City Club of N.Y. v New York City Bd. of Stds. & Appeals
2020 NY Slip Op 30823(U)
March 16, 2020
Supreme Court, New York Couty
Docket Number: 161071/2019
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

Justice

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THE CITY CLUB OF NEW YORK,

Petitioner,

- v -

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, NEW YORK CITY DEPARTMENT OF BUILDINGS, EXTELL DEVELOPMENT COMPANY, WEST 66TH SPONSOR LLC,

Respondents.

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INDEX NO. 161071/2019

MOTION DATE 3/2/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to DISMISS.

Upon the foregoing documents, it is hereby ordered that the motion to dismiss is denied.

E-Filed Document # 87 (which only came to this Court's attention when it read E-Filed Document # 88, [which, unlike # 87 the clerk's office incorrectly did not consider as a paper relevant to this motion], as, contrary to what most practicing attorneys seem to think, E-filing does not alert judges of that fact itself) seeks, in part, to have the Court recuse itself. Speaking generally, the Court feels completely capable of presiding over this matter impartially. Speaking specifically, yes, the Court lived on the Upper West Side, some 20 blocks from the site in question, for almost 30 years, but moved to Nassau County years ago. Yes, as I disclosed immediately in open court, I know some of the attorneys and principals on petitioner's side, but in no way would that compromise my impartiality. Finally, respondents suggest that petitioners may have changed their settlement posture when they found out that the case was assigned to this Court. Based on all I know, including the intense history of this case; I do not believe that this happened; I see no reason why this would have happened; and, anyone familiar with this Court's record, will, I hope, conclude that it is neither reflexively anti-development (reference the Court's allowing the Broadway Triangle-Pfizer Project in Brooklyn to proceed) nor reflexively pro-development (reference the Court's recent decisions temporarily halting the Lower East Side's "Two Bridges" Project). Thus, the request for the Court to recuse itself is, respectfully, denied. (Incidentally, this Court sees nothing nefarious, much less improper, unethical or illegal, in the fact and manner of Mr. Low-Beer's obtaining an Order to Show Cause from this Court last February.)

Respondents Extell Development Company and West 66th Sponsor LLC ("The Developers") want to build a 41-story, 775-foot residential tower containing 127 condominium units, with a 30,000-square-foot synagogue at its base, at 36-44 West Sixty-Sixth Street, running from West 66th Street to West 65th Street on the block between Central Park West and Columbus Avenue, in Manhattan ("The Proposed Project"). In April of 2019 the New York City Department of Buildings ("DOB") issued a New Building Permit for The Proposed Project.

A few weeks later Petitioner, The City Club of New York and others (collectively "The Opponents") commenced a lawsuit ("The Lawsuit") in this Court asking the judge (1) to declare that The Proposed Project violated zoning regulations; and (2) thus, to prevent The Developers from constructing it. In early May 2019, The Opponents appealed the DOB ruling ("The Administrative Appeal") to Respondent New York City Board of Standards and Appeals ("BSA") asserting, essentially, the same objections to The Proposed Project that DOB had rejected. For a while The Lawsuit and The Administrative Appeal proceeded in parallel. In June 2019, Justice Barbara Jaffe dismissed The Lawsuit on the ground, inter alia, that The Opponents had failed to exhaust their administrative remedies. Petitioner appealed that Decision. On October 15 the BSA unanimously denied and dismissed The Administrative Appeal, finding all of The Opponents arguments to be "unpersuasive." Pursuant to N.Y.C. Admin. Code § 25-207(a), The Opponents had 30 days within which to commence a CPLR Article 78 Special Proceeding seeking to overturn the BSA ruling.

On or about October 19 David Karnovsky, The Developers' land use attorney, proposed, to John Low-Beer, one of petitioner's attorneys, discussing a settlement that would have, essentially, obviated the need for the instant CPLR Article 78 Special Proceeding challenging the BSA ruling. For several weeks the parties negotiated a possible settlement. However, the attorneys tabled the talks because they could not agree on whether Petitioner would have to withdraw its appeal to the Appellate Division. In early November 2019 the Appellate Division dismissed the appeal as moot because of the BSA's October 15 Ruling. At that point petitioner's only recourse was this proceeding.

The following table summarizes, in chronological order, all material settlement communications that the parties have brought to the Court's attention:
(Please note that text in quotes usually is not verbatim; "T-C" indicates "telephone call"; E-M indicates email [or snail mail]; Jason "Cyrulnik" is respondents' litigation counsel.)

Date	From	To	Content	Format	Source
10/16/20	Karnovsky	Low-Beer	$275K settlement proposal	T-C	Low-Beer Aff ¶ 10
10/19	Low-Beer	Karnovsky	$37K counter-proposal	E-M	Low Beer Aff in Opp ¶ 10
10/20	Karnovsky	Low-Beer	$300K + strict confidentiality – binding upon parties signing	E-M	Low-Beer Aff in Opp ¶ 12

10/22	Low-Beer	Karnovsky	Various obstacles; settlement may be impossible	E-M	Low-Beer Aff in Opp ¶ 13
11/4	Low-Beer	Karnovsky	Numerous concerns, including confidentiality proposal	E-M	Low-Beer Aff in Opp ¶ 14
11/8	Low-Beer	Karnovsky	Revised proposal with "numerous changes"; no confidentiality provision	E-M	Low-Beer Aff in Opp ¶ 17
11/8	Karnovsky	Low-Beer	"not acceptable"; $100K offer	E-M	Low-Beer Aff in Opp ¶ 19
11/8	Low-Beer	Karnovsky	"client won't settle on those terms"	E-M	Low-Beer Aff in Opp ¶ 19
11/9	Low-Beer	Karnovsky	Draft Settlement Agreement	E-M	Karnovsky Moving Aff ¶ 9
11/9	Karnovsky	Low-Beer	$300K "Final offer"	E-M	Low-Beer Aff in Opp ¶ 10
11/9	Karnovsky	Low-Beer	Rejection with comments	E-M	Karnovsky Moving Aff ¶ 9
11/9	Low-Beer	Karnovsky	New Proposal, contingent on no other CPLR Article 78 proceedings	E-M	Karnovsky Moving Aff ¶ 11
11/11	Karnovsky	Low-Beer	Counter-proposal: "OK in concept"; $100K offer	E-M	Karnovsky Moving Aff ¶ 13
11/11	Low-Beer	Karnovsky	Counter-Proposal: $300K	E-M	Karnovsky Moving Aff ¶ 14
11/12	Karnovsky	Low-Beer	"Preparing agreement" including $300K amount; no mention of confidentiality terms	E-M	Karnovsky Moving Aff ¶ 15
11/12	Low-Beer	Karnovsky	"OK" "Filing Art 78 tomorrow"	E-M	Karnovsky Moving Aff ¶ 16
11/12	Karnovsky	Low-Beer	"Let's talk tomorrow"	E-M	Karnovsky Moving Aff ¶ 17

11/12(?)	Low-Beer	Karnovsky	"OK, I would like to avoid court filing"	E-M	Karnovsky Moving Aff ¶ 17
11/13	Low-Beer	Karnovsky	"$300K OK"	T-C	Karnovsky Moving Aff ¶ 18
11/13	Low-Beer	Cyrulnik	"What are we discussing"? "You never responded to my redline"	E-M	Low-Beer Aff in Opp¶ 28
11/13	Low-Beer	Cyrulnik	"may never be a settlement	T-C	Low-Beer Aff in Opp ¶ 29
11/13	Low-Beer	Cyrulnik	"inability to agree presumably unlikely	E-M	Low-Beer Aff in Opp ¶ 32
11/13	Low-Beer	Cyrulnik	"Should be able to settle but not 100% certain"	E-M	Low-Beer Aff In Opp. ¶ 33
11/13	Weinstock (or Low-Beer)	Cyrulnik	"Let's hope case will be moot soon."	E-M	Cyrulnik Moving Aff ¶ 18
11/13	Low-Beer	Cyrulnik	"Other objectors need not sign"	E-M	Low-Beer Aff In Opp ¶ 36
11/13	Cyrulnik	Low-Beer	"Other objectors need to sign. Have your clients ready to sign."	E-M	Low-Beer Aff in Opp ¶ 37
11/14	Low-Beer	Cyrulnik	"Proposed release is too broad"	E-M	Low-Beer Aff in Opp ¶ 39
11/14	Cyrulnik	Low-Beer	Proposed Settlement Agreement; "Confirm that this is a final draft"; contains confidentiality clause	E-M	Karnovsky Moving Aff ¶ 22; Low-Beer ¶¶ 41-44
11/14	Low-Beer	Cyrulnik	Confidentiality unacceptable + other issues	T-C	Low-Beer Aff in Opp ¶ 45-46
11/14	Low-Beer	Cyrulnik	Confidentiality unacceptable + other minor issues	E-M	Low-Beer Aff in Opp 48
11/12-20	Low-Beer	Karnovsky(?)	Agree to $300K	Misc.	Karnovsky Moving Aff ¶ 24
11/18	Low-Beer	Cyrulnik	"Will send clients' signature pages"	T-C	Cyrulnik Moving Aff ¶ 20

11/18	Weinstock	City	"Negotiations continuing"	E-M	Low-Beer Aff in Opp ¶ 52
11/20	Cyrulnik	Low-Beer	"Following up on where signatures stand."	E-M	Low-Beer Aff in Opp ¶ 56
11/20	Low-Beer	Cyrulnik	Petitioner unsure about settling; new proposal, with confidentiality stricken, "in event the decision is to settle,"	T-C	Cyrulnik Moving Aff ¶¶ 23-24; Low-Beer Aff in Opp ¶ 57
11/20	Low-Beer	Cyrulnik	New proposal "in case Petitioner is willing to settle"	E-M	Cyrulnik Moving Aff ¶¶ 25
11/20	Cyrulnik	Low-Beer	"But we already settled"	E-M	
11/20	Low-Beer	Cyrulnik	"We did not agree; parties disputing terms."	E-M	Cyrulnik Moving Aff ¶ 27: Low-Beer Aff in Opp ¶ 59
11/20	Low-Beer	Cyrulnik	"No binding agreement	E-M	Cyrulnik Moving Aff ¶ 28
11/21	Cyrulnik	Low-Beer	Petitioners' members signatures merely ministerial	E-M	Cyrulnik Moving Aff ¶ 29
11/21	Low-Beer	Cyrulnik	Signatures not the only remaining issue; new redline copy sent	E-M	Cyrulnik Moving Aff ¶ 30
11/22	Low-Beer	Cyrulnik	Petitioner meeting to discuss possible settlement	E-M	Cyrulnik Moving Aff ¶ 32
11/22	Low-Beer	Cyrulnik	"Prior to petitioner's meeting, inform me whether redline copy is acceptable"	E-M	Cyrulnik Moving Aff ¶ 33; Low-Beer Aff in Opp ¶ 60
11/24	Cyrulnik	Low-Beer	We already agreed; and anyway, we accept redline/proposal	E-M	Cyrulnik Moving Aff ¶ 34
11/25	Karnovsky	Low-Beer	"We settled earlier"	E-M	Karnovsky Moving Aff ¶ 25
12/2	Cyrulnik	Low-Beer	Inform by 12/3 whether sending signature pages and dismissing Art. 78	E-M	Cyrulnik Moving Aff ¶ 37

12/24	Low-Beer	Karnovsky	"We are not settling"	T-C	Karnovsky Moving Aff ¶ 26

Of course, these brief summaries do not provide the full flavor of the lengthy (one might say "torturous") negotiations which are detailed in the parties' submissions, but they provide a reference point. In particular, in the Court's opinion, Mr. Low-Beer's "OK" emails, read in context, always mean "OK" as to a particular issue, not to a full-scale settlement.

On December 24, 2019 The Developers sued City Club, for breach of contract, in the Commercial Division of this Court. Justice Barry Ostrager has stayed that case pending resolution of the instant motion to dismiss.

The Developers now move to dismiss the petition on the ground of settlement and release. (Petitioner correctly notes that Respondents' Notice of Motion is technically defective because it fails to state any grounds, as CPLR 2214(a) requires. However, the Court will overlook this defect as non-prejudicial pursuant to CPLR 2001.)

Discussion

Hornbook law provides that the burden of proof lies with a party relying on a release. Khalid v. Scagnelli, 290 AD2d 352, 354 (1st Dept 2002). The Developers urge this Court (Moving Memorandum at 15-16) to adopt what might be termed a "holistic" view of settlement negotiations: considering the totality of the circumstances, did the parties intend to bind themselves? The Developers also point out, correctly (ibid.), that documents and negotiations that contemplate signatures can still demonstrate a settlement even if final signatures are not (to use a somewhat archaic phrase) "inked." The Developers are also correct (i.d. at 16-18) that they and petitioners agreed to the basic framework of an agreement: the settlement amount (to wit, $300,000.00) and a discontinuance and release.

Petitioner relies on the hornbook law that settlements and other contracts require a clear agreement on all material terms. "To form a binding contract there must be a 'meeting of the minds,' such that there is 'a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.'" Stonehill Capital Management LLC v Bank of the West, 28 NY3d 439, 448 (2016).

In this Court's considered view, at least three reasons significantly militate in favor of finding that the parties never settled.

First, the parties never agreed upon the existence or substance of a confidentiality clause. Respondents have cited to cases where confidentiality was deemed immaterial. That does not seem to be the case here. Each side had its own significant reason(s) to want or not want such a clause. The potential construction of the tallest building on the Upper West Side of Manhattan, challenged by a state legislator, a neighboring building, vociferous community activists, and a century-old self-proclaimed "good government" group, is not your everyday, garden variety dispute. The First Department guides us that one strong indicia of materiality is that a party has indicated that it must be resolved. Silber v. New York Life Ins. Co., 92 AD3d 436, 439 (1st

Dep't 2012) ("Plaintiff's claim that there would be no point in 'moving forward' without resolving one of these terms indicates that it is a material term."). Here, opposing versions of confidentiality, or lack thereof, appear to have been batted back and forth without a final resolution.

Second, although a closer call than the first ratio decidendi, both the specific wording of the subject emails, and what one would expect in a situation like the instant one, indicate that an agreement would have required a signature(s) by petitioner's governing body. Both sides of the negotiations seemed to contemplate this.

Finally, settlement was clearly "in the air" here, the parties had agreed on the basic terms, but that is not enough. Settlements are binary; they exist or they do not. And there must be a specific action or inaction, at a specific time to create them. Several times in November (The Developers rely on 11/12), the parties came very close to settling. But a close reading of the emails does not reveal a final agreement, a "meeting of the minds." "Proof of negligence in the air, so to speak, will not do." Palsgraf v Long Island R. Co., 248 NY 339, 341 (1928), quoting Pollock, Torts [11th ed.] at 455.

This Court certainly agrees with the Developers that, for a variety of excellent reasons, courts should honor and enforce contracts in general and settlements and releases in particular. However, the Court does not believe that The Developers have satisfied their burden of demonstrating that the parties reached an agreement to settle this case.

The Obvious Irony

This Court notes in passing (i.e., dicta) the obvious irony that when this Court reaches the merits of the instant proceeding, which it has studiously avoided up until now, but which it hopes, circumstances permitting, to do on an expedited basis when the case is fully submitted, petitioner will have an uphill, albeit not insurmountable, battle convincing this (or any) Court to overturn a BSA decision. If it cannot do that, it will have passed up a $300,000 windfall. However, petitioner has its reasons, and whether they are good, bad, or indifferent is not for this Court to say.

Conclusion

Motion to dismiss denied.

3/16/2020
DATE

ARTHUR F. ENGORON, 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