

Franklin Ave Acquisition LLC v HPG Assoc., Inc.

2021 NY Slip Op 32636(U)

December 9, 2021

Supreme Court, New York County

Docket Number: Index No. 650032/2021

Judge: Andrew Borrok

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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. ANDREW BORROK PART 53

Justice

-----X

FRANKLIN AVE ACQUISITION LLC

Plaintiff,

- v -

HPG ASSOCIATES, INC.,

Defendant.

-----X

INDEX NO. 650032/2021

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (12.8.21), HPG Associates, Inc. (**Seller**)'s motion to dismiss is granted without prejudice.

Reference is made to a Contract of Sale, dated July 17, 2017 (the **Original Agreement**; NYSCEF Doc. No. 7), as amended by a first amendment to contract of sale, dated November __, 2017 (the **First Amendment**; NYSCEF Doc. No. 8), as amended by a second amendment to contract of sale, dated June 25, 2019 (the **Second Amendment**; NYSCEF Doc. No. 9), as amended by a third amendment of contract of sale (the **Third Amendment**, NYSCEF Doc. No. 10; the Original Agreement, the First Amendment, the Second Amendment, and the Third Amendment, collectively, the **Purchase Agreement**), each by and between HPG as Seller and Franklin Ave Acquisition LLC (the **Purchaser**) as Buyer.

It is undisputed that, pursuant to the Purchase Agreement, the Purchaser was required to make monthly payments in the amount of \$100,000 to the Seller which it failed to do and that each

month the Seller sent default notices to the Purchaser for failure to make such monthly payments (NYSCEF Doc. No. 11-12) from March, 2020 until December, 2020 (i.e., the closing date set forth in the Purchase Agreement) before terminating the Agreement by Notice of Termination, dated December 24, 2020 (**Termination Notice**; NYSCEF Doc. No. 14).

Upon receipt of the Termination Notice, the Purchaser sued alleging (i) breach of the implied covenant of good faith and fair dealing (first cause of action) and (ii) promissory estoppel (second cause of action). Neither theory is viable as pled.

The parties agreed pursuant Section 6.02 of the Purchase Agreement that in the event of a Seller default, Purchaser's sole and exclusive remedies were to (i) waive Seller's contractual obligations, (ii) extend the time for performance, (iii) terminate the Agreement, or (iv) specific performance of the Agreement (NYSCEF Doc. No. 7, §6.02[a]) (i), (ii) and (iii). Section 6.02(a) of the Purchase Agreement provides that, if the Purchaser elected to terminate the Agreement, it was entitled to return of the Downpayment (hereinafter defined) and reimbursement for actual out of pocket third party costs not to exceed \$400,000. The Purchaser seeks damages in the amount of a minimum of \$500,000 to be determined at trial and a determination that the Purchase Agreement is still valid and in full force and effect but does not seek specific performance. This is simply not what is bargained for in the Purchase Agreement.

The complaint is premised on two theories, neither of which as pled are viable. The first theory is the Seller breached the covenant of good faith and fair dealing (i.e., but did not breach any specific contractual obligation set forth in the Purchase Agreement) and therefore the Purchaser

is entitled to damages in the amount not less \$500,000. This fails because undeniably the closing date set forth in the Purchase Agreement was never extended and the Purchaser never made the progress installment payments that the Purchaser was required to make. The second theory sounds in promissory estoppel where the Purchaser argues that it relied on two different representations made during the pandemic. The first alleged representation (i.e., in March, 2020) was that the Seller would not terminate the Purchase Agreement before the closing date based on the Purchaser's defaults if the Purchaser made the progress payments at the closing date. The second alleged representation occurred between September, 2020 and December, 2020 where the Purchaser alleges that the Seller would extend the closing date until December, 2021. This theory fails because the Purchaser's reliance damages would be limited to any actual costs incurred based on these alleged representations (i.e., damages from the date of the reliance) – not the damages demanded. Indeed, the Purchaser asserts that it “reasonably relied on HPG’s promise and proceeded with legal, regulatory, and developmental work at substantial time and expense” (*id.*, ¶37). This work was in furtherance of Franklin Ave’s efforts to obtain regulatory approval for its construction, including through the Uniform Land Use Review Procedure (ULURP) application process. However, the Agreement was not contingent on ULURP approval (NYSCEF Doc. No. 7, §15) and the Purchaser based on this theory could not recover its then pre-reliance sunk costs.

Additionally, reliance that the closing date would be extended until December, 2021 (i.e., the second representation – extension of the closing date beyond December, 2020), without making the progress payment is not alleged in the complaint and expressly controverted by the Sobel Affidavit (NYSCEF Doc. No. 4, ¶6) which indicates that payments were to be made pursuant to

the unexecuted contemplated Fourth Amendment. Thus, the motion must be granted without prejudice.

For the avoidance of doubt, *Castellotti v Free*, 138 AD3d 198 (1st Dept 2016), upon which the Purchaser relies, does not support a different result. In that case, the First Department held that, where an oral agreement modifies a contract, a promissory estoppel claim may lie even where the underlying contract is barred by the statute of limitations (*id.*, at 205). This is not at issue here.

The motion to dismiss must be granted, which necessitates the cancellation and discharge of the Notice of Pendency filed by the Purchaser with the Kings County Clerk's Office. Pursuant to Section 6.01 of the Agreement, the Seller is entitled to the Downpayment as described in Section 1.03(a) of the Agreement, consisting of the Initial Deposit of \$2.5 million, the Additional Deposit of \$500,00, and any interest accrued thereon, currently being held in escrow. The Seller is also entitled to attorney's fees pursuant to Section 19.12 of the Agreement.

It is hereby ORDERED the Seller's motion to dismiss the complaint is granted; and it is further

ORDERED that the Notice of Pendency filed by the Purchaser with the Kings County Clerk's Office must be cancelled and discharged; and it is further

ORDERED that the escrow agent is directed to release the Downpayment to the Seller; and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine the issue of attorneys’ fees, which is hereby submitted to the JHO/Special Referee for such purpose

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) 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 “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

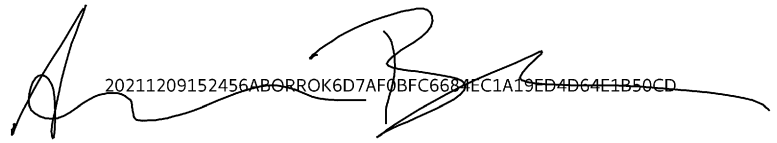
ORDERED that counsel shall immediately consult one another and counsel for the Seller shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all 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 parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees 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(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

12/9/2021
DATE



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ANDREW BORROK, JSC

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: