

361 Broadway Assoc. Holdings, LLC v Morales

2020 NY Slip Op 30089(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 151711/2018

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 14
Acting Justice
INDEX NO. 151711/2018
361 BROADWAY ASSOCIATES HOLDINGS, LLC MOTION DATE 05/14/2019
Plaintiff, MOTION SEQ. NO. 001
- v -
JAVIER MORALES, DECISION + ORDER ON MOTION
Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9-41
were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents Plaintiff's motion for summary judgment is determined as follows:

In this action for breach of contract and recoupment of attorney's fees and costs arises out of the unconsummated sale of a condominium, Unit 4A, located at 67 Franklin Street, New York, New York. Plaintiff, the sponsor of the Cast Iron House Condominium, and Defendant entered into an option agreement for the sale of Unit 4A dated June 30, 2015. When the parties executed the contract, Unit 4A, like the rest of the project was incomplete and under construction. The purchase price for Unit 4A was \$7,450,000.00 and Defendant made a premium payment, or deposit, on the purchase of \$1,490,000.00. Incorporated into the parties' agreement was the condominium offering plan.

The offering plan states that "if Purchaser does not close on the [agreement], Purchaser will forfeit Purchaser's Premium Payment as liquidated damages".

The plan further states at paragraph 2 (e):

"In the event a Purchaser defaults under the Option Agreement, time being of the essence with regard to the obligations of Purchaser thereunder, Sponsor, in its sole discretion, may elect by notice to Purchaser to: (i) cancel the Agreement. If Sponsor elects to cancel, Purchaser shall have 30 days from the giving of the notice of cancellation to cure the specified default. If the default is not cured within such 30 days, TIME BEING OF THE ESSENCE, then the Agreement shall be deemed cancelled, and Sponsor shall have the right to retain, as and for liquidated damages, (a) the entire Premium Payment and any interest earned on the Premium Payment and (b) Unit Upgrade Funds. Upon the cancellation of the Agreement, Purchaser and Sponsor will be released and discharged of all further liability and obligations hereunder and under the Plan,

and the Unit may be sold to another as though the Agreement had never been made, and without any obligation to account to Purchaser for any of the proceeds of such sale”.

Likewise, the plan indicates that “No closing of a Residential Unit will occur prior to the issuance of a Temporary Certificate of Occupancy for the particular residential Unit”. As per this Offering Plan, “Each Purchaser shall be required to close title to their particular Residential Unit once a temporary certificate of occupancy is issued irrespective of outstanding items of work, provided Sponsor has satisfied the closing conditions set forth in the Section of the Plan entitled “Terms of Sale”.

As per the agreement, Plaintiff initially sent a letter to Defendant to schedule the closing for December 7, 2016. However, since Plaintiff had yet to obtain a temporary certificate of occupancy, the closing was adjourned by Plaintiff in keeping with Section 6.1 of the agreement, that states “After the Initial Closing Notice, Sponsor may from time to time, adjourn and reschedule the date and hour for Closing at any time on notice to Purchaser, which new Closing notice shall fix a new date, hour and place for the Closing. Delays ensued in completing the construction, and the closing was adjourned first to February 1, 2017 and again to February 27, 2017. Thereafter, the next closing letter was not sent to Defendant until November 28, 2017.

During the delay in completing the construction, on January 10, 2017, as required pursuant to 13 NYCRR §20, Plaintiff filed the Ninth Amendment to the Offering Plan with the New York State Attorney General. This plan provided Defendant with a 15-day right to rescind the agreement, since the first closing of a residential unit did not take place within the first 12 months of the projected First Year of Condominium Operation. While Plaintiff informed Defendant of this 15-day rescission period that expired on January 25, 2017, Defendant never elected to rescind the agreement during that time period. A closing date of December 7, 2017 was noticed and accepted by Defendant. Subsequently, Defendant exercised his one-time right to adjourn the closing and the parties agreed to reschedule for December 14, 2017.

Plaintiff pled two causes of action, breach of contract and a claim for attorney’s fees. As damages for the alleged breach, Plaintiff seeks to retain Defendant’s deposit. Now, Plaintiff moves for summary judgment.

A seller of real property seeking a determination that the buyer is in default under the contract of sale must make a *prima facie* showing that the seller was ready, willing, and able to perform on the law day (*see Jian Yun Guo v Azzab*, 162 AD3d 754 [2nd Dept 2018]; *Nehmadi v Davis*, 121 AD3d 871, 872 [2nd Dept 2014]). In this regard, the moving seller of real property may establish its entitlement to summary judgment by demonstrating the existence of a valid contract of sale with a time-is-of-the-essence clause, and that it was “ready, willing and able to deliver good and marketable title at the scheduled closing” (*Sikander v Prana-BF Partners*, 22 AD3d 242, 243 [1st Dept 2005]). A seller may retain a purchaser’s deposit where a purchaser defaults on a real estate contract without lawful excuse (*see 1776 Assoc. Corp. v Broadway W. 57th St. Assoc.*, 181 AD2d 601 [1st Dept 1992], *appeal dismissed* 80 NY2d 824 [1992]).

"[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 214, [2009] [internal quotation marks omitted]). That "rule has even greater force in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks and citation omitted]). "[C]ourts 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" (*Willsey v Gjuraj*, 65 AD3d 1228, 1230 [2d Dept 2009] [internal quotation marks omitted]).

The Plaintiff has met its initial burden of proof by demonstrating that Defendant failed to close title to the Unit and that it was ready willing and able to perform on the closing date. The burden, therefore, shifted to Defendant to establish the existence of a triable issue of fact that would excuse his failure to close (*Morgan Barrington Fin. Servs. v Roman*, 27 AD3d 385, 385 [1st Dept 2006]). In his answer, Defendant denies Plaintiff's allegations and asserts four counterclaims: fraud in the inducement, the refund of his deposit, promissory estoppel and unjust enrichment. All these counterclaims are predicated upon Defendant justifiably relying upon Plaintiff's communications as to the status of the building's construction and that temporary certificate of occupancy and closing date were anticipated soon, causing him to waive the 15-day right to rescind the agreement.

Defendant relies on three e-mails from Plaintiff to demonstrate the alleged material misrepresentation to Defendant by Plaintiff. The first e-mail, sent with the Ninth Amendment to Condominium Offering Plan, is dated January 11, 2017, and two others both dated January 19, 2017, that were all sent during the 15-day rescind period [January 10, 2017 to January 25, 2017] and expressed Plaintiff's expectation that the temporary certificate of occupancy was expected shortly.

However, these communications by Plaintiff cannot sustain Defendant's counterclaims grounded in fraud or misrepresentation. For Plaintiff's statements to Defendant regarding when the temporary certificate of occupancy would issue to be actionable would require that Plaintiff knew its misstatements were false, and Defendant points to nothing to demonstrate Plaintiff's required scienter. Plaintiff's expressed uncertainty as to when it would receive the temporary certificate of occupancy is patent from multiple adjournments of the closing that was originally scheduled in December 2016. Each of these letters scheduling the closing contained language warning that "we are advised that Sponsor anticipates, but cannot guarantee, that the [temporary certificate of occupancy] for the Unit will be issued in advance of the Closing Date". In this case, Plaintiff's prediction to Defendant as to when it would obtain the temporary certificate of occupancy was not a misrepresentation of an existing fact, but nothing more than an expression of future expectations (*see generally New York Univ v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *see also Deutsche Bank National Trust Company v Sinclair*, 68 AD3d 914, 916 [2nd Dept 2009]; *Foot Locker Stores, Inc., v Pyramid Management Group, Inc.*, 45 AD3d 1447 [4th Dept 2007]); *Marx v Mack Affiliates*, 265 AD2d 202 [1st Dept 1999]; *Jobe v Akowchek*, 259

AD2d 735 [2d Dept 1999]). It is settled that “[m]ere promissory statements as to what will be done in the future are not actionable” (*Adams v Clark*, 239 NY 403, 410 [1925]; *see also GE Oil & Gas, Inc., v Turbine Generation Services, LLC.*, 168 AD3d 563 [1st Dept 2019]). This is particularly so in the present case since the future action was not in Plaintiff’s control and it was reliant upon contractors and the NYC Department of Buildings to secure the required temporary certificate of occupancy (*see Bailey v Diamond*, 47 AD2d 363 [3rd Dept 1975]; *cf Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder LLC*, 177 AD3d 420 [1st Dept 2019] [“Plaintiff’s statement that its required deposit check was ‘on its way’ was an actionable statement of present fact, not of future expectation”).

Even if these communications did constitute misrepresentations of present facts, in order to prevail on his claim of justifiable reliance, Defendant must show that “if the facts represented are not matters peculiarly within the [Plaintiff’s] knowledge, and the [Defendant] has the means available to [him] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the Defendant] must make use of those means, or [he] will not be heard to complain that [he] was induced to enter into the transaction by misrepresentations” (*see ACA Financial Guar Corp. v Goldman, Sach & Co.*, 25 NY3d 1043, 1044 [2015] *quoting Schumaker v Mather*, 133 NY 590, 596 [1892]; *see also Danann Realty Corp. v Harris*, 5 NY2d 317 [1959]). While Defendant argues he was “left in the dark about the status of the Condominium,” the arrival of the temporary certificate of occupancy was not something within Plaintiff’s direct control, and Defendant does not articulate what steps he took to ascertain the truth or accuracy of Plaintiff’s representations. Thus, Defendant’s claims that he was induced to rely on Plaintiff’s representations is unsustainable (*see Rosenblum v Glogoff*, 96 AD3d 514 [1st Dept 2012] [“Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on [the other party’s] misrepresentations”] *quoting Stuart Silver Assoc v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1999]).

Defendant’s attempt to raise the issue of justifiable reliance fails since there is no demonstration of his due diligence or the materiality of Plaintiff’s communications. As Plaintiff sets forth in its motion, and Defendant does not refute, the contract documents warned Defendant purchaser of the potential for construction delays that would postpone closing on the unit and contained no obligation for the Plaintiff to close on a date certain. Given that the original closing was scheduled for December 7, 2016, but was delayed, it is unexplained how Plaintiff’s January 2017 e-mails induced Defendant to not assert his right of rescission. Defendant provides no reason to justifiably rely on Plaintiff’s January 2017 predictions when in fact the closing had previously been delayed and that Plaintiff relied on outside agencies to secure the necessary temporary certificate of occupancy.

Additionally, by Defendant’s affidavit in opposition, he shows that Plaintiff’s subject statements were, in fact, inconsequential. According to Defendant, when the closing did not take place in February 2017, through counsel, he sought a status update of the unit in March 2017. This demonstrates that after Defendant’s right to rescission had lapsed, he maintained continued interest in purchasing the unit despite multiple adjournments of the closing. Further, after Plaintiff had noticed Defendant of the closing for December 7, 2017, Defendant did not seek rescission at that time but only requested an adjournment of the closing, as per the contract, to

December 14, 2017. At that point, any purported reliance upon Plaintiff's January 2017 communications would be moot.

Defendant also attempts to raise the issues of equitable estoppel and promissory estoppel in opposition to the motion. However, as shown above, without material misrepresentation and without justifiable reliance, Defendant's arguments in support of equitable estoppel and promissory estoppel fail (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Management, LP.*, 7 NY3d 96, 106-107 [2006])["In the absence of evidence that a party was misled by another's conduct or that the party significantly and justifiably relied on that conduct to its disadvantage, "an essential element of estoppel [i]s lacking"] quoting *Lynn v Lynn*, 302 NY193, 205 [1951]; *Condor Funding LLC, v 176 Broadway Owners Corp.*, 147 AD3d 409 [1st Dept 2017]; *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 941-842 [1st Dept 2011]).

Lastly, since Plaintiff has prevailed on its motion, pursuant the contract, it is entitled to reasonable attorney's fees. Provided it prevails on this litigation, the sponsor is also entitled to recover the costs and expenses relating to Defendant's default under the Purchase Agreement, including reasonable attorneys' fees. Paragraph 6 of the June 30, 2015 Rider to the option agreement provides for this¹. Contracts that authorize the recovery of attorneys' fees and court costs incurred in the prosecution or defense of an action are valid and enforceable under state law (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1 [1986]; *Equitable Lbr. Corp. v IPA Land Dev. Corp.*, 38 NY2d 516 [1976]).

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment on both of its causes of action is granted in its entirety; it is further

ORDERED that an assessment of attorney's fees against Defendant is directed; it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the amount of liquidated damages is due and owing to Plaintiff by Defendant and reasonable attorneys' fees and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M. 646-386-3028 or spref@courts.state.ny.us for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local

¹ The provision reads: "In the event of any litigation between the parties hereto, the prevailing party in such litigation shall be entitled to recover its reasonable legal fees and other costs and disbursements incurred in connection with such action."

Rules” link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that Plaintiff’s counsel shall serve a copy of this order with notice of entry on the defaulting Defendants and that counsel for Plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212) 401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/suptctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR §4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee’s Part in accordance with the Rules of that Part; and it is further


ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

1/6/2020
DATE

CHECK ONE: CASE DISPOSED GRANTED DENIED

APPLICATION: SETTLE ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN


 HON. FRANCIS A. KAHN III, J.S.C.
 NON-FINAL DISPOSITION OTHER
 GRANTED IN PART SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE