CB Frontier LLC v Wilmington Trust, N.A.
2018 NY Slip Op 32045(U)
August 20, 2018
Supreme Court, New York County
Docket Number: 654339/2016
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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CB FRONTIER LLC,

Plaintiff,

- against -

WILMINGTON TRUST, NATIONAL ASSOCIATION,

Defendant.

--X

Index No. 654339/2016
Motion Date: 3/26/2018
Motion Seq. No: 003

BRANSTEN, J.

In this declaratory judgment action, Plaintiff CB Frontier LLC ("CB Frontier"), moves pursuant to CPLR 3212, for summary judgment. Defendant Wilmington Trust, National Association ("Wilmington Trust") opposes Plaintiff's motion and cross-moves, pursuant to CPLR 3212, for partial summary judgment on its counterclaim and an award for attorney's fees, costs and expenses.

I. BACKGROUND[1]

A. Construction of the Property and the Inclusionary Housing Program

CB Frontier is the developer and owner of two residential apartment buildings containing 91 units located at 593-597 Third Avenue, New York, New York (a/k/a 200 East 39th Street New York, New York, hereinafter the "200 East 39th Street Building") and 202 East 39th Street, New York, New York (the "202 East 39th Street Building" and

[1] Except where otherwise indicated, all facts detailed in this section are drawn from Plaintiff's 19-a Statement in support of Plaintiff's Motion for Summary Judgment.

collectively, the "Property"). (Plaintiff's Rule 19-a Statement ("Pl. 19-a.") ¶ 1.) At the time CB Frontier was developing the Property, the City of New York (the "City") implemented the Inclusionary Housing Program, which awarded floor area ratio bonuses ("FAR Bonus") to developers in order to incentivize the creation of affordable housing. (*Id.* ¶ 2.) Pursuant to the Inclusionary Housing Program, a developer may utilize the FAR Bonus to increase the floor area ratio of a development or transfer the awarded FAR Bonus to other developers who would then use the FAR Bonus at other developments. Therefore, the FAR Bonus has value to a developer.

On or about September 26, 2013, CB Frontier entered into a written regulatory agreement (the "Regulatory Agreement") with the New York City Department of Housing Preservation and Development ("HPD") with respect to the Property. (*Id.* ¶ 4.) Pursuant to the Regulatory Agreement, as amended, CB Frontier agreed to construct 19 affordable housing units at the Property. (*Id.* ¶ 5.) In August 2015, CB Frontier completed construction of the Property with financing provided by Wells Fargo. (*Id.* ¶¶ 6, 19.) In exchange for creating 19 affordable housing units at the Property, totaling 14,517 square feet, the City awarded CB Frontier FAR Bonus equal to 3.5 times the amount created, or 50,810 square feet. (*Id.* ¶ 7.) CB Frontier applied 9,475 square feet of its FAR Bonus toward the Property, which reached the maximum permitted floor to area ratio for the Property. (*Id.* ¶¶ 9-10.)

In connection with CB Frontier's application of the FAR Bonus to the Property, HPD issued a "Certificate of Floor Area Compensation Transfer" (the "Certificate") that

named CB Frontier as the "Benefit Transferor" and the "Benefit Transferee," and identified the Property as the "compensated development." (*Id.* ¶¶ 10-12.) The Certificate stated 2,707 square feet of "Affordable Housing Floor Area" was transferred with an "Affordable Housing Floor Area Bonus Ratio" of 3.5:1. (*Id.* ¶ 13.) Thus, a total FAR Bonus of approximately 9,475 square feet was transferred by CB Frontier for use at the Property. (*Id.* ¶ 14.)

The Certificate further provided CB Frontier, as Benefit Transferor, may convey or sell the FAR Bonus. (*Id.* ¶ 15.) On or about February 17, 2016, CB Frontier sold 15,977 square feet of FAR Bonus to the owner of a neighboring property (*Id.* ¶ 16.) As of February 26, 2016, CB Frontier owned a remaining 25,358 square feet of FAR Bonus (the "Remaining FAR Bonus"). (*Id.* ¶ 17.)

B. The LStar Mortgage

In late 2015, CB Frontier sought a loan from LStar Capital Finance II, Inc. ("LStar"), a Texas based lender, to refinance the construction loan on the Property (Pl. 19-a ¶ 20.) On or about February 26, 2016, the parties executed the Loan Agreement and LStar granted a loan to CB Frontier in the principal amount of $48,250,000.00 (the "Loan"). (*Id.* ¶¶ 20, 21.) To secure the Loan, CB Frontier granted to LStar a mortgage (the "Mortgage") over CB Frontier's leasehold interest in the 200 East 39th Street Building and CB Frontier's fee interest in the 202 East 39th Street Building. (*Id.* ¶ 22.) LStar also filed a UCC financing statement (the "UCC Statement") evidencing its security for the Loan (*Id.* ¶ 23.)

In connection with the Loan, LStar executed a Subordination and Non-Disturbance Agreement (the "Subordination Agreement") in favor of the City (*Id.* ¶ 35.) The Subordination Agreement expressly refers to CB Frontier's participation in the Inclusionary Housing Program and provides, "[t]he Loan Documents are and shall continue to be subject and subordinate to the terms, covenants, agreements, and conditions of the Regulatory Agreement." (*Id.* ¶ 36; Schnay Affid. Ex. 9 ¶ 1.)

C. The Remaining FAR Bonus

In July 2016, CB Frontier informed LStar that it intended to sell 3,948 square feet of the Remaining FAR Bonus to a development located at 539 Fifth Avenue. (Pl. 19-a ¶ 62.) LStar objected to the proposed sale, stating that the Remaining FAR Bonus was collateral for the Loan and LStar would not release the Remaining FAR Bonus without some form of compensation. (*Id.* ¶ 64.) The parties unsuccessfully attempted to negotiate a solution to the dispute.

Consequently, CB Frontier commenced this action against LStar by Summons and Verified Complaint on August 16, 2016 to determine the parties' rights regarding the Remaining FAR Bonus. CB Frontier subsequently filed an Amended Verified Complaint on October 6, 2016. On October 26, 2016, LStar moved to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1) and (a)(7). By Decision and Order dated February 6, 2017, this Court denied LStar's motion to dismiss, finding dismissal was not warranted because both parties proffered independently reasonable interpretations of the Mortgage.

On February 21, 2017, LStar submitted an Answer with counterclaim. LStar also appealed this Court's decision on the motion to dismiss, which was affirmed by the First Department on September 26, 2017.

On or about March 31, 2017, LStar conveyed its entire interest in the Mortgage to Wilmington Trust, National Association ("Wilmington Trust"). Accordingly, Wilmington Trust was substituted for LStar as Defendant in this action by So-Ordered Stipulation, dated May 17, 2017. (NYSCEF Doc. No. 59.)[2]

II. DISCUSSION

CB Frontier now moves, pursuant to CPLR 3212, for summary judgment for an order directing the entry of judgment for the CB Frontier and against Wilmington Trust, declaring that Wilmington Trust does not have a lien or other legal interest in the Remaining FAR Bonus and that the Remaining FAR Bonus is not part of the collateral for the Loan.

Wilmington Trust opposes CB Frontier's motion and cross-moves, pursuant to CPLR 3212, for partial summary judgment (1) dismissing CB Frontier's claims (2) granting Wilmington Trust's counterclaim set forth in its Answer to the extent of granting judgment that the mortgage covers the Remaining FAR Bonus and that the Remaining FAR

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[2] On the instant motion for summary judgment, both parties used the original caption in their papers.

Bonus is part of the collateral for the Loan; and (3) awarding Wilmington Trust all expenses, including reasonable attorney's fees.

A. Legal Standard

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Santiago v. Filstein*, 35 A.D.3d 184, 185-86 (1st Dep't 2006) (internal quotation marks omitted), quoting *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). The burden then shifts to the party opposing the motion "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006); *see also DeRosa v. City of N.Y.*, 30 A.D.3d 323, 325 (1st Dep't 2006). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 (1st Dep't 2002).

B. Declaratory Judgment

CB Frontier moves and Wilmington Trust cross-move for summary judgment on their claims for a declaratory judgment. CB Frontier alleges the Wilmington Trust does not have a lien or other interest in the FAR Bonus and the Mortgage does not include the Remaining FAR Bonus as collateral. Wilmington Trust alleges the Mortgage covers the

Remaining FAR Bonus and the Remaining FAR Bonus is collateral for the Loan. It is undisputed that the Mortgage does not explicitly refer to the FAR Bonus. (Pl. 19-a ¶ 46; Def. Response to Pl. 19-a ¶ 46.) However, Wilmington Trust argues the Remaining FAR Bonus is collateral under Section 1.01(e) of the Mortgage.

Section 1.01 of the Mortgage provides grants of security for the Loan. The pertinent language of Section 1.01 defines the collateral as follows:

> ARTICLE I - GRANTS OF SECURITY
>
> SECTION 1.01 Property Mortgaged. Borrower does hereby irrevocably mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey to and grant a security interest to Lender and its successors and assigns in, the following property, rights, interests and estates now owned, or hereafter acquired by Borrower (collectively, the 'Property'):
>
> * * *
>
> "(e) Easements. All easements, rights-of-way or use, rights, strips and gores of land, streets, ways, alleys, passages, sewer rights, water, water courses, water rights and powers, **air rights and development rights,** and all estates, rights, titles, interests, privileges, liberties, servitudes, tenements, hereditaments and appurtenances of any nature whatsoever, in **any way now or hereafter belonging, relating or pertaining to the Land and the Improvements** and the reversion and reversions, remainder and remainders, and all land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Land, to the center line thereof curtesy, property, possession, claim and demand whatsoever, both at law and in equity, of Borrower of, in and to the Land and the Improvements and every part and parcel thereof, with the appurtenances thereto . . . .

(Pl. 19-a ¶ 50; Schnay Affid. ¶ 40, Ex. 10 at 2-3 [emphasis added].) The UCC Statement contains nearly identical language. (Schnay Affid. Ex. 11 at 1-2.)

Whether a contract is ambiguous is a question of law to be resolved by the courts. *See Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995). "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978). Thus, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) (internal quotation marks and citations omitted).

As an initial matter, the Court finds the FAR bonuses, in general, would be considered a "development right" under Section 1.01(e), as the credits can be used by developers to develop more floor area for a building than would otherwise be permitted under the zoning laws.

Here, the issue is whether the Remaining FAR Bonus "belonged, related or pertained" to the Property at the time the Mortgage was executed. CB Frontier argues that FAR Bonuses belong to the developer and not the Property. The FAR Bonus was created by and is subject to the Inclusionary Housing Program to incentivize the development of affordable housing. The FAR Bonus is not attached to the land or development, but, rather, is granted to developers and is owned and transferable independent of any property, as demonstrated by the Certificate, which states:

> This Certificate may be conveyed or sold **only by the Benefit Transferor named above**. . . . [I]f this Certificate is not transferred in accordance with the above procedure, then the Benefit Transferor shall remain the owner of record of the above referenced Affordable Housing Floor Area if and until such time as Benefit Transferor directs HPD, at its sole discretion, to re-issue this Certificate to another party.

(Schnay Affid. Ex. 7 [emphasis added].) Therefore, the Remaining FAR Bonus does not "belong" or "pertain" to the Property.

Next, the Court must determine whether the Remaining FAR Bonus "relates to" the Property. A contract should not be read in a manner that renders words meaningless. *See Matter of Wallace v. 600 Partners Co.*, 205 A.D.2d 202, 206 (1st Dep't 1994), *aff'd* 86 N.Y.2d 543 (1995). Neither party claims Section 1.01(e) is ambiguous or incomplete. Wilmington Trust defines the word "relate" as "connected by reason of an established or discoverable relation." *See Coregis Ins. Co. v. Am. Health Found.*, 241 F.3d 123, 128 (2d Cir. 2001) (interpreting the term "related to" as used in an insurance policy). Wilmington Trust argues the Remaining FAR Bonus "relates" to the Property because it was granted to CB Frontier in connection with the construction of affordable housing units at the Property. CB Frontier argues the FAR Bonus does not "relate to" the Property because the Remaining FAR Bonus exists only for CB Frontier's benefit, independent of the Property.

Based on the plain language of Section 1.01(e), the Court concludes the Remaining FAR Bonus does not relate to the Property. Section 1.01(e) provides air and development rights "now or hereafter" relating to the Property are collateral for the Loan.

There is no dispute that the Property was built to its maximum FAR permitted by the zoning laws before negotiations for the Mortgage commenced and the Remaining FAR Bonus could not be used on the Property at the time the Mortgage was executed. (Pl. 19-a ¶ 54; Def. Response to Pl. 19-a ¶ 54.) Once the maximum FAR Bonus was used on the Property, the Remaining Far Bonus cannot be used to benefit the Property and the Remaining FAR Bonus only has value if CB Frontier can convey it to other developers to use on other properties.[3] In addition, the rest of Section 1.01(e) lists easements as grants of security for the Loan, all of which affect or otherwise touch the Property. Thus, the term "relating to" refers to rights that can be used on the Property or affect the use of the Property.

The Court finds unavailing Wilmington's argument that the fact that the Property is listed as the "site of affordable units" on the Certificate of Floor Area Compensation Transfer means that the Remaining FAR Bonus is "related to" the Property. LStar's representative, Cory Wong, testified that "air rights and development rights" mean "rights that developers use to build the maximum square footage **in a given development.**" (Ainsworth Affirm. Ex. 1 at 52-53 [emphasis added]). As noted above, the Remaining FAR Bonus could not be used on the Property at the time the Mortgage

[3] The Court does not address whether the FAR Bonus would "relate to" the Property if the Mortgage had been executed prior to the issuance of the FAR Bonus. The Court's holding is solely limited to the facts presented.

was executed. Therefore, the Remaining FAR Bonus did not "relate to" the Property at the time the Mortgage was executed.

Furthermore, in the context of real property transactions, where the instrument was negotiated between sophisticated business people negotiating at arm's length, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) (internal quotation marks and citations omitted). As noted above, the Mortgage does not make any reference to the Remaining FAR Bonus. Wilmington Trust asserts that it did not know about the Remaining FAR Bonus at the time the Mortgage was executed. (Defendant's Rule 19-a Statement ¶ 19.) In fact, the Remaining FAR Bonus was never discussed by the parties prior to the closing of the Loan. (*Id.* ¶ 16.) Consequently, LStar did not appraise the Remaining FAR Bonus as collateral or consider it when LStar decided to grant CB Frontier the Mortgage. Therefore, the Court should not now insert the FAR Bonus into the Mortgage.

Even assuming the Mortgage language is ambiguous, that language must be construed against LStar because it drafted the Mortgage. *See SOS Oil Corp. v. Norstar Bank of Long Is.*, 76 N.Y.2d 561, 568 (1990) ("As in the interpretation of any document, we look for the parties' intent within the four corners of the instrument, reading any ambiguity against the drafter . . ."). Therefore, the Remaining FAR Bonus does not

"relate to" the Property and the Remaining FAR Bonus was not granted as collateral pursuant to Section 1.01(e) of the Mortgage.

C. Wilmington Trust's Counterclaim for Breach of Contract

Finally, the Court notes Wilmington Trust argues the parties intended to include all of CB Frontier's assets as collateral for the Loan. Wilmington Trust asserts CB Frontier represented and warranted in numerous Loan documents that it did not own and would not acquire any material assets that were not pledged as collateral for the Loan. However, the Court finds Wilmington Trust's arguments regarding CB Frontier's representations and warranties relate to Wilmington Trust's claim that CB Frontier breached the Loan Agreement by owning and attempting to sell the Remaining FAR Bonus. In the instant cross-motion, Wilmington Trust moved for partial summary judgment on its claim seeking a declaration that the Remaining FAR Bonus was part of the collateral for the Loan. Accordingly, the Court will not address those arguments on the instant motion.

In view of the foregoing, CB Frontier's motion for summary judgment is granted and Wilmington Trust's cross-motion for partial summary judgment is denied. As to Wilmington Trust's claim for costs, expenses, and attorney's fees, since summary judgment was granted in favor of CB Frontier, Wilmington Trust has no right to recover any fees or expenses related to the action at this time.

III. CONCLUSION

Accordingly, it is hereby

ORDERED that CB Frontier's motion for summary judgment is granted; and it is further

ORDERED that Wilmington Trust's cross-motion for partial summary judgment is denied; and it is further

ORDERED that Wilmington Trust's request for attorneys' fees and costs is denied because Wilmington Trust is not the prevailing party; and it is further

ADJUDGED and DECLARED that Wilmington Trust and/or LStar Capital Finance II, Inc. does not have a lien or other legal interest in CB Frontier's remaining 25,358 square feet of floor area compensation, and the remaining 25,358 square feet of floor area compensation is not part of the collateral for LStar Capital Finance II, Inc.'s Loan to plaintiff that closed on February 26, 2016.

Dated: New York, New York
August 20, 2018

ENTER:

HON. EILEEN BRANSTEN
J.S.C.