

Calm Ave, LLC v Baker
2022 NY Slip Op 34040(U)
November 29, 2022
Supreme Court, New York County
Docket Number: Index No. 651752/2018
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK P. NERVO PART 04

Justice

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CALM AVE, LLC,

Plaintiff,

- v -

JANET BAKER, NORMAN BAKER, BAKER REALTY
GROUP, INC.

Defendant.

-----X

INDEX NO. 651752/2018

MOTION DATE 01/31/2022

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 124

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, and on-the-record oral argument held on October 18, 2022, the Court issues the following decision and order.

Defendants move for summary judgment dismissing the complaint against them alleging, inter alia, plaintiff breached the parties' contract and that the express terms of the contract allows for defendants to retain plaintiff's deposit upon plaintiff's breach. Plaintiff opposes contending, inter alia, that defendants interfered with the contract and an issue of fact regarding their breach, if any, is created by the parties continuing to work together despite the expiration of the contract's deadlines.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer Lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

As an initial matter, the parties conceded at oral argument that a valid contract exists between the parties (NYSCEF Doc. No. 124 at p. 3-5; 12-13). Thus, the issue raised in this motion is whether the parties complied with their contract’s terms.

It is axiomatic that unambiguous contract terms raise questions of law for the Court to determine, and in so doing, the Court should consider the contract as whole so as to give effect to the parties' intentions and general purpose of the agreement (*see e.g. Kaplan v. Kaplan*, 174 AD3d 691 [1st Dept. 2019]). “[W]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms” (*Vermont Teddy Bear Co., Inc.*, 538 *Madison Realty Co.*, 1 NY3d 470 [2004] [internal citations omitted]).

Here, the contract at issue relates to the anticipated sale of defendants' apartment co-op. It is undisputed that the general purpose of the agreement was for plaintiff to provide defendants with an infusion of capital so as to allow for the renovation and sale of the apartment, and that the plaintiff would, after accounting for its approximately \$200,000.00 investment, realize a profit following the sale of the apartment. The sale of apartment, as part of a co-operative corporation, was and is subject to approval by the building's board of managers.

As relevant here, the parties' contract provides that defendants were to provide certain forms and documents to plaintiff within 15 days of the contract's execution and that plaintiff would, within 15 days thereafter, submit a

renovation/alteration/sale package to the building's board of managers for approval (NYSCEF Doc. No. 91, parties' contract at ¶ 51). While there is a dispute regarding the parties' actions following execution of the contract on or about October 6, 2016, it is beyond argument that the funds were transferred to defendants on or about October 18, 2016, within the time contemplated by the contract. It is also beyond argument, however, that the renovation plan was submitted on or about May 21, 2017 - well beyond the 15 days required under the contract (see NYSCEF Doc. No. 91, alternation agreement dated May 21, 2017; NYSCEF Doc. No. 102). Accordingly, plaintiff failed to timely submit the renovation plan, as required by the parties' agreement.¹ The renovation plan and sale were not approved by the building's board of managers.

To the extent that plaintiff alleges defendants' failure to serve a default notice or notice to cure is fatal to their position, defendants' failure to serve such notice on plaintiff does not excuse plaintiff's default (see generally, *Whiteside v. North American Accident Ins. Co. of Chicago*, 200 NY320 [1911]).

¹ To the extent that plaintiff alleges defendants interfered with its ability to timely comply with the agreement, a dearth of proof has been submitted to support same. In any event, in the related matter of *Baker v. 40 East 80*, NY Index No. 603683/2003, an action regarding damage to the subject apartment via water ingress, and following a length bench trial, this Court found the Bakers did not interfere with the renovations/repairs to the apartment. Likewise, plaintiff has failed to raise any other triable issue of fact to defeat summary judgment.

Furthermore, “where the breach is impossible to cure, or so substantial that it undermines the entire contractual relationship such that it cannot be cured,” notice to cure is not required notwithstanding the parties’ agreement requiring otherwise (*East Empire Construction Inc. v. Borough Construction Group LLC*, 200 AD3d 1 [1st Dept 2021] [internal citations omitted]; see also *Giuffee Hyundai Ltd v. Hyundai Motor Am.*, 756 F3d 204 [2d Cir. 2014]).


Here, the contract demonstrates that the parties anticipated compliance with same under rapid deadlines, providing approximately one month from the contract’s execution until the submission deadline before the building’s board of managers. Notwithstanding that, in hindsight, these deadlines were untenable, permitting plaintiff to attempt to cure its default more than 7 months after the agreed upon deadline for submission of its board package undermines the entire bargained for contractual relationship. Thus, under these circumstances, the Court finds a notice to cure or notice of default by defendants is not required. The Court further finds plaintiff’s untimely submission of the renovation/sales plan – more than seven months after the deadline imposed by the parties’ contract – constitutes a breach of the contract; therefore, the Court turns to remedies provided for plaintiff’s breach.

The parties negotiated a liquidated damages provision in paragraph 13.1 of the contract, which provides that upon plaintiff's default, defendants shall retain the contract deposit as appropriate damages. The Court finds these damages do not violate public policy and are not otherwise grossly disproportionate (*Mancho v. Miller*, 200 AD3d 533 [1st Dept 2021] \$200,000.00 deposit forfeited as liquidated damages; 45 *Renwick Street, LLC v. Lionbridge, LLC*, 162 AD3d 550 [1st Dept 2018]; see generally *Truck Rent-A-Center v. Puritan Farms 2nd, Inc.*, 41 NY2d 420 [1977]); the Court cannot relieve the parties of the consequences of their bargain (*Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 NY2d 6875, 695 [1995]; *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, 38 NY3d 169 [2022]).

At bottom, the determination of this motion is predicated upon whether the defendants complied with the contract's 15-day requirement and, if so, whether the plaintiff complied with its concomitant 15-day requirement. There is no dispute that defendants complied with their 15-day requirement in providing requisite documents to plaintiff. Therefore, the plaintiff's 15-day deadline to submit its board package was triggered. There is, likewise, no dispute that plaintiff did not submit the board package until approximately 7 months after its 15-day deadline. Thus, plaintiff will have breached the contract

absent circumstances excusing its untimely submission. The time to lay bare one’s proof is on a summary judgment motion, that is to say plaintiff must lay bare its proof excusing its failure to comply with the 15-day requirement. Plaintiff, however, has not substantiated its claims that defendants subverted plaintiff’s ability to perform under the contract and, therefore, plaintiff has breached the contract. The remedy for this breach is proscribed by the contract’s liquidated damages provision, which is neither violative of public policy nor an unenforceable penalty; consequently, the liquidated damages due defendants is the retainer of plaintiff’s deposit, as bargained.

Accordingly, it is ORDERED and ADJUDGED defendants’ summary judgment motion is granted that the Clerk of the Court shall enter judgment dismissing the complaint as against all defendants and the matter shall be marked disposed. THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

<u>11/29/2022</u> DATE			 _____ HON. FRANK P. NERVO
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> J.S.C.
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE