

Madison Park Owner LLC v Krouk
2011 NY Slip Op 32109(U)
August 1, 2011
Sup Ct, NY County
Docket Number: 105399/11
Judge: Donna M. Mills
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 : DONNA M. MILLS
Justice

PART 58

MADISON PARK OWNER LLC,
Petitioner,
-v-
ALAN KROUK, et al.,
Respondents.

INDEX No. 105399/11
MOTION DATE _____
MOTION SEQ. No. _____
MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	<u>1 + 2</u>
Answering Affidavits- Exhibits _____	<u>3, 4, 5</u>
Replying Affidavits _____	<u>6 + 7</u>

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 8/11/11

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION _____ NON-FINAL DISPOSITION

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).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

UNFILED JUDGMENT

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

In the Matter of the Application of MADISON PARK
OWNER LLC,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

Index No. 105399/11

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
BERKELEY EDUCATIONAL SERVICES OF
NEW YORK, INC.,

Respondents.

-----X

DONNA M. MILLS, J.:

In this special proceeding pursuant to C.P.L.R. Article 78, petitioner Madison Park Owner LLC, ("Petitioner" or "Sponsor") challenges a determination by the respondent, Eric T. Schneiderman as Attorney General of the state of New York ("Attorney General"), dated March 23, 2011, ordering Petitioner to cause its escrow agent to return to Respondent Alan Krouk ("Purchaser" or "Krouk") a \$435,000 escrow deposit paid by respondent Krouk.

The vast majority of the facts in this proceeding are not in dispute. Petitioner was the sponsor of the condominium offering plan for Fifteen Madison Square North. On December 27, 2007, Petitioner and Purchaser entered into a purchase agreement (the "Agreement") for the sale of unit number 9E (the "Unit") at the condominium to be known as Fifteen Madison Square North, located at 15 East 26th Street, New York, New York for the purchase price of \$2.9 million . Pursuant to the Agreement, Purchaser made an aggregate down payment of \$435,000, which was paid in two separate installments. Those funds are currently being held in escrow. The Agreement listed a closing date of on or about November 1, 2008.

The Agreement contains the following two relevant provisions. Paragraph 10(a) titled Inability to Complete Construction; Force Majeure provides:

[Purchaser] understands and agrees that the construction of the Unit in the Building herein described is either to be commenced or has already been started and [Sponsor] agrees to endeavor to complete the same on or before the date herein set for the closing of title. However, if conditions at the time of construction are such that there is uncertainty in the obtaining of labor and/or materials for residential construction, due to strikes, lockouts, war, military operations, and requirements, terrorist attacks, national emergencies, and/or governmental restrictions causing the unavailability of same, or if construction is halted due to a government imposed moratorium on building, or due to inclement weather, or if the installation of any public utilities is curtailed or restricted or if we are otherwise prevented from performing our obligations under this Agreement by any other circumstances beyond our control, then [Purchaser] hereby agrees that [Sponsor] may declare the Closing Date to be extended until such time as the Unit can be completed, but not more than one (1) year from the Closing Date set forth in this Agreement.

Paragraph 14 titled Cancellation of Agreement; Our Default of the Agreement, in pertinent part, provides:

If title in accordance with the terms hereof is not conveyed to [Purchaser] within one (1) year after the Closing Date set forth in the Agreement or any adjourned

date mutually agreed upon (except where such failure is due to our fault), and [Purchaser] tenders to [Sponsor] a written notice of cancellation during thirty (30) days following the first anniversary of the Closing Date, this Agreement shall be deemed canceled on the date set forth in that notice. . . unless we are ready, willing, and able to convey title in accordance with the terms of this Agreement by such date. If you choose to cancel this Agreement, all monies you have paid under this Agreement will be returned to [Purchaser]. . . with interest if any has been earned.

Petitioner did not schedule a closing of title to the Unit by November 1, 2008 or declare the closing date to be extended pursuant to the terms of the Agreement. Consequently, by letter dated November 1, 2008, Purchaser demanded that Petitioner close title to the unit on or about December 3, 2008 with time being of the essence. Petitioner rejected this demand, invoking paragraph 14 of the Agreement as the sole basis for the adjournment.

By letter dated November 26, 2008, Petitioner noticed a closing for December 30, 2008, but subsequently, by letter dated January 9, 2009, noticed a closing for January 28, 2009. When Purchaser did not appear for the noticed closing, Petitioner sent a notice to cure dated January 28, 2009, giving Purchaser 30 days, time being of the essence, to cure his purported default. Petitioner submitted its Application to the Attorney General for a Determination on the Disposition of Downpayments on February 10, 2009.

Purchaser responded to the Application and cross-applied for return of the Down Payment by submission dated June 30, 2009. Sponsor replied by submission dated August 14,

2009.

The Attorney General issued his Determination on March 23, 2009. In that Determination, the Attorney General found, among other things, that:

1. Based on the principles of contract construction, the specific provisions of Agreement paragraph 10 control over the more general terms of Agreement paragraph 14.

2. Sponsor failed to identify any instance of force majeure as a basis for adjourning the closing.

3. The failure to obtain a temporary certificate of occupancy for the Unit does not constitute force majeure within the meaning of Agreement paragraph 10, as such incidents are not force majeure under New York Law.

4. Purchaser had the right to demand that Sponsor close within a reasonable time after the Closing Date and his demand giving Sponsor 32 days to close was reasonable.

The legislature delegates rule-making authority to an administrative agency and furnishes it with a broad outline within which to operate. The construction given to statutes and regulations by the agency is entitled to great weight and will be upheld if it is not irrational or arbitrary (Matter of Bates v Toia, 45 NY2d 460, 464 [1978]). In making a determination the administrative agency should show the basis of the denial, in order for the court to determine if the decision was reasonable; otherwise there would ordinarily be no protection against arrogation by a board, or departmental head of excess power (Meschino & O'Driscoll v Lowery, 34 AD2d 255 [1st Dept 1970]).

In this Article 78 proceeding, the Attorney General's determination will be upheld unless it is shown that it "was affected by an error of law . . . or was arbitrary and capricious or an abuse

of discretion.” CPLR 7803(3). The test is whether the determination is “without sound basis in reason and is generally taken without regard to the facts” (see Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974).

Pursuant to General Business Law Article 23-A, the Attorney General has promulgated regulations governing newly constructed condominiums. 13 NYCRR Part 20. The regulations relating to purchasers’ down payments require sponsors to state in their offering plans that funds held pursuant to GBL §§ 352-e(2-b) and 352-h will be held in escrow accounts. If a dispute arises with respect to the down payment, the sponsor shall apply and the purchaser or escrow agent may apply to the Attorney General for a determination regarding the dispute. 13 NYCRR § 20.3(o)(3) (viii)(a).

In the instant action, the Attorney General cannot be said to have made its determination without reason or regard to the facts. Additionally, none of Petitioner’s contentions provides grounds for vacature of the Attorney General’s Determination, which rationally construed the two contractual provisions based on the facts presented by the parties at the administrative level.

Accordingly, it is

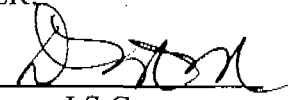
ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents.

Dated: 8 / 1 / 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).

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.