

141 S. 5th LLC v Bedford Ave. Assoc., LLC

2023 NY Slip Op 32495(U)

July 19, 2023

Supreme Court, Kings County

Docket Number: Index No. 518625/2021

Judge: Robin K. Sheares

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
141 SOUTH 5th LLC,

Plaintiff(s),

- against -

BEDFORD AVENUE ASSOCIATES, LLC and MEIR
MILGRAUM,

Defendant(s).

Index No. 518625/2021

-----X
BEDFORD AVENUE ASSOCIATES, LLC and MEIR
MILGRAUM,

Third-Party Plaintiff

DECISION/ORDER

Motion Sequence No. 05

-against-

JACK GOLD

Third-Party Defendant

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this Motion:

<u>Papers</u>	<u>NYSCEF Document No:</u>	
	<u>Sequence # 04</u>	<u>Sequence # 05</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	158 -161; 178; 193	283 – 284; 324; 346
Exhibits	162 – 177; 179 - 187	285 – 322
Opposition	199 – 201; 208	357 – 358
Exhibits	202 – 207	
Reply		367 – 369; 371
Decision/Order Motion Sequence No. 04		214

Defendants/Third Party Plaintiffs, Bedford Avenue Associates', LLC and Meir Milgraum's (hereinafter, "Bedford") motion to reargue this court's March 2, 2023 order which found that both the waiver/subordination executed by 141 LLC (the "Lot 11 Waiver") to the 2017 Zoning Lot Development Agreement ("2017 ZLDA") between the owners of the Lots formerly known as 4, 5, 8, 101 (now known as part of Lot 4) and Lots 1001, 1002, 26, 27, 127 and 32 on Block 2444, Kings County, New York, and the Exhibit IV, Declaration of Zoning Lot Restrictions ("2017 Exhibit IV"), did not allow for the expansion of the Merged Zoning Lot (defined as the Combined Zoning Lot in the 2017 ZLDA), to include Block 244 is GRANTED.

However, after a review of the foregoing papers, and after oral arguments, this Court has determined that the decision of March 2, 2023 stands, that it did not misapprehend the law of New York regarding contractual recitals, nor did it overlook the wide-ranging implications on the Real Estate Industry as set forth in the affirmation of Jodi Stein, Esq.

This Court's decision relied heavily on *Little Cherry v. Cherry St. Owner LLC*, 2021 NY Slip Op 31225(U), 2021 N.Y. Misc. LEXIS 1726, (hereinafter "*Little Cherry*"), which both parties cited and/or discussed as support for their case as the fact pattern presented in that decision is similar to the instant case. The court in *Little Cherry* concluded that, "As a matter of law, the Declarations of Waiver **signed** (Emphasis Added) by *Little Cherry* and NYCB did not waive their right to object to future mergers with other lots." *Little Cherry v. Cherry St. Owner Llc*, 2021 NY Slip Op 31225(U), 10, 2021 N.Y. Misc. LEXIS 1726, *13. That Court further stated that "the Recitals are descriptive and non-binding." See also, *Hampton Hall Pty Ltd. v Global Funding Servs., Ltd.*, 82 AD3d 523, 524, 918 N.Y.S.2d 455 [1st Dept 2011 and *Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc.*, 65 AD3d 445, 447, 885 N.Y.S.2d 255 [1st Dept 2009]. As this is common knowledge in the legal community, the brief discussion of the Recital in the original decision was merely demonstrative.

In affirming the lower court, the Appellate Division, First Department stated that "The IAS court correctly concluded that plaintiffs did not waive their rights to consent to future enlargements of the Combined Zoning Lot. The 2008 Waivers clearly manifested plaintiffs' intent to relinquish only their rights with respect to the merger of Lots 15 and 76, and did not waive any right to object to future zoning lot mergers." *Little Cherry, LLC v. Cherry Street Owner, LLC*, 210 A.D.3d 476, 477, 178 N.Y.S.3d 494, 495, 2022 N.Y. App. Div. LEXIS 6199, *1-2, 2022 NY Slip Op 06322,

1; *See also, DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd.*, 81 AD3d 563, 920 N.Y.S.2d 1 [1st Dept 2011]).

The Appellate Division also noted that Recital B of the 2008 Zoning Lot and Development Agreement (ZLDA) did not waive plaintiffs' consent rights. It stated that the "Recitals of the 2008 ZLDA were not binding on any party, **particularly plaintiffs, who were not even parties to that agreement.**" (Emphasis Added) *Little Cherry, LLC v. Cherry Street Owner, LLC*, 210 A.D.3d 476, 477, 178 N.Y.S.3d 494, 495-496, 2022 N.Y. App. Div. LEXIS 6199, *2, 2022 NY Slip Op 06322, 1; (*see also, Grand Manor Health Related Facility, Inc. v Hamilton Equities Inc.*, 65 AD3d 445, 447, 885 N.Y.S.2d 255 [1st Dept 2009]).

Likewise, in the instant case, just as in *Little Cherry*, the Plaintiffs were not signatories of the ZLDA, nor did the Waiver state that 141 South 5th LLC waives its right to further expansion of the zoning lot. In addition, there exist nothing in the 2017 Waiver or the 2017 ZLDA that effectuated an incorporation by reference.

As and for Defendants' argument that the Court overlooked the wide-ranging implication on the Real Estate Industry as set forth in the affirmation of Jodi Stein, Esq., it did not.

Prior to the parties coming to Court there existed at least two New York City Department of Building's ("DOB") challenges to this project. The second challenge's decision, dated April 21, 2022, reads as follows:

A review of the application records indicates that the recorded zoning exhibits (zoning exhibit II) did provide the required certification that all parties in interest have either declared or waived their respective rights relative to the proposed zoning lot as required in the definition of "zoning lot" pursuant to ZR 12-10. However, the submitted challenge brings to light that zoning exhibit II identifies the fee owner of Lot 11 as waiving their rights to execute the October 2021 DZLR pursuant to a 2017 Zoning Lot Development Agreement (the "2017 ZLDA"). As noted by the challenge, the fee owner of Lot 11 did not execute the 2017 ZLDA

and the provision in the 2017 ZLDA which agreed to further expansions of the zoning lot was limited to define "fee owners" **that did not include the fee owner of Lot 11.** (Emphasis Added) As such, it appears that the fee owner of Lot 11 has not waived or executed the October 2021 DZLR. Therefore, this Challenge is accepted.

Thereafter, by letter dated May 27, 2022, the DOB stated:


"It is not clear from the Waiver of Declaration of Zoning Lot Restrictions and Consent and Subordination to Zoning Lot Development and Easement Agreement, executed by the Lot 11 Owner on January 10, 2017 (the "2017 Waiver"), that the Lot 11 Owner waived objections to future mergers or expansions of the 2017 combined zoning lot. Whether the Lot 11 Owner waived their right to execute future declarations that would enlarge the 2017 combined zoning lot is a question of the parties' contractual agreement set forth in the referenced Zoning Lot Declaration and Easement Agreement. Such questions are for the judicial courts as they are the proper jurisdictional entity to determine private contractual disputes"¹

The Court notes that the New York City Department of Buildings' decision is that the Owner of Lot 11 **did not waive or execute the October 2021 DZLR** and relegated any further determination on this matter to the Courts.

Therefore, based on the above, Defendant/Third-Party Plaintiffs motion for partial summary judgment pursuant to CPLR §3212 remains DENIED.

This constitutes the Decision/Order of the Court.

Dated: July 19, 2023



Hon. Robin K. Sheares, J.S.C.

For clerks use only

Motion Seq. # 04

MG _____

MD

Motion Seq. # 05

MG _____

MD

¹ See Plaintiff Opposition to Motion Sequence Number 4; NYSCEF Document Number 206.