

O'Lear v Soho 311 Dev., Inc.

2011 NY Slip Op 31552(U)

May 16, 2011

Sup Ct, NY County

Docket Number: 0107514/2009

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 57

Index Number : 107514/2009

O'LEAR, CHRIS

vs

SOHO 311 DEVELOPMENT

Sequence Number : 001

DISMISS ACTION

INDEX NO. 107514/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion ~~is~~ for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No and cross-motion are

Upon the foregoing papers, It is ordered that this motion ~~is~~ determined as
per decision/order dated 5-16-11.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5-16-11



MARCY S. FRIEDMAN ^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

UNFILED JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

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PRESENT: Hon. Marcy S. Friedman, JSC

CHRIS O'LEAR, x

Plaintiff(s),

Index No.: 107514/09

- against -

DECISION/ORDER

SOHO 311 DEVELOPMENT, INC.,
Defendant(s).

x

This is an action by plaintiff-buyer for rescission of an agreement to purchase a condominium unit. Defendant-seller, Soho 311 Development, Inc. (Soho), moves for summary judgment dismissing plaintiff's complaint and granting a declaratory judgment on its counterclaim, cancelling the agreement and releasing plaintiff's down payment to defendant as liquidated damages. Plaintiff cross-moves for summary judgment on its complaint, and seeks rescission of the contract and return of plaintiff's down payment. Plaintiff contends that Soho breached the parties' agreement by failing to comply with the Offering Plan. Plaintiff also argues that the agreement violates the rule against perpetuities.

The following material facts are undisputed: By Purchase Option Agreement dated June 5, 2007 (purchase agreement), plaintiff purchased a condominium for \$2.270 million. (Soho's Motion, Ex. A.) Plaintiff tendered a down payment to Soho of \$340,500. By Closing Notice dated April 3, 2009, Soho scheduled the closing for May 27, 2009. (Id., Ex. C.) By letter dated May 29, 2009, Soho declared plaintiff in default of the purchase agreement for failure to close, and gave plaintiff 35 days to cure the default, with "time being of the essence" as to the cure

period. (Id., Ex. D.) Upon plaintiff's failure to cure, by letter dated July 2, 2009, Soho cancelled the purchase agreement and provided that the security deposit would be held in escrow pending resolution of the matter. (Id., Ex. E.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Soho makes a prima facie showing, based on the above-cited documentary evidence, that plaintiff defaulted under the purchase agreement by failing to appear at the closing and to cure his default during the time of the essence grace period. Soho was accordingly entitled to cancel the purchase agreement and to retain plaintiff's down payment pursuant to paragraphs 20(f) and 22(b) of the agreement.

Plaintiff may not avoid summary judgment based on his claim that Soho improperly declared the Offering Plan effective or failed to amend the Offering Plan. Footnote 1 to Schedule B of the Offering Plan provides: "In the event the projected commencement date of the first year of condominium operation is to be delayed more than six (6) months from the anticipated date of the First Closing, the Plan will be amended to include a revised budget disclosing the then current budget projections. Sponsor will not declare the plan effective if any material changes to

the budget are not yet disclosed in an amendment to the plan.” (Soho’s Motion, Ex. H.) The Offering Plan also provides that purchasers will be offered a right of rescission in the event that revised budget projections exceed the prior budget by 25% or more. (Id.) It is undisputed that Soho declared the plan effective on December 12, 2008 by the 10th Amendment to the Offering Plan. (Id., Ex. I.) It is also undisputed that the Offering Plan established the first year of condominium operation as July 1, 2008 to June 30, 2009. (Id., Ex. J.) By the 11th Amendment to the Offering Plan, dated April 30, 2009, the first year of condominium operation was changed to May 1, 2009 to April 30, 2010. (Id., Ex. K [Schedule B].)

While the first year of condominium operation was thus delayed more than six months, plaintiff makes no showing that the Offering Plan was prematurely declared effective. The Plan, by the express terms quoted above, requires an amended budget to be submitted prior to declaration only if there are “material changes” to the budget. The Sponsor’s Affidavit submitted with the 10th Amendment attested that “[t]here are no material changes to the projected budget for the first year of condominium operation that have not been disclosed in a duly filed amendment to the plan.” (Id., Ex. I.) In addition, plaintiff does not dispute that the initial budget of approximately \$1.4 million was increased to \$1.459 million, approximately four percent. (Id., Exs. J, K.) Such an increase is not a material change which gives rise to a right to rescission pursuant to the terms of the Offering Plan quoted above. (Id., Ex. H.) The court accordingly holds that plaintiff fails to establish his claim that the purchase agreement was void or voidable based on defendant’s failure to comply with the Offering Plan.

Plaintiff also fails to address the bases asserted by defendant for dismissal of plaintiff’s causes of action based on the Interstate Land Sales Full Disclosure Act. (15 USC § 1701 et seq.)

This branch of defendant's motion will therefore be deemed unopposed.

Finally, the court rejects plaintiff's contention that the purchase agreement should be rescinded on the ground that the Offering Plan violates the rule against perpetuities. The court adopts the reasoning of its decision of a recent action entitled Rozina v Casa 74th Development, LLC (29 Misc3d 675 [Sup Ct 2010]), which involved an Offering Plan and purchase agreement that were materially similar to those at issue in the instant action. Here, as in Rozina, the purchase agreement does not set forth an express end date by which a notice of closing must be served. However, it requires that a notice of closing be sent at least 30 days in advance of the closing date, and provides that upon failure of the purchaser to exercise its option after an opportunity to cure, the Sponsor may cancel the agreement. (Offering Plan, Soho's Motion, Ex. M.) As this court concluded in Rozina, the vesting event is not the seller's service of a notice of closing, but the purchaser's exercise of the option. (29 Misc 3d at 678 [and authorities cited therein].)

In addition, to the extent that plaintiff's exercise of the option depends on a contingency, EPTL § 9-1.3 is applicable to validate the purchase agreement. As in Rozina, it clearly appears from the face of the Offering Plan that contingencies to closing were expected to occur in the near future – e.g., as in Rozina, the Offering Plan provides that if the first closing is delayed 12 months or more beyond the specified date on which the Sponsor anticipates the first closing will occur, the purchaser must be offered a right of rescission. (See Rozina, 29 Misc3d at 679.)

The court has considered plaintiff's remaining contentions and finds them to be without merit. The court accordingly holds that defendant is entitled to summary judgment dismissing the complaint and awarding a declaratory judgment on its first counterclaim cancelling the

purchase agreement and directing that the \$340,500 down payment, with interest, be released to Soho as liquidated damages. Defendant is also entitled to judgment on its third counterclaim for attorney's fees, pursuant to section 22(b) of the purchase agreement.

It is accordingly hereby ORDERED that defendant's motion is granted to the extent that it is

ORDERED that plaintiff's complaint is dismissed; and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant is granted summary judgment as to liability on its first counterclaim for a declaratory judgment; and it is further

ORDERED, ADJUDGED, and DECLARED that the Purchase Option Agreement dated June 5, 2007 between Chris O'Lear and Soho 311 Development, Inc. is hereby cancelled; and it is further

ORDERED, ADJUDGED, and DECLARED that the down payment of \$340,500.00, plus any accrued interest, currently held in escrow by defendant's counsel and escrow agent, D'Agostino, Levine & Landesman, LLP, shall be released forthwith to Soho 311 Development, Inc.; and it is further

ORDERED that defendant Soho 311 Development, Inc. is awarded judgment as to liability on its third counterclaim for attorney's fees against plaintiff Chris O'Lear; and it is further

ORDERED that entry of judgment for the foregoing is held in abeyance pending an assessment on defendant's reasonable attorney's fees; and it is further

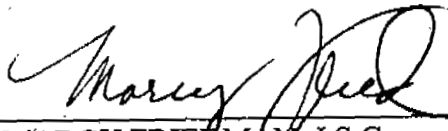
ORDERED that, within 30 days from the date of entry of this order, defendant shall serve

a copy of this order with notice of entry, a note of issue and statement of readiness upon the plaintiff, by first class mail, and upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall thereupon place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that plaintiff's cross-motion is denied.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
May 16, 2011


MARCY FRIEDMAN, J.S.C.

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