

**Angelo Gordon Real Estate Inc. v Benlab Realty,
LLC**

2022 NY Slip Op 31168(U)

April 7, 2022

Supreme Court, New York County

Docket Number: Index No. 652062/2020

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
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ANGELO GORDON REAL ESTATE INC.,

Plaintiff,

- v -

BENLAB REALTY, LLC, JDB SPECIAL, LLC, JOB
SPECIAL, LLC, PAB SPECIAL, LLC

Defendant.

INDEX NO. 652062/2020

MOTION DATE _____

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 112, 116, 117, 118, 119, 120, 121

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons set forth on the record (4.7.22) the plaintiff's motion for summary judgment is granted and the defendants' motion for summary judgment must be denied.

The parties expressly agreed, pursuant to Section 9.1(xviii) of the purchase and sale agreement that the Seller was obligated to deliver commercial tenant estoppel certificates, and pursuant to Section 20(f) that the Purchaser's obligation to close was contingent upon receiving an estoppel certificate from each commercial tenant of the premises, which shall (i) be dated no more than thirty days prior the Scheduled Closing date, (ii) be in the form attached as Schedule 20(f) or in form reasonably and substance reasonably acceptable to Purchaser, and (iii) not contain any

discrepancies or inconsistencies from the terms of the tenant's applicable Lease or due diligence materials provided to Purchaser, failing which Seller shall deliver Seller's estoppel certificate(s) in form attached hereto as Schedule 20(f) or otherwise in a form and substance reasonably acceptable to Purchaser. It is undisputed that the Seller did not deliver estoppel certificates from all of the commercial tenants. Instead, the Seller delivered its own estoppel certificates and those estoppel certificates were not in the form attached as Schedule 20(f) to the purchase and sale agreements because they did not contain a representation as to whether the commercial tenant was in default of its lease set forth in Section 3 of the Schedule 20(f) form estoppel certificate.

When the Purchaser received these non-conforming estoppel certificates, which they determined were not reasonably acceptable to them, they promptly rejected them (NYSCEF Doc. No. 4) and demanded prompt repayment of the deposit as they were permitted to do under the purchase and sale agreement (*see Fifteenth & Fifth LLC v LG Park Slope LLC*, 70 Misc.3d 1217[A] [Sup Ct, NY County 2021], *affd* 199 AD3d 412 [1st Dept 2021]). The Seller rejected the Purchaser's letter (NYSCEF Doc. No. 5) and declared that the Purchaser's letter was "null, void and of no force or effect, ab initio" and made no attempt to cure the default under the purchase and sale agreement by providing conforming Seller estoppel certificates or did not otherwise claim that the estoppel certificate provided should be reasonably acceptable to the Purchaser. Having done that, they can not now claim two years later that they are entitled to cure any such default. Any such cure rights were either expressly waived or waived by the passage of time because no replacement estoppels were delivered within the cure period expressly agreed to in the purchase and sale agreement.

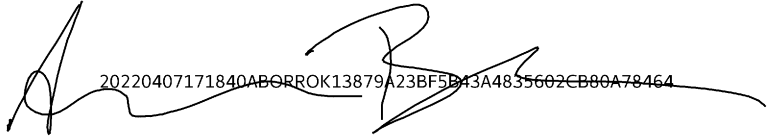
For completeness, the purchase and sale agreements are clear and are not ambiguous. Section 18.3 of the purchase and sale agreement reflects that the Purchaser and Seller agreed that the Purchaser would look to the estoppel certificates and not the Seller for representations as to whether there was a tenant default unless the Seller provided the replacement Seller certificate as it was permitted to do pursuant to Section 20(f). The Court has considered the defendants remaining arguments and finds them unavailing. The plaintiff is therefore entitled to summary judgment on its causes of action for a declaratory judgment that it is entitled to an immediate return of the down payment currently held in escrow.

Pursuant to Section 5.4 of the purchase and sale agreement, if the Purchaser properly terminated the purchase and sale agreement, the parties agreed that the Seller shall reimburse the Purchaser “for a portion of Purchaser’s legal fees and expenses in the aggregate amount of up to \$25,000.00 relating to this Agreement and all of the Portfolio PSAs, such that Seller shall pay a lump sump payment of \$25,000.00, in the aggregate, covering Purchaser’s legal fees and expenses for this Agreement and all of the Portfolio PSAs.” As such, the plaintiff is also entitled to \$25,000 in attorneys’ fees.

It is hereby ORDERED that the plaintiff’s motion for summary judgment is granted and the defendants’ motion for summary judgment is denied; and it is further

ORDERED that the plaintiff is entitled to a return of its \$12 million deposit and \$25,000 in attorneys’ fees as permitted under the PSAs; and it is further

ORDERED that the plaintiff is directed to settle judgment on notice.


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4/7/2022
DATE

ANDREW BORROK, JSC

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