

Monaghan v Cole

2018 NY Slip Op 32027(U)

August 15, 2018

Supreme Court, New York County

Docket Number: 650099/2018

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
WILLIAM S. MONAGHAN as Trustee of the
Monaghan Qualified Personal Residence
Trust,

Plaintiff,

-against-

Index No.
650099/2018

ERIC COLE,

Motion Seq. No.:
001 & 002

Defendant.

-----X
DORIS LING-COHAN, J:

Motion sequence Nos. 001 and 002 are consolidated for
disposition.

This is a breach of contract action relating to a contract
to purchase a cooperative apartment in a building located at 165
Perry Street, New York, New York. In motion sequence No. 001,
the seller, plaintiff William S. Monaghan (Monaghan), as Trustee
of the Monaghan Qualified Personal Residence Trust (the Trust),
moves, pursuant to CPLR 3212, for an order granting summary
judgment in his favor on his request for a declaratory judgment
against defendant Eric Cole (Cole), the buyer. In motion
sequence No. 002, Cole moves for summary judgment in his favor on
his counterclaims against Monaghan.

The complaint alleges that the Trust owns 23 shares of stock
in the 165 Housing Corp., the owner of the residential
cooperative building located at 165 Perry Street (the Building).
The 23 shares owned by the Trust are allocated to Apartment 6 and

the garage space in the basement allocated to the apartment (the Unit). The complaint further alleges that, as of July 28, 2017, the Trust and Cole entered into a contract pursuant to which the Trust agreed to sell, and Cole agreed to purchase, the 23 shares allocated to the Unit, for a sum of \$17,500,000.00, with a contract deposit of \$1,750,000.00. In conformity with the contract of sale, Cole deposited \$1,750,000.00 with the escrowee.

The complaint alleges that, prior to entering into the contract, Monaghan was in a dispute with the cooperative corporation (the Coop) concerning the number of shares that should be allocated to the Unit. According to the complaint, on October 20, 2017, Monaghan informed Cole that he was negotiating a settlement with the Coop Board that would include a 15% increase in the maintenance for the Unit, but would not require any additional payment from Cole. The complaint alleges that Cole advised Monaghan that he was "only prepared to proceed provided that the maintenance does not increase by more than 15%." Eisentein Affirmation, Exhibit 1 (Complaint), ¶ 10. According to the complaint, on December 7, 2017, Monaghan sent Cole copies of the as yet unsigned agreements settling the dispute with the Coop. The agreements provided, among other things, that the Trust would purchase an additional 5 shares that would be allocated to the Unit, and that the maintenance for the Unit would increase by 15%. On December 12, 2017, Monaghan sent

Cole copies of the signed agreements and notified Cole that the dispute had been settled, and that an interview of Cole by the Board was scheduled for January 6, 2018 at 10 a.m.

On December 15, 2017 and December 19, 2017, Cole was again notified of the scheduled interview. On December 20, 2017, however, Cole notified Monaghan that he had elected to cancel the contract of sale “due to Seller’s material default of its obligation not to enter into an agreement that would be binding upon Mr. Cole after closing” (Complaint, ¶ 14), and demanded the return of his contract deposit.

On December 21, Monaghan gave Cole formal notice that he objected to the return of the contract deposit, considered Cole’s action an anticipatory repudiation of the contract, and demanded that the deposit be remitted to the Trust, as liquidated damages for breach of contract. On January 8, 2018, Monaghan filed this action seeking a declaratory judgment that Cole had defaulted under the contract, and that Monaghan is entitled to receive the contract deposit as liquidated damages for breach of contract and default.

On January 29, 2018, Cole filed his answer and counterclaims, alleging that the settlement agreement entered into between Monaghan and the Coop Board regarding the shares allocated to the Unit contained additional unrelated matters that imposed new conditions on Cole’s use and occupancy of the Unit,

in breach of their agreement. According to Cole, those new conditions far exceeded the terms of the proprietary lease, shifting the responsibility from the Coop to the shareholder for:

- 1) repair and replacement of all non-original windows in the Unit;
- 2) maintaining adjacent roof areas, including cleaning and inspecting those areas;
- 3) maintaining the air-conditioning portions of the combined air-conditioning/heating system; and
- 4) maintaining the portion of the garage area associated with the Unit.

Additionally, the counterclaim alleges that the terms of the settlement agreement mandating that the vestibule adjacent to the 6th floor elevator, the service elevator and the stairwell would not be considered part of the Unit, and limiting the Unit owner's use of that space, and placing conditions on his use of the freight elevator, materially and adversely affected Cole's use and occupancy of the Unit. The counterclaim alleges that by agreeing to those terms without Cole's approval, Monaghan breached the contract, and that Cole is, therefore, entitled to a return of the contract deposit. Finally, Cole alleges that Monaghan breached the contract by making alterations to the Unit, without amending the building's certificate of occupancy (C of O), in violation of paragraph 4.1.6. of the Contract.

As a second counterclaim, Cole alleges that he fully performed all of his obligations under the Contract, and, therefore, the seller's failure to return his deposit constituted

a breach of the duty of good faith and fair dealing.

The printed Contract of Sale entered into by Monaghan and Cole is accompanied by a Rider and a Purchaser's Rider (the Riders), which are collectively deemed the Contract. See, Eisenstein Affirmation, Exhibit 4, Rider, ¶ 31 and Purchaser's Rider, ¶ 47. In addition, there is a side-letter to the Contract addressed to Cole and signed by Monaghan, dated July 28, 2017 (the Side-Letter).

Section 4.1.6. of the printed Contract of Sale states:

"Seller has not made any material alterations or additions to the Unit without any required consent of the Corporation or, to Seller's actual knowledge, without compliance with all applicable law. This provision shall not survive the closing."

Eisenstein Affirmation, Exhibit 4, Contract of Sale, ¶ 4.1.6.

Section 4.1.7 of the printed Contract of Sale states:

"Seller has not entered into, shall not enter into, and has no actual knowledge of any agreement (other than the Lease) affecting title to the Unit or its use and/or occupancy after Closing, or which would be binding on or adversely affect Purchaser after Closing (e.g. a sublease or alteration agreement)."

Id., ¶ 4.1.7.

Paragraph 34 of the Rider to the Contract of Sale states as follows:

"Seller has advised Purchaser, and Purchaser acknowledges, that Seller is in a dispute with the Corporation with respect to how many Shares should be allocated to the Unit, and the monthly Maintenance amount. Purchaser acknowledges that Seller has no obligation to resolve such dispute with the Corporation or expend any funds in connection with the dispute.

Seller may, in Seller's sole and absolute discretion, settle the dispute on any terms Seller finds acceptable, and Purchaser consent is not required in connection with any such settlement. However, in the event this dispute is not resolved by settlement or by a final, non-appealable court order, by December 31, 2017, or the Closing has not occurred by December 31, 2017 for any other reason, this Contract shall automatically terminate and thereafter, (i) the Contract Deposit and all interest accrued thereon shall be promptly returned to Purchaser, (ii) this Contract shall be of no further force or effect and (iii) neither party shall thereafter have any further rights or claims against the other and the Seller may sell the Unit to any third party as though this Contract had never been entered into"

(emphasis supplied). *Id.*, Rider, ¶ 34.

In addition, the Side-Letter states as follows:

"Pursuant to paragraph 34 of Seller's rider to the Contract, Seller and Purchaser have agreed that, in the event the dispute between Seller and the Board (the 'Dispute') is not settled by December 31, 2017 (the 'Termination Date'), the Contract shall automatically terminate by its terms. ... For the avoidance of doubt, if the Dispute is resolved prior to the Termination Date or Extended Termination Date (if Purchaser elects to extend the Termination Date), the Contract shall remain in full force and effect and the remaining terms of the Contract shall control Seller's and Purchaser's obligations thereunder.

* * *

"Further to the above, Seller agrees to keep Purchaser informed with regard to any settlement discussions between Seller and the Board regarding the Dispute. If Seller intends to settle the Dispute and such settlement requires either (i) a payment for periods prior to the date a settlement is reached which Seller demands that Purchaser pay, or (ii) an increase in the Maintenance in excess of fifteen (15%) percent of the Maintenance as of the date hereof, Purchaser shall have the option to be exercised no later than five (5) business days after receiving notice from Seller of a proposed settlement of the Dispute, to terminate the Contract and receive return of the Contract Deposit in which case the Contract shall terminate."

Id., Side-Letter, at 1.

Paragraph 31 to the Rider to the Contract of Sale states:

"To the extent that there may be any conflict or inconsistency between provisions of this Rider, any provision of the main body of this Contract of Sale and any other rider attached hereto or thereto, the provisions of this Rider shall govern (the Contract of Sale, this Rider and the attached rider, if any are collectively, the 'Contract')."

Id., Rider, ¶ 31; see also Purchaser's Rider, ¶ 47 to the same effect.

Motion Seq. No. 001: Plaintiff's Motion for Summary Judgment

Monaghan's makes essentially two arguments in support of his motion for summary judgment. Monaghan first argues that, in paragraph 34 of the Contract, Cole agreed that Monaghan could "in Seller's sole and absolute discretion, settle the dispute [with the Coop concerning the number of shares allocated to the Unit] on any terms Seller finds acceptable, and Purchaser consent is not required in connection with any such settlement." *Id.*, Rider, ¶ 34. According to Monaghan, the only limitation on his discretion concerning the terms of the settlement was that if the settlement resulted in a maintenance increase for the Unit of more than 15% or a requirement that Cole make any payments for periods prior to the date of settlement, Cole had the option to terminate the contract, as memorialized in the Side Letter. See *Id.*, Side Letter, at 1. Thus, according to Monaghan, since the maintenance increase was limited to 15%, and Cole was not

required to make any payments involving the pre-settlement period, Cole had no basis for challenging any of the other provisions in the settlement agreement between Monaghan and the Coop.

Next, addressing the specific items of the settlement to which Cole objects, Monaghan notes generally that the number of shares that are allocated to an apartment fix the proportionate share of the Coop's expenses paid by the apartment as monthly maintenance. Therefore, a dispute about the number of shares to be allocated to the Unit, would impact the amount of maintenance to be paid by the shareholder. Monaghan argues that, for example, shifting of financial responsibility for the newly installed windows relates directly to the Coop's cash requirements. Had he not agreed to that shifting of responsibility, as a result of the increase in the number of shares allocated to the Unit, the maintenance for the Unit would have been increased, unless some other measures were taken to provide for the payment of certain costs. With respect to other costs specified in the settlement agreement such as the responsibility for cleaning and inspecting the roof adjacent to the Unit, Monaghan contends that, pursuant to paragraph 7 of the Proprietary Lease, the Unit owner was already responsible for keeping "the terrace, balcony or portion of the roof appurtenant to his unit clean and free of snow, ice, leaves and other debris

and shall maintain all screens and drain boxes in good condition." Id., Exhibit 9 (Proprietary Lease), ¶ 7, at 5. Similarly, with respect to maintenance and repair of the garage, to the extent that portions of the garage are allocated for the exclusive use of the Unit, pursuant to section 18a of the Proprietary Lease, the shareholder is responsible for their maintenance and repair as part of the Unit. See Proprietary Lease at 1, n 1 ("The word 'Unit' as used in this lease ... shall mean the space leased for any lawful purpose ..."), and Proprietary Lease, ¶ 18(a) Repairs by the Lessee ("[T]he Lessee shall keep the interior of the unit ... in good repair....").

With respect to whether the elevator lobby or vestibule is considered part of the Unit, Monaghan argues that nothing in the Contract suggests that the elevator lobby or vestibule is part of the apartment, and that, on the floor plan for the unit, the vestibule area is not labeled with dimensions, in contrast with the rooms within the apartment which are so labeled. In any case, according to Monaghan, the items deemed objectionable by Cole are reasonably related to the amount of maintenance that would otherwise be allocated to the Unit, and, therefore, well within his discretion to accept as conditions of the settlement.

Finally, with respect to Cole's objection about the limitations on his use of the freight elevator, Monaghan contends that, as noted in the Coop's offering plan, the freight elevator

has manually operated doors (Cole Aff, Exhibit 6 [offering plan] at 56), and that under section 3010.1 of the Building Code of the City of NY, such elevators must be operated by a designated elevator operator. Administrative Code of City of NY (Administrative Code) § 3010.1.

As a procedural matter, Cole opposes Monaghan's motion for summary judgment, arguing that plaintiff has failed to submit an affidavit from anyone with personal knowledge of the material facts, submitting only the affirmation of plaintiff's attorney, Jethro Eisenstein, and an unsworn memorandum of law. However, as Eisenstein states in his reply affidavit, as the attorney who negotiated the settlement between Monaghan and the Coop, and the attorney who kept Cole's attorney apprised of the settlement negotiations, he had personal knowledge of, or personally reviewed, the various documents on which the motion for summary judgment is based. *Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 8-9 (1st Dept 2017) (affidavit of counsel based on personal knowledge of attached documents is sufficient); see also *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980) ("The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g. documents, transcripts"). Furthermore, both plaintiff and defendant have

moved for summary judgment and both sides take the position that there are no questions of fact here, and that the outcome depends on the interpretation of the documents on which they both rely. As a result, Cole's objection concerning the Eisenstein affirmation is without merit.

With respect to the substance of plaintiff's motion, Cole contends that the portions of the settlement agreement relating to the shifting of financial responsibility from the Coop to the shareholder constitute conditions adversely "affecting title to the Unit or its use and/or occupancy after Closing, or which would be binding on or adversely affect Purchaser after Closing," in violation of section 4.1.7 of the Contract of Sale.

Cole argues that despite paragraph 34 of the Rider to the contract giving Monaghan the discretion to enter into a settlement with the Coop, that by agreeing to the additional terms discussed above, Monaghan abused his discretion. Cole cites *C & E 608 Fifth Ave. Holding, Inc. v Swiss Ctr., Inc.* (54 AD3d 587, 588 [1st Dept 2008][internal quotation marks and citation omitted]) which states that "exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits." According to Cole, one of the benefits of the Contract was the acquisition of the Unit without any

additional conditions or obligations, other than those disclosed in the proprietary lease, and that under section 4.1.7 of the Contract, Monaghan could not use his discretion to enter into a settlement agreement that would place such additional conditions on Cole. Moreover, according to Cole, Monaghan could have settled the dispute with the Coop without adversely affecting his use and occupancy of the Unit.

Cole further contends that the portion of the settlement which treats the lobby adjacent to the freight and passenger elevators as common space does not comport with the floor plan of the Unit that he was given. According to Cole, under the terms of the settlement, "approximately 100 square feet of space from the Unit and [were converted] it into common space" (Cole aff in opposition, ¶ 30), and he was prohibited from installing built-in furniture or fixtures or using the space for storage, and thus "materially reduced the size of the Unit." Defendant's Memorandum in Opposition, at 10. Cole notes that certain areas within the apartment such as the bathrooms, hallways and storage spaces are not labeled with dimensions on the floor plan. He argues that, as a result, the absence of vestibule dimensions on the floor plan would not have put him on notice that the vestibule is not considered part of the apartment. He also contends that the fact that the freight elevator is not for general use, may only be used for moving bulky items and special

deliveries, can only be operated by the superintendent, and will remain locked when not in use, constitute "substantial additional restrictions on the Unit owner's ability to use the freight elevator." *Id.* By agreeing to these conditions, which according to Cole, violate section 4.1.7 of the Contract, Monaghan is in breach of the Contract.

Finally, Cole states that "[i]t is undisputed that Plaintiff made various alterations to the Unit, including altering the sixth-floor courtyard and the seventh-floor terrace areas. Plaintiff, however, failed to amend the Building's Certificate of Occupancy to include the terrace areas as usable space." Cole Aff in Opposition, ¶ 34. According to Cole, under the Administrative Code, no building or open space may be used without a C of O (Administrative Code § 28-118.1), and changes to an existing building or its open space must be reflected in a revised C of O. Administrative Code §§ 28-118.3.1 and 28-118.3.2. Thus, according to Cole, Monaghan's failure to amend the C of O constitutes a violation of paragraph 4.1.6 of the Contract which states: "Seller has not made any material alterations or additions to the Unit without any required consent of the Corporation or, to Seller's actual knowledge, without compliance with all applicable law. This provision shall not survive Closing." Eisentein Affirmation, Exhibit 4 (Contract of Sale), ¶ 4.1.6.

With respect to his counterclaim for breach of good faith, Cole also argues that by entering into the settlement agreement which placed additional conditions on the Unit, Monaghan violated section 4.1.7 of the Contract and thereby defaulted on the Contract and that Cole, as the non-breaching party may elect to terminate the contract. *Grace v Nappa*, 46 NY2d 560, 566 (1979).

In reply, Monaghan argues that Cole's reliance on section 4.1.7 of the contract fails, both because of section 34 which gave him absolute discretion to settle the dispute with the Coop regarding the allocation of shares and the maintenance for the Unit, and because the parties agreed, in paragraph 31 of the Rider and paragraph 47 of the Purchaser's Rider, that, to the extent that there was a conflict between the terms in the main body of the contract and any rider to the contract, the provisions in the rider would prevail.

As Monaghan contends, "[i]t is a fundamental principle of contract interpretation that when a handwritten or typewritten provision conflicts with the language of a preprinted form document, the former will control, 'as it is presumed to express the latest intention of the parties.'" *Home Fed. Sav. Bank v Sayegh*, 250 AD2d 646, 647 (2d Dept 1998) (citation omitted). Here, section 4.1.7 was part of the pre-printed contract, and paragraph 34, which gave Monaghan absolute discretion, was part of the typewritten rider, the provisions of which, the parties

specifically agreed would prevail.

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 (1990). Here the parties clearly agreed that the terms of the Riders would govern over the terms of the pre-printed contract, and that Monaghan had total discretion in reaching a settlement regarding the shares and maintenance allocated to the Unit, with the sole limitation that the maintenance would not be increased more than 15% and, that the buyer would not be required to make any payments for the period of time prior to the date of the settlement, as memorialized in the Side-Letter. Thus, the court need not reach Cole's argument that agreeing to the additional terms which are part of the settlement agreement constituted an abuse of discretion by Monaghan, or his contention that those additional terms constituted an improper burden on his use and occupancy of the Unit.

With respect to Cole's allegations that Monaghan made material alterations to the Unit without amending the C Of O, Monaghan submits an affidavit in reply stating that he was one of the sponsors of the cooperative conversion of the Building and that:

"3. The sixth floor courtyard and the Penthouse terrace areas of Apartment 6 were constructed pursuant to plans approved by the New York City Department of Buildings.

"4. The sixth floor courtyard and the Penthouse terrace areas of Apartment 6 were part of Apartment 6 when the Certificate of Occupancy for Apartment 6 was issued on April 26, 1982.

"5. All alterations to Apartment 6 since 1982 were made pursuant to plans filed with and approved by the Department of Buildings under the existing April 26, 1982 Certificate of Occupancy.

"6. I have no actual knowledge of any material alterations or additions to Apartment 6 that were made without compliance with applicable law."

Monaghan Aff, dated Feb. 28, 2018.

The court notes that not all alterations to a building require a change in the C of O. Rather, section 28-118.3.1 of the Administrative Code, relied on by Cole, requires the issuance of a new C of O where the alteration "change[s] from one occupancy group to another, or from one zoning use group to another, either in whole or in part." There is no suggestion that such changes of occupancy group or zoning group resulted from the alleged alterations.

In any case, in light of Monaghan's sworn statement, Cole's claim that it is undisputed that alterations were made that were not included in the C of O is clearly not correct, and his unsupported allegation that various unspecified alterations were made to the Unit after the original C of O was filed is inadequate to assert a violation of paragraph 4.1.6 of the Contract of Sale.

For these reasons, the court concludes that Cole had no

basis to terminate the contract, and was not entitled to the return of his deposit. Plaintiff's motion for summary judgment (motion sequence no. 001) is, therefore, granted.

Motion Seq. No. 002: Defendant's Motion for Summary Judgment

Defendant's motion seeks summary judgment in his favor on his counterclaims for breach of contract and breach of the covenant of good faith and fair dealing and seeks summary judgment in his favor with respect to plaintiff's motion for a declaratory judgment. Defendant's arguments basically mirror those he made in his opposition to plaintiff's motion for summary judgment in motion seq. no. 001. The court's conclusions with regard to plaintiff's motion, however, render defendant's motion moot.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of plaintiff Monaghan Qualified Personal Residence Trust (motion seq. No. 001) is granted, and it is hereby

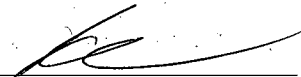
ADJUDGED AND DECLARED that defendant Eric Cole defaulted on the Contract entered into between the Monaghan Qualified Personal Residence Trust, as seller, and Eric Cole, as purchaser, and that the Monaghan Qualified Personal Residence Trust is entitled to receive the contract deposit as equitable damages as provided for in the Contract, and it is further

ORDERED that the motion for summary judgment of defendant Eric Cole (motion seq. No. 002) is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy on defendant, with notice of entry.

Dated:

8/15/18



Hon. Doris Ling-Cohan, J.S.C.

J:\Judge_Ling-Cohan\Summary Judgment\MONAGHAN.stearns.N. breach of contract of sale co-op.wpd