Rich Ning LLC v 130 William St. Assoc. LLC

2023 NY Slip Op 32450(U)

July 13, 2023

Supreme Court, New York County

Docket Number: Index No. 654340/2022

Judge: Lyle E. Frank

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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. LYLE E. FRANK** ***Justice*** **PART** **11M**

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RICH NING LLC,

Plaintiff,

- v -

130 WILLIAM STREET ASSOCIATES LLC,SEIDEN & SCHEIN, P.C.,

Defendant.

---X

INDEX NO. 654340/2022

MOTION DATE 03/02/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 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

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

Plaintiff brings the instant action to recover a down payment provided in a real estate transaction, alleging that defendants breached a contract[1]. Defendants, 130 William Street Associates LLC and Seiden & Schein, P.C., answered and asserted a counterclaim.

Defendants now move for summary judgment, on the counterclaim and for dismissal, on the grounds that the down payment should be released to defendants because plaintiff breached the contract, not the defendants, and that defendants are entitled to legal fees resulting from the instant action. For the reasons set forth below, defendants' motion for summary judgment is granted.

It is well established that for a moving party to prevail on a summary judgment, the moving party must demonstrate an entitlement to judgment as a matter of law. *Alvarez v Prospect Hosp.*,

[1] The Court would like to thank Ethan Lee for his assistance in this matter.

68 NY2d 320, 324 [1986]. Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof. *Id.*

The material facts are not in dispute. In May 2021, the parties entered into a Purchase Agreement for a condominium unit PH65 (the "Unit") located at 130 William Street. *See* NYSCEF Doc. 27. Plaintiff deposited, in an escrow account, $1,900,000.00 as a down payment. Notably, it is undisputed that the purchase agreement did not contain a closing date.

In October 2022, plaintiff sought to rescind and requested the return of the down payment as the Unit was not yet delivered and allegedly delayed. Defendants refused and sent instead a Notice of Remote/Escrow Closing which purported that the closing will be scheduled for November 18, 2022. Plaintiff did not appear at the scheduled closing on November 18, 2022, and did not cure its failure to appear, with no other action taken until December 21, 2022, resulting in default.

In support of their motion, defendants contend that the purchase agreement and the Certificate of Occupancy conclusively show that they are entitled to judgment as a matter of law. The purchase agreement, paragraph 5, in relevant part provides: "[C]losing of Title shall be held [...] on such date and hour as Sponsor may designate to Purchaser on not less than 30 days' prior notice (the "Closing Notice"). The Certificate of Occupancy issued on November 15, 2022, establishes that the specific unit at issue was habitable. Defendants contend that the Notice of Closing scheduled for November 18, 2022, was valid and plaintiff's failure to appear resulted in default pursuant to the purchase agreement.

Further, defendants contend that the purchase agreement specifically provides that the down payment will be released to defendants, as liquidated damages, upon plaintiff's default. Paragraph 12 of the purchase agreement states, in relevant part, that "Events of Default" include

"[F]ailure to close title to the Unit on the scheduled Closing Date" and in such case, "Sponsor may [...] retain the Down Payment [...] together with interest earned thereon."

Defendants also contend, that pursuant to the terms of the agreement, they are entitled to attorney fees. Specifically, defendants cite to paragraph 34 of the purchase agreement, which provides in relevant part: "Purchaser shall be obligated to reimburse Sponsor for any legal fees and disbursements incurred by Sponsor in defending Sponsor's rights under this Agreement."

In opposition, plaintiff alleges that an issue of fact exists because defendants have breached the contract. Specifically, plaintiff relies heavily on an e-mail that defendants' counsel sent to plaintiff dated April 23, 2021, stating that the Unit is "[S]et to close in 2021," and therefore alleges that defendants did not adhere to the set closing date.

The Court finds this argument unpersuasive. It is well established in New York courts that generally extrinsic evidence that alters or adds a provision to a written agreement is barred by the parol evidence rule. *Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]; *South Rd Assocs., LLC v IBM*, 4 NY3d 272, 278 [2005].

Here, the purchase agreement explicitly states in paragraph 20 that "[N]o representations [...] shall be considered a part of this agreement." Hence, the e-mail, that occurred before the execution of the purchase agreement, cannot be used as evidence to supplement a closing date that is unspecified in the written contract.

Plaintiff further alleges that defendants' counterclaim is procedurally flawed because it seeks declaratory judgment when the defendants are in fact seeking remedy for a breach of contract. This argument also fails. New York courts have frequently granted declaratory judgment to determine who is entitled to an escrow account. *See Beinstein v Navani*, 131 AD3d 401, 402-04 [1st Dept 2015]. Further, to amend the counterclaim to address a new cause of action would

be an imprudent use of judicial resources. Moreover, defendants seek the release of the down payment as liquidated damages, and it is well established that New York courts have long upheld liquidated damages clauses when it is specified in the contract. *225 5th, LLC v Volynets*, 96 AD3d 429 [1st Dept 2012]; *45 Renwick St, LLC v Lionbridge, LLC*, 162 AD3d 550, 551 [1st Dept 2018].

The Court finds that there is no question of fact as to plaintiff's default pursuant to the terms of the purchase agreement. The Court has review plaintiff's remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED, ADJUDGED, and DECLARED that defendants' motion for summary judgment is granted in its entirety and that defendants are entitled to the release of the Down Payment held in escrow in the sum of $1,900,000.00 as liquidated damages; and it is further

ORDERED that an assessment of damages is directed to ascertain reasonable attorney fees; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

7/13/2023						
DATE			LYLE E. FRANK, J.S.C.			
CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE