

**56th & Park (NY) Owner, LLC v Lengard Projects
LLC**

2021 NY Slip Op 30981(U)

March 29, 2021

Supreme Court, New York County

Docket Number: 652354/2020

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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56TH AND PARK (NY) OWNER, LLC	INDEX NO.	<u>652354/2020</u>
Plaintiff,	MOTION DATE	<u>09/28/2020</u>
- v -	MOTION SEQ. NO.	<u>001</u>
LENGARD PROJECTS LLC,		
Defendant.		

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28
 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In motion sequence number 001, plaintiff 56th and Park (NY) Owner, LLC (Seller) moves, pursuant to CPLR 3212, for summary judgment on its sole cause of action for a declaration that: (a) Lengard Projects, LLC (Purchaser) defaulted on the parties' purchase agreement (Agreement), (b) Seller cancelled the Agreement, (c) Purchaser's initial deposit, and any interest earned, is to be released to Seller, and (d) Seller is entitled to attorney's fees.

Seller's motion is granted for the reasons stated on the record on March 3, 2021 and that decision is supplemented here.

Seller and Purchaser entered into the Purchase Agreement for the sale of unit 41A at 432 Park Avenue, New York, New York (Unit). (NYSCEF Doc. No. [NYSCEF] 8, Agreement.) Pursuant to the Agreement, Purchaser was required to make two deposits and a final payment of the balance of the purchase price. (*Id.* at § 3, Purchase Price.)

Purchaser paid the first deposit of \$3,108,750 pursuant to the payment plan in the Agreement (Initial Deposit). (*Id.*; see also NYSCEF 22, Undisputed Facts ¶ 3.)

The Agreement granted Seller the discretion to designate the date and time of the closing. (NYSCEF 8, Agreement § 5.1.) On March 10, 2016, Seller scheduled in writing the closing for April 11, 2016 (First Closing Date). (NYSCEF 22, Undisputed Facts ¶ 12.) There was no closing on the First Closing Date. (*Id.* ¶ 13.) On April 12, 2016, Seller sent Purchaser a notice of default based on Purchaser's failure to close. (*Id.* ¶ 14.) Seller declared that time being of the essence, warned that Purchaser would have a final opportunity to cure its default, and set a second closing date for May 17, 2016 (Second Closing Date). (NYSCEF 10, Default Notice.) The notice also provided that if Purchaser failed to cure, the Seller would terminate the Agreement. (*Id.*) There was no closing on the Second Closing Date. (NYSCEF 22, Undisputed Facts ¶ 17.) On June 8, 2016, Seller sent a notice of cancellation to Purchaser (NYSCEF 11, Notice of Cancellation) and a written request to escrow agent holding the Initial Deposit for the release of the Initial Deposit. (NYSCEF 12, Release Request.) Purchaser rejected Seller's attempt to cancel the Agreement and its request for release of the Initial Deposit. (NYSCEF 14, Purchaser Letter.)

The material facts here are not in dispute. Purchaser failed to close on the Unit twice, a default under the Agreement. Seller properly followed the cancellation provisions of the Agreement. Rather, Purchaser's defense to this motion is that it is premature because there has been no discovery relating to the impact of construction delays on Purchaser's ability to perform and possible bad faith on Seller's behalf.

“A party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant.” (*Burlington Ins. Co. v Casur Corp.*, 123 AD3d 965, 965-966 [2d Dept 2014] [citations omitted]; see also CPLR 3212 [f].) “To speculate that something might be caught on a fishing expedition provides no basis pursuant to CPLR 3212(f) to postpone decision on the summary judgment motion.” (*First City Natl. Bank & Trust Co. v Heaton*, 165 AD2d 665, 667 [1st Dept 1990] [internal quotation marks and citation omitted].) CPLR 3212(f) requires allegations with some evidentiary basis to suggest discovery may lead to evidence. (*Id.*)

Here, Purchaser relies on its counsel’s affirmation that the Unit was sold months after the second failed closing at a higher sales price. (NYSCEF Doc. No. 24, Fischman aff ¶ 3.) Even if true, it is not enough to defeat this motion. CPLR 3212(f) provides that “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion.” Affirming the sale of the Unit is not conclusive, nor does it provide any evidence of bad faith alleged. Not surprisingly, the attorney affirmation is silent as to the alleged construction delay as the attorney has not first hand knowledge. Purchaser’s opposition is woefully insufficient.

Nevertheless, even if Purchaser could show that delays occurred, the Agreement expressly states that Purchaser is not excused from its obligations if closing occurs substantially later than July 2015, the projected completion date. (NYSCEF 22,

Agreement Section 17.4.) Further, Purchaser admitted in its June 10, 2014 letter that it needed more time to liquidate assets in order to purchase the Unit. (NYSCEF 14, Letter.)

On the record, the court informed the parties that granting this motion was conditional on Seller's submission of a certificate of conformity. Seller satisfied this condition. (NYSCEF 28, Certificate of Conformity.)

Finally, Section 12 (c) of the Agreement provides for attorneys' fees. This issue is severed for determination after an inquest.

Accordingly, it is

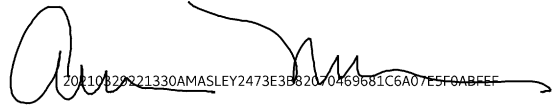
ORDERED that plaintiff 56th and Park (NY) Owner, LLC's motion for summary judgment is granted; and it is further

ADJUDGED AND DECLARED that (a) Lengard Projects, LLC defaulted under the parties' Purchase Agreement dated March 27, 2014; (b) 56th and Park (NY) Owner, LLC cancelled the Agreement pursuant to its terms; (c) 56th and Park (NY) Owner, LLC is entitled to obtain, as liquidated damages, the Initial Deposit of \$3,108,750 and any interest earned thereon; (d) the Initial Deposit and any interest earned thereon is required to be released to 56th and Park (NY) Owner, LLC by the escrow agent; and (e) 56th and Park (NY) Owner, LLC is entitled to an award of attorneys' fees and disbursements incurred in this action; and it is further

ORDERED that the issue of the amount of attorneys' fees owed is severed; and it is further

ORDERED that counsel are directed to appear for a virtual inquest on attorneys' fees on April 22, 2021, at 2:15PM. By April 19, 2021, Seller shall file in NYSCEF and email to Purchaser an affirmation of services, resumes or firm biographies, and time

sheets. Purchaser shall advise by April 21, by email to SFC-Part48@nycourts.gov whether Purchase intends to cross examine counsel about the amount of attorneys' fees requested.



3/29/2021

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE