SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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151 EAST 19TH STREET, LLC,

Plaintiff,

- v -

EDEN ASHOURZADEH, NUCHEM OBSTFELD a/k/a NATHAN OBSTFELD,

Defendants.

BELKIN BURDEN GOLDMAN, LLP (as Escrow Agent)

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INDEX NO. 160222/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

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

Plaintiff's motion for summary judgment is denied and defendants' cross-motion is granted as described below.

Background

Plaintiff brings this case for a declaration that it is entitled to retain a downpayment made by defendants in connection with the sale of real property. Plaintiff contends that it entered into a contract on July 19, 2022 to sell the building at 151 East 19th Street to defendants for $11.3 million. Defendants delivered $1.695 million as a downpayment. Plaintiff emphasizes that the agreement contained a time of the essence clause that set a closing date for October 27, 2022.

Plaintiff admits that one week before the closing, defendants' counsel sent a letter claiming that the renewal of certain residential leases in the premises constituted a default. Plaintiff insists that the contract of sale did not prevent a renewal of any leases and instead only

prevented it from entering into any new leases. It claims that the defendants knew about these lease renewals and that this was merely a pretext to avoid the closing. Plaintiff maintains that there is no way to read the contract to require it to put existing tenants out of their homes. It claims it was ready willing and able to close on the closing date but that defendants refused to close on the premises.

Plaintiff asserts that under the contract, defendants had to either sue for specific performance or seek to terminate the contract but that they did neither. It maintains that based on defendants' counterclaim that they were ready to close, it scheduled another closing for March 2, 2023, but that they, again, refused to close.

Defendants cross-move for summary judgment and for the return of the downpayment. They claim that the building has 14 free market units as well as 5 rent-stabilized units and a rent-controlled unit. Defendants argue that the tenants in the free-market units did not have a contractual right to renewal upon the expiration of their leases. They insist that the new leases entered into by plaintiff before the closing date (and after the parties entered into the contract of sale) constitute a default because the contract prohibited plaintiff from entering into new leases.

Defendants point out that the three leases at issue were all renewed after the contract date, the renewed leases were all set to expire *after* the closing date and that they were all for free market units. They insist that the lease renewals were at significantly below market rates. Defendants also claim that they sent a written notice of default on October 20, 2022. They observe that under the contract, plaintiff had 20 days to remedy the default but that plaintiff commenced this lawsuit instead of addressing the issue. Defendants characterize the second alleged closing in 2023 as a sham.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The essential facts in the instant action are undisputed. The parties entered into a contract to sell the rental building on July 19, 2022 and the closing date was set for October 27, 2022. The contract prohibited the plaintiff/seller from entering into any contracts that would bind the defendants/buyers after the closing. Plaintiff entered into three lease renewals within this time period even though none of those leases expired until after the closing date. The question on this

motion is whether these lease renewals constitute a default under the terms of the contract of sale.

The contract provides in part that:

> "Provided that Purchaser is not in default under this Agreement, from and after the Effective Date until the Closing, unless required by applicable law, Seller shall not enter into any new leases, contracts or agreements affecting the Property and which would be binding on the Purchaser following the Closing. Seller agrees that Seller occupied units 63 and 64 (the "Seller Occupied Units") and apartment units 31, 41, 51, 54 and 61 (the "Vacant Units") will be delivered vacant at closing, free of leases, subleases, license, occupancy agreements, tenants, subtenants, licensees and occupants. Upon the occurrence of any vacancy of any residential unit at the Property (including, but not limited to, either of the Seller Occupied Units), Seller shall keep each such unit vacant" (NYSCEF Doc. No. 6, ¶ 6.1).

The second sentence clearly says the seller shall not enter any new leases that would bind the purchaser after the closing. But the seller did just that. The three subject leases were set to expire after the October 27, 2022 closing - Units 34 and 52 expired on October 31, 2022 and Unit 33 expired on November 30, 2022 (NYSCEF Doc. Nos. 42-44). There was absolutely no reason cited on this record to renew them and bind the purchaser after the closing.

The Court finds that these lease renewals constitute "new" leases under the terms of the contract of sale and therefore constituted a default under the contract. The fact is that these were all free-market units, which means that plaintiff was not obligated to extend a renewal offer, unlike a rent-stabilized unit. If plaintiff did not send a notice of intent not to renew and the tenants remained in the units after the expiration of their leases, then the tenants would simply become month-to-month tenants. Instead, plaintiff entered into these lease renewals *after* the parties entered into the contract of sale but *before* the closing date. And there is no question that each of these lease renewals would bind defendants after the closing (they all expired in late 2023).

Plaintiff's assertion that it was not supposed to force these tenants out of the units makes no sense and certainly does not raise a material issue of fact. Each of their leases lasted until after the closing – plaintiff would not even own the building when their leases expired. As long as plaintiff owned the building, these tenants had binding leases.

Plaintiff's other argument that defendants did not properly terminate the contract is also without merit. The contract provides that "In the event Seller defaults under a material term of this Agreement, and such default is not cured within twenty (20) days from Seller's receipt of written notice of such default, then Purchaser's sole remedy shall be to have the right to either (i) terminate this Agreement and receive the return of the Downpayment or (ii) to seek specific performance, it being understood that if Purchaser fails to commence an action for specific performance within sixty (60) days after such default then Purchaser shall be deemed to have elected the remedy provided under clause (i) of this Section 16.3" (*id*. ¶ 16.3).

Defendants sent a letter dated October 20, 2022 in which it declared plaintiff in default (NYSCEF Doc. No. 21) and now defendants want the downpayment back in their counterclaims. While defendants' letter on October 25, 2022 suggested that they were still interested in closing and the first counterclaim seeks specific performance, defendants now demand the downpayment in their cross-motion. They have now elected their remedy and, contrary to plaintiff's assertion, defendants are not prohibited from seeking either remedy under these circumstances. Moreover, plaintiff does not assert that it attempted to remedy the default in question.

Summary

The Court recognizes that plaintiff insists that entering into renewal leases does not constitute a new lease. However, at least one Court (when considering a rent-stabilized lease) noted that "a renewal lease is not a notice under the lease but rather a new lease" (*Aqua Realty*

LLC v Stacy Truesdale, 2023 NY Slip Op 50653(U) [Civ Ct, NY County 2023]). This Court disagrees with plaintiff's view and emphasizes that the rent was apparently increased for at least two of three units in question and the term was changed in all three. That means that a key term was changed and these leases bound defendants after the closing, something that is expressly prohibited under the parties' contract. And the fact is that these were not leases where plaintiff was required to send a renewal lease; plaintiff, on its own initiative, entered into new leases at rental rates it determined. That contravenes the contract and constitutes a default by plaintiff. Defendants are entitled to a return of the downpayment as well as legal fees as the prevailing party, as provided for in the contract.

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendants' cross-motion is granted to the extent that plaintiff's complaint is dismissed and defendants are entitled to the return of the downpayment; and it is and legal fees; and it is further

DECLARED that Belkin Burden Goldman LLP, as escrow agent, shall release the subject downpayment of $1.695 million (and any interest accrued) to defendants on or before July 20, 2023; and it is further

ORDERED that defendants are entitled to reasonable legal fees and shall make a separate motion for such fees on or before July 31, 2023; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of defendants and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

7/6/2023
DATE

ARLENE P. BLUTH, J.S.C.

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