311 E. 54th St. LLC v Parker Hart Ltd. Partnership
2013 NY Slip Op 33539(U)
February 4, 2013
Supreme Court, New York County
Docket Number: 600242/10
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK Justice PART 39

Index Number : 600242/2010
311 EAST 54TH STREET LLC,
vs
PARKER HART LIMITED
Sequence Number : 004
SUMMARY JUDGEMENT

INDEX NO. 600242/10
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 ~~is~~ are DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2/4/13

BARBARA R. KAPNICK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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311 EAST 54TH STREET LLC,

Plaintiff,

-against-

PARKER HART LIMITED PARTNERSHIP and MARY HUGHES,

Defendants.

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DECISION/ORDER
Index No. 600242/10
Motion Seq. No. 004

BARBARA R. KAPNICK, J.:

This action arises out of a Sale-Purchase Agreement dated December 9, 2009 (the "Agreement") between defendant Parker Hart Limited Partnership ("Parker Hart" or "defendant") as seller, and plaintiff 311 East 54th Street LLC ("311 East 54th" or "plaintiff") as purchaser, for the sale of real property located at 311 East 54th Street, New York, New York (the "Premises").

Background

Plaintiff alleges in its Verified Complaint (the "Complaint"), dated February 1, 2010, that on January 22, 2010 it notified defendants that it was exercising its rights to terminate the Agreement, pursuant to Sections 8 and 10 of the Agreement. (Compl. ¶ 2.) Plaintiff also demanded the return of its $660,000 down payment (the "Downpayment") and the $5,000 it spent in diligence costs (the "Diligence Costs"). (Compl. ¶¶ 7, 19.)

The Complaint asserts one cause of action for a declaratory judgment alleging that the Agreement was terminated because of

defendant's material misrepresentations that the Premises was used in accordance with the Certificate of Occupancy ("C of O"), that defendant failed to cure its misrepresentations within 10 days of receiving a notice of termination, and acted arbitrarily and in bad faith in seeking to enforce the Agreement and then declare a default. Plaintiff thus seeks a judgment declaring that the Agreement was terminated and that Parker Hart must return plaintiff's Downpayment and Diligence Costs totaling $665,000.[1] (Compl. ¶¶ 26-31.)

By Decision and Order dated June 4, 2010 ("the June 4th Decision"), this Court denied defendant's cross-motion to dismiss the Complaint holding:

> Based on the papers submitted and the oral argument held on the record on March 23, 2010, this Court finds that there are disputed issues of fact with respect to the veracity of the representations in Section 10.1 (m) of the Agreement, i.e., whether or not the building was used as a transient hotel in violation of the Certificate of Occupancy **during the relevant time period**.

(emphasis added.)[2]

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[1] In the alternative, the Complaint requests that if it is determined that defendant has not breached the Agreement, then plaintiff be given five calendar days from the date of this Court's decision to close its purchase of the Premises in accordance with the Agreement.

[2] The Court also denied plaintiff's motion for an order pursuant to CPLR 3001 declaring that the Agreement, as amended, was terminated and that plaintiff was entitled to $660,000 form defendants.

Defendant Parker Hart now moves pursuant to CPLR 3212 for an order granting summary judgment in its favor.

Plaintiff opposes the motion and cross-moves pursuant to CPLR 3124 to compel defendant to comply with plaintiff's requests for disclosure made on the record at the deposition of Cody Parker on August 4, 2011 and to compel Cody Parker to answer the questions posed to her at her deposition, to which she allegedly improperly pled the Fifth Amendment, and in the event of defendant's non-compliance therewith, pursuant to CPLR 3126, to strike defendant's pleadings and order a default judgment be entered against defendant.

Discussion

Section 8 of the Agreement provides, in relevant part:

> **8. Disposition of Downpayment.**
>
> If (a) Seller is unable to convey title in accordance with the terms of this Agreement, (b) Seller has the right to, and does, terminate this Agreement for a reason that specifically requires Seller to refund the Downpayment to Purchaser, or (c) Purchaser is entitled to and does elect to terminate this Agreement in accordance with the provisions of Sections 3, 7, 10 or 18 of this Agreement, then (i) Seller and Purchaser shall direct Escrow Agent to refund to Purchaser the Downpayment (or such portion thereof as shall have been deposited with Escrow Agent), and (ii) if the termination of this Agreement is pursuant to Sections 7, 10 or 18 of this Agreement, then Seller shall reimburse Purchaser for reasonable diligence costs (the "Diligence Costs") actually expended by

> Purchaser in connection with its inspection of the Premises up to the aggregate maximum amount of Five Thousand and 00/100 Dollars ($5,000.00). . . .

Plaintiff also relies on the following portion of Section 10:

> **10. Representations**
>
> 10.1. Seller hereby represents and warrants to Purchaser that, as of the Effective Date:
>
> * * *
>
> (m) to the actual knowledge of Seller, the current use of the Occupied Units is in substantial compliance with all material laws and regulations pertaining to the use and occupancy of same and the current use of the Premises is in accordance with the Certificate of Occupancy attached hereto as Exhibit Q and made a part hereof; . . . .[3]

Plaintiff maintains that the representation contained in 10.1(m) was false, and, therefore, plaintiff had the right to

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[3] For the first time in its opposition papers to the instant motion, plaintiff argues that Section 10.1(k) is another false representation made by the Seller prior to Closing:

> (k) the Premises are vacant, except for (i) the apartment units (collectively, the "Occupied Units") at the Premises set forth on Exhibit P attached hereto . . ., (ii) Apartment 1H at the Premises which is occupied by the superintend[e]nt for the Premises, Lorenzo Torres, and his family, and (iii) Apartment 6D at the Premises which is occupied by Cody Parker; . . . .

[* 6]

terminate the Agreement pursuant to Section 10.3(b), which provides as follows:

> (b) If prior to Closing, Seller's Representations, as made as of the Effective Date, are determined to be untrue in any material respect as to the Effective Date or if Seller's Representations, as remade on the Closing Date shall result in Seller's Representations made as of the Effective Date being untrue in any material respect as of the Closing Date, then Purchaser may, at Purchaser's option and as Purchaser's sole remedy (Purchaser specifically waiving any right to bring any action against Seller for damages arising therefrom) prior to the Closing Date, either (i) terminate this Agreement by notice in writing to Seller, in which event (subject to the provisions of this Section 10.3) the provisions of Section 8 of this Agreement shall apply to such termination, or (ii) waive the same and accept title to the Premises without any abatement of the Purchase Price (it being agreed that Purchaser shall not have any right to terminate this Agreement with respect to any Seller's Representations which are discovered to be untrue after the Closing Date or which are referenced in a notice of termination sent by Purchaser to Seller after the Closing Date); provided, however, that Purchaser shall have no right to terminate this Agreement as a result of any modification to or updating of Seller's Representations to reflect: . . . .

There is no dispute that the original Closing Date under the Agreement was December 21, 2009. (Spitalnic Aff. ¶ 4, Dec. 16, 2011; Parker Aff. ¶ 3, Nov. 15, 2011.)

The parties executed the "FIRST AMENDMENT TO SALE-PURCHASE AGREEMENT" on December 17, 2009 (the "First Amendment"). Section 5 of the First Amendment provides that the Closing Date was extended to January 5, 2010. Defendant contends that the extension was granted because plaintiff was allegedly having difficulty raising capital for the acquisition, and that in exchange for the extension, plaintiff agreed to the following:

> 11. Representations. Section 10.3 of the Purchase Agreement shall be modified such that **the Seller's Representations made in Sections 10.1(c), (d), (e), (f), (j), (m) and (n) (the "December 21 Representations") shall only be made as of the Effective Date and as of December 21, 2009 and may not continue to be true thereafter or on the Closing Date.** Accordingly, throughout Section 10.3 of the Purchase Agreement, with respect to the December 21 Representations, all references to the Closing or the Closing Date shall be deemed to refer to December 21, 2009 (except that the reference to the Closing in Section 10.3(c)(y) shall continue to refer to the Closing). **Notwithstanding the foregoing, if Seller intentionally breaches the December 21 Representations between December 21, 2009 and the Closing Date, Purchaser shall be entitled to rely on such representation as if the same were required to be true on the Closing Date, provided, however, that such reliance shall be subject to the limitations set forth in Section 10.4 of the Purchase Agreement.**

(First Amendment, Section 11 [emphasis added].)

On December 30, 2009, the parties executed the "SECOND AMENDMENT TO SALE-PURCHASE AGREEMENT"(the "Second Amendment"),

which provided that the Closing Date " shall mean the date that is the earlier of (i) February 1, 2010 or (ii) any such earlier date as may be selected by Purchaser on three (3) Business Days notice to Seller . . . ." (Second Amendment, Section 3.) Defendant contends that in exchange for granting this extension, it secured the following representation from plaintiff:

> 5. No Defaults, Defenses etc. Purchaser hereby acknowledges and agrees that as of the date hereof (i) it is not aware of any default under the Purchase Agreement on the part of the Seller; (ii) it has no defenses, offsets or counterclaims with respect to its performance thereunder . . . .

(Second Amendment, Section 5.)

Defendant contends that plaintiff did not commence its due diligence review until January 15, 2010, which was three weeks after the original closing date, and after the First and Second Amendments had been executed, wherein plaintiff had traded away its rights to make objections under the Agreement. (Parker Aff. ¶ 6.)

The issue, as framed by this Court's June 4, 2010 Decision, is whether, pursuant to Section 11 of the First Amendment, defendant intentionally breached any of the December 21 Representations during the "relevant time period," *i.e.*, from December 21, 2009 to the Closing Date (February 1, 2010).

In support of its motion for summary judgment, defendant argues that no facts have been established during discovery to support plaintiff's allegations and maintains that the Premises was not used as a transient hotel during the relevant time period. Moreover, defendant argues that plaintiff cannot meet its burden of producing evidentiary proof in admissible form to establish the existence of material issues of fact.

Defendant argues that it is undisputed that the Premises was vacant except for three rent-regulated tenants, Cody Parker and the superintendent. (Parker Dep. 11:8-16, Aug. 4, 2011; Grill Dep. 7:3-8:12, Sept. 21, 2010; Awrey Dep. 10:2-19, 12:13-21, Aug. 18, 2011.) This is also evidenced by the Agreement itself, which represented in Section 10.1(k) that the Premises was vacant, except for the apartments occupied by a schedule of tenants, the superintendent and Parker. (*See supra* n.3.) Moreover, defendant cites to its 2009 tax returns, which reported zero income from hotel operations.

Plaintiff primarily argues that defendant cannot properly rely upon the Affidavit of Cody Parker since Parker refused to answer numerous questions at her deposition about the topics referenced in her Affidavit, invoking the Fifth Amendment privilege against self-incrimination and evading plaintiff's line of questioning

concerning defendant's illegal use of the Building, including straightforward questions concerning when the Building ceased to house transient occupants. Plaintiff argues that blanket invocations of the Fifth Amendment to prevent the disclosure of adverse facts is not permissible absent a specific showing by the party seeking protection of the Fifth Amendment that there is a reasonable likelihood of self-incrimination.

Plaintiff also argues that it is entitled to a return of the Downpayment because defendant misrepresented to plaintiff that the Premises was being used in compliance with its C of O when, in fact, it was being improperly used as a transient hotel. Plaintiff contends that the parties' Agreement gave it the right to rely upon the truth of defendant's representations during the period between December 21, 2009 and February 1, 2010. After conducting its initial due diligence, plaintiff claims that it learned that defendant was using the Premises as a transient hotel during the relevant time period, thereby breaching the parties' Agreement and entitling plaintiff to a termination of the Agreement and the return of the Downpayment.

To support this allegation, plaintiff merely cites to the Affidavit of Raz Ofer, sworn to on February 1, 2010, which was submitted to this Court in opposition to the previous cross-motion

to dismiss. Plaintiff, however, fails to resubmit this affidavit, or any of the exhibits attached thereto, or to attach any new evidence in support of its position here, including an affidavit or affirmation from anyone with personal knowledge. The only affirmations submitted on behalf of plaintiff in the instant motion are counsel's affirmations.

Although plaintiff's counsel refers to "internet advertisements and postings, including those dated January 31, 2010, [that] indicate Defendant's advertised use of the Building for transient occupancy during the Window Period," plaintiff fails to provide the Court with any of these alleged documents. (Spitalnic Aff. ¶ 5.) The Court notes that *defendant* did attach the deposition of defendant's representative, Mr. Ofer, and at least some of the documents that he relied upon in his deposition. These documents appear to be internet listings that advertise the Premises as a "Vacation Rental," a "Directloft property" or "Studios/Apartments." Plaintiff, however, makes no effort in its papers to suggest that defendant was actually responsible for posting these listings or otherwise providing this information for listing by others; or that these purported internet print-outs are in admissible form or how they otherwise raise material issues of fact. Plaintiff merely concludes that they mandate the denial of

summary judgment, which is insufficient. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Plaintiff also refers to documents that were apparently attached to its prior counsel's affirmation in opposition to the prior cross-motion to dismiss, including an e-mail dated February 25, 2010, which states that the Premises was "previously operating as a hotel, which was a non-conforming use." (Spitalnic Aff. ¶ 11.) Again, these documents were not produced by plaintiff in the instant motion, nor were these documents identified by an electronic-filing document number, so that the Court could attempt to locate them in the electronic filing system. However, after searching the 350 page document that plaintiff refers to as the "Kastner Aff." (Spitalnic Aff. ¶¶ 3, 11), which was submitted as part of motion sequence 001, the Court did locate the e-mail that plaintiff appears to refer to now. Plaintiff, however, makes no effort to explain how this e-mail is in admissible form or how it raises a material issue of fact.

Accordingly, the Court finds that plaintiff has failed to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *Zuckerman*, 49 NY2d at 562.

Plaintiff's arguments in support of its cross-motion to compel disclosure are also without merit, as the topics on which plaintiff seeks further disclosure are not relevant to whether or not the Premises was used as a hotel *during the relevant time period*.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's cross-motion to compel is denied. The action is hereby dismissed with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Dated: February 4, 2013

BARBARA R. KAPNICK
J.S.C.

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