

14 LLC v J & R 240 LLC

2023 NY Slip Op 31216(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 653063/2019

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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 48

-----X

14 LLC,	INDEX NO.	<u>653063/2019</u>
Plaintiff,	MOTION DATE	<u>N/A, N/A, N/A</u>
- v -	MOTION SEQ. NO.	<u>004 005 006</u>
J & R 240 LLC A/K/A J&R 240 LLC, 240-242 LLC, JR FAMILY LLC, HERSNAG LLC, WILLIAM RADMIN, and MILROSE CONSULTANTS, INC.,	DECISION + ORDER ON MOTION	
Defendants.		

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 166, 167, 173, 177, 180, 181, 192 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 005) 158, 159, 160, 161, 162, 163, 164, 165, 174, 175, 176, 178, 182, 190, 191 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 006) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 168, 169, 170, 171, 172, 179, 183, 184, 185, 186, 187, 188, 189 were read on this motion to/for JUDGMENT - SUMMARY.

This is an action for breach of the November 19, 2013 agreement between 240-242 LLC and J&R 240 LLC, and plaintiff (the Agreement), where plaintiff alleges an overpayment of over \$1 million for air rights at 244 and 248 West 14th Street (the Air Rights).¹ (NYSCEF 2, Complaint ¶ 169.) Pursuant to the Agreement, plaintiff agreed to pay the purchase price of \$335.00/square foot. (NYSCEF 112, Agreement § 2.4.)

As an initial matter, on the record on December 19, 2022 (NYSCEF 194, transcript of argument [mot. seq. nos. 004, 005, 006]), plaintiff concedes dismissal of its

¹ The term "Development Rights" in the Agreement refers to air rights.
653063/2019 14 LLC vs. J & R 240 LLC A/K/A J&R 240
Motion No. 004 005 006

second, third, fourth, eighth, ninth, tenth, and eleventh causes of action. (NYSCEF 194, tr. 3:8-10.)

In motion sequence number 004, defendant Milrose Consultants, Inc. (Milrose) moves, pursuant to CPLR 3212, to dismiss plaintiff's breach of contract claim and defendants' J&R 240 LLC, 240-242 LLC JR Family LLC, Hersnag LLC and William Radmin's (together the J&R Defendants) cross claims for common-law indemnification and contribution. (NYSCEF 107, notice of motion.)

In motion sequence number 005, the J&R Defendants move, pursuant to CPLR 3212, to dismiss the complaint in its entirety and pursuant to CPLR 6514 to cancel the notice of pendency with costs and expenses. (NYSCEF 158, notice of motion.)

In motion sequence number 006, plaintiff moves, pursuant to CPLR 3212, for summary judgment on its fifth cause of action for reformation against the Sellers.

In the fifth cause of action, plaintiff alleges a mutual mistake as to the available air rights, which were believed to be 34,859 sq feet, but were in fact 31,844 sq feet, a difference of 3,015 sq feet. (NYSCEF 2, Complaint ¶¶ 225-226.) Based on a reformed chart and closing statement, plaintiff seeks damages in the amount of \$1,009,857.50. (*Id.* ¶ 246; NYSCEF 3, reformed chart; NYSCEF 5, reformed closing statement.) For the reasons stated on the record, motion number 006 is denied because there is an issue of fact as to whether there was a mutual mistake or not.

As discussed on the record, the court finds defendants' reliance on *Harmit Realities LLC v 835 Ave. of the Americas, L.P.*, 2015 NY Slip Op 30931(U) (Sup Ct, NY County 2015), *aff'd* 135 AD3d 564 (2016), instructive, but misapplied here. (NYSCEF 194, tr. at 4:6-5:25.) Indeed, this is the anti-*Harmit* case because the disclaimer here is

not specific.² The agreement here does not waive quantity or miscalculation. It does not say, as the agreement did in *Harmit*, that we do not know the number and we do not want to know the number. Rather, here, the agreement provides:

6.1.5 During the Option Period, [plaintiff] shall make a complete and independent investigation of all facts and data which [plaintiff] deems necessary in its decision to acquire the [Air Rights]. [Plaintiff] further agrees that Owners shall not be liable or bound in any manner by any express or implied warranties, guarantees, promises, statements, representations or other information pertaining to the [Air Rights], made or furnished by any real estate broker, salesperson, agent, employee, servant or other person during the Option Period representing or purporting to represent Owner unless such warranties, guarantees, promises, statements, representations or other information are expressly and specifically set forth in this Agreement or in any instrument executed by Owners (or any principal of Owners) contemporaneously with this Agreement. Except for the representations made by Owners set forth in this Agreement, [plaintiff] will not rely on any representation with respect to present use of the [Air Rights], the feasibility of obtaining building or other permits, or any matters with respect to the zoning or environmental condition of the Parcels except as expressly set forth herein.

(NYSCEF 112, Agreement at 14-15.³)

Thus, unlike in *Harmit*, here the J&R Defendants “have the right to obtain” the measurement of Air Rights if plaintiff fails to timely do so. (*Id.* § 3.2.) The J&R Defendants are also required to confirm the Air Rights measurement. (*Id.* Development Rights definition.) Additionally, the J&R Defendants hired an expert who calculated the

² Compare to *Harmit*: “The agreements do not state the amount of square footage, any measurement or equation of the air rights purchased, or the mezzanine. Certain disclaimers are contained within the agreements stating ‘Seller makes *no representation as to the number of square feet of floor area* contained in the Excess Development Rights’ (Sherman Aff., Exh. 2, § 1.1 [M][emphasis added]) and ‘purchaser acknowledges that seller has made *no representations regarding the amount of the Excess Development Rights* or the compliance of the transfer of the Excess Development Rights and the utilizations thereof by Purchaser...and that Seller has made *no representation regarding the amount of Utilized development Rights*’ (*Id.* at Exh. 2, § 2.2 and Exh. 3, § 5 [emphasis added]).” (*Harmit Realities LLC*, 2015 NY Slip Op 30931[U], at *2.)

³ References to page numbers are to the NYSCEF-generated page numbers.

measurement. If the J&R Defendants' argument is that they simply accepted plaintiff's measurement, that raises a credibility issue.

Plaintiff asserts that the J&R Defendants' affirmative defenses for (1) failure to state a claim; (2) statute of limitations; (3) contributory negligence of plaintiff and its agent Milrose; (4) documentary evidence; (5) caveat emptor; (6) disclaimers of reliance or representation in the Agreement; and (7) statute of frauds, do not bar the fifth cause of action for reformation based on mutual mistake. The court agrees that these affirmative defenses do not thwart plaintiff from proceeding with its fifth cause of action because defenses 1 and 4 are inapplicable to a motion for summary judgment; defenses 2 and 7 are not defenses on these facts; defenses 3 and 5 raise issues of fact; and defense 6 is addressed elsewhere in the decision. However, since the court denies plaintiff's motion for summary judgment on other grounds, the court need not determine whether the affirmative defenses should be dismissed.

The J&R Defendants' motion to dismiss the first cause of action is denied for the reasons stated on the record. Whether there was a breach of contract, by the actual sale of the Air Rights in the closing, is an issue of fact which turns on the Agreement's definition of the "Development Rights" (i.e. the Air Rights):

"Development Rights" has the meaning given in the preamble and as set forth in greater detail on **Schedule 'A'** annexed hereto and shall include all of the Development Rights, by square foot that Owners are able to convey to [plaintiff] at the time of the Closing. The Development Rights shall be determined by [plaintiff]'s independent survey and architectural review and shall be confirmed by Owners prior to the Closing."

(NYSCEF 112, Agreement at 7-8.)

The J&R Defendants' motion 005 for summary judgment as to the second, third, and fourth causes of action is rendered moot by plaintiff's withdrawal of those claims.

Motion 005 is also denied as to the fifth cause of action for the same reasons that

plaintiff's motion on the same cause of action is denied. In addition, as discussed on the record on December 19, 2022, the seventh cause of action for unjust enrichment against Sellers is dismissed as duplicative of the contract claim. (NYSCEF 194, tr. 3:18-19.) Further, as stated on the record, the sixth cause of action against the Sellers for unilateral mistake is dismissed, because plaintiff now must decide on whether to go with mutual mistake or unilateral mistake, and clearly plaintiff has opted for the remedy of reformation as a result of mutual mistake, as alleged in the fifth cause of action. (NYSCEF 194, tr. at 3:11-17.)

Plaintiff's eighth cause of action for reformation based on unilateral mistake is dismissed, because it is identical to plaintiff's contract claim.

Plaintiff's ninth cause of action is for fraud, fraudulent concealment, and fraudulent misrepresentation, for which plaintiff seeks compensatory and punitive damages. Plaintiff's tenth cause of action is for fraudulent inducement, while its eleventh cause of action is for fraudulent concealment. In light of plaintiff's admission that "there is a possibility that [the J&R Defendants] did, in fact, know more than they let on" but "there is no present proof of same, and the little evidence admitted by [the J&R Defendants] suggests they were equally mistaken as to quantity . . ." (NYSCEF 191, plaintiff's opposition at 26) the court is compelled to dismiss the ninth, tenth, and eleventh causes of action.

The twelfth cause of action for negligent misrepresentation and fourteenth cause of action for constructive trust are dismissed, because plaintiff concedes that the parties do not have a special relationship. (NYSCEF 191, plaintiff's opposition at 31.)

Plaintiff's thirteenth cause of action, which is effectively for a declaratory judgment that plaintiff has a valid claim to the property pursuant to RPAPL §§ 1501 and

1515, the quiet title provisions, is dismissed. Plaintiff cannot acquire air rights that admittedly do not exist. (See *2626 Bway LLC v Broadway Metro Assocs., L.P.*, 2010 NY Slip Op 33846[U], at *7 [Sup Ct, NY County 2010] [dismissing plaintiff's request for specific performance as logically without merit, because of plaintiff's allegations of impossibility of performance].)

Since plaintiff's fifth cause of action proceeds, the J&R Defendants' motion to cancel the notice of pendency is denied as premature.

Milrose's motion for summary judgment against plaintiff is denied.⁴ Milrose argues that it made a small mistake when it failed to note that a small section of the six properties is in a different zoning district than the district identified by Milrose, which is not a breach of contract. Whether the mistake was small or large is irrelevant to whether it is a breach of contract, as to which there remains an issue of fact. As plaintiff concedes, however, damages against Milrose are limited to \$7,500. (NYSCEF 194, tr. 2:11-13.)

The J&R Defendants' cross claim for indemnification against Milrose is dismissed, because there is no relationship between Milrose and the J&R Defendants. The J&R Defendants withdrew their cross claim for contribution. (NYSCEF 173, the J&R Defendants' opposition at 12.)

The trial is scheduled for December 4-8, 2023. A pre-trial conference is scheduled on April 20, 2023 at 9:30 am to review pre-trial schedule obligations. The parties shall read the court's trial procedures and comply. The parties shall initiate motions in limine within 30 days of this decision, otherwise waived.

⁴ The court already dismissed the 15th, 16th, and 18th causes of action against Milrose. (NYSCEF 48, decision dated May 21, 2020 [mot. seq. no. 001].)

Accordingly, it is

ORDERED that motion sequence number 006 is denied; and it is further

ORDERED that motion sequence number 005 is granted in part to the extent that the sixth, seventh, twelfth, thirteenth, and fourteenth causes of action are dismissed.

The second, third, fourth, eighth, ninth, tenth, and eleventh causes of action are dismissed on consent; and it is further

ORDERED that motion sequence number 004 is granted in part to the extent that damages against Milrose Consultants, Inc. on plaintiff's first cause of action for breach of contract are limited to \$7,500, and the cross claim of defendants J & R 240 LLC a/k/a J&R 240 LLC, 240-242 LLC, JR Family LLC, Hersnag LLC, and William Radmin for indemnification is dismissed; and it is further

ORDERED that J & R 240 LLC a/k/a J&R 240 LLC, 240-242 LLC, JR Family LLC, Hersnag LLC, and William Radmin are permitted to withdraw their cross claim for contribution.

4/12/2023

DATE

ANDREA MASLEY, J.S.C.

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: