closing (proposed third cause of action), and BHM's failure to make a proper and complete tender at the closing (proposed fourth cause of action).

Plaintiff previously made two motions for preliminary injunctions to stay the closings on the sale of the property owned by BMH to plaintiff. This court denied both motions based on plaintiff's failure to establish its likelihood of success on the merits. As to the second motion, on June 17, 2009, the court issued a decision on the record, determining that "Latipac has not established that it's likely to prevail on its argument that the Tishman Speyer decision renders the contract unenforceable based on the doctrine of frustration of purpose or impossibility of performance." The court analyzed those doctrines, and concluded that "[h]ere it cannot be said that the non-occurrence of the decision in Tishman Speyer, that is that the fair market status of certain apartments notwithstanding the J-51 tax abatement was so completely the basis of the

contract so that both parties understood that without it the contract made little sense.” The court further concluded “that the Tishman Speyer decision regarding the J-51 tax abatement issue if applicable to the free market/rent stabilization status of certain apartments in the building, may make the transaction less profitable to Latipac, . . . is not a basis to invoke either the doctrine of frustration of purpose or impossibility of performance.”

Plaintiff now seeks to add a new second cause of action based on identical allegations that the decision in Roberts v. Tishman Speyer Properties, L.P., 62 AD3d 71 (1st Dept), aff’d 13 NY3d 270 (2009), frustrated the purpose of the subject contract, or rendered the performance of the contract impossible. For the reasons previously stated on the record on June 17, 2009, plaintiff, in connection with the instant motion, has not made a sufficient showing to establish that either of those doctrines is applicable to facts as alleged in the proposed amended complaint. Furthermore, both doctrines require an unforeseen or unanticipated event. See e.g. Kel Kim Corp. v. Central Markets, Inc., 70 NY2d 900, 902 (1987) (impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract); Sage Realty Corp. v. Omnicom Group Inc., 183 Misc2d 574 (Sup Ct, NY Co), app withdrawn 270 AD2d 973 (1st Dept 2000) (frustration of purpose refers to a situation where an unforeseen event occurs, which in the context of the entire transaction, destroys the underlying reasons for performing the contract). Here, it is clear that potential consequences of the disposition in the Tishman Speyer action were neither unforeseen nor unanticipated. Thus, since has plaintiff not established the merits of its proposed claim to annul the contract on the grounds of impossibility of performance or frustration of purpose, the motion to amend is denied as to the proposed second cause of action.

In the proposed third cause of action, plaintiff alleges that “BMH’s effort to compel a time of the essence closing on June 26, 2009 [was] improper because BMH did not provide a full 30 days notice as required by applicable law,” and as a result, “BMH’s demand to close was premature and ineffective.” It is not disputed that BMH gave plaintiff three days notice of the June 26, 2009 time of the essence closing date.¹ Even though plaintiff does not identify any “applicable law” requiring 30 days notice, case law establishes that when the closing date specified in a contract for the sale of real property has passed, either party may subsequently give notice making time of the essence provided that such notice is clear, distinct, unequivocal and fixes a reasonable time within which to perform. See Baltic v. Rossi, 289 AD2d 430 (2nd Dept 2001); Miller v. Almquist, 241 AD2d 181, 185 (1st Dept 1998). What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case, considering factors such as the nature and object of the contract, the parties’ previous conduct, the presence or absence of good faith, the parties’ experience, and the possibility of hardship to either party, along with the specific number of days provided for performance. See id at 185.

Assuming plaintiff was entitled to “reasonable time,” a sufficient basis exists for plaintiff to assert a claim for return of its deposit on the grounds that three days’ notice was not reasonable under the facts and circumstances of this case. See id (holding that buyers were entitled to recover their down payment where the time allotted by the seller in the time of the essence letter was not reasonable so as to inflexibly bind the buyers to that closing date). Thus, plaintiff shall be

¹Although neither party submits a copy of written time of the essence notice, defendants submit a transcript of statements from the closing, which includes a statement by defendants’ counsel, Mr. Greenblatt, that on June 23, 2009, he served a letter scheduling a closing time of the essence for June 26, 2009 at 2:00 p.m.

permitted to amend its complaint to assert the proposed third cause of action.

In the proposed fourth cause of action, plaintiff alleges that on the June 26, 2009 closing date, "BMH did not demonstrate or establish that it was actually ready, willing and able to close the sale transaction." Specifically, that cause of action alleges that BMH "failed to make a complete, full and proper tender" in accordance with the its "delivery obligations under the Contract," including not "bring[ing] any originals or copies of tenant leases or files to the closing as mandated in paragraph 56 of the Contract," not providing other "required documentation," such as a current estoppel certificate from the commercial tenant and a certificate for fuel adjustment, and failing to deliver a satisfaction of the mortgage or a pre-closing escrow arrangement between BMH and the title company.

While defendants object that plaintiff has not submitted an affidavit based on first hand knowledge as to what occurred on the June 26, 2009 closing date, defendants concede that a time of the essence closing was scheduled for that day. Defendants allege that BHM was ready, willing and able to close on June 26, and that "all documentation to be produced by Defendants under the Contract of Sale, was produced in its entirety." Defendants assert that plaintiff failed to show or tender any performance, and that plaintiff was the party who was not ready, willing and able to close. Defendants submit a transcript of "statements on the record" from June 26, 2009, which at best shows that the closing did not take place because each side accused the other of not being ready, willing and able to perform.

In view of the parties' conflicting allegations as to what occurred on the June 26, 2009 closing day, a sufficient basis exists to support plaintiff's claim for its deposit based on defendant's alleged failure to be ready, willing and able to perform on the closing day. See e.g.

Morgan Barrington Financial Services v. Roman, 27 AD3d 385 (1st Dept 2006) (seller awarded down payment as liquidated damages, where it established that it was ready, willing and able to deliver good and marketable title on date of the third closing, and buyer failed to establish it had the necessary funding and proof of insurance to close).

Plaintiff's motion to amend is therefore granted only to the extent that plaintiff shall be permitted to amended its original complaint to add the proposed third and fourth causes of action. to the original complaint. In all other respects the motion is denied, and with the exception of the allegations specifically relating to those two new causes of action, plaintiff shall not add to or alter the factual allegations or causes of action in the original complaint.

Accordingly it

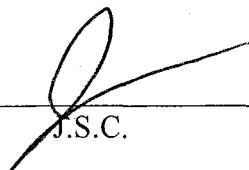
ORDERED that plaintiff's motion to amend the complaint is granted only to the extent that plaintiff shall be permitted to add to its original complaint the proposed third and fourth causes of action, and in all other respects the proposed amendments are denied; and it is further

ORDERED that within 20 days of the date of this order, plaintiff shall prepare, serve and file an amended complaint in compliance with this decision and order; and it is further

ORDERED that within 20 days of said service, defendants shall serve and file an answer to the amended complaint; and it is further

ORDERED that the parties are directed to appear for the conference previously scheduled for July 22, 2010 at 2:00 p.m., in Part 11, Room 351, 60 Centre Street.

DATED: May 18, 2010

ENTER:


J.S.C.