

311 E. 54th St. LLC v Parker Hart LP

2010 NY Slip Op 31405(U)

June 4, 2010

Sup Ct, NY County

Docket Number: 600242/10

Judge: Barbara R. Kapnick

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6-8-10
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kapnick
Justice

PART 3am

311 East Sixth Street LLC

INDEX NO. 600242/10

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

Parkway Hart Limited et al

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED

JUN 08 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/2/10

BARBARA R. KAPNICK J.S.C. JAC

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: IA PART 39

-----x
311 EAST 54th STREET LLC,

Plaintiff,

-against-

PARKER HART LIMITED PARTNERSHIP and
MARY HUGHES,

Defendants.

DECISION/ORDER
Index No. 600242/10
Motion Seq. No. 001

FILED
JUN 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA R. KAPNICK, J.:

This action for a declaratory judgment arises out of a Sale-Purchase Agreement dated as of December 9, 2009, entered into between plaintiff 311 East 54th Street LLC and defendant Parker Hart Limited Partnership ("Parker Hart") for the purchase of the premises located at 311 East 54th Street, New York, New York. Defendant Mary Hughes acted as the Escrow Agent.

Paragraph 8 ("Disposition of Downpayment") provides as follows:

If (a) Seller is unable to convey title in accordance with the terms of this Agreement, (b) Seller has the right to, and does, terminate this Agreement for a reason that specifically requires Seller to refund the Downpayment to Purchaser, or (c) Purchaser is entitled to and does elect to terminate this Agreement in accordance with the provisions of Sections 3, 7, 10 or 18 of this Agreement, then (i) Seller and Purchaser shall direct Escrow Agent to refund to Purchaser the Downpayment (or such portion thereof as shall have been deposited with Escrow Agent), and (ii) if the termination of this Agreement is pursuant to Sections 7, 10 or 18 of this Agreement, then Seller shall reimburse Purchaser for reasonable diligence costs (the "Diligence Costs")

actually expended by Purchaser in connection with its inspection of the Premises up to the aggregate maximum amount of Five Thousand and 00/100 Dollars (\$5,000.00). Upon such delivery of the Downpayment to Purchaser, this Agreement shall terminate and neither party to this Agreement shall have any further rights or obligations hereunder, except for the Surviving Obligations (as hereinafter defined), which shall survive such termination. Seller's conditional obligation under Section 8(ii) of this Agreement to reimburse Purchaser for the Diligence Costs shall survive the termination of this Agreement.

Paragraph 10 ("Representations") of the Agreement provides, in relevant part, as follows:

10.1. Seller hereby represents and warrants to Purchaser that, as of the Effective Date:

* * *

(m) to the actual knowledge of Seller, the current use of the Occupied Units is in substantial compliance with all material laws and regulations pertaining to the use and occupancy of same and the current use of the Premises is in accordance with the Certificate of Occupancy attached hereto as Exhibit Q and made a part hereof; ...

Plaintiff claims that this representation was false. The Certificate of Occupancy attached as an Exhibit to the Agreement stated that the "Permissible Use and Occupancy" for: (i) the cellar of the premises was "One (1) apartment, one (1) doctor's offices, [sic] boiler room, storage, tenants' laundry and incinerator room;" and (ii) for the 1st through 5th stories was "Eight (8) apartments, on each story."

However, plaintiff claims to have discovered as a result of inquiries it made during the week of January 10, 2010 while conducting due diligence that Parker Hart had been operating a transient hotel at the premises in violation of the Certificate of Occupancy.¹ In addition, plaintiff claims to have discovered that: (i) rent records have not been filed with the DHCR for more than five years; (ii) Parker Hart has not been paying certain New York City hotel taxes; (iii) the amounts Parker Hart has been charging for using the premises as a hotel (up to \$6,000.00 per month) far exceed the rent-regulated amounts; (iv) Parker Hart has not fully disclosed the amounts it received in rents to the DHCR; and (v) Parker Hart may not have charged proper hotel tax amounts for rental at the premises.

Pursuant to Section 10.3(b) of the Agreement,

[i]f prior to Closing, Seller's Representations, as made as of the Effective Date, are determined to be untrue in any material respect as to the Effective Date or if Seller's Representations, as remade on the Closing Date shall result in Seller's Representations made as of the Effective Date being untrue in any material respect as of the Closing Date, then Purchaser may, at Purchaser's option and as Purchaser's sole remedy (Purchaser specifically waiving any right to bring any action against Seller for damages arising therefrom) prior to the Closing Date, either (i) terminate this Agreement by

¹ According to plaintiff, certain advertisements on the internet demonstrate that the building was, in fact, being used as a transient hotel *after* the Agreement was signed on December 9, 2009. Defendant denies that these advertisements were authorized by Parker Hart.

notice in writing to Seller, in which event (subject to the provisions of this Section 10.3) the provisions of Section 8 of this Agreement shall apply to such termination, or (ii) waive the same and accept title to the Premises without any abatement of the Purchase Price (it being agreed that Purchaser shall not have any right to terminate this Agreement with respect to any Seller's Representations which are discovered to be untrue after the Closing Date or which are referenced in a notice of termination sent by Purchaser to Seller after the Closing Date); provided, however, that Purchaser shall have no right to terminate this Agreement as a result of any modification to or updating of Seller's Representations to reflect:...²

Plaintiff claims that it provided a written notice to cure pursuant to Section 10.3(c) on January 22, 2010, and demanded the return of the downpayment in the amount of \$660,000.00 and diligence costs in the amount of \$5,000.00.

² Pursuant to Section 11 of the First Amendment to Sale-Purchase Agreement, Section 10.3 was

modified such that the Seller's Representations made in Sections 10.1(c), (d), (e), (f), (j), (m) and (n) (the "December 21 Representations") shall only be made as of the Effective Date and as of December 21, 2009 and may not continue to be true thereafter or on the Closing Date. Accordingly, throughout Section 10.3 of the Purchase Agreement, with respect to the December 21 Representations, all references to the Closing or the Closing Date shall be deemed to refer to December 21, 2009 (except that the reference to the Closing in Section 10.3(c)(y) shall continue to refer to the Closing). Notwithstanding the foregoing, if Seller intentionally breaches the December 21 Representations between December 21, 2009 and the Closing Date, Purchaser shall be entitled to rely on such representations as if the same were required to be true on the Closing Date, provided, however, that such reliance shall be subject to the limitations set forth in Section 10.4 of the Purchase Agreement.

According to plaintiff, Parker Hart failed to cure the alleged default (i.e., the purported misrepresentation with respect to the Certificate of Occupancy). Parker Hart thereafter demanded that plaintiff proceed to the closing date which had already been extended by two Amendments to the Agreement to February 1, 2010, with "TIME BEING OF THE ESSENCE absolutely and unequivocally."

Plaintiff's Complaint seeks a judgment: (i) adjudicating the parties' rights with respect to the Agreement; (ii) declaring the Agreement terminated; (iii) declaring that Parker Hart must return plaintiff's deposit and diligence costs totaling \$665,000.00; or (iv) in the alternative, for specific performance of the contract.³

Plaintiff now moves by Order to Show Cause for an order pursuant to CPLR § 3001 declaring that the Agreement, as amended, is terminated and that plaintiff is entitled to \$660,000.00 from defendants.

Defendant Parker Hart opposes the motion and cross-moves for an order: (i) dismissing plaintiff's Complaint in its entirety

³ Specifically, plaintiff seeks five calendar days from the Court's Decision/Order to close its purchase of the premises in accordance with the Agreement, in the event this Court determines that the contract was not terminated pursuant to Section 10.3.

pursuant to CPLR §§ 3211(a)(1) and (7); or (ii) in the alternative, rendering declaratory judgment on the law as to certain matters alleged in plaintiff's Complaint; and (iii) imposing sanctions on plaintiff for frivolous and malicious prosecution.

Defendant denies that the building was used as a hotel during any relevant period. Defendant further argues, inter alia, that plaintiff's claim for termination of the contract and return of the downpayment fail because there was no misrepresentation with respect to the "current use" of the only occupied units in the building, which were three rent stabilized apartments. All other units, according to defendant, were vacant prior to the contract.

Based on the papers submitted and the oral argument held on the record on March 23, 2010, this Court finds that there are disputed issues of fact with respect to the veracity of the representations in Section 10.1(m) of the Agreement, i.e., whether or not the building was used as a transient hotel in violation of the Certificate of Occupancy during the relevant time period.

Defendant also argues that plaintiff is not entitled to specific performance of the Contract since plaintiff is also contending that it terminated the contract.

However, "[i]t is well established that a party may plead alternative theories, even on the basis of allegations that contradict each other." *Raglan Realty Corp. v Tudor Hotel Corp.*, 149 AD2d 373, 374 (1st Dep't 1989).

Accordingly, the motion and cross-motion are both denied.

Defendant shall serve an Answer within 20 days of entry of this order.

A preliminary conference shall be held in IA Part 39, 60 Centre Street, Room 208 on July 14, 2010 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: June 4, 2010



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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JUN 08 2010

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