SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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DLK, LLC,

Plaintiff,

- v -

KIRELAND-B LLC,MEDRITE MIDTOWN WEST LLC D/B/A MEDRITE, ALEXANDER CONDOMINIUM

Defendant.

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INDEX NO. 155811/2020

MOTION DATE 07/26/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 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

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

Upon the foregoing documents, and after oral argument, which took place on January 24, 2023, where Lavinia Acaru, Esq. appeared for Plaintiff DLK, LLC ("Plaintiff") and Robyn Fearon, Esq. appeared for Defendant Kireland-B ("Defendant" or "Kireland"), Kireland's motion for summary judgment is granted and Plaintiff's cross-motion for summary judgment is denied. The other Defendants have not appeared.

I. Background

This action arises out of the placement of a demising wall between two commercial condominium units which are immediately adjacent to one another. The units and are owned by Plaintiff and Kireland. Plaintiff initiated this action on July 28, 2020 (NYSCEF Doc. 1). The demising wall at issue is in the basement of the building located at 250 East 49th Street a/k/a the Alexander Condominium (the "Building") (*id.* at ¶ 6). Plaintiff owns commercial unit 4 ("Unit 4"). Kireland owns commercial unit 2 ("Unit 2").

In the original condominium declaration, dated June 18, 2009, there was one commercial unit located on portions of the basement, ground floor, and second floor (NYSCEF Doc. 39). The offering plan and declaration were amended in June of 2010 to reflect the subdivision of the commercial unit into four separate commercial units (NYSCEF Docs. 40 and 43). In August of 2010, the sponsor of the Condominium leased Unit 2 to Defendant Medrite Midtown West LLC d/b/a Medrite ("Medrite") (NYSCEF Doc. 44). At the time the Medrite Lease was signed, the sponsor was still in the process of constructing portions of the building, including physically subdividing the four commercial units (NYSCEF Doc. 35 at ¶ 3). The undisputed evidence reflects that the Demising Wall was constructed by the sponsor between August 16, 2010, when the Medrite Lease commenced, and February 15, 2011, when Kireland acquired Unit 2 (*id.* at ¶¶ 3 and 5).

Plaintiff alleges that the wall separating Unit 2 and Unit 4 was incorrectly placed, and that the wall encroaches on Unit 2 by an area of at least 4 feet and 10 inches in depth by 27 feet in length to the benefit of Unit 4 (NYSCEF Doc. 1 at ¶ 10). Plaintiff alleges this encroachment deprives it from the use of its property (*id.* at ¶ 11). Plaintiff alleges that the encroachment has existed for less than ten years, thus adverse possession does not apply (*id.* at ¶ 12). Plaintiff therefore seeks a declaration that the demising wall encroaches on its premises and seeks an order directing Defendants Kireland and Medrite to remove the encroachment (*id.* at ¶ 16). Plaintiff also seeks money damages (*id.* at ¶¶ 17-19).

On October 30, 2020, Defendant Kireland filed its Answer with counterclaims (NYSCEF Doc. 9). In its Answer, Kireland asserted as an affirmative defense that pursuant to its deed, it was granted an easement permitting it to maintain any encroachments that may exist (*id.* at ¶ 11). Kireland also asserted as an affirmative defense that pursuant to Plaintiff's deed, it took title subject

to easements in favor of adjoining units for the continuance of all encroachments of such adjoining units existing as a result of the construction or rehabilitation of the building, and that any such encroachments may remain so long as the building stands (*id.* at ¶ 12). Kireland further asserted that at the time Kireland took title to Unit 2, the demising wall between Unit 2 and Unit 4 was already erected as part of the construction of the Building (*id.* at ¶ 13). Kireland asserted as an affirmative defense that when Plaintiff took title to Unit 4 subject to any encroachments existing at the time of its purchase, Plaintiff waived and/or ratified any alleged encroachment (*id.* at ¶ 14).

Kireland further alleged that the sponsor of the condominium deeded Unit 2 to Kireland on February 15, 2011, with an easement for the continuance of all alleged encroachments on adjacent units, while on March 1, 2012, the sponsor of the condominium deeded Unit 4 to Plaintiff subject to an easement for the continuance of all alleged encroachments from adjacent units (*id.* at ¶¶ 37-38). Kireland seeks a declaration from the Court that it is entitled to maintain the demising wall in its present location (*id.* at ¶ 40). Kireland also asserted crossclaims for indemnification and contribution against Defendant Alexander Condominium[1] ("the Condominium").

On July 18, 2022, Kireland moved for summary judgment (NYSCEF Doc. 31). Kireland seeks dismissal of Plaintiff's Complaint and summary judgment on its first counterclaim declaring that pursuant to the deeds to Unit 2 and Unit 4, Unit 2 has an easement over Unit 4 permitting the demising wall to remain in its present location (NYSCEF Doc. 31). Kireland argues that the clear and unambiguous language contained on the deeds of Unit 2 and Unit 4 – namely that any alleged encroachment by one unit onto any other unit resulting from construction or rehabilitation of the building is permitted to remain "so long as the building may stand" – entitles it to summary judgment (NYSCEF Doc. 33 at ¶ 5).

[1] Defendants Alexander Condominium and Medrite have not appeared in this action.

DLK purchased Unit 4 from the condominium sponsor on January 18, 2012 pursuant to a purchase agreement (NYSCEF Doc. 46). Kireland highlights that in paragraph 20 of the purchase agreement, DLK acknowledged that it was purchasing the property based solely upon its inspections and investigations, and that it was purchasing the property "as is" and "with all faults" based upon the condition of the property as of the date of the agreement (*id.* at ¶ 20). At the deposition of Karina Sagiev ("Sagiev") who testified on behalf of DLK, she confirmed that the demising wall at issue was in the same location now as when DLK purchased Unit 4, and that it never obtained a survey or measured its dimensions prior to closing (NYSCEF Doc. 47 at pages 29-31). According to Sagiev, DLK only learned about the encroachment after an architect measured the dimensions of Unit 4 in late 2015 or early 2016, well after DLK had already taken title. Kireland argues there are no triable issues of fact, and that pursuant to the clear and unambiguous terms of the deeds of Unit 2 and Unit 4, Kireland was granted an easement allowing for the encroachment at issue.

On September 12, 2022, DLK cross-moved for summary judgment (NYSCEF Doc. 61). DLK argues that it was a bona fide purchaser of real property who took Unit 4 free and clear of any prior conveyance or encumbrance (NYSCEF Doc. 62). DLK argues that the easement Kireland seeks to enforce was never recorded against Unit 4 (*id.*). DLK argues, therefore, that "there is absolutely no evidence that Plaintiff had notice of the alleged easement" (*id.* at ¶ 28). DLK also argues that notice could not be imputed through the Amended Condo Declaration, as the floor plans in that declaration shows the demising wall in a location that does not encroach on Unit 4. DLK also argues that the conveyance was made "subject to the provisions of the Declaration, By-Laws, and Floor Plans of the Condominium" (*id.*). DLK asserts that Kireland is not entitled to summary judgment as there is no evidence when the demising wall was erected. DLK argues that

the affidavit of Samuel Fisch should not be considered as Kireland never identified Samuel Fisch as a witness with knowledge of this case.

On October 3, 2022, Kireland filed its reply and opposition to DLK's cross-motion (NYSCEF Doc. 77). Kireland argues that DLK's attempt to preclude Fisch as a witness is belied by the fact that he is the sole member of Defendant Medrite, and Kireland stated that the parties to this action are all relevant witnesses. Kireland also argues that DLK has not provided any evidence rebutting Kireland's *prima facie* evidence that the demising wall was built by the sponsor as part of the construction in subdividing the four commercial units. Kireland argues that DLK is not a bone fide purchaser since it was notified that the units would be conveyed subject to easements permitting encroachments by adjoining units. Kireland further argues DLK was on notice of potential easements because the Amended Declaration stated that Unit 2 and Unit 4 were being separated on the cellar level by the demising wall. Kireland also argues that DLK had inquiry notice of the encroachments based on facts available at the time of its purchase.

II. Discussion

A. Standard

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980];

Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

An easement appurtenant may be created when the easement (1) is conveyed in writing, (2) is subscribed by the creator, and (3) burdens the servient estate for the benefit of the dominant estate (*Akasa Holdings, LLC v 214 Lafayette House, LLC*, 177 AD3d 103, 118 [1st Dept 2019]). Once created, an easement appurtenant runs with the land, even if it is not specifically mentioned in the deed (*Northwood School, Inc. v Fletcher*, 190 AD3d 1136, 1138-1139 [3d Dept 2021]). An easement can only be extinguished by abandonment, conveyance, condemnation, or adverse possession (*Djoganopoulos v Polkes*, 95 AD3d 933, 935 [2d Dept 2012]; *Webster v Ragona*, 7 AD3d 850 [3d Dept 2004]).

While a good-faith purchaser for value is not bound by an easement which is not properly recorded prior to its purchase of an encumbered property, a purchaser cannot claim good-faith purchaser status if it had actual or constructive notice of the easement (*Conwell Properties, Inc. v DAG Route Six, LLC*, 210 AD3d 1051 [2d Dept 2022]). "If the facts within the knowledge of the purchaser are of such a nature, as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed" (*Akasa, supra* at 120 quoting *Anderson v Blood*, 152 N.Y. 285 293 [1897]). Indeed, where there is open and visible use of property by a third person, a purchaser is placed on constructive notice of the possible existence of prior rights (*Conwell, supra* at 1054 citing *Miles v De Sapio*, 96 AD2d 970, 971 [3d Dept 1983]).

B. Kireland's Motion for Summary Judgment

Kireland has met its *prima facie* burden in showing it possesses an easement encroaching on DLK's unit. Kireland's deed, which was conveyed by 250 East Borrower LLC, the sponsor of the condominium, explicitly states that it is taken "TOGETHER with an easement for the continuance of all encroachments by the Unit on any adjoining Units or Common Elements now existing as a result of the construction or rehabilitation of the Building." (NYSCEF Doc. 36). It is undisputed that at the time Kireland took title to Unit 2, the sponsor retained ownership of Unit 4, and therefore had the authority to grant an easement in favor of Unit 2 against Unit 4. DLK's deed, which was also conveyed by the sponsor, after Kireland had taken title to Unit 2, expressly states Unit 4 is conveyed "SUBJECT to easements in favor of adjoining Units…for the continuance of all encroachments of such adjoining units…now existing as a result of the construction or rehabilitation of the Building….so that any such encroachments may remain so long as the Building shall stand. Each Unit shall be subject to the aforesaid easements in favor of all other Units." (NYSCEF Doc. 37).

It is undisputed that Unit 2 and Unit 4 are adjoining units. It is further undisputed that the demising wall was constructed to subdivide the commercial units, and that the demising wall had been completed prior to both DLK and Kireland taking title to their respective units.

Although DLK objected to the admissibility of the Fisch Affidavit, Kireland correctly points out that in response to DLK's demand for witnesses, Kireland stated it was not aware of any witnesses "other than the parties herein." Therefore, there is no basis for excluding the Fisch Affidavit, as Fisch testifies he is the sole member of Defendant Medrite (NYSCEF Doc. 35). Fisch testified that the demising wall at issue was constructed in order to subdivide the four commercial units, and that it was completed prior to Kireland and DLK taking title to their respective units (*id.*

at ¶¶ 3-6). Fisch also testified that he was in possession of the premises at the time the construction was ongoing, and therefore he has personal knowledge of the demising wall's construction (*id.* at ¶ 3). In any event, Sagiev, who testified on behalf of DLK, also confirmed that the demising wall existed before DLK took title and has remained in the same location ever since DLK purchased Unit 4 (NYSCEF Doc. 72, 31:21-24).

The language granting the easement is both broad and clear and must be enforced pursuant to its objective intent (*Liberty Square Realty Corp. v Doe Fund, Inc.*, 202 AD3d 55, 67 [1st Dept 2021]). As it is undisputed that Units 2 and 4 are adjoining units, that the demising wall encroaches on Unit 4 in favor of Unit 2, and that the encroachment due to the demising wall was a result of construction, specifically, subdividing the one commercial unit into four separate commercial units, the encroachment of which DLK complains is subject to an easement granted by the sponsor to Kireland. Indeed, it is an easement which DLK agreed to when it took title.

Although DLK attempts to argue it is a bona fide purchaser and therefore the easement was extinguished upon DLK taking title, this Court disagrees. A party that is on inquiry notice of another party's possible interest in land is not a bona fide purchaser (*see Conwell Properties, Inc. v DAG Route Six, LLC*, 210 AD3d 1051 [2d Dept 2022]; *Akasa Holdings, LLC v 214 Lafayette House, LLC*, 177 AD3d 103 [1st Dept 2019]). It is undisputed that there was a wide array of facts within DLK's possession at the time it took title that would have alerted it that Kireland had an easement for encroachments on Unit 4. First, the plain language of the deed, which tells the purchaser that the unit is subject to easements and encroachments, should have put DLK on notice that Unit 4 is subject to easements due to encroachments. Moreover, DLK was on notice that construction had taken place to subdivide one commercial unit into four commercial units, and

therefore, pursuant to the plain language of the deed by which it was conveyed title, it was possible Unit 4 would be subject to easements because of that construction.

Further, DLK asserts that the encroachment is so open and obvious that it interferes with its right to enjoy Unit 4 (NYSCEF Doc. 63 at ¶ 18 ["Plaintiff cannot use its land because the wall separating Unit 2 and Unit 4 is encroaching on and cuts off at least 4 feet and 10 inches in depth, and 27 feet and 10 inches in length…[t]herefore, said easement unreasonably interferes with Plaintiff's right to use its land."]; *see also* NYSCEF Doc. 64 at ¶ 17 ["we are unable to rent the Unit 4 because the wall separating the units is encroaching on Unit 4, making the space smaller."]). DLK cannot argue that it is a bona fide purchaser that lacked notice of the encroachment and simultaneously argue that it is entitled to damages due to the flagrant encroachment which purportedly prevents it from leasing the space or enjoying its use of the land.

Finally, even Sagiev, who was deposed on behalf of DLK, testified that "it's a very large wall" (NYSCEF Doc. 72, 30:23). Sagiev further testified in regard to taking measurements of Unit 4 "that if somebody checked, we wouldn't be in this nightmare situation" (*id.*, 58:12-15). Sagiev also testified that "when tenants look at this space…the damage is that they don't choose it because it's smaller and it doesn't work for them" (*id.* at 60:9-15). Sagiev testified "It's embarrassing. Everybody who is involved in [the purchase] did a crappy job including us." (*Id.* at 61:16-17). When asked if DLK's real estate attorney did his due diligence before purchasing the property, Sagiev sarcastically responded "Yeah. He's number one on the list of who great job done, correct." (*Sic*) (*id.* at 61:18-22). As DLK's own witness has testified about the open and obvious encroachment preventing tenant's from leasing the space, and DLK's own culpability in failing to do their due diligence prior to acquiring the property, DLK's arguments as to its status as a bona

fide purchaser is contradicted by the record and insufficient to defeat Kireland's motion for summary judgment.

As stated by the Court of Appeals over a century ago: "If the facts within the knowledge of the purchaser are of such a nature, as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed" (*Akasa Holdings, LLC v 214 Lafayette House, LLC*, 177 AD3d 103, 120 [1st Dept 2019] quoting *Anderson v Blood*, 152 N.Y. 285 293 [1897]). Based on DLK's knowledge of facts which put it on inquiry notice, it cannot claim to be a bona fide purchaser.

DLK's remaining argument is unavailing. DLK argues that summary judgment should be denied because the deed contains a clause which states Unit 4 was conveyed subject to the provisions of the Declaration, By-Laws, and Floor Plans. Therefore the easement is invalid as the encroachment is not reflected in the floor plan. However, DLK's interpretation of the deed would render the clause which grants an easement for other encroachments as a result of construction of the premises meaningless, as according to DLK, if an encroachment is not on the floor plan, then it does not give rise to an easement. As the Court of Appeals has held, an interpretation which renders a clause in a contract superfluous is an unsupportable interpretation under the standard principles of contract interpretation (*Lawyers' fund for Client Protection of State of N.Y. v Bank Leumi Trust Co. of N.Y.*, 94 NY2d 398, 404 [2000]). Therefore, this argument is insufficient to defeat Kireland's motion for summary judgment.

As the undisputed facts and clear and unambiguous terms of Kireland's and DLK's deeds show that Kireland has an easement in its favor over DLK's unit as a result of the demising wall's encroachment resulting from the subdivision of the one commercial unit into four commercial

units, and DLK has failed to set forth a material issue of fact, Kireland's motion for summary judgment is granted. As Kireland is granted summary judgment, DLK's cross-motion is denied.

Accordingly, it is hereby,

ORDERED that the branch of Kireland's motion that seeks summary judgment dismissing Plaintiff's Complaint against it is granted, and Plaintiff's Complaint as it pertains to Kireland is hereby dismissed; and it is further

ORDERED that the branch of Kireland's motion that seeks summary judgment in Kireland's favor on its first counterclaim and a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

ADJUDGED and DECLARED that pursuant to the deeds for Kireland's Commercial Unit 2 located at 250 East 49th Street, New York, New York 10017 and DLK's Commercial Unit 4 located at 250 East 49th Street, New York, New York 10017, Kireland's Unit 2 has an easement over DLK's Unit 4, and the demising wall that separates Unit 2 and Unit 4 may remain in its present location, and any encroachment by Unit 2 or the demising wall onto Unit 4 may be maintained pursuant to said easement; and it is further

ORDERED that within ten days of entry, counsel for Kireland shall serve a copy of this Decision and Order, with notice of entry on all parties; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

4/13/2023
DATE

Mary V Rosado JSC
MARY V. ROSADO, J.S.C.

CHECK ONE:	[x]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[x]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE