SMDF Realty LLC v CH Hudson 44 LLC
2019 NY Slip Op 33196(U)
October 28, 2019
Supreme Court, New York County
Docket Number: 158521/2015
Judge: Saliann Scarpulla

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

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SMDF REALTY LLC,

Plaintiff,

- v -

CH HUDSON 44 LLC,

Defendant.

INDEX NO. 158521/2015

MOTION DATE 12/11/2018

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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CH HUDSON 44 LLC

Plaintiff,

-against-

CARONE & ASSOCIATES, PLLC

Defendant.

Third-Party
Index No. 595720/2015

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is

In this action arising out of a real estate dispute, Plaintiff SMDF Realty LLC ("Seller") moves for summary judgment on its complaint, and Defendant CH Hudson 44 LLC ("Purchaser") cross-moves for summary judgment on its counterclaim and third-party complaint.

Background

Seller and Purchaser entered into a contract of sale, dated November 28, 2014, for the sale of real property located at 49 Dominick Street, New York, New York ("Premises") in exchange for six million dollars ("Agreement"). Pursuant to the Agreement, Purchaser paid one million dollars as a down payment ("Down Payment"), which was placed in an IOLA account that Seller's attorney and third-party defendant, Carone & Associates, PLLC, held as the escrow agent ("Escrow Agent"). The remainder of the purchase price was to be paid at closing, on February 23, 2015 at 11:00am ("Closing Date"). Prior to the execution of the Agreement, Seller provided Purchaser with a survey of the Premises, dated November 21, 2006 ("2006 Survey"),[1] and Purchaser ordered and obtained a title report ("2014 Report").

Agreement ¶3.01 provides that "Seller shall convey and the Purchaser shall accept marketable fee simple title to the Premises free and clear of all liens, encumbrances and other defects (collectively, 'Title Defects'), in title." However, Purchaser is obligated to accept the Premises "subject to" enumerated exceptions ("Permitted Exceptions"), including, *inter alia*: "(b) [s]uch state of facts as would be shown by an accurate survey of the Premises, provided such facts do not render title unmarketable, or uninsurable;" "(i) [a]ny exceptions caused by, consented to or approved by, in writing, the Purchaser, its agents, representatives or employees;" "(k) MINOR Encroachments [such as] . . . fences[,] . . . retaining walls and yard walls, if any, on . . . the Premises . . . provided title

[1] The 2006 Survey states that it is "NOT FOR TITLE PURPOSES."

is not rendered unmarketable thereby;" and "(k) Exceptions 5, 6, 7 and 8 [as] set forth in . . . [the 2014 Report] annexed hereto as Schedule C[.]" *Id.*[2]

Agreement ¶3.02 provides, *inter alia*, that

> Purchaser shall promptly, but no later than ten (10) days after the date [of the Agreement], order a title report for the Premises, at Purchaser's sole cost and expense, from an [sic] reputable title company licensed to do business in New York (the 'Title Company'), and Purchaser cause a copy of such report to be simultaneously sent to Seller's attorney.

Although the Agreement provides that "[t]ime is of the essence as to Purchaser's obligation to close," ¶10.01(a), the Agreement permits the Seller to adjourn the Closing Date "for up to one hundred twenty (120) days for the purpose of clearing any Title Defects, together with any and all violations which are the obligation of the Seller to discharge . . ." and for an "additional sixty (60) day period" if "a continuation of title at Closing reveals additional Title Defects . . . ." ¶3.02.

Purchaser did not order a new title report within ten days after the date of the Agreement. After the execution of the Agreement, Purchaser ordered a survey of the Premises and used Insignia BNT National Title Agency, LLC ("Insignia") to conduct a survey reading (the survey, dated February 16, 2015, and survey reading are jointly referred to as the "February 2015 Survey"). On February 18, 2015, Insignia emailed the February 2015 Survey to Purchaser. The February 2015 Survey states, in relevant part:

> Easterly line: chain link fence varies up to 1.45 feet west of the easterly line, and 12 inch concrete curb is up to 1.41 feet west of the easterly line; owner may be out of possession of a strip of land to the east of said fence and curb, and title is not insured as to such strip of land in the absence of a

[2] "Neither the [P]urchaser or its attorneys shall have the right to raise or make objection to any of the Permitted Objections." Agreement ¶3.02.

> boundary line agreement or other acceptable proof from the owner of the premises to the east.

That same day, Purchaser's attorney, Peter Marullo ("Marullo"), sent a letter with the February 2015 Survey to Seller's attorney, Anthony Carone ("Carone"), objecting to the state of the Premise's title, informing Carone that Purchaser was "advised by [Insignia] that the removal of the curb and fence will not cure this title defect because of potential adverse possession claims by adjoining land owners," and asking how Seller "intended to cure said title defect," the existence of which precludes Seller from being "ready, willing or able to convey title in accordance with the [Agreement] on the scheduled Closing Date." In a response email, Carone informed Marullo that "[t]here is no valid title issue . . . . [Seller] will be ready willing and able to convey title per the [Agreement] . . . . [T]here will be no closing if we don't close on Monday as [it] is time is of the essence closing."

On February 20, 2015, Marullo sent another letter to Carone, objecting to the release of the Down Payment to Seller and advising Carone that Purchaser "rejects any attempt . . . to convene a 'time of the essence' closing on February 23, 2015. Title is unmarketable and you have stated that [Seller] is unwilling or unable to cure the title defects at this time. Consequently, the Seller is not ready, willing or able to convey title in accordance with the [Agreement]."

On February 23, 2015, the Closing Date, Carone sent the following email to Marullo: "Attached are the [2006 and February 2015 Surveys]. Meir has confirmed to me that the easterly fence and curb were constructed by Kenny 3-4 years ago. Once

confirmed, this should eliminate any out of possession concerns. Please get back to me as soon as you confirm this with your client."

On March 2, 2015, Carone responded to Marullo's February 18, 2015 letter, and maintained that: no valid title objection exists; Purchaser's objection was untimely and raised in bad faith; and "the fence and curb that form the basis for the objection were both recently constructed by [Purchaser], its principles [sic] agents and/or employees" and therefore constitutes a Permitted Exception under the Agreement. Carone also asserted that, although Seller "does not concede or admit that any valid title objection or exception exists, [Seller] reserves the right to remove the fence installed by [Purchaser], install a fence on the proper boundary lines and submit proof that no 'out of possession' claim exists to a reputable and licensed title company . . . ."

It is undisputed that Seller relocated the fence after the Closing Date. On March 20, 2015, Carone sent an email to Insignia asking to update the Premises' title report to reflect an updated survey, dated March 18, 2015 ("March 2015 Survey"). Later that day, Insignia informed Purchaser that the relocated fence may not cure any adverse or out of possession claim and that, because it "is aware of the earlier surveys, [it] can't underwrite this without taking an exception as to potential claims by the owner of the adjoining premises (reputed to be the Port Authority)."

At the end of March 2015, Carone sent a proposed Fence and Boundary Agreement to the Port Authority of New York and New Jersey ("Port Authority") to confirm that the March 2015 Survey is an accurate depiction of the boundary line on the

eastern portion of the Premises and that the Port Authority "makes no claim for ownership by adverse possession or otherwise to any portion of [the Premises]." On July 15, 2015, the Fence and Boundary Agreement was executed by Seller and the Port Authority.

On July 28, 2015, Seller sent a notice to Escrow Agent, requesting that the Down Payment be released to Seller because Purchaser purportedly default under the Agreement by: (1) failing to close on the Closing Date, pursuant to ¶10.01(a); and (2) failing to order a title report, pursuant to Agreement ¶3.02. Seller also wrote a letter to Purchaser, dated July 28, 2015, informing Purchaser that it has confirmed with Port Authority that there are no issues with title, as is evidenced by the Fence and Boundary Agreement, and that Purchaser is entitled to the Down Payment for reasons set forth in the notice to Escrow Agent. Purchaser responded to Seller by letter dated July 29, 2015, whereby Purchaser denied Seller's allegations, objected to the release of the Down Payment to Seller, and demanded that the Down Payment be returned to Purchaser.

Based on the foregoing, Seller commenced this action, asserting two causes of action seeking: (1) a declaration that it properly terminated the Agreement and is entitled to retain the Down Payment as liquidated damages because Purchaser breached and defaulted under the Agreement by failing to order a title report for the Premises within ten days of the date of the Agreement and failing to close on the Closing Date; and (2) attorneys' fees. Purchaser answered the complaint and asserted a counterclaim against Seller and a third-party claim against Escrow Agent seeking: (1) an order directing Seller and/or Escrow Agent to return the Down Payment to Purchaser; and (2) attorneys' fees.

Seller now moves for summary judgment on its complaint and to dismiss Purchaser's counterclaim and third-party claim. In support of its motion, Seller argues, *inter alia*, that: Purchaser was obligated to order a survey within the same time that Purchaser was obligated to order a new title report under Agreement ¶3.02, and Purchaser's failure to do so required Purchaser to rely on the title exceptions raised in the 2014 Report and constituted a waiver of any objections to title raised in the 2015 Survey; Purchaser failed to attend the closing on the Closing Date; and Purchaser failed to disclose information to Insignia that would have established that no valid title objection existed under the February 2015 Survey.

Purchaser opposes Seller's motion and cross-moves for summary judgment on its counterclaim and third-party claim and to dismiss Seller's complaint. In support of its cross-motion, Purchaser argues, *inter alia*, that it is entitled to a return of the Down Payment because: Seller failed to hold a closing on the Closing Date; and Seller was obligated to obtain title insurance for the Premises once Insignia determined that the Premises uninsurable based upon the February 2015 Survey, but failed to do so.

Discussion

A party moving for summary judgment "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," *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (citations omitted). Where, as here, "a written agreement is complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms." *Greenfield v Philles Records*, 98 N.Y.2d 562, 569 (2002) (citations

omitted). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990).

The relevant portion of Agreement ¶3.02 states that "Purchaser shall promptly, but no later than ten [] days after the date hereof, order a title report for the Premises . . . and the Purchaser shall cause a copy of such report to be simultaneously sent to the Seller's attorney." The Agreement does not prohibit Purchaser from ordering a survey of the Premises, set a deadline by which Purchaser may order a survey, nor specify any timeframe by which Purchaser must give notice of any objections to title.

Seller's argument, that the term "title report" in the Agreement includes surveys of the Premises, is unavailing. Although neither "title report" or "survey" are defined, the Agreement refers specifically to each term separately.[3] *See Helmsley-Spear, Inc. v New York Blood Ctr., Inc.*, 257 AD2d 64, 69 (1st Dept 1999) ("Courts should construe a contract so as to give meaning to all of its language and avoid an interpretation that effectively renders meaningless a part of the contract."). Moreover, because the Agreement here is clear and unambiguous, I may not consider extrinsic evidence of pre-contractual communications between the parties to establish otherwise. *See Greenfield*, 98 N.Y.2d at 569; *Non-Linear Trading Co., Inc. v Braddis Assoc., Inc.*, 243 AD2d 107, 114 (1st Dept 1998).

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[3] For example, Agreement ¶5.03 specifies that "Purchaser shall pay all premiums and charges of the Title Company for the Owner's Title Policy . . . to be issued pursuant to the Title Report, the cost of a new survey or of any updates or modifications to any existing survey obtained by the Purchaser . . . ."

Despite Seller's argument to the contrary, the Agreement does not specify a time by which Purchaser must object to any issues with title, and the cases upon which it relies are inapposite. *Compare, e.g.*, *Venetoklis Family Ltd. Partnership v Kora Developers, LLC*, 74 AD3d 1057, 1058 (2d Dept 2010) (Under the terms of the contract at issue, purchaser was required to provide written notification to "the seller of its objections to defects in title within 10 days of receipt of any title report, and any objection to title not so noticed was deemed waived."). Therefore, Seller has failed to establish that Purchaser waived any objections to title.

Questions of fact exist as to whether Purchaser defaulted under the Agreement by failing to close on the Closing Date, or whether Seller defaulted by failing to hold a closing on the Closing Date. Although Agreement ¶10.01(a) states that "[t]ime is of the essence as to Purchaser's obligation to close," based upon a review of the parties' conduct and communications after entering the Agreement and after the Closing Date, numerous questions of fact exist, including as to whether: Purchaser repudiated the Agreement; Seller waived, or is estopped from relying on, the Agreement's time of the essence provision, *accord Stefanelli v Vitale*, 223 AD2d 361, 362 (1st Dept 1996); *Gaston v Estrada*, 40 AD3d 580, 580 (2d Dept 2007); and whether Purchaser ordered and Seller received the 2015 Survey within a reasonable time.

Moreover, a review of the record shows that additional questions of fact exist regarding, *inter alia*, the circumstances surrounding the construction of the fence and curb, the accuracy and validity of the February 2015 Survey, and whether the fence and

curb constituted a Permitted Exception. Therefore, Seller's motion for summary judgment on its first cause of action is denied. These issues of fact also preclude summary judgment in Purchaser's favor because Purchaser has failed to establish that Seller was obligated to obtain title insurance for the Premises once Insignia rendered the Premises uninsurable based upon the February 2015 Survey.

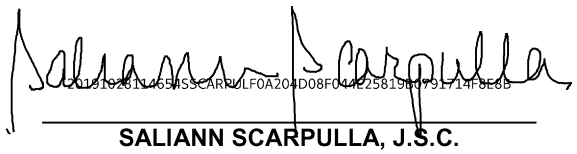
Finally, the portion of each party's motion seeking an award of attorneys' fees pursuant to Agreement ¶21.10 – which provides that if either party commences "any action . . . for the purpose of enforcing any provision of this Agreement, the prevailing party . . . shall receive . . . their costs and reasonable attorneys' fees . . . ." – is denied because I am unable to determine which is the "prevailing party" at this juncture.

In accordance with the foregoing, it is hereby

ORDERED that Plaintiff SMDF Realty LLC's motion for summary judgment and Defendant CH Hudson 44LLC's cross-motion for summary judgment are denied; and it is further

ORDERED that the parties are directed to appear for pre-trial conference in Room 208, 60 Centre Street, New York, New York 10007, on November 20, 2019 at 2:15pm.

This constitutes the decision and order of the Court.



10/28/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE