

**BRE Newton Hotels Prop. Owner LLC v Fine
Hospitality Inv. Group Inc.**

2021 NY Slip Op 32258(U)

May 25, 2021

Supreme Court, New York County

Docket Number: Index No. 651834/2020

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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BRE NEWTON HOTELS PROPERTY OWNER LLC,
Plaintiff,

INDEX NO. 651834/2020

MOTION DATE N/A

- v -

FINE HOSPITALITY INVESTMENT GROUP INC., and
FINE HOSPITALITY GROUP, LLC,

MOTION SEQ. NO. 002

Defendants.

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

Plaintiff BRE Newton Hotels Property Owner LLC (Seller) moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the counterclaims to the extent they seek specific performance of the December 17, 2019 contract for the sale of the hotel at issue here (Contract).

Defendants Fine Hospitality Investment Group Inc. and Fine Hospitality Group LLC (Buyer) assert counterclaims for: (1) specific performance of the Contract; (2) declaratory judgment that the Contract remains in full force and effect; (3) injunctive relief: enjoining Seller from selling the hotel and directing Seller to provide certain financial information; (4) alternatively, rescission of the contract due to commercial impracticability, impossibility, frustration of purpose, and failure of consideration; (5) alternatively, foreclosure on its equitable lien on the \$1 million deposit; and (6) alternatively, money damages for breach of contract.

The contract provision at issue here is §12.2(b) which states:

(b) REMEDIES FOR SELLER DEFAULT. IF SELLER SHALL MATERIALLY DEFAULT IN THE PERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT TO CAUSE THE SALE OF THE ASSETS AS OF THE LATER OF THE CLOSING DATE OR FIVE (5) BUSINESS DAYS AFTER SELLER'S RECEIPT OF BUYER'S WRITTEN NOTICE THEREOF BUYER, AS ITS SOLE AND EXCLUSIVE REMEDY, MAY EITHER (I) TERMINATE THIS AGREEMENT AND DIRECT ESCROW AGENT TO DELIVER THE DEPOSIT TO BUYER AND

RETAIN THE DEPOSIT, AT WHICH TIME THIS AGREEMENT SHALL BE TERMINATED AND OF NO FURTHER FORCE AND EFFECT EXCEPT FOR THE PROVISIONS WHICH EXPLICITLY SURVIVE SUCH TERMINATION, OR (II) IF (A) SELLER'S DEFAULT CONSTITUTES A WILLFUL AND INTENTIONAL REFUSAL OR FAILURE TO CONVEY THE ASSETS AS PROVIDED IN THIS AGREEMENT FOR ANY REASON OTHER THAN A PROVISION OF THIS AGREEMENT THAT (1) PERMITS SELLER TO TERMINATE THIS AGREEMENT, (2) RELIEVES SELLER OF THE OBLIGATION TO CONVEY THE ASSETS OR (3) CONDITIONS SELLER'S OBLIGATION TO CONVEY THE ASSETS AND SUCH CONDITION HAS NOT BEEN SATISFIED, AND (B) BUYER HAS (1) WAIVED ALL CONDITIONS TO CLOSING FOR THE BENEFIT OF BUYER UNDER THIS AGREEMENT, (2) HAS DELIVERED TO ESCROW AGENT AND TITLE COMPANY THE DOCUMENTS, INSTRUMENTS AND OTHER ITEMS REQUIRED TO BE DELIVERED BY BUYER AT THE CLOSING, INCLUDING IMMEDIATELY AVAILABLE FUNDS ON ACCOUNT OF THE PURCHASE PRICE, TOGETHER WITH AN UNCONDITIONAL WRITTEN INSTRUCTION TO PROCEED TO THE CLOSING, AND (3) SELLER THEREAFTER FAILS OR REFUSES TO DELIVER TO ESCROW AGENT WITHIN THREE (3) BUSINESS DAYS THEREAFTER THE DOCUMENTS AND INSTRUMENTS REQUIRED TO BE DELIVERED BY SELLER AT CLOSING, THEN BUYER MAY, IN LIEU OF EXERCISING THE REMEDY PROVIDED FOR IN SECTION 12.2(b)(I) (BUT NOT IN ADDITION THERETO), COMMENCE APPROPRIATE LEGAL PROCEEDINGS SEEKING TO ENFORCE SELLER'S OBLIGATION TO CONVEY THE ASSETS THROUGH SPECIFIC PERFORMANCE (INCLUDING THE RIGHT TO FILE/RECORD A LIS PENDENS); PROVIDED HOWEVER THAT NO SUCH PROCEEDING FOR SPECIFIC PERFORMANCE SHALL REQUIRE SELLER TO DO ANY OF THE FOLLOWING (UNLESS OTHERWISE EXPRESSLY REQUIRED OF SELLER BY THIS AGREEMENT: (X) CHANGE THE PHYSICAL CONDITION OF THE ASSETS . . . PROVIDED, FURTHER, THAT THE REMEDY PROVIDED FOR IN THIS SECTION 12.2(b)(II) SHALL BE AVAILABLE TO BUYER ONLY IF BUYER COMMENCES SUCH PROCEEDING WITHIN NOT MORE THAN THIRTY (30) DAYS ATER THE SCHEDULED CLOSING DATE. FAILURE TO FILE A SUIT FOR SPECIFIC PERFORMANCE WITHIN THIRTY (30) DAYS AFTER THE SCHEDULED CLOSING DATE SHALL BE DEEMED A WAIVER OF SUCH REMEDY. . . . (emphasis added)(NYSCEF Doc. No. [NYSCEF] 44, Contract.)

Seller's motion to dismiss is granted to the extent that Buyer's requested remedy of specific performance is barred by the contract. To qualify for specific performance, Buyer was required by §12.2(b) to take certain objective steps e.g. give written notice; deliver documents and funds to the escrow agent. Buyer argues that its performance of these steps was waived by Seller's anticipatory breach. Regardless of when or how Seller breached, to get specific performance, Buyer was required to follow the protocol set forth in the Contract. The court rejects Buyer's anticipatory breach argument because the parties negotiated a limit on Buyer's remedies and such agreements are

enforceable. (*Gindi v Intertrade Internationale Ltd.*, 50 AD3d 575, 576 [1st Dept 2008]) (denying specific performance per terms of the contract.)

Alternatively, Buyer’s counterclaim for specific performance must be dismissed because it was filed well beyond the 30 days allowed by the Contract. The closing date was March 27, 2020. (NYSCEF 1, Complaint ¶¶ 3-5.) However, Buyer filed its counterclaims on March 9, 2021, a delay of 347 days after March 27, 2020. Even if the court gives Buyer the benefit of the date it filed its motion to dismiss, August 3, 2020, Buyer is woefully late. (NYSCEF 6, Notice of Motion.) The court rejects Buyer’s attempt to piggyback on the date that Seller filed this action, May 25, 2020, the first day that New York State Courts were open following COVID, to the filing of new actions electronically in NYSCEF. Buyer does not get the benefit of CPLR 203(d), the relation-back doctrine, to toll the contractual time to initiate an action. (*In re Condado Plaza Acquisition LLC*, 620 BR 820 [Bankr SDNY 2020].) Again “contractual limitations on available remedies are enforceable as they are written.” (*Id.*, citing *Mehlman v 592-600 Union Avenue Corp.*, 46 AD3d 338, 343 (1st Dep’t 2007.)

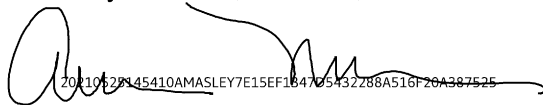
In addition, Buyer’s counterclaim for specific performance is legally deficient. “A party seeking specific performance must allege that it substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law.” (*M&E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 6 [1st Dep’t 2020].) Again, the court turns to the contract which required Buyer to take the objective step of giving the funds to the escrow agent. Buyer admittedly failed to do so. The dispute between the parties as to whether Buyer was ready, willing, and able to close on March 27, 2020 or now is irrelevant. Again, the parties negotiated an objective protocol for specific performance and Buyer failed to allege compliance.

The first, second, and third counterclaims are dismissed because they presuppose that Buyer has a right to specific performance, which it does not.

The parties are directed to ADR, again.

Accordingly, it is

ORDERED that plaintiff’s motion is granted and Buyer’s first, second, and third counterclaims are dismissed.


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5/25/2021
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE