Vision Enters., LLC v 111 E. Shore, LLC

2010 NY Slip Op 31778(U)

July 7, 2010

Supreme Court, Nassau County

Docket Number: 9964-09

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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VISION ENTERPRISES, LLC,

Plaintiff,

- against -

111 EAST SHORE, LLC and
GOLD & ROSENBLATT, LLC,

Defendants.

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TRIAL/IAS PART: 22

NASSAU COUNTY

Index No: 9964-09
Motion Seq. Nos: 2 and 3
Submission Date: 5/3/10

Motion Seq. No. 1
On Motion Calendar: 7/30/10

The following papers have been read on these motions:

Notice of Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....x
Notice of Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....x
Notice of Cross Motion and Opposing/Cross Moving Affidavits (2)....x
Index to Defendants' Opposing and Cross Motion Exhibits.....x
Defendants' Memorandum of Law in Opposition/Support.....x
Plaintiff's Reply Affirmation and Reply Affidavit.....x
Defendants' Reply Memorandum of Law.....x
Defendants' Reply Affidavit.....x
Plaintiff's Supplemental Affirmation.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff Vision Enterprises, LLC ("Vision," "Buyer" or "Plaintiff") on December 15, 2009, 2) the motion filed by Plaintiff Vision on January 20, 2010, and 3) the cross motion filed by Defendants 111 East Shore, LLC ("Seller") and Gold & Rosenblatt, LLC on February 9, 2010. Motion Sequence numbers 2 and 3 were submitted on May 3, 2010. Motion Sequence Number 1 seeks identical

relief as Motion Sequence Number 2 and is currently on the Court's motion calendar on July 30, 2010. The Court directs that these three (3) motions will be the subject of a Conference in Aid of Disposition before the Court on August 10, 2010 at 10:30 a.m.

BACKGROUND

A. Relief Sought

In Motion Sequence Numbers 1 and 2, Plaintiff seeks identical relief. In those motions, Plaintiff moves for an Order, pursuant to CPLR § 3212, awarding summary judgment in favor of Plaintiff for the relief demanded in the Verified Complaint ("Complaint").

In Motion Sequence Number 3, Defendants cross move for an Order, pursuant to CPLR § 3212, 1) granting summary judgment to Defendants dismissing the Complaint; 2) awarding Defendants judgment for the $250,000.00 portion of the agreed contract deposit not paid by Plaintiff; and 3) declaring that Defendants may retain, as liquidated damages, the $750,000.00 portion of the contract down payment deposited by Plaintiff with Defendants.

B. The Parties' History

This action arises out of a twenty-three page contract of sale ("Contract") dated March 28, 2007 (Ex. A to Zangas Aff. in Supp.) pursuant to which Buyer agreed to purchase commercial real property comprised of an office building and one additional unattached parking lot located at 111 East Shore Road and 33 East Shore Road, Great Neck, New York for the agreed price of $14,200,000 of which Buyer paid $750,000 to Seller as a down payment. The down payment is held in a special interest bearing escrow account maintained pursuant to Section 2.05(a) of the Contract of sale by seller's attorney, Defendant Gold & Rosenblatt, LLC ("Escrowee").

Schedule C of the Contract, titled "Purchase Price," reflects Seller's receipt of the required $500,000 down payment and provides for additional payments of $250,000 on March 29, 2008 and $250,000 on September 29, 2008. Buyer made the first $250,000 payment, but did not pay the final installment. Section C of the Contract also provides, in pertinent part, as follows:

> In the event that any of the payments to be made hereunder are not timely made or in the event purchaser[']s checks do not clear the seller[']s bank or that of their attorneys then upon 3 days written notice if the funds are not made good the seller can cancel this contract and retain such deposits that have actually been paid.

The Contract, which provided for a closing date of May 31, 2009 followed by the language "time being of the essence" in capital letters, never closed. By letter dated February 6, 2009, Buyer notified Seller that the mezzanine area of the building could not be occupied legally. Based on its allegation that Seller's representations regarding square footage and the legality of the building were "substantially inaccurate," (Ex. C to Zangas Aff. in Supp.), rather than tender performance, Buyer elected to terminate the Contract pursuant to Section 13 of the rider ("Rider") to the Contract and demanded return of the deposit. Seller rejected the letter of termination by letter of the same date (Ex. D to Zangas Aff. in Supp.) which advised Buyer that "the deposit paid by [Buyer] is hereby forfeited" and advising Buyer that Seller would pursue its right to the deposit, and any damages sustained. In response to Buyer's second demand for return of its down payment by letter dated March 9, 2009 (Ex. E to Zangas Aff. in Supp.), Seller reminded Buyer, by letter dated May 19, 2009 (Ex. F to Zangas Aff. in Supp.) of a June 1, 2009 time of the essence closing date. [1] Seller's letter of May 19, 2009 also stated that:

> If the buyer does not appear with sufficient funds to complete this transaction the buyer will be deemed in default and their deposit will be forfeited (§ 13.04 of the contract).

In its Complaint, Buyer seeks judgment declaring the Contract null and void and the return of its $750,000 down payment as well as damages arising from Seller's alleged false and fraudulent misrepresentation that the premises was in compliance with all laws and the required certificates of occupancy were issued.

In their Second Amended Verified Answer ("Answer"), Defendants assert numerous affirmative defenses and three alternative counterclaims. Defendants seek dismissal of Plaintiff's first and second causes of action. Defendants also seek an Order 1) declaring that Buyer is no longer entitled to limit Seller's damages to the contractual liquidated damages and awarding Seller its actual contract damages of $4,450,000.00; 2) declaring that, if Seller is not awarded its contract damages, Seller is entitled to the $750,000.00 escrow portion of the $1,000,000.00 required full contract down payment; 3) declaring that, if Seller is not awarded its contract damages, Seller is entitled to judgment against Buyer in the amount of the $250,000.00

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[1] As the original time of the essence closing date of May 31, 2009 was a Sunday, the closing was moved to Monday, June 1, 2009.

unpaid portion of the full required contract down payment; 4) declaring that Defendant Escrowee is required to pay to Seller, free of any claim of Buyer, the entire $750,000.00 escrow deposit with accumulated interest and is entitled, thereon, to be discharged as Escrowee; 5) awarding Escrowee the costs and expenses of defending this action, including reasonable attorney's fees; 6) declaring the Contract to be of no further force and effect based on Buyer's breach and default or, alternatively, if the Contract was not thereby terminated; 7) declaring that, if Seller does not prevail on its defenses and counterclaims, that Seller's time to cure a contract default on its part, if any, has not yet expired and Seller still has a reasonable time in which to cure any such default; and 8) awarding Defendants allowable disbursements and taxable costs of this action.

C. The Parties' Positions

Buyer contends that it is entitled to the return of its down payment because of Seller's breach of contract and false representations. In paragraph 18 of the Rider, Sellers represented:

> that the premises are improved by an office building and parking spaces for 213 units. Copies of the relevant and available certificate of occupancies are annexed hereto on pages 21, 22 and 23.

No certificate of occupancy was in effect for the mezzanine area of the building until after the scheduled time of the essence closing date of June 1, 2009. Buyer maintains that, given that no certificate of occupancy/completion for the mezzanine area of the building was in effect at the time of its February 6, 2009 termination letter, Buyer was not obligated to close and accept title to the premises notwithstanding Seller's scheduling of the time of the essence closing for June 1, 2009. Buyer contends that under Section 1.02 of the Contract, Buyer was required to accept transfer of title subject to the permitted exceptions set forth in schedule B including "zoning regulations and ordinances" only to the extent such regulations "are not violated by existing structures or present use thereof." (*See* Rider, Schedule B(1))

Section 1.02 of the Contract provides as follows:

> Seller shall convey and Purchaser shall accept fee simple title to the Premises in accordance with the terms of this contract, subject only to:
> (a) the matters set forth in Schedule B attached hereto (collectively, "Permitted Exceptions"); and
> (b) such other matters as (i) the title insurer specified in Schedule

> D attached hereto (or if none is so specified, then any member of the New York Board of Title Underwriters) shall be willing, without special premium, to omit as exceptions to coverage or to except with insurance against collection out of or enforcement against the Premises.

Buyer asserts that Seller did not request an extension of the closing date in order to cure the purported illegality. Instead, Seller insisted that Buyer proceed with the closing on June 1, 2009 or forfeit its down payment, as reflected in Seller's letter dated February 6, 2009, notwithstanding Buyer's assertion that Seller itself was not able to perform on the purported time of the essence closing date.

In opposition to Buyer's motion, and in support of its cross motion, Seller submits that the time within which Buyer was permitted to cancel the Contract based on the physical or record conditions of the premises was expressly limited by the plain language of paragraph 12 of the Rider which provides that:

> The Contract is subject to and conditioned upon the satisfactory review of the engineering inspection report ("The Engineering Report"), by April 11, 2007. The Purchasers represent that they have conducted an engineering inspection with a licensed engineer on the 23rd day of March, 2007. It is agreed and understood that the Purchasers shall have the right to unilaterally terminate the within contract at any time up to and including midnight on April 11, 2007 (Time Being of the Essence). It is agreed and understood that said right to terminate shall be based solely upon the Purchasers' review and consideration of factors that are addressed in "The Engineering Report." The Purchasers represent that they shall forward a copy of the Engineering Report to the Seller upon receipt thereof. In the event that the Purchasers elect to terminate said contract in accordance with this paragraph, they must do so by forwarding a written notification to the Seller's attorney setting forth said termination, with said Notification to be delivered to the Seller's attorney not later than midnight on April 4, 2007 (Time Being of the Essence).

Although the provision calls for Buyer to do so, Buyer never provided Seller with a copy of the Engineering Report. Moreover, Seller contends that Buyer's purported February 6, 2009 termination of the contract was impermissibly untimely and contractually barred. Further, Seller characterizes the open permit related to alteration work performed on the premises' mezzanine in

1985-1986 (before Seller acquired ownership of the premises) and lack of a certificate of occupancy, technical irregularities rather than matters of title or violations of applicable laws and codes to which Buyer might object. Seller further contends that, even if the open permit did, in fact, constitute a valid objection, Buyer's time within which to assert an objection expired on April 11, 2007.

Seller further maintains that Buyer's first cause of action, based on alleged false representations and warranties, is not viable given the Buyer's acknowledgment in Section 5.01 of the contract of sale that it was fully familiar with the physical condition and state of repair of the premises which Buyer agreed to accept "as is" and in their present condition "subject to all violations whether or not of record." Further, Section 5.02 of the Contract states in pertinent part, that:

> In entering into this Contract, Purchaser has not been induced by and has... not relied upon any representations, warranties or statements, whether express or implied made by Seller ...which are not expressly set forth in this contract, whether or not any such representations, warranties or statements were made in writing or orally.

RULING OF THE COURT

The Court directs that these motions shall be the subject of a Conference in Aid of Disposition before the Court on August 10, 2010 at 10:30 a.m. At that Conference, the Court will address issues raised by the motion papers, including 1) whether the dispute regarding the certificate of occupancy/permit is a title issue; and 2) whether the Engineering Report to which the Contract refers would reasonably have been expected to uncover the issue regarding the certificate of occupancy/permit.

ENTER

DATED: Mineola, NY
July 7, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUL 12 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE