SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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SPLIT RAIL HOLDINGS LLC

Plaintiff,

- v -

176 GRAND ST. CORP.,

Defendant.

INDEX NO. 652417/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61

were read on this application to/for Judgment - Summary

HON. SALIANN SCARPULLA:

In this action for specific performance and breach of contract, plaintiff Split Rail Holdings LLC ("Split Rail") moves for summary judgment, pursuant to CPLR § 3212, against Defendant 176 Grand Street Corp. ("176 Grand"), to enforce an option to purchase real property located at 176-180 Grand Street, New York, NY 10013 (the "Property"). 176 Grand opposes and cross-moves for summary judgment in its favor and on its counterclaims.

Background

Split Rail is a New York limited liability company, and it has three members: (1) Lisa Goode; (2) Christopher Goode; and (3) Kerry Orent. 176 Grand is a New York

Corporation that owns the Property, and the current shareholders of 176 Grand are (1) Gloria Sperling Zeisel Grantor Trust; (2) Murray Zeisel Irrevocable Trust; and (3) Dena Friedman ("Current Shareholders").[1]

On February 11, 2002, Split Rail and 176 Grand entered into a lease of the Property for a 30-year term commencing on February 1, 2002 and ending on January 31, 2032 ("Lease"). Accompanying Split Rail's submission of the Lease is the Former Shareholders' consent, dated January 31, 2002, to "enter into a long term lease (with an option to Purchase) for the Property . . . with Split Rail" and authorizing 176 Grand's officers, specifically Murray Zeisel and/or Henry Zeisel, "to take all steps necessary to enter into such lease[.]" Murray Zeisel executed the Lease on behalf of 176 Grand as president. None of the Shareholders executed the Lease.[2]

Article 43 of the Lease is titled "Option to Purchase Fee Ownership of Landlord." Paragraph 43(A) provides that "[Split Rail] and the owners of 100% of the issued and outstanding shares of [176 Grand] agree that provided and on condition that (i) [Split Rail] is in possession of the Demised Premises; (ii) that this Lease is not previously cancelled or terminated as in this Lease provided, by operation of law or otherwise; (iii) that [Split Rail] has faithfully complied with and performed all the covenants and conditions in the Lease on its part to be performed during the term hereof; and (iv) [Split

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[1] The former shareholders of 176 Grand were: 1) Murray Zeisel; 2) the Trust of Laura Zeisel; and 3) Gloria Zeisel ("Former Shareholders" and together with the Current Shareholders, "Shareholders").

[2] The parties dispute whether Murray Zeisel executed the Lease in his capacity as a shareholder, but not whether he executed the lease as president of 176 Grand.

Rail] is not in default at the time of the exercise of this option to extend, [Split Rail] shall have the option to acquire Landlord's fee interest in the Demised Premises."

Paragraph 43, section (A)(1), of the Lease provides "[t]he right to exercise this Option to Purchase . . . any time after the completion of the fourteenth (14)th year of the lease term [*i.e.*, February 1, 2016], but before the completion of the nineteenth (19th) year of the lease term." To exercise this option, paragraph 43, section (A)(2), adds that "[Split Rail must] deliver[] written notice of its exercise of this option to [176 Grand] at least thirty (30) days in advance of its intended closing date. [Split Rail's] notice shall state the time and place of closing . . . . [176 Grand] shall be paid in certified funds at the time of closing. [Split Rail] shall provide to [176 Grand] at the time of exercising its option a title report describing the property to be conveyed together with a proposed deed and other closing documents to be executed and delivered by the Seller."

Paragraph 43(C) provides that "[i]n all cases, the purchase price for the fee interest of [176 Grand] shall be a sum equal to ten (10) times the Base Rent . . . as set forth in paragraph 2 at the time of closing." Paragraph 2(a) of the Lease sets out "the Base Rent payable by the Tenant to the Landlord" in amounts that differ by each year, and it specifically provides that for "Year 15 from February 1, 2016 to [] January 31, 2017 [Base Rent] is $635,547.74 per annum[.]"

On February 1, 2016, Split Rail provided 176 Grand with written notice that it was exercising its option to purchase the Property for $6,355,470.40, *i.e.*, annual rent for year 15 times 10, and also included a proposed closing date of April 1, 2016 and proposed closing location ("Notice"). Prior to the Notice, Split Rail provided 176 Grand with a

proposed contract of sale. The Notice also indicated that Split Rail ordered a title report and would provide it to 176 Grand's counsel when it became available. Split Rail submits documentary evidence demonstrating that it obtained a commitment from Flushing Bank for an $8 million dollar mortgage on January 6, 2016, and also bank statements from Split Rail, Lisa Goode, and Christopher Goode, which Lisa Goode attests demonstrates that there is an additional $1,587,045.67 available in cash and securities to finance the purchase of the Property.

On February 2, 2016, 176 Grand's counsel responded to the Notice ("Initial Response"), stating:

> "I have the letter dated February 1, 2016 on the letterhead of Split Rail []. As you know the principals of the landlord and tenant have had a wonderful relationship over the years and we expect that to continue through the closing . . . . [W]e in fact did receive the proposed contract of sale which we did not review but conveyed to you that we would convey title in accordance with the provisions of the lease. If you need evidence to present to your lender or prospective lender that this is our intention, please advise. Please send to me your title report when it is received and we will review what is required for the closing. Please let us know as soon as conveniently possible when you will be prepared to close."[3]

Despite the Initial Response, on March 28, 2016, 176 Grand's litigation counsel rejected Split Rail's Notice ("Rejection Letter"), stating that there was no option to purchase the Property because the Lease contemplates an unenforceable stock purchase option, and because the Shareholders did not execute the Lease. The Rejection Letter

[3] 176 Grand submits an affidavit from Charles B. Friedman, who is the husband of one of the Shareholders, attesting that "[s]tatements by 176 Grand's counsel . . . were not authorized by 176 Grand . . . and are counsel's own choice of words . . . ." However, 176 Grand does not dispute that the Initial Response was drafted by 176 Grand's prior counsel.

further disputes Split Rail's purchase price based on the annual rent due in year 15, and instead asserts that the purchase price is the rent due for the remainder of the Lease times 10, *i.e.*, "$128.1 million."

Also, in the Rejection Letter 176 Grand sought Split Rail's consent to obtain a mortgage on the Property pursuant to paragraph 43(E) of the Lease, which provides that 176 Grand's ability to obtain a mortgage on the Property is subject to "the consent of [Split Rail] which consent shall not be unreasonably withheld or delayed." 176 Grand alleges that, in contravention to paragraph 43(E) of the Lease, Split Rail has unreasonably withheld consent to the proposed mortgage.

Shortly thereafter, on May 5, 2016, Split Rail filed its complaint asserting two causes of action: (1) specific performance to sell and convey the Property to Split Rail in accordance with the terms of the Lease; and (2) breach of contract for the same alleged wrong. On June 15, 2016, 176 Grand filed its answer, asserting ten affirmative defenses and two counterclaims: (1) declaratory judgment directing Split Rail consent to the mortgage pursuant to paragraph 43(E) and/or declaring that Split Rail's consent is no longer necessary; and (2) breach of contract based on the same provision for $28.5 million in damages.

Split Rail now moves for summary judgment on its cause of action for specific performance, arguing that it validly exercised the alleged option to purchase the Property and that it is ready, willing, able to close on it. 176 Grand opposes summary judgment, raising contractual interpretation issues that it argues preclude summary judgment in Split Rail's favor, and also argues that it has not been afforded the opportunity to conduct

discovery to determine whether Split Rail's non-compliance and/or default under the Lease precludes exercise of the alleged option.

176 Grand cross-moves for summary judgment on its ninth affirmative defense, statute of frauds, requesting dismissal of Split Rail's complaint on this ground. 176 Grand also cross-moves for summary judgment on its first counterclaim for declaratory judgment and for partial summary judgment on its second counterclaim for breach of contract based on Split Rail's alleged violation of paragraph 43(E).

Discussion

Resolution of this action turns on construction of the Lease. Like other contracts, a lease that is "complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" *Greenfield v Philles Records*, 98 N.Y.2d 562, 569 (2002). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" *Id.* (citation omitted). "Whether or not a writing is ambiguous is a question of law to be resolved by the courts" *W.W.W. Assoc., Inc. v Giancontieri*, 77 N.Y.2d 157, 162 (1990).

The Purchase Option

Paragraph 43(A) of the Lease provides that "[Split Rail] and the owners of 100% of the issued and outstanding shares of [176 Grand] agree that . . . [Split Rail] shall have the option to acquire [176 Grand]'s fee interest in the [Property]" provided that several conditions are satisfied. 176 Grand argues that paragraph 43(A) creates a stock purchase option between Split Rail and the Shareholders of 176 Grand, not an option to purchase

the Property. 176 Grand further argues that Split Rail cannot exercise the stock purchase option because the Shareholders of 176 Grand are not parties to the Lease and therefore, the Lease violates the statute of frauds. 176 Grand also claims that, at a minimum, the Lease is ambiguous as to whether paragraph 43(A) creates an asset purchase or a stock purchase option, creating additional ambiguity regarding the party to be bound.

Contrary to 176 Grand's interpretation, paragraph 43(A) unambiguously creates an "option to acquire [176 Grand's] fee interest in the [Property.]". 176 Grand, not the shareholders, own the fee interest in the Property. 176 Grand's interpretation of paragraph 43(A) as being between Split Rail and 176 Grand's Shareholders is contrary to the clear purpose of paragraph 43(A), which is to provide an option for the transfer of the fee interest from 176 Grand to Split Rock. *See Currier, McCabe & Assoc., Inc. v Maher*, 75 A.D.3d 889, 892 (3d Dep't 2010) ("Where . . . a literal construction defeats and contravenes the purpose of the agreement, it should not be so construed") (citation omitted).

To the extent the Lease mentions the Shareholders of 176 Grand, their stock ownership in 176 Grand, or the purchase of stock in 176 Grand; 176 Grand places excessive emphasis on particular words as opposed to the provision as a whole. These references do not create an ambiguity in the clear language of paragraph 43(a) of the Lease. *See generally S. Rd. Assoc., LLC v Intern. Bus. Machines Corp.*, 4 N.Y.3d 272, 277 (2005).

Because I find that paragraph 43(A) is a clear and unambiguous option to purchase the Property between Split Rail and 176 Grand, I deny summary judgment on 176 Grand's ninth affirmative defense premised on the statute of fraud.

The Purchase Price

Paragraph 43(C) provides that "the purchase price for the fee interest of [176 Grand] shall be a sum equal to ten (10) times the Base Rent as set forth in paragraph 2 at the time of closing." Paragraph 2 provides that "[Split Rail] . . . agrees to pay to [176 Grand] . . . Base Rent as follows" and sets out the per annum rent for each year of the Lease. Rent for "Year 15 from February 1, 2016 to . . . January 31, 2017 [is] $635,547.74 . . . ."

Split Rail argues that the purchase price is calculated based on the annual rent of the year it exercises the purchase option times ten, *i.e.*, because it exercised the purchase option during Year 15, the purchase price is $6,355,477.40.

In opposition, 176 Grand argues that the purchase price is based on the amount of rent owing for the remainder of the Lease at the time Split Rail exercises the option times 10, *i.e.*, because approximately $12.6 million remains due for Year 15 – Year 30, the purchase price is $126,517,726.20. In reaching this price, 176 Grand notes that paragraph 43(C) refers to "Base Rent", a term defined as "any rental due." 176 Grand then argues that because "due" can only mean immediately enforceable or owing, the purchase price is either $0 or rent owing for the remainder of the Lease times 10. Therefore, according to 176 Grand, the purchase price must be $126,517,726.20 because $0 is an absurd purchase price.

Here again, the straightforward language of the Lease shows that the purchase price under the option is calculated based on a calculation of ten times the annual rent during the year Split Rail exercises the purchase option. If the parties intended the purchase price to be calculated based on the rent owing for the entire remainder of the Lease, then the parties could have drafted the Lease to express that meaning. *See Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include").

Moreover, adopting 176 Grand's interpretation of the purchase price provision creates a commercially unreasonable result, and I have to give a practical interpretation to the language employed and the parties' reasonable expectations. *See Greenwich Capital Fin. Prods., Inc. v. Negrin,* 74 A.D.3d 413, 415 (1st Dep't 2010) (stating that contracts should be read "in a manner that accords the words their fair and reasonable meaning and achieves a practical interpretation of the expressions of the parties").[4] Accordingly, I find that the Lease is unambiguous as to the purchase price, and should be calculated based on the annual rent of the year that Split Rail exercised the option to purchase the Property, *i.e.*, Year 15, times ten.

[4] For example, if 176 Grand's interpretation of the payment price as being based on the remaining rent due for the entire lease term was correct, the purchase price of the Property would *decrease*, not increase, for every additional year that Split Rock remained a tenant under the Lease.

Split Rail's Cause of Action for Specific Performance

To establish its entitlement to specific performance, the party seeking such relief must establish "that it complied with the terms and conditions of the exercise of the option in accordance with the Lease [and] . . . demonstrate that he or she was ready, willing, and able to perform the contract" *Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 A.D.3d 1010, 1014–15 (2d Dep't 2010). Upon the papers submitted I find that Split Rail has established *prima facie* entitlement to judgment as a matter of law for specific performance because it satisfied the conditions to exercise the option to purchase the Property, and it is ready, willing and able to complete the transaction.

176 Grand argues that Split Rail is unable to prove irreparable harm and also failed to demonstrate that it is ready, willing, and able to complete the purchase of the Property. Regarding irreparable harm, 176 Grand claims that because the Property is commercial, monetary damages are adequate, requiring dismissal of Split Rail's request for specific performance. However, it is not only the loss of the Property, but also the loss of a bargained-for contractual right to exercise an option to purchase the Property that constitutes irreparable harm. *See, e.g., EMF Gen. Contr. Corp. v Bisbee*, 6 A.D.3d 45, 51 (1st Dep't 2004) ("[T]he equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique"); *Lamberti v Angiolillo*, 73 A.D.3d 463, 464 (1st Dep't 2010) (affirming lower court's discretion to grant specific performance where there was a valid option contract, and the optionees had substantially performed thereunder).

Moreover, contrary to 176 Grand's assertion, Split Rail submits sufficient documentary evidence demonstrating its financial ability to purchase the Property for $6,355,477.40, including a commitment letter from Flushing Bank for an $8 million-dollar loan [5] and bank statements from Split Rail, Lisa Goode and Christopher Goode demonstrating that additional cash and securities exist to finance the purchase of the Property. Split Rail also complied with the other Lease requirements, including providing 176 Grand with written notice and the contract of sale, securing financing, and ordering a title report. *See Sanchez v Hay*, 122 A.D.3d 533, 534 (1st Dep't 2014).

Finally, 176 Grand argues that Split Rail's summary judgment motion is premature absent discovery. *See* CPLR 3212(f). "A party who seeks a finding that a summary judgment motion is premature is required to put forth some evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant." *Vikram Const., Inc. v Everest Nat. Ins. Co.*, 139 A.D.3d 720, 721 (2d Dep't 2016). Here, 176 Grand argues that Split Rail may have failed to abide by some Lease terms that may prevent Split Rail from exercising the option to purchase. Split Rail properly notes however that, prior to commencement of this action, 176 Grand never raised any issue with its compliance with the Lease, and 176 Grand does not dispute that. 176 Grand's mere hope or speculation that discovery bearing on the issues of whether

[5] 176 Grand notes that the $8 million-dollar loan commitment was subsequently reduced to $5.8 million, and that Split Rail fails to submit the loan commitment modification. However, there is no need to further develop the record here when Flushing Bank already approved Split Rail for an $8 million mortgage, and Split Rail elected to reduce the financing it needed to close.

Split Rail may have breached or defaulted under the Lease at some time in the past is an insufficient ground upon which to deny summary judgment pursuant to CPLR 3212(f), particularly because 176 Grand's prior counsel characterized the parties' relationship as wonderful in the Initial Response.

Accordingly, I grant summary judgment in favor of Split Rail on its cause of action for specific performance.[6]

176 Grand's Counterclaims

Pursuant to paragraph 43(E) of the Lease, 176 Grand requested Split Rail's consent to obtain a mortgage on the Property in the Rejection Letter, *i.e.*, the same letter it rejected Split Rail's exercise of the option to purchase. According to 176 Grand, Split Rail breached paragraph 43(E) by unreasonably withholding and delaying consent as a matter of law, entitling summary judgment on 176 Grand's first counterclaim and partial summary judgment on its second counterclaim against Split Rail.

Prior to the Rejection Letter, Split Rail reasonably assumed that the parties were proceeding with a sale of the Property. As 176 Grand notes in its Rejection Letter, "a mortgage may affect title." Therefore, although Split Rail's obligation to provide consent exists independent of the option to purchase, I find that Split Rail reasonably withheld and delayed consent given that the Rejection Letter placed the issue of whether the parties were proceeding with a sale of the Property in sharp dispute, and a mortgage may

[6]As I am granting summary judgment on Split Rail's specific performance claim, Split Rail's alternative cause of action for damages based for the same breach is moot.

affect title. Accordingly, I deny summary judgment on 176 Grand's counterclaims and dismiss both causes of action.

Attorneys' Fees

Section 18(b) of the Lease states that "[i]f either party commences litigation or any other legal proceeding for the enforcement of any obligations of the parties hereunder, the prevailing party shall be entitled to recover from the other party such costs and reasonable attorneys' fees as may have incurred with respect thereto." As the prevailing party, Split Rail is entitled to recover from 176 Grand such costs and reasonable attorneys' fees incurred in enforcing the option to purchase the Property, and I refer the issue of the amount of such costs and reasonable attorneys' fees to a special referee to hear and report.

In accordance with the foregoing, it is

ORDERED that that the motion of plaintiff Split Rail Holding LLC for summary judgment is granted as to its first cause of action for specific performance against defendant 176 Grand St. Corp., and it is further

ORDERED that Split Rail Holding LLC's second cause of action against defendant 176 Grand St. Corp. is dismissed as moot, and it is further

ORDERED that the cross-motion of 176 Grand St. Corp. for summary judgment on its ninth affirmative defense to dismiss plaintiff Split Rail Holding LLC's complaint and on its first and second counterclaim against plaintiff Split Rail Holding LLC is denied, and it is further

ORDERED that the defendant 176 Grand St. Corp.'s first and second counterclaims against plaintiff Split Rail Holding LLC are dismissed, and its further

ORDERED that the amount of costs and reasonable attorneys' fees owed plaintiff Split Rail Holding LLC in seeking to enforce the option to purchase is referred to a Special Referee to hear and report. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the issue; and it is further

ORDERED that counsel for plaintiff Split Rail Holding shall, within 30 days from the date of this order, serve a copy of the order, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report, I will issue a judgment in accordance with the results of the Special Referee's report and this decision.

This constitutes the decision and order of the Court.

1/22/18
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE