

154 E. 62 LLC v Normanus Realty LLC

2023 NY Slip Op 32194(U)

July 3, 2023

Supreme Court, New York County

Docket Number: Index No. 160329/2021

Judge: Paul A. Goetz

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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. PAUL A. GOETZ **PART** **47**

Justice

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154 E. 62 LLC

Plaintiff,

- v -

NORMANUS REALTY LLC,

Defendant.

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INDEX NO. 160329/2021

MOTION DATE 05/30/2023

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 116, 117, 118, 119, 120, 121, 122, 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, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This breach of contract action arises out of a license agreement entered into between plaintiff 154 E. 62 LLC (154) and defendant Normanus Realty LLC (Normanus), granting defendant access to plaintiff’s adjoining property to perform chimney work, waterproofing, pest control, tree protection, and to install anchor points for plaintiff to hang a trellis. Plaintiff now moves to consolidate this matter, pursuant to CPLR § 602, with *Normanus Realty LLC v 154 E. 62 LLC (Normanus, Index No. 152586/2023)*, a special proceeding pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881 in which defendant claims this license agreement has expired and therefore, is seeking renewed access to plaintiff’s property to complete the project. Plaintiff also moves for partial summary judgment, pursuant to CPLR § 3212, for specific performance directing defendant to finish its easterly wall abutting and rising two stories above plaintiff’s second-floor terrace and install anchor points on the easterly wall for plaintiff’s trellis, in compliance with the parties’ license agreement (mot seq no 004).

Plaintiff argues for consolidation based on the cases sharing the exact same parties and identical questions of law and fact surrounding the license agreement for the currently halted construction project. Plaintiff argues that specific performance should also be granted pursuant to the license agreement, which plaintiff alleges remains in effect. Lastly, plaintiff seeks to dismiss defendant's affirmative defenses pursuant to CPLR § 3211.

Defendant opposes consolidation arguing that the two matters contain different issues of fact and law since this matter involves an alleged breach of the license agreement that defendant argues is expired, whereas *Normanus* is a special proceeding requesting a new license to enter plaintiff's property. Defendant opposes plaintiff's request for specific performance as unavailable since it does not have a current license to enter onto plaintiff's property and also asserts that its affirmative defenses should not be dismissed because they are relevant and proper, and plaintiff does not offer any substantiating proof challenging them.

BACKGROUND

In 2016, defendant, owner of a townhouse located at 152 East 62nd Street, New York, New York (premises), commenced a major alteration project (project) at the premises to build a multi-story extension in its rear yard (Statement of Facts, ¶¶ 2-3, NYSCEF Doc No 147). Since the project was immediately adjacent to plaintiff's property, located at 154 East 62nd Street, defendant was required to obtain a license in order to install customary protections at plaintiff's property (*id.* at ¶¶ 1, 4). As part of the project, defendant extended the boundary wall to the south by constructing a four-story high concrete-block wall abutting and rising two stories above plaintiff's second-floor terrace (easterly wall) (*id.* at ¶ 7). Following negotiations, the parties entered into a "License, Access and Settlement Agreement" (license agreement), dated March 21, 2019, and an "Agreement Regarding Trellis and Chimney Maintenance and Underpinning"

(trellis agreement) dated March 21, 2019 (NYSCEF Doc Nos 121-122). The agreements require defendant to finish the easterly wall and install anchor points for plaintiff's trellis and require plaintiff to provide access to plaintiff's roof and rear courtyard in order for defendant to complete the project (NYSCEF Doc No 121, ¶¶ 1.VI-VII; NYSCEF Doc No 122, ¶ 7; NYSCEF Doc No 147, ¶ 12).

The license agreement commenced on October 27, 2019, and contains a termination clause as follows:

“The License shall terminate upon earlier to occur of: (i) the completion of both the Chimney Work and the construction of the exterior of the vertical enlargement of the Project Premises . . . , and (ii) six months after the Commencement Date (the “Termination Date”); unless the License is earlier terminated pursuant to the terms of this Agreement. Notwithstanding the foregoing, if the License Work is not completed by the Termination Date, the License term shall be extended conditioned upon Licensee making the payments to Licensor required by paragraph 16 below”

(NYSCEF Doc No 121, ¶ 1 [II] [b]). Paragraph 16 explains:

“In the event that the License Work continues beyond the Termination Date (or as extended pursuant to Paragraph 1.II.a), Licensee shall pay Licensor use and occupancy in the amount of \$1,500.00 per week for each week or portion of a week that any such work and/or repair, clean up, and/or restoration remains incomplete for up to the next six (6) months, and then \$3,000 per week thereafter, until the License Work, repair, clean up, and/or restoration is completed. Payment shall be made on a weekly basis to Licensor without demand”

(*id.* at ¶ 16 [I]).

Work on the project stalled in 2020 due to various issues related to the COVID-19 pandemic (Kargman Aff, ¶ 54, NYSCEF Doc No 117; Mass Aff, ¶ 12, NYSCEF Doc No 150). Then, in February 2021, defendant filed and received approval of revised plans from the New York City Department of Buildings that changed and reduced the scope of the project, including

the protections needed on plaintiff's adjoining property (Oberman Affirm, ¶¶ 6-8, NYSCEF Doc No 160).

The parties dispute whether access onto plaintiff's property has been denied since the expiration of the license agreement and cessation of construction in 2020. The parties also dispute whether the license agreement is still in effect, with plaintiff seeking to keep it in place at a higher monthly fee and defendant asserting that the license agreement expired thereby necessitating a new license agreement.

DISCUSSION

Consolidation

CPLR § 602 provides that:

“When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

Denial of a motion to consolidate “may be warranted where common questions of law or fact are lacking, where the actions involve dissimilar issues or disparate legal theories, or where a joint trial would prejudice an opposing party or pose a risk of confusing the jury or rendering the litigation unwieldy” (*Cromwell v CRP 482 Riverdale Ave., LLC*, 163 AD3d 626, 627 [2d Dept 2019]).

Here, the predicate issue that must be resolved is whether the license agreement is still in effect. There is a textual ambiguity as to when the license agreement terminates because of contradictory wording. The termination clause first states that the license shall terminate upon the “earlier to occur of” two options; however, between the two options for termination, the parties include an “and,” suggesting both must occur for the license to terminate. While six

months have elapsed since the license's commencement date on October 27, 2019, the chimney work and construction of the enlargement have not yet been completed.

“The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent, and the best evidence of what parties to a written agreement intend is what they say in their writing” (*Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] [internal quotations omitted]). However, when an ambiguity in the contract leads to an absurd result “courts may as a matter of interpretation carry out [the] intention of [a] contract by transposing, rejecting, or supplying words to make the meaning of the contract more clear” (*Wallace v 600 Partners Co.*, 86 NY2d 543, 547 [1995]; *see also Jade Realty LLC v Citigroup Commercial Mortg. Trust 2005-EMG*, 83 AD3d 567 [1st Dept 2011]). In that case, “courts must construe contracts in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect” (*W. & S. Life Ins. Co. v U.S. Bank Natl. Assoc.*, 209 AD3d 6, 13 [1st Dept 2022]).

Here, interpreting the license agreement to terminate after *both* the completion of the chimney work *and* six months from the commencement date elapsed would render meaningless the introductory clause stating that the license will terminate “upon earlier to occur of . . .” two conditions. Therefore, the license agreement will be read to terminate upon the occurrence of either completion of the chimney work *or* the expiration of six months since the commencement date. Thus, the license expired six months after the commencement date, *i.e.*, in April 2020, and no event of a delay caused by licensor-plaintiff or by a “force majeure” extended the termination date (*see* NYSCEF Doc No 121, ¶ 1 [II] [b]-[c]).

Plaintiff also heavily relies on the following sentence in the termination clause stating that the license agreement can be extended upon licensee-defendant making regular payments to plaintiff (NYSCEF Doc No 121, ¶ 1 [II] [b]). However, the key phrase in the agreement is that it shall only be extended “*conditioned upon*” defendant making those payments, which defendant never did. Therefore, the license was not extended under this provision (*accord Merritt Hill Vineyards Inc. v Windy Hgts. Vineyard, Inc.*, 61 NY2d 106, 112 [1984] [a condition under a contract is “an event, not certain to occur, which must occur, . . . before performance under the contract becomes due”]; *Bodeya v Rodriguez*, 186 AD3d 1308 [2d Dept 2020]).

In light of the termination in April 2020 of the initial license agreement and the new circumstances concerning the scope of Normanus’ improvements to its property, commencement of a new separate proceeding is appropriate. Since the *Normanus* proceeding concerns a license agreement and plaintiff’s instant action seeks specific performance under the terms of the expired license agreement, consolidation of the *Normanus* special proceeding and the instant plenary action is not appropriate as the special proceeding and the instant action concern dissimilar issues of both law and facts (*172 Van Duzer Realty Corp. v 878 Educ., LLC*, 164 AD3d 1171 [1st Dept 2018]).

Accordingly, plaintiff’s motion to consolidate this proceeding with *Normanus* will be denied.

Specific Performance & Affirmative Defenses

Specific performance is not an available remedy under an expired agreement (*see 971 Madison Ave. Corp. v Complex Assocs.*, 90 AD2d 758 [1st Dept 1982] [purported assignee of real estate sales contract could not maintain action for specific performance of agreement where

contract expired more than two weeks before action was commenced]; *see also Premium Cornerstone Props., LLC v S & R Main Realty, LLC*, 173 AD3d 1230 [2d Dept 2019]).

Since plaintiff's demand that defendant finish its easterly wall abutting and rising two stories above plaintiff's second floor terrace requires a new license for defendant to enter onto plaintiff's property, as discussed above, plaintiff's motion for partial summary judgment on its specific performance claim will be denied. However, defendant has stated in its papers that "it remains willing to complete the wall and install the[] anchor points once it receives a new license to do so" (Opposition Memorandum of Law, p 5, NYSCEF Doc No 169).

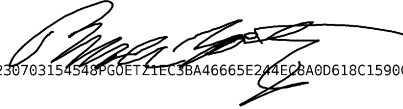
As to plaintiff's request to dismiss defendant's affirmative defenses pursuant to CPLR § 3211 (b), plaintiff "bears the heavy burden of showing that the defense[s] [are] without merit as a matter of law" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 A.D.3d 479, 481 [1st Dept 2015]). Since defendant has established that questions of fact remain pertaining to its affirmative defenses, this part of plaintiff's motion will also be denied (*id.*).

Accordingly, plaintiff's motion for summary judgment and to dismiss defendant's affirmative defenses will be denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff’s motion is denied in its entirety.


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7/3/2023
DATE

PAUL A. GOETZ, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | | |
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| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | <input type="checkbox"/> | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |