

Nassau Beekman LLC v Ann/Nassau Realty LLC
2011 NY Slip Op 32119(U)
August 2, 2011
Sup Ct, NY County
Docket Number: 116402/08
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART _____

Justice

Index Number : 116402/2008

NASSAU BEEKMAN

VS.

ANN/NASSAU REALTY

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

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

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

FILED

AUG 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/2/11

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
NASSAU BEEKMAN LLC,

Plaintiff,

- against -

ANN/NASSAU REALTY LLC,

Index No.: 116402/08
Motion Sequence No.: 001
Submission Date: 5/25/11

DECISION AND ORDER

Defendant.
-----X

For Plaintiffs:
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New York, NY 10017

For Defendants:
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Daniel R. Milstein, Esq.
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New York, NY 10166

FILED

Papers considered in review of this motion to dismiss:

Notice of Motion.....1
Memorandum of Law In Support of Motion.....2
Notice of Cross Motion.....3
Memorandum of Law In Support of Cross Motion.....4
Reply Aff.....5
Reply Memorandum of Law.....6

AUG 03 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for a failed real estate deal, defendant Ann/Nassau Realty LLC ("ANR") moves for summary judgment dismissing plaintiff's complaint and for summary judgment on its counterclaim, declaring that ANR is entitled to retain plaintiff's deposit. Plaintiff, Nassau Beekman LLC ("Beekman"), cross-moves for summary judgment seeking liquidated damages of \$15,000,000; a declaratory judgment that ANR is in default and must refund Beekman's deposit, and a hearing to determine further damages.

By agreement dated August 14, 2007 (the "Contract of Sale"), Beekman agreed to buy, and ANR agreed to sell, the real property located at 21 Ann Street and 109, 111 and 113 Nassau Street, New York, NY ("the property") for a price of \$56,700,000, later reduced to \$50,030,000. Beekman placed an initial down payment of \$5,000,000 with ANR for the property. At the time they executed the Contract of Sale for the property, the parties also entered into a separate, handwritten agreement. In this separate agreement (the "Development Rights Agreement"), ANR represented that it intended to purchase certain development rights attributable to 21 Ann Street, and ANR agreed to assign these development rights to Beekman.

In the initial Contract of Sale, the closing date for the sale of the property was scheduled for "August 30, 2007, time of the essence for Purchaser to perform its obligations by no later than October 10, 2007." (*See* Notice of Motion, Exhibit A, Contract of Sale, Schedule D). The closing date was rescheduled multiple times, through written amendments to the Contract of Sale, and the down payment was increased to a total of \$9,000,000. The last closing date memorialized in writing was scheduled for September 25, 2008.

On September 25, 2008 ANR appeared at the closing and, as memorialized by a court reporter, purported to tender the documents it was required to tender under the Contract of Sale. Beekman, however, failed to close on September 25, 2008. On November 6, 2008, ANR notified Beekman in writing of the termination of the Contract of Sale for Beekman's breach thereunder and its election to retain the \$9,000,000 down payment as liquidated damages. By letter dated November 13, 2008, Beekman claimed

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that the parties orally agreed to an extension of the closing date; that ANR was not ready, willing and able to close on September 25, 2008; and that ANR's termination of the Contract of Sale was improper.

Beekman then commenced this lawsuit. In its first four causes of action Beekman seeks a declaration that ANR wrongfully terminated the Contract of Sale and that, as a result, Beekman is entitled to the return of its down payment. In the fifth cause of action, Beekman alleges that ANR breached the Development Rights Agreement, which triggered a default of the Contract of Sale. In the sixth and seventh causes of action, Beekman claims that, as a result of ANR's breach of the Contract of Sale, Beekman is entitled to breach of contract damages over and above the return of its \$9,000,000 deposit.

ANR answered Beekman's complaint, denying all material allegations, and asserted a counterclaim, in which it seeks to retain Beekman's \$9,000,000 deposit as liquidated damages. The parties now cross-move for summary judgment.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

To recover on a breach of contract claim, the party alleging the breach must demonstrate its own performance, or ability to perform, under the contract. “The contract between the parties to the action [is] mutual, and neither [may] recover against the other for a breach of its terms, or put the other in default, without a tender of performance, or at least proof of a readiness and willingness to perform.” *Nelson v. Plimpton Fireproof Elevating Co.*, 55 N.Y. 480, 484 (1874). “A valid tender requires not only readiness and ability to perform, but actual production of the thing to be delivered [. . .].” *Jamaica Savings Bank v. Sutton*, 42 A.D.2d 856, 857 (2nd Dept. 1973); *see also Eddy v. Davis*, 116 N.Y. 247, 251 (1889). “The formal requisite of a tender may be waived, but to establish a waiver there must be an existing capacity to perform.” *Eddy*, 116 N.Y. at 251.

ANR has the burden of establishing *prima facie* entitlement to summary judgment by showing that it had, and was ready, willing and able to deliver, marketable title to the property on the “time is of the essence” date. *See Nelson*, 55 N.Y. at 484. Here, ANR only submitted a transcript of the purported closing that Beekman failed to attend. (Notice of Motion, Exhibit I). This closing transcript lists the documents that ANR allegedly tendered at closing. These documents would prove that ANR did perform, or at least had the ability to perform, under the Contract of Sale, but ANR failed to include any of these documents with the transcript.

Because ANR has failed to submit probative, competent evidence that it was capable of performing under the Contract of Sale, its motion for summary judgment on its counterclaim is denied, with leave to renew upon submission of requisite proof. That

part of ANR's motion in which it seeks summary judgment dismissing Beekman's complaint is addressed below.

Beekman cross-moves for summary judgment on its complaint, claiming that ANR, not Beekman, defaulted under the Contract of Sale. First, Beekman claims that there was an oral agreement to further extend the closing date beyond September 25, 2008. This contention is unavailing. "If the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls." *Rose v. Spa Realty Associates*, 42 N.Y.2d 338, 343 (1977). The Contract of Sale states that no provision "may be waived, modified, amended, discharged or terminated except by an instrument signed by the party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument." (Contract of Sale, §16.01, Exhibit A, Affidavit of Robert Friedman). Prior to September 25, 2008, each and every extension of the closing date was memorialized in a writing. In light of the Contract of Sale's requirement of written modification, and the parties' course of conduct, any alleged oral modification is ineffectual.

Beekman also argues that ANR failed to tender its interest in the Development Rights Agreement to Beekman and unilaterally increased the maximum purchase price for the development rights. Beekman argues that ANR's failure to perform under the Development Right Agreement constituted a default under the Contract of Sale.

Beekman's argument that ANR's alleged default under the Development Rights Agreement caused a default under the Contract of Sale is meritless. The Agreement

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specifically states, “[i]f the Zoning Lot Agreement is not executed and delivered by the Owner/Seller thereunder for any reason whatsoever, [. . .] such failure shall not effect that certain Contract of Sale, as amended, executed and delivered by Purchaser and Contract Vendee.” (Reply Affidavit of Robert Friedman, Exhibit A). With respect to Beekman’s argument concerning the cost of the development rights, the Second Amendment to the Development Rights Agreement, executed by both Beekman and ANR, authorizes a maximum purchase price above the price that ANR paid for the development rights.

In sum, Beekman has failed to raise an issue of fact as to ANR’s alleged breach of the Contract of Sale. Accordingly, Beekman’s motion for summary judgment on the complaint is denied. Moreover, because ANR has submitted evidence conclusively refuting Beekman’s claims, the Court awards ANR summary judgment dismissing Beekman’s complaint.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by defendant Ann/Nassau Realty LLC is granted in part and denied in part, with leave to renew; and it is further

ORDERED that defendant Ann/Nassau Realty LLC’s motion for summary judgment dismissing plaintiff’s complaint is granted, the complaint of plaintiff Nassau Beekman LLC is dismissed in its entirety and the Clerk of the Court is directed to sever and enter judgment dismissing the complaint; and it is further

ORDERED that defendant Ann/Nassau Realty LLC’s motion for summary judgment on its counterclaim is denied with leave to renew; and it is further

ORDERED that the cross-motion for summary judgment by plaintiff Nassau
Beekman LLC is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York

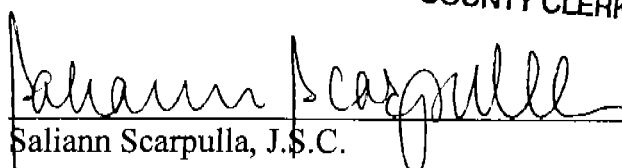
August 2, 2011

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Saliann Scarpulla, J.S.C.