SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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JEFFREY ALTMAN,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 653478/2011
Mot. Seq. No. 001

HEEA DEVELOPMENT, LLC., EH1 ASSOCIATES, LLC., SEIDEN & SCHEIN, P.C., JEFF SPIRITOS and DEAN MALTZ,

Defendants.

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O. PETER SHERWOOD, J.:

In this declaratory judgment action, plaintiff Jeffrey Altman (Altman) moves for partial summary judgment, and defendant HEEA Development, LLC (Sponsor), cross-moves for relief on its counterclaims.

Background

On or about October 17, 2007, Sponsor offered a plan for the sale of new condominium units at the 524 West 19th Street Condominium, located at 524 West 19th Street, New York, New York (the Building). Defendants EH1 Associates, LLC, Jeff Spiritos and Dean Maltz are members of Sponsor. Defendant Seiden & Schein, P.C. is the escrow agent, holding the down payment at issue here. On November 6, 2007, Altman and Sponsor entered into a purchase agreement wherein Altman agreed to purchase a residential condominium unit in the Building (the Penthouse Unit) from the Sponsor for $10,250,000.00 pursuant to an agreement dated November 29, 2007 and a Rider (together, the Purchase Agreement).

The Purchase Agreement does not specify a date for the closing, but allows the Sponsor to unilaterally select and adjourn a closing date, upon five days' written notice to Altman:

> "The closing of title to the Unit (the "Closing") shall take place on no less than thirty (30) days prior written notice to [Altman] . . . . [Sponsor] shall have the right, from time to time, to adjourn the Closing Date on written notice to [Altman]. If adjourned, [Sponsor] shall fix a new date and time for the Closing and shall give [Altman] not less than five (5) days written notice of the newly scheduled Closing Date"

(Purchase Agreement, attached as Exhibit A to Altman Aff., ¶ 2.1).

However, the Rider to the Purchase Agreement limits the closing to no later than May 1, 2010, after which Altman receives the right to terminate the Purchase Agreement. This provision, paragraph 44 of the Rider, states:

> "Section 2.1 of the Purchase Agreement is amended by adding the following at the end of the third sentence:
> Notwithstanding anything to the contrary contained in this Purchase Agreement to the contrary [sic] . . . . (b) whether or not the closing of the First Residential Unit in the Building has occurred on or before November 1, 2008, [Sponsor] shall have the right to adjourn the Closing Date on written notice to [Altman] but not later than May 1, 2010, after which [Altman] shall have the right to terminate this Purchase Agreement"

(Purchase Agreement, ¶ 44, ¶51 has parallel language, as well).

Paragraph 42 of the Rider creates an option for Altman to request that the Sponsor customize the Penthouse Unit at Altman's sole cost and expense. The provision required Altman to provide Sponsor with drawings and designs by July, 2008, so that Sponsor's architects and engineers could complete construction drawings within a reasonable time. However, pursuant to paragraph 42 (e) (ii), the Sponsor is not required to perform "any portion of [Altman's] work that . . . delays the scheduled Closing Date . . ." (Purchase Agreement, ¶ 42 [e] [ii]).

In November 2007, pursuant to the Purchase Agreement, Altman delivered the initial down payment of $1,537,500.00 to Sponsor. Also around that time, pursuant to a separate agreement, Altman and Sponsor agreed that Altman would license a storage bin at the Building for $45,600.00 (the License Agreement), and Altman delivered a down payment of $4,560.00 to the Sponsor for that accommodation. On or about May 15, 2008, Altman delivered an additional down payment of $512,500.00 to the Sponsor, for a total of $2,054,060.00.

Several months later, on August 16, 2008, Sponsor, as contractor, and Altman, as owner, entered into a construction agreement for the customization of the Penthouse Unit based upon the plans and specifications provided by Altman (Construction Contract). According to the Construction Contract, Altman was to pay an additional $1,781,650.00 to the Sponsor if Altman exercised an option for Sponsor to perform additional defined work to the Penthouse Unit.

The Construction Contract provided, in part:

> § 6.2 . . . The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations of agreements, either written or oral . . . and
>
> § 12.1 [Altman] . . . may order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly . . . and . . .
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> § 13.1 Time limits stated in the Contract Documents[1] are of the essence of the Contract . . . and
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> §13.3 . . . If [Sponsor] is delayed at any time in the commencement or progress of the Work by changes ordered in the Work . . . or any cause beyond [Sponsor's] control . . . the Contract Time shall be extended . . . for such reasonable time as [Sponsor] may determine . . . and . . .
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> § 13.3 . . . THE CLOSING FOR THE PENTHOUSE IS EXPECTED TO OCCUR AROUND JULY 15, 2009. CONTRACTOR WILL COMPLETE THE ITEMS NECESSARY TO OBTAIN TEMPORARY CERTIFICATE OF OCCUPANCY TO ALLOW FOR CLOSING OF UNIT. THEREAFTER OWNER WILL ALLOW WORK NOT COMPLETED BY CLOSING TO CONTINUE FOR THE NECESSARY TIME BUT NOT TO EXCEED MAY 1, 2010, and . . .
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> § 19.2 [Altman] waives any right to terminate the contract until May 1, 2010 after which time [Altman] may terminate this agreement with or without cause [emphasis in original].

According to the parties' submissions, the construction schedule for the Penthouse Unit dragged on. The parties agreed that initially Altman was to have the drawings for the renovation completed by March 16, 2009. Altman did not submit the drawings by that date. Later, in an April 30, 2009, email to his architect, Altman directed the architect to stop work as he did not intend to close. Subsequently, in a May 19, 2009, letter, Altman's counsel directed Sponsor to stop the construction work, and demanded the return of the amount of the balance being held in trust by Sponsor under the Construction Contract.

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[1] The Contract Documents that form the Construction Contract do not include the Purchase Agreement (Spiritos aff, exhibit C, § 6.1).

By a November 30, 2009, letter to Sponsor, Altman sought to rescind the Purchase Agreement, and thereby demanded return of the down payment on the Penthouse Unit, as well as the down payment on the storage unit. Sponsor did not return the down payments at that time.

On or about March 22, 2010, Sponsor sent a letter to Altman informing him of the closing scheduled for April 29, 2010. The letter includes the language: "The Closing is subject to a temporary certificate of occupancy being issued for the Unit on or before the date of the Closing" (Altman aff, exhibit H at 1). Because Sponsor did not have either a temporary or permanent certificate of occupancy for the Penthouse Unit, the closing did not occur on April 29. On May 4, 2010, Altman sent a letter to Sponsor terminating the Purchase Agreement pursuant to paragraph 44 of the Purchase Agreement, and seeking a refund of the $2,050,000.00 down payment on the Penthouse Unit, as well as the $4,560.00 down payment on the storage unit.

Sponsor obtained a temporary certificate of occupancy (TCO) on May 19, 2010. By letter dated June 4, 2010, Sponsor's attorneys informed Altman that the closing was rescheduled for July 6, 2010. Subsequently, by letter dated July 1, 2010, the Sponsor's attorneys rescheduled the closing one more time to July 20, 2010. The closing did not occur.

On August 20, 2010, Altman filed an application before the Attorney General for a determination on the disposition of the deposits. Additionally, on August 23, 2010, Altman filed a demand for arbitration, pursuant to the arbitration provision in the Construction Contract, with which he sought the return of $1,931,662, the balance of the funds held by Sponsor under the Construction Contract for the custom work. On September 30, 2011, the Attorney General declined to reach a determination of Altman's claim, as it appeared to include a dispute under the Construction Contract, which was beyond the purview of that Office. Additionally, the Attorney General noted that the dispute was the subject of the then-pending arbitration proceedings, and, therefore, directed the escrow agent to continue to hold the down payment. On May 22, 2012, the arbitration panel directed Sponsor to pay Altman an award of $709,864.00.

Altman subsequently filed this suit seeking, *intra alia*, return of the down payment. Now, Altman moves for summary judgment on his third and fourth causes of action, which seek the return of the down payment based upon Altman's termination of the Purchase Agreement. Altman argues that he is entitled to summary judgment on the ground that the terms of the Purchase Agreement

permitted him to terminate that agreement if the closing had not occurred by May 1, 2010, and that he exercised that right on May 4, 2010. Altman argues that, while the sponsor noticed the closing for April 29, 2010, the closing did not occur because there was no TCO for the Penthouse Unit. Furthermore, according to Altman, even if his conduct caused the delay in Sponsor's construction work on the Penthouse Unit, Sponsor had no obligation to complete that work, if it created problems for the closing.

Sponsor opposes Altman's motion, claiming Altman terminated the Agreement prematurely. According to Sponsor, the closing provision contains no "time is of the essence" language, and, consequently, Sponsor had a reasonable time to complete the construction work and schedule the closing, including extending the May 1, 2010 date. Additionally, Sponsor argues that Altman delayed the Sponsor's construction work on the Penthouse Unit, which prevented the Sponsor from completing it by May 1, 2010.

Sponsor cross-moves on its counterclaims, seeking retention of the down payment and payment of its expenses and legal fees, due to Altman's breach of the Purchase Agreement.

Discussion

It is well understood that summary judgment is a drastic remedy and should be granted only if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Regardless of the sufficiency of the opposing papers, the "[f]ailure to make such showing requires denial of the motion" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"When interpreting contracts, we have repeatedly applied the 'familiar and eminently sensible proposition of law [] that, when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms' [citations omitted]" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Thus, in the context of interpreting contract language, courts may not expand upon the meaning of terms chosen and used by the parties, which

might, as a consequence, write a new contract with a sense unintended by the parties (*id.*). This is especially true "in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*id.* [internal quotation marks and citation omitted]).

In a contract for the sale of real property, "time is not ordinarily of the essence unless the agreement so provides" (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 489 [2006]; *Grace v Nappa*, 46 NY2d 560, 565 [1979]). "When a provision that time is to be of the essence is inserted in a real property contract, the date established as the law day takes on especial significance" (*Grace*, 46 NY2d at 565). "As we have long held, 'the mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract'" *ADC Orange, Inc.*, 7 NY3d at 489, quoting *Ballen v Potter*, 251 NY 224, 228 [1929]). "[T]ime is never of the essence in real estate contracts, even if a closing date is stated, unless the contract specifically so provides, or if special circumstances surrounding its execution so require [citations omitted]" (*Whitney v Perry*, 208 AD2d 1025, 1026 [3d Dept 1994]). "A party need not state specifically that time is of the essence, as long as the notice specifies a time on which to close and warns that failure to close on that date will result in default [citations omitted]" (*Karamatzanis v Cohen*, 181 AD2d 618, 618 [1st Dept 1992]). Notably, language such as "in no event later than" is not sufficient to make time of the essence (*ADC Orange, Inc.* at 489).

Here, the parties agree that the closing scheduled for April 29, 2010, did not occur and that Sponsor did not have a TCO for the Penthouse Unit at that time, or at any time on or before May 1, 2010. Altman argues that the Purchase Agreement, by its express terms, permitted him to terminate it after May 1, 2010, provided the closing had not taken place by that time. Sponsor counters that, because Altman's right to terminate after that date only arose in the event there was no prior closing, the right was qualified by Sponsor's ability to bring the Penthouse Unit to readiness for the closing, and because the Purchase Agreement did not use "time is of the essence" language with respect to the closing, the Sponsor had a reasonable time to complete that requirement. Thus, according to Sponsor, it should not matter that it was unable to procure the TCO prior to May 1, 2010, but, instead, obtained the TCO within three weeks of that date, and was ready, willing and able to close by July 20, 2010. Sponsor argues that its efforts were in good faith, it met the requirements for the

closing and scheduled the closing within a reasonable time.

This court must determine, based upon the language of the Purchase Agreement, whether time was of the essence for the closing date, May 1, 2010, and consequently, whether the onset of Altman's termination right was fixed or flexible.

The Purchase Agreement states, with respect to Altman's right to terminate: "[Sponsor] shall have the right to adjourn the Closing Date on written notice to [Altman] but not later than May 1, 2010 after which [Altman] shall have the right to terminate this Purchase Agreement" (Purchase Agreement, ¶ 44). Additionally, the Purchase Agreement specifies that the funds constituting the down payment may be returned to Altman if, among other things, the Purchase Agreement is "canceled (without default by either party) in accordance with its terms" (*id.*, ¶ 16.1).

While the Purchase Agreement does not use the specific phrase, "time is of the essence", it is clear that the parties rights were intended to change on May 1, 2010. The Purchase Agreement states that Sponsor "shall have the right" to adjourn the closing, but not later than May 1, 2010, after which Altman "shall have the right" to terminate. The parties have done more than specify a closing date. As in *Karamatzanis*, failure to close on a particular date triggered an event, manifesting the parties' intent to make this date a final one. Thus, the provision designates an immediate consequence for failure to act by that date. In this way, the parties reflected their bargain that the Sponsor had two and one-half years from November, 2007, to ready the premises for sale and schedule the closing, up until May 1, 2010. After that date, however, Altman had the unfettered right to back out if the closing still had not occurred. Any other reading would alter the meaning of this agreement and nullify the parties' creation of Altman's termination option.

It is undisputed that, as of May 1, 2010, the closing had not taken place and the Sponsor had not provided written notice of an adjournment. The record indicates that, in accordance with the time limits set forth in the Purchase Agreement, the Sponsor had scheduled the closing for April 29, 2010. Yet, because the Sponsor had not yet procured a TCO, the closing did not occur on that date. Additionally, the Sponsor did not provide notice of any adjourn date for the closing on or before the May 1st deadline. Altman having terminated the Purchase Agreement after May 1, 2010, pursuant to its terms, he is entitled to a refund of his deposit under ¶ 16.1 of the Purchase Agreement.

Even if this court were to find that the parties' failure to use the "time is of the essence"

language meant that the May 1, 2010 closing deadline is flexible, the court would arrive at the same result. Without the "time is of the essence" language, the closing would have to occur within a reasonable time after May 1, 2010. There is no ground on these submissions to find that a July 20th closing date was within a reasonable time of May 1, 2010.

"What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case" (*Ben Zev v Merman*, 73 NY2d 781, 783 [1988]). The factors included in a court's determination of reasonableness, which is to be decided on a case-by-case basis, include: "the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance" (*id.*). "Although the question of reasonableness is generally one of fact, 'where the facts are undisputed, what is a reasonable time becomes a question of law, and the case is appropriate for summary judgment,'" (*Mills v Chauvin*, 103 AD3d 1041, 1045 [3d Dept 2013]).

Here, the July 20, 2010, final closing date was almost three months after the May 1st deadline. Sponsor has provided no explanation for this additional delay. At oral argument, the Sponsor's attorney stated that the Sponsor did not have to wait for completion of the construction work to obtain the TCO, making Sponsor's arguments about Plaintiff's delays irrelevant. Further, Sponsor has offered no explanation for why it did not procure the TCO prior to May 1, 2010. Sponsor's attorney stated, during oral argument, that the status of the construction work was not an impediment to getting the TCO and completing the closing. Sponsor's attorney asserted: "So, I suppose, while we could have gotten a TCO without the build out, our obligation under both the sale contract and the construction agreement was to deliver a unit with the improvements that the construction agreement required" (transcript at 8). Additionally, the Purchase Agreement, ¶ 42 [e][ii], provides that the Sponsor is not required to perform the construction work requested by Altman if it delays the scheduled closing date.

The Sponsor obtained the TCO on May 19, 2010, two months prior to the July 20th final scheduled closing, and, again, there is no explanation for that delay. The Sponsor had two and one-half years to complete the closing by May 1, 2010, and provides no evidence or rationale to support the argument that the additional three months' delay was reasonable.

The motion for partial summary judgment as to the third and fourth causes of action set forth in the complaint must be granted. Defendant's cross motion as to its first counterclaim for retention of the down payment and as to its second counterclaim, seeking attorneys' fees pursuant to section 35 of the Purchase Agreement will be denied. Because the decision on the motion grants all the relief plaintiff seeks, judgement may be entered on the entire case.

Accordingly, it is hereby

ORDERED that the plaintiff, Jeffrey Altman's, motion for partial summary judgment is granted, and it is further

ORDERED that the defendant, HEEA Development, LLC's, cross motion as to its first and second counterclaims are denied; and it is further

ORDERED that the Clerk of the Court should enter judgment in favor of plaintiff, Jeffrey Altman, and against defendant, HEEA Development LLC, in the amount of $2,054,060.00, together with interest from May 4, 2010 plus costs and disbursements upon submission of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: April 7, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.