

Old Crompond Rd., LLC v County of Westchester
2019 NY Slip Op 34694(U)
June 28, 2019
Supreme Court, Westchester County
Docket Number: Index No. 57579/2016
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
OLD CROMPOND ROAD, LLC,

Plaintiffs

-against-

COUNTY OF WESTCHESTER,

Defendants.
-----X

DECISION AND ORDER

Index No. 57579/2016

Motion Sequence 3

The following papers were considered on the County of Westchester's motion for summary judgment pursuant to CPLR 3212:

Notice of Motion/Affirmation/Exhibits A-K	1-13
Memorandum of Law in Support	9
Affidavit in Opposition/Exhibits 1-11	10-21
Affirmation in Reply/Exhibits L-M	22-24
Memorandum of Law in Reply	25

Upon the foregoing papers, it is ordered that the motion is DENIED.

The plaintiff, Old Crompond Road, LLC ("OCR") filed this action on May 27, 2016, alleging two causes of action against the defendant, County of Westchester (the "County"). The County previously filed a motion for dismissal of the complaint against it due to failure to state a claim and OCR filed a cross-motion seeking an order pursuant to CPLR 3025[c] to serve and file an amended complaint to conform the pleadings to the proof. This Court granted OCR's motion to serve and file an amended complaint by Decision and Order dated October 18, 2018 and the amended complaint was filed on October 24, 2018.

The first cause of action in the amended complaint alleges that in or about 2007, OCR was designated and approved to develop and construct a twenty-six unit

Affordable Affirmatively Furthering Fair Housing ("AFFH") project on Old Crompond Road, Yorktown Heights, New York. The project was part of the County's plan to develop 750 units to satisfy its requirements per a stipulation of settlement in a federal law suit. The County agreed to perform and pay for certain site work and infrastructure required by the project; to have county contractors, Housing Action Counsel "(HAC)", market the project, find and vet qualified purchasers for the units, and to otherwise aid in the financing, sale and closing of the units. OCR alleges that the County agreed that only three bedroom units were to be constructed.

OCR alleges that, on April 17, 2013, in fulfillment of its construction obligation, the County contracted with Bradhurst Construction ("Bradhurst") to perform the site work, with a scheduled completion date of six months and that OCR was a third-party beneficiary of such contract. OCR asserts that the work took substantially longer due to inexcusable delays by Bradhurst and was not completed until the fall of 2014. OCR alleges that despite numerous requests for the County to speed the construction along and despite the ability of the County to take actions to insure compliance with the contract, the County failed to take action and such failure resulted in a two-year delay and consequential damages in an amount to be determined, but in excess of \$250,000.00.

OCR alleges in the second cause of action that the County required OCR to retain the services of HAC and had an obligation under its Marketing Plan to insure that such consultant was competent and qualified, which the County failed to do or did so negligently. OCR alleges that, despite the promises and representations of the County and as to the availability of qualified purchasers and available financing for closings commencing December 2013, such purchasers could not easily be found due to the defendant's and HAC's incompetence and failure to abide by the Marketing Plan requirements, or if found could not qualify for financing and/or could not meet HUD requirements. Therefore, the project, which should have closed out in 2014, still had three units unclosed as of August 2015 and the length of time between contract and closing was inordinate and greater than provided or estimated. OCR alleges that the County also had an obligation under its approved Marketing Plan to preliminarily market

the units and review and supervise the HAC to insure fulfillment of HAC's obligations, neither of which it did.

OCR alleges that it was damaged by the County's breach of contract and misrepresentations, by being forced to incur excess carrying costs and loss of use of the proceeds of sales for up to two years and reduced sales prices in an amount to be determined but in excess of \$350,000.00.

Prior to this Court's Decision on those motions, the County filed the instant motion for summary judgment. The County argues that OCR fails to identify the breached provisions of any alleged contract; that OCR is not a third-party beneficiary to the Bradhurst contract and that even if it were a third-party beneficiary to the Bradhurst contract, the County is not the proper defendant; that there is no enforceable contract between the parties for marketing and/or financing the finished units and any claims based upon representations outside the four corners of the sale agreement are barred by the merger clause.

In opposition, OCR submits an affidavit from Neil DeLuca ("DeLuca"), a member of OCR, stating that the amended complaint was not answered and that the County is in default for failure to file an answer to the amended complaint. DeLuca states that the County's obligation to perform infrastructure work is contained in a tripartite agreement known as the Sales Agreement between the County, OCR and Crompond Crossing Housing Development Fund Company, Inc., a not-for-profit entity associated with HAC, the marketing agent for the development.

DeLuca contends that the County and/or its contractor created a critical path schedule, confirming the time frame for the completion of the infrastructure, which constituted an addendum to the contract of sale, providing a time frame for the completion which the original contract did not contain. DeLuca avers that, based upon this agreed time schedule, OCR proceeded to construct the 26 affordable housing units, so as to be able to market them and close on them in January 2014 and the County was well aware of the construction schedule. The affiant asserts that the County did not comply with the schedule and that the contract with Bradhurst should have contained a

time of the essence clause, or liquidated damages or an enforceable schedule. He contends that the County had options, none of which it took.

DeLuca also asserts that HAC, the marketing consultant, designated by the County, had no expertise; was incompetent to market the units and should never have been designated by the County. That negligent and/or improper designation was itself a breach of the Marketing Plan, made part of the Sales Agreement. DeLuca states further that the implementation and processing of applicants was terrible and the County failed to meet its contractual obligations to complete the infrastructure by December 2013 and failed to meet its obligations of marketing and supervision pursuant to the Marketing Plan as required by HUD.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); see also, *Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

As previously stated, this Court granted OCR's motion to amend the complaint and the amended complaint was filed October 24, 2018. However, the note of issue was filed prior to this Court's previous Decision and Order, requiring the County to file the motion for summary judgment within the time required by the Differentiated Case Management Rules. Prior to this Court's Decision and Order on the motion to dismiss and motion for leave to amend, the County made a motion for summary judgment. However, the County failed to serve or file a response to the amended complaint and therefore, the motion is considered premature because it was made prior to service of an answer to the amended complaint (see *Johnson v Boro Medical Center Local No.*

563, 89 AD2d 901 [2d Dept 1982] *see also Schoenborn v Kinderhill Corp.*, 98 AD2d 831, 832 [3d Dept 1983]).

Since this Court may have created confusion in its prior Decision and Order, by stating toward the end that the County had already filed a motion for summary judgment which would be decided when it was fully submitted; the attorneys reached out to the Court and was told that the motion was still pending and was being transferred to this Court's calendar; and the current motion referred to the original complaint and not the amended complaint, the Court will allow the County to file an answer to the amended complaint.

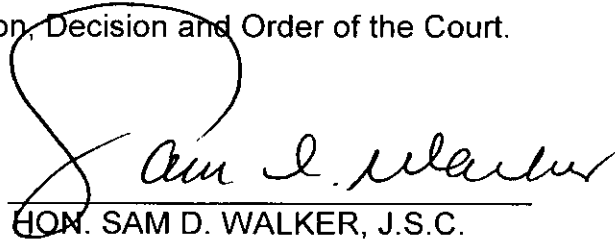
Accordingly, based on the foregoing, it is

ORDERED that the motion for summary judgment is denied.

The plaintiff shall serve and file an answer to the amended complaint within ten days of the filing of this Decision and Order. The parties are directed to appear before this Court on July 24, 2019 at 9:30 a.m. in Courtroom 1403 for a conference on the matter.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
June 28, 2019



HON. SAM D. WALKER, J.S.C.