

**Skyline Restoration Inc. v Roslyn Jane Holdings,
LLC**

2011 NY Slip Op 32345(U)

August 24, 2011

Supreme Court, Nassau County

Docket Number: 4506/11

Judge: Anthony L. Parga

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SHORT FORM ORDER
 SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
 PRESENT: HON. ANTHONY L. PARGA
 JUSTICE

-----X PART 8
 SKYLINE RESTORATION INC.,

Plaintiff,

INDEX NO. 4506/11
 XXX

-against-

MOTION DATE: 07/08/11
 SEQUENCE NO. 001, 002

ROSLYN JANE HOLDINGS, LLC and WILSON SHUM,
 ESQ., as Escrow Agent ,

Defendants.

-----X

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Upon the foregoing papers, the motion by plaintiff for summary judgment on its second cause of action for a declaration that the defendant breached the contract and for a return of the plaintiff's down payment is granted, and defendant's cross-motion for summary judgment on its counterclaims is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

The within action arises from an alleged anticipatory breach of a contract of sale for a commercial piece of real property located at 71 Jane Street, Roslyn Heights, New York. Defendant Roslyn Jane Holdings, LLC is the owner of said property and entered into a contract, dated February 11, 2011, with plaintiff for the sale of same for the purchase price of \$3,800,000. Upon the signing the contract, the plaintiff paid a down payment of \$380,000. Said money is currently on deposit with escrow agent (Seller's attorney), defendant, Wilson Shum, Esq.

Plaintiff argues that defendant Roslyn Jane Holdings, LLC (hereinafter "Roslyn") was unable to deliver the premises at closing in compliance with the town's zoning laws and the premises' existing certificate of occupancy, as required by the contract of sale. As such, plaintiff argues that the defendant breached the contract and that plaintiff is entitled to a return of its down

payment.

Plaintiff alleges that the defendant advertised the premises as a 30,000 sq. ft. commercial dwelling which was approved for warehouse and office space usage. After signing the contract, the plaintiff discovered that the defendant had constructed an 18' elevated concrete slab, and excavated and poured a 4' below grade concrete base, within the interior of the premises. Said alteration added a 4,432 square foot mezzanine to the premises, which was done without obtaining approval of the plans and permits from the municipality. Plaintiff alleges that as a result, the structure violates the existing certificates of occupancy, and renders the premises' current usage illegal. Plaintiff also alleges that no amended certificate of occupancy has been issued to reflect the addition of the mezzanine.

Plaintiff argues that the acts of the defendant resulted in the creation of "a defect affecting the certificate of occupancy," which the defendant is required by the contract to cure without monetary limitation. Plaintiff also argues that the contract of sale required the defendant to comply with zoning laws and deliver a certificate of occupancy for the premises at closing, or cure the defect forty-five days after notice of same, pursuant to sections 13.01 and 13.06 of the contract. Plaintiff contends that in early March 2011, prior to the March 25, 2011 time of the essence closing date, the plaintiff made the defendant aware of the defect, but the defendant failed and refused to cure same. Accordingly, plaintiff argues that the defendant was unable to deliver title in accordance with the terms and conditions of the contract on the date of closing.

In support of its motion, plaintiff submits the affidavits of John Kalafatis, president of Skyline Restoration, Inc., as well as affidavits of experts Thomas V. Pantelis, Esq., a legal zoning expert, and John Amisano, a licensed architect. Both of plaintiff's experts attest that defendant constructed an 18' elevated concrete slab, and excavated and poured a 4' below grade concrete base, within the interior of the premises, adding a 4,421 square foot mezzanine to the premises. Both experts state that same was completed without first obtaining approved plans or permits from the municipal authorities. Mr. Pantelis attests that said alteration is in violation of zoning regulations and ordinances of the Town of North Hempstead (hereinafter "Town") and that it violates the existing certificate of occupancy.

Mr. Pantelis attests that based upon his review of the building records of the Town, a Certificate of Completion dated April 6, 1980 was issued for construction of a 20,000 square foot masonry building. Prior to construction, variances were granted by the Town Board of Zoning Appeals (hereinafter "BZA") for insufficient off-street parking, insufficient landscape areas, use of the Residence "C" District for a portion of the building, and insufficient setbacks.

Thereafter, in or around 1987, the building was expanded by approximately 4,500 square

feet, and a Certificate of Completion, dated April 17, 1987, was issued by the Town Building Department. The 1987 addition was the subject of a BZA case, however, because the additional square footage was located in a Residential zone and required an increase in off-street parking. As such, the addition required a variance to be obtained from the BZA.

Mr. Pantelis attests that there are no other Certificates of Completion issued by the Town for the subject premises. Mr. Pantelis also attests that the defendant never applied for permits relating to an alteration or expansion of the building, in violation of Sections 70-220 and 70-222 of the Town Code. He further attests that based upon the fact that variances were required to initially construct the building and later to add an addition, new variances are required to expand the square footage of the building by the addition of the concrete mezzanine. Additionally, if the added mezzanine were used for office space, the Town Code would require a minimum of an additional twenty-two parking spaces, which is an increase over the forty-seven parking spaces previously required and approved.

Architect, John Amisano, also attests that the addition of the one story steel and masonry building in 1987 required variances to be obtained from the BZA for insufficient off-street parking, due to the fact that the parking was located entirely within a residential district; construction of a portion of the building was in the residential zone; and there were insufficient landscape buffers and setbacks. Mr. Amisano attests that the 1987 addition removed the original floor concrete slab and added a new concrete slab at 4' below outside grade level. It also involved the installation of a "mid-level" or "mezzanine" second level in the now taller space, adding an additional 4,421 square feet. He attests that the defendant never had the plans approved and never obtained a building permit to make such addition, in violation of the Town Code. In addition, Mr. Amisano states that "assuming that the plans had been or were to be filed with the Town Building Department, they would have to be rejected and applications for variances made" as a portion of the building is located in the residential zone (and the added mezzanine is in the portion of the building located in the residential zone) and the Town Code requires that the addition of 4,221 square feet would require at least 21 additional parking spaces on the property. He states that there is little to no room for any additional parking spaces to comply with Town requirements, therefore an application for an off street parking variance would have to be made to the BZA. As a result, he attests that "the Premises are currently in violation of zoning code absent a zoning board variance or substantial efforts to remove the non-approved second floor level."

Plaintiff argues that the contract required defendant to: (a) deliver at closing a certificate of occupancy in full force and effect for the entire premises, pursuant to §1.01(v); (b) ensure that

zoning regulations and ordinances are not violated by the existing structures or present use, pursuant to Schedule B (¶1); and (c) deliver the premises on the date of closing in compliance with any such certificate; to comply with the representation that the premises are legally commercially zoned; and to deliver a valid unexpired certificate of occupancy for commercial use, pursuant to §4.09. The plaintiff also argues that section §13.01 provides that the seller shall be entitled to a reasonable adjournment of the closing for up to 45 days or until the expiration date of any written commitment of purchaser's lender to remove any defects or objections disclosed prior to the closing date; and that section §13.06 specifies that "the monetary cure limitations contained in §13.02 and §7.02 shall not apply to...violations or defects affecting the certificate of occupancy, which were caused by an act of Seller and which may be removed as exceptions to title by the payment of a liquidated sum of money."

Plaintiff has submitted sufficient proof that it had the necessary amount of funds on the time of the essence closing date of March 25, 2011. Based upon the defendant's anticipatory breach, plaintiff refused to appear at the closing and instead filed the within action on March 25, 2011.

Defendants oppose plaintiff's motion and cross-move for summary judgment, dismissing the complaint and directing the escrow agent to release the \$380,000 downpayment to defendant Roslyn, or in the alternative, directing plaintiff to close title as per the terms of the contract of sale, without damages or abatement, but with an assessment of damages for defendant Roslyn. In support of its cross-motion and in opposition to plaintiff's motion, defendants argue that plaintiff anticipatorily breached the contract, as the contract of sale contained a time of the essence closing date of March 25, 2011, as against the purchaser only, and the plaintiff failed to appear, failed to tender its performance, failed to show it was ready, willing and able to tender performance, sent a letter stating it was refusing to attend the closing, and filed this lawsuit on the date of the closing without obtaining or seeking a stay of the closing. In addition, defendant argues that plaintiff had no legal justification for its failure to close.

Defendant contends that the constructed concrete "mezzanine" is only a "concrete shelf" which contains no office space. Defendant also argues that the premises, as a "warehouse," would only require one parking space per 600 square feet, pursuant to the Town Code. Thus, the present structure, as a "warehouse," requires only 50 parking spaces. The defendant argues that the subject premises has 51 parking spaces, and "even if the alteration were to be filed as 2,200 square feet of office space, the premises would only require 50 parking spaces as the requirements for office space is one space per 300 square feet, the first 1000 square feet being exempt."

While defendant admits that the alteration to the premises which added the “concrete shelf” was done without a permit, the defendant argues that Schedule B, paragraph 1, requires the plaintiff to take title to zoning violations and encumbrances which do not affect the insurability of title, and plaintiff has not demonstrated that title to the property was not insurable. Defendant also argues that the defendant made no representations as to the status of the certificate of occupancy, as section 4.09 requires an initialed certificate of occupancy to apply and there is no initialed certificate of occupancy. Defendant also argues that section 1.01(v) only provides that the defendant must transfer all permits, certificates of occupancy and other approvals, and does not require an updated certificate of occupancy.

In support of their application, defendants submit the affidavit of David Wong, president of Roslyn, who attests that the premises has two existing certificates of completion which are in full force and effect for the premises. He also admits that the concrete slab “adds to the interior warehouse” and that approvals for all work, except for the concrete slab, were obtained from the Town. He further attests that the subject premises has sufficient parking spaces (51 spaces) and that there is other space in the lot that could be converted to additional parking spaces. In addition, he attests that after plaintiff’s failure to close, Roslyn filed the necessary drawings with the Town to cure the alleged “defect affecting the certificate of occupancy.”

The defendants further submit the affidavit of architect, John Notaro. Mr. Notaro attests that the premises has a certificate of occupancy which is in full force and effect. It also has a certificate of completion for a renovation done in or about 1987. He attests that it is his opinion that there is no defect in the certificate of occupancy, as where there is no change in use, final approval of the Town would result only in a certificate of completion. In addition, he attests that the only work done without a prior approved plan was the construction of the elevated concrete slab. Mr. Notaro attests that even with the construction of the concrete slab, as a “warehouse,” the Town would require only 50 parking spaces. He attests further that even with the addition of 2,200 square feet of “office” space, the premises would require only 50 parking spaces. Mr. Notaro states that “it is certainly possible that the filing of plans for the approval of the concrete slab would not require going before the BZA for a variance,” and it is equally possible that the Building Department would approve the plans.

Submitted with plaintiff’s motion, however, is a letter, dated March 22, 2011, from the defendant’s expert, architect, John Notaro, in which Mr. Notaro advises the President of Roslyn, David Wong, that in 2008, Mr. Wong amended his 2007 application to the Town to show the addition of a “2nd floor,” but the amendment was not approved. Mr. Notaro states that the amendment shows the construction of a second floor with accessory “offices.” Mr. Notaro

opines that the amended application could be revived, and with some minor drafting work, “could” be approved.

The relevant sections of the contract of sale are sections 1.01(v), section 4.09, and Schedule B, Permitted Exceptions (§1). Section 1.01(v) of the contract of sale specifically states that the “certificates of occupancy shall be in full force and effect for the entire premises at the time of closing.” In addition, section 4.09 states that “If a copy of a certificate of occupancy for the Premises has been exhibited to and initialed by Purchaser or its representative, such copy is a true copy of the original and such certificate has not been amended Seller represents that the premises as of the date of closing will be in compliance with any such certificate and that the premises are legally commercially zoned and that a valid unexpired certificate of occupancy for commercial use exists for the premises.” Schedule B, Permitted Exceptions (§1) states “Zoning regulations and ordinances which are not violated by the existing structures or present use thereof and which do not render title uninsurable.”

The general rule is that “where a person agrees to purchase real estate, which, at the time, is restricted by laws or ordinances, he will be deemed to have entered into the contract subject to same’....[but] an exception exists where the contract contains a provision whereby the seller warrants and represents that, upon purchase, the property and its structures will not be in violation of any zoning ordinance or regulation.” (*Pamerqua Realty Corp. v. Dollar Serv. Corp.*, 93 A.D.2d 249, 461 N.Y.S.2d 393 (2d Dept. 1983); *Kopp v. Boyango*, 67 A.D.3d 646, 889 N.Y.S.2d 200 (2d Dept. 2009); *See also, Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920)). In such a case, where it reasonably appears that the purchaser will be plagued by zoning problems when he purchases the property, a titled defect does exist and the purchaser is entitled to demand that the seller rectify same or return any monies paid. (*Pamerqua Realty Corp. v. Dollar Serv. Corp.*, 93 A.D.2d 249, 461 N.Y.S.2d 393 (2d Dept. 1983); *Kopp v. Boyango*, 67 A.D.3d 646, 889 N.Y.S.2d 200 (2d Dept. 2009)(in this situation, in the event that the purchaser determines that the property is not in compliance with the relevant laws or ordinances, the purchaser has the right to demand that the seller rectify the situation or to receive a refund or his or her down payment)).

In the instant action, Sections 1.01(v), 4.09, and Schedule B (§1) all require that the certificates of occupancy be in full force and effect for the entire premises at the time of closing, that the premises as of the date of closing be in compliance with the certificates, that the premises are legally commercially zoned and that zoning regulations and ordinances are not violated by the existing structures or present use of the structure. Schedule B, paragraph 1, allows an exception for zoning regulations and ordinances which are *not* violated by the existing structures or present

use thereof and which do not render title uninsurable, however, in the instant matter, the zoning regulations and ordinances were violated by the defendant by its failure to obtain approvals and permits for the addition of the concrete shelf, or mezzanine. It is uncontested that the defendant did not seek or obtain approval or permits for the addition of the concrete shelf, or mezzanine, and that the failure to do so was a violation of the Town Code. In addition, the plaintiff has submitted sufficient evidence that it notified defendant of the defect, and the defendant failed to cure same pursuant to §§13.01 and 13.06 of the contract of sale.

In addition, the plaintiff has provided sufficient evidence of its ability to perform its own contractual undertakings. (*See, Huntington Min. Holdings v. Cottontail Plaza*, 60 N.Y.2d 997, 471 N.E.2d 492 (1983)(though the seller's anticipatory breach of contract relieved the purchaser of its obligation to tender performance, it did not discharge plaintiff's obligation to show that it was ready and able to perform its own contractual undertakings on the closing date, in order to secure specific performance)). The affidavit of John Kalafatis, president of Skyline Restoration, Inc., as well as the copies of plaintiff's bank statement and loan commitment letter from TD Bank, are sufficient to evidence its ability and willingness to go forward with the closing upon the defendant's cure of the defects affecting the certificate of occupancy and zoning law violations. Further, the submission of letters and emails between counsel evidence a dialogue regarding same.

While the defendant argues that there was an anticipatory breach by the plaintiff in stating in advance of the "time of the essence" closing date that it was unwilling to close and in failing to appear at the closing, where the seller is given notice of a defect prior to the scheduled closing date and does nothing to correct it until after the closing date, the purchaser need not tender performance as such tender would be meaningless. (*Klaiber, LLC v. Coon*, 48 A.D.3d 856, 851 N.Y.S.2d 667 (3d Dept. 2008); *Kopp v. Boyango*, 67 A.D.3d 646, 889 N.Y.S.2d 200 (2d Dept. 2009); *See also, Iannelli Bros. v. Muscarella*, 24 N.Y.2d 779, 248 N.E.2d 28 (1969)(holding that the plaintiff was entitled to the return of its down payment without the making of an obviously futile tender and demand); *Rhodes v. Astro-Pac, Inc.*, 51 A.D.2d 656, 378 N.Y.S.2d 195 (4th Dept. 1976)(a purchaser is not required to make a tender when it is apparent that the seller cannot or will not perform)).

Plaintiff has demonstrated its entitlement to summary judgment on its second cause of action for a declaration that there was an anticipatory breach of the contract by the defendant, and as such, it is entitled to a return of its down payment. The terms of the contract required the premises, and the structures upon it, to not be in violation of any zoning ordinance or regulation, and also required a certificate of occupancy to be in full force and effect for the entire premises at

the time of closing. It is the primary rule of construction of contracts that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations. (*Slamow v. Delcol*, 174 A.D.2d 725, 726, 571 N.Y.S.2d 335 (2 Dept. 1991)).

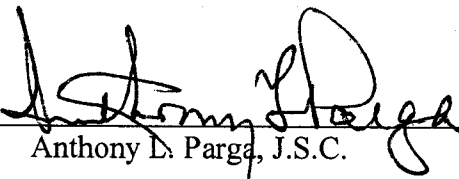
In its opposition and cross-motion, the defendant failed to demonstrate its compliance with the terms of the contract. Defendant also failed to demonstrate that it attempted to cure the "defects affecting the certificate of occupancy" prior to the closing date. Contrary to its contentions, defendant Roslyn did not submit a certificate of occupancy that was in full force and effect for the entire premises on the date of the closing. In addition, the defendant did not submit a certificate of completion for the addition of the concrete shelf, or mezzanine, as the plans for said addition were admittedly never submitted to, or approved by, the Town. As such, the defendant has failed to raise a triable issue of fact sufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment, and the defendant has also failed to demonstrate its entitlement to summary judgment on its counterclaims.

Accordingly, plaintiff's motion for summary judgment is granted and the defendant's cross-motion for summary judgment is denied. As such, the Court hereby declares the following:

- (1) That the defendant Roslyn's actions in being unable to deliver the premises at closing in compliance with the town's zoning laws, in being unable to deliver a certificate of occupancy that was in full force and effect for the entire premises at the time of closing, and in failing to cure the defects upon notice in accordance with the terms of the contract of sale, were an anticipatory breach of the contract rendering the contract null and void;
- (2) That the plaintiff is entitled to a return of its \$380,000 down payment;
- (3) That Wilson Shum, Esq., as the Escrow Agent with whom the \$380,000 is on deposit, is hereby directed to return said sum to the plaintiff within thirty (30) days of this order.

This constitutes the decision and order of this Court.

Dated: August 24, 2011


Anthony L. Parga, J.S.C.

ENTERED
AUG 26 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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