Board of Mgrs. of 150 E. 72nd St. Condominium v Vitruvius Estates LLC
2020 NY Slip Op 33388(U)
October 15, 2020
Supreme Court, New York County
Docket Number: 160831/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
- X
THE BOARD OF MANAGERS OF
150 EAST 72ND STREET CONDOMINIUM,

Plaintiff,

-against-

VITRUVIUS ESTATES LLC,

Defendant.
- X

DECISION AND ORDER
Index No.: 160831/2016

Motion Sequence No.: 003

O. PETER SHERWOOD, J.:

Under motion sequence 003, defendant seeks summary judgment on its counterclaim, or alternatively, dismissal of plaintiff's supplemental claims. Plaintiff also cross-moves for summary judgment on defendant's counterclaim and the supplemental claims. The motions shall be denied for the reasons stated below. As this is a motion for summary judgment, the following facts are taken from the parties' 19-a statements.

I. BACKGROUND

Plaintiff The Board of Managers (the "Board") of the 150 East 72nd Street Condominium (the "Building") acts as agent for the residential unit owners. Defendant Vitruvius Estates, LLC ("Sponsor") sponsored conversion of the Building from a rental building to condominium ownership. An Original Offering Plan ("Original Plan") was filed with New York Attorney General on August 27, 2012, and the Third Amendment at issue here was filed on July 11, 2013. The Original Plan provided that at the closing on each residential unit, the purchaser would also pay a proportion of the cost of the Resident Manager's Unit (the "RM Unit") to be used by the Building's on-site superintendent. The Third Amendment changed that procedure by providing that the Board would pay upfront for the RM Unit, subject to a financing arrangement. Unit owners would then pay debt service proportionate to their percentage of Common Interest in the condominium as part of their fees for Common Charges. The Third Amendment provides as follows:

> Purchasers will not be required to contribute to the purchase of the Resident Manager's Unit at Closing. All references in the Offering Plan to Purchasers purchasing the Resident Manager's Unit at Closing shall hereby be deleted. The Resident Manager's Unit will be purchased by the Condominium Board on behalf of the Unit Owners at or after the First Closing. One hundred percent (100%) of the

> purchase price will be financed by a loan from the Sponsor for a term of fifteen (15) years and secured by a mortgage on the Residential Manager's Unit. The note will initially be interest only at a rate of 4% per annum for the first five (5) years and then for the next ten (10) years with an 8% interest rate and a twenty-five year amortization schedule. The note will provide for the payment of equal monthly installments of interest and will require a balloon payment on its maturity date which will be fifteen (15) years after the First Closing. The debt service to be paid to the Sponsor will be included in the Common Charges payable by unit Owners and each Unit Owner will be individually liable therefore to the extent of his or her percentage of Common Interest. The Condominium Board on behalf of all Unit Owners will be responsible for the payment of all mortgage recording taxes and all other closing costs.

(Third Amendment [NYSCEF Doc No. 97] § 6).

There is no dispute that first unit closing occurred on October 23, 2013. The superintendent has resided in the RM Unit since that date, but the parties dispute who had ownership and control over the RM Unit from that date. The parties dispute whether the 15-year period began on October 23, 2013, since the Sponsor did not immediately demand a formal closing on the RM Unit. In 2015, the parties first discussed a formal closing, but it did not go forward at that time. Sponsor demanded a formal closing in a letter dated September 29, 2017, setting a closing date of October 31, 2017, and attaching a proposed note and mortgage on the respective Fannie Mae/Freddie Mac forms. The Board contends that those forms contained provisions not contained in the standard Fannie Mae/Freddie Mac forms. The closing was thereafter adjourned several times to July 6, 2018 with the parties continuing to exchange correspondence regarding the terms of the closing. On July 3, 2018, Sponsor filed its counterclaim alleging that the Board repudiated the agreement for the purchase of the RM Unit. Sponsor remains listed as the owner of the RM Unit and has been obligated to pay property taxes on it since October 23, 2013.

Sponsor's counterclaim for rescission asserts that the Board has "repudiated its obligation to formally close on the Resident Manager's Unit" and has refused to pay any of the amounts due to date (counterclaims ¶¶ 120-121 [NYSCEF Doc No. 92]). Sponsor demands rescission of the contract, possession of the RM Unit, and restitution for the benefit conferred to the Board through its possession of the unit since October 23, 2013 (*id.* ¶ 125). The Board's supplemental claims, counts 7-9, request (vii) a declaratory judgment as to the terms of the Sale Agreement with respect to the RM Unit; (viii) a permanent injunction enjoining Sponsor from requiring plaintiff to purchase the RM Unit on Sponsor's proposed terms; and (ix) specific performance compelling the

Sponsor to sell the Board the RM Unit on the terms "set forth in the Sale Agreement" (NYSCEF Doc No. 86).

II. STANDARD

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.,* 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop,* 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

III. ARGUMENTS & DISCUSSION

A. Contract Interpretation

Sponsor first argues that the Third Amendment to the Original Offering Plan called for a fifteen-year financing period that would begin on October 23, 2013 – the date of the first unit closing – and end on October 23, 2028. "[T]he Board is liable for (a) interest-only (at 4%) for the first five years . . ., i.e. from October 24, 2013 through October 23, 2018; and (b) interest at 8%, and some principal(--i.e., as if amortized over twenty-five years), for the following ten years of the stipulated fifteen-year period (i.e. for October 24, 2018 – October 23, 2028); plus (c) a payment of the 'balloon' (unamortized principal) amount remaining as of October 23, 2028, with payment in full due on that date – i.e., again, fifteen years 'after the First Closing" (mem at 6). Since the superintendent has been living in the RM Unit throughout, the Board has been receiving the benefit of the bargain for years.

Sponsor also argues that the Board's contentions that the phrase "first five (5) years" refers to the first five years beginning whenever a formal closing on the RM Unit may occur is nonsensical. If the Board's argument were to be accepted, it would mean then that the "next ten (10) years" would not actually mean ten years, but a constantly shrinking number of years based on any continued delay of the formal closing. According to the Board, the ten-year period has already shrunk to five years and continues to shrink (mem at 8).

In opposition, the Board notes that the Third Amendment was prepared by Sponsor alone, and so any ambiguous language should be construed against it. "This rule is consistently applied against sponsors when interpreting ambiguous provisions of an offering plan" (opp at 8, citing *305 East 24th Owners Corp. v Parman Co.*, 122 AD2d 684, 691-703 [1st Dept 1986], *rev'd* on dissenting opinion, 69 NY2d 991 [1987]; *River Oaks Marine, Inc. v River Oaks Marina Associates, Inc.*, 227 AD2d 897, 898 [4th Dept 1986]).

The Board also argues that Sponsor's interpretation of section 6 is incorrect because it would mean that the Sale Agreement provides for "retroactive financing" when the formal closing on the RM Unit has not yet occurred and the agreement explicitly states that the sale of the RM Unit can occur "at or after the First Closing" (opp at 9). Because Sponsor chose to delay sale of the RM Unit until after the first closing, it now faces the consequences of a defective drafting job. Although "the Note would provide for interest and installment payments for fifteen years from its issuance, those payments would be cut off by the required balloon payment 15 years after the First

Closing" (opp at 10). The Note has not yet been issued. Sponsor cannot explain how a note can bear interest prior to its issuance. Nor is there any language in the Sale Agreement indicating that the amounts due would be retroactive to the First Closing (*id.*). The language must be construed against the drafter, and "this Court should find and declare that the Note to be issued on the sale of the RM Unit will provide for five years of monthly 4% interest-only payments, and then commence monthly payments at 8% interest on a 25-year amortization schedule, with all principal and interest then owing to be paid as a balloon payment on October 23, 2028" (*id.* at 11).

In reply, the Sponsor further argues that because time was of the essence with respect to the July 6, 2018 closing date, the purchaser that fails to perform is in breach unless it asserts a lawful excuse (*see Ward Capital Management, LLC v New Pelham Parkway North, LLC*, 165 AD3d 477, 478 [1st Dept 2018]). The Board's objections are not lawful excuses. The Board's reading of the agreement does not consider the agreement as a whole or give meaning to the concept of "the next ten years". The agreement is not construed against the drafter unless the court first finds that the agreement is ambiguous after reading it as a whole document for sensible meaning (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 448 [1st Dept 2017]; *William C. Atwater & Co. v Panama R.R. Co.*, 246 NY 519 [1927]). It does not matter what the formal date of conveyance is, since the formal closing is solely for the Sponsor's benefit, and the provision for 15-year financing is independent from the provision for a documentary closing date. There was no need to specify retroactivity because the terms speak for themselves (reply at 7-8).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Although the agreement provides that "[t]he Resident Manager's Unit will be purchased by the Condominium Board on behalf of the Unit Owners at or after the First Closing", it does not provide for what should happen in the event that purchase of the RM Unit occurs *after*, in this case years after, the First Closing. The rest of the provision proceeds on the assumption that purchase of the RM Unit would occur on the date of the First Closing, but if the court were to adopt Sponsor's position that the same timeline and terms of payment apply regardless of when the closing takes place, the result is impracticable. While Sponsor's interpretation tracks the language of the provision, its adaptation would require that upon execution of the note and mortgage, the Board would owe interest on an instrument that did not exist previously. If the court were to adopt the Board's position, however, the explicit temporal terms of the provision would be contravened. This shows the agreement is ambiguous.

When the court finds an agreement to be ambiguous, it may, as a last resort "if the extrinsic evidence is inconclusive", be construed against the drafter, here the Sponsor, but the parties do not rely on extrinsic evidence for purposes of this motion. The agreement may only be construed against Sponsor if the matter proceeds to trial and the extrinsic evidence is inconclusive (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 448 [1st Dept 2017]).

Sponsor has not proffered any evidence showing that any of the Board's statements made in furtherance of its objections to the terms of the closing were false, and therefore constituted an unlawful excuse (*see Ward Capital Management, LLC v New Pelham Parkway North, LLC*, 165 AD3d 477, 478 [1st Dept 2018]). Thus, neither side has shown a prima facie entitlement to judgment as a matter of law. As there are triable issues of fact as to what the parties intended, the motions must be denied.

B. Repudiation and Rescission

1. Sponsor's memo in support

Sponsor argues that the letter sent by the Board in June 2018 constitutes an anticipatory repudiation of the agreement because, in that letter, the Board refuses to formally close on the RM Unit unless the Sponsor adopted its interpretation of section 6 of the Third Amendment (*see IBM Credit Financing Corp. v Mazda Motor Manufacturing (USA) Corp.*, 92 NY2d 989, 993 [1998]; *Beinstein v Navani*, 131 AD3d 401 [1st Dept 2015]; *Stadtmauer v Brel Associates IV, L.P.*, 270 Ad2d 59 [1st Dept 2000]). The Board also stated in the letter that it was entitled to refuse to close because the Third Amendment required that the form of the note be non-negotiable, while the form

provided was negotiable. Defendant argues that because the Third Amendment clearly contemplated that the note would be a separate document from the mortgage, it would be considered negotiable as a matter of law in any event (*see* RPL § 258; *In re Apponline.com, Inc.*, 285 BR 805, 815-818 [Bankr ED NY 2002], *aff'd* 321 BR 614, 622 [ED NY 2003], *aff'd* 2004 WL 3127849 [2d Cir 2003]). The Board also asserted in the letter that it had various monetary claims against Sponsor, and that it intended to assert those claims as a defense against the note. Defendant argues that those claims could only offset the Board's liability, not operate as complete defense (mem at 12-13).

To the extent the Board complains that the form of the mortgage contains extraneous terms, RPL § 258 does not "prevent or invalidate the use of other forms" (mem at 13). The could should imply reasonable and customary terms because the agreement did not provide that the terms of the note and mortgage were to be negotiated in the future (*Cowles v Cole*, 137 Misc. 491, 494 [Sup Ct Broome County 1930]; *Diel v Diel*, 2013 WL 1777474 at *1, *5 [Sup Ct Kings County 2013]). The forms proffered by Sponsor are undeniably reasonable.

Rescission is the appropriate remedy here because there was an agreement to buy and sell property, but there was no downpayment that seller could collect upon failure to close. Buyer has also refused to pay the agreed-upon consideration (*see Brualdi v Iberia, Lineas Aereas de Espana, S.A.*, 79 AD3d 959, 960 [2d Dept 2010]; *Bistro Shop, LLC v NY Park N Salem, Inc.*, decision and order dated March 14, 2018, index no. 110907/2008, NYSCEF Doc No. 111 at 23-24). Sponsor should be awarded restitution for the benefit conferred upon the Board from its possession of the RM Unit for the past five years (NY Contract Law [2d ed] 23:35; *Bistro Shop, supra*).

2. Board's opposition and cross-motion

In opposition, the Board argues that its June 2018 letter did not constitute repudiation. "A repudiation can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach" (*Norcon Power Partners, L.P. v Niagara Mohawk Power Corp.,* 92 NY2d 458, 462-63 [1998]). Plaintiff's letter does not contain any statement that it intended to breach, rather it is a rejection of the terms demanded by Sponsor as inconsistent with the Third Amendment (opp at 18-19, citing *Princess Point LLC v Muss Dev. LLC*, 30 NY3d 127, 133 [2017]; *Condor Funding LLC v 176 Broadway Owners Corp.*, 147 Ad3d 409, 411-12 [1st Dept 2017]). The cases cited by

Sponsor for the proposition that the letter constitutes a repudiation are inapposite. For example, in *IBM*, unlike here, the court found that the appellant insisted on an untenable interpretation of the contract (92 NY2d 989). Similarly, in *Beinstein*, the court found that defendants "sought to insert an additional material term or condition into the contract" (131 AD3d at 407). Plaintiff states: "[T]he Board has always intended and still intends to purchase the RM Unit under the terms set forth in the terms of the Sale Agreement" (opp at 20).

With respect to the form of the note and mortgage, the Sale Agreement provides that the loan to finance the RM Unit will be "secured by a mortgage" and a note, without providing detail as to the form of those documents. While the Board proposes to use the statutory form, the Sponsor insists upon a more burdensome form – a modified version of the forms used by Fannie Mae and Freddie Mac. Where the terms are not specified in the agreement, the default form provided in RPL § 258 is legally sufficient and additional terms may not be unilaterally imposed (*see e.g., Ansorge v Belfer*, 248 NY 145, 150 [1928]; *Gilden v Moehlau*, 274 AD 1089, 1089 [4th Dept 1949]). If Sponsor wanted those extraneous terms included, it had every opportunity to do so when it drafted the Sale Agreement. Sponsor argues that its forms are reasonable, but Fannie Mae and Freddie Mac forms are used for single-family, primary residence mortgage loans, not business financing. Moreover, the modified forms proffered by Sponsor contain the following more burdensome terms: "(i) a clause requiring an escrow for taxes and insurance; (ii) an obligation to occupy the property as the borrower's principal residence; (iii) a requirement that 'the Property shall be occupied solely by the Resident Manager hired by Borrower'; (iv) a due on sale clause" (opp at 14, citing Kim aff, exhibit L ¶¶ 6, 18). The cases Sponsor cites to support the proposition that the mortgage must be in a reasonable form selected by the Sponsor are inapposite. For example, in *Cowles v Cole*, the court construed the agreement to provide "good security", rather than for a mortgage, for which there is no form specified by statute (opp at 14 n 6).

Regarding negotiability of the note, the First Department has held that "a note given in a real estate transaction in connection with a mortgage does not fall into the classification of a negotiable instrument" (*Felin Assoc., Inc. v Rogers*, 38 AD2d 6, 9 [1st Dept 1971]; *see also Rudes v Magna Stables Co.*, 227 AD2d 236, 236 [1st Dept 1996]). Because the Sale Agreement did not otherwise specify that the note was to be negotiable, the Board should be permitted to tender a non-negotiable note. Moreover, "a non-negotiable note would preserve the assets of the Sponsor

and protect the subject matter of the underlying litigation between the Board and the Sponsor" (opp at 17).

3. Sponsor's reply and opposition to cross-motion

With respect to the negotiability of the note, Sponsor argues a note is historically considered negotiable, unless it includes additional terms and conditions on top of the straightforward promise to pay a specific amount. Additional terms destroy negotiability. The fact that a note is secured by a mortgage does not, however, destroy its negotiability (Dale A. Whitman, *Transferring Nonnegotiable Mortgage Notes*, 11 Fla. A&M Law Rev. 63, 76-80 [2016]; *see also In re AppOnline.com, Inc.*, 285 BR at 816-817). Likewise, the additional terms in the Fannie Mae and Freddie Mac forms do not destroy negotiability. The Board's contends that these forms are unreasonable because they are used for residential, not commercial transactions, but as this transaction concerns a residential unit the point is of no consequence. The Board fails to dispute that unrelated claims do not constitute defenses (reply at 11). At the time of its objection letter, the Board failed to specify which provisions of the form were burdensome, and it is too late to do so now (*see Ilemar Corp. v Krochmal*, 59 AD2d 853, 855 [2d Dept 1977], aff'd 44 NY2d 702 [1978]). In any event, the cases cited by the Board do not preclude inclusion of usual and customary clauses, which these are (reply at 14).

4. Board's reply to cross-motion

With respect to negotiability of the note, the Board points out that defendants rely on a law review article for support. With respect to the form of the note and mortgage, Sponsor has conceded that the RPL § 258 form is "sufficient" (mem at 13). Sponsor contends that the Board did not timely specify its objections, but the July 6, 2018 closing date was adjourned on consent of both parties (NYSCEF Doc No. 103). In any event, the Board's June 2018 objection letter clearly and unambiguously objected to any mortgage more burdensome than the statutory form (NYSCEF Doc No. 104 at 4). The June 2018 letter was not a repudiation of the agreement, but even if it were, the Board properly objected in good faith to the proposed closing terms.

5. Discussion

Under New York law, "if one party to a contract repudiates his duties thereunder prior to the time designated for performance and before he has received all of the consideration due him thereunder, such repudiation entitles the nonrepudiating party to claim damages for total breach." (*Long Is. R. Co. v Northville Indus. Corp.,* 41 NY2d 455, 463 [1977]). This doctrine "evolved as

a defense to performance by the injured party" (*id.* at 464). Accordingly, the application of anticipatory breach is limited to bilateral contracts involving mutual and interdependent conditions and obligations (*id.*). A party who has fully performed on a bilateral contract, making the contract unilateral and unconditional, cannot make a claim for anticipatory breach even if the other party has repudiated. (*id.* at 464; *see Reprosystem, B.V. v SCM Corp.*, 630 F Supp 1099, 1100 [SDNY 1986] ["In New York, the doctrine of anticipatory breach is only available as a defense to continued performance by the injured party and therefore is not appropriate if the party invoking the doctrine has fully performed"]).

The "insistence on an untenable interpretation of a key contractual provision, and refusal to perform otherwise, constitute[s] an anticipatory breach of the contract" (*IBM Credit Fin. Corp.*, 92 NY2d at 993). But because neither party has demonstrated entitlement to summary judgment on the issue of contract interpretation, it cannot be determined whether the Board's position is untenable.

With regard to the form of the note and mortgage, the agreement is silent as to its terms, other than the financial terms. Where the parties have not agreed on additional terms, the statutory form is "lawful" and the terms it contains "may be implied as part of the mortgage called for by the contract" (RPL § 258; *Ansorge*, 248 NY at 150). Sponsor does not provide persuasive legal argument as to why extraneous terms beyond the default should be imposed on the Board.

With regard to negotiability of the form, the Board is correct that, absent affirmative proof otherwise, "a note given in a real estate transaction in connection with a mortgage does not fall into the classification of a negotiable instrument" (*Felin Assocs., Inc.*, 38 AD2d at 9). Here, Sponsor has not provided affirmative proof other than a theory explored in a law review article. Therefore, the form of the note is non-negotiable.

C. Supplemental Claims

Sponsor argues that the Board's supplemental claims for declaration as to contract interpretation, a permanent injunction, and specific performance, should also be dismissed because the Board has already repudiated the contract (mem at 19-20). Plaintiff does not respond to this portion of the motion, and defendant notes the same on reply.

D. Conclusion

Accordingly, it is hereby

ORDERED that the motion of defendant Vitruvius Estates, LLC for summary judgment (motion sequence number 003) on its counterclaim dismissing the complaint with respect to the Resident Manager's Unit is DENIED; and it is further

ORDERED that the cross-motion of plaintiff Board of Managers for summary judgment as to its Seventh (declaratory judgment), Eighth (permanent injunction), and Nineth (specific performance) causes of action seeking to require the Sponsor to close on sale of the Resident Manager's Unit is DENIED.

This constitutes the decision and order of the court.

DATED: October 15, 2020

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD J.S.C.