Nashua Daniel Webster Hwy., LLC v CTL Propco I LLC
2023 NY Slip Op 32582(U)
July 26, 2023
Supreme Court, New York County
Docket Number: Index No. 650421/2022
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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NASHUA DANIEL WEBSTER HIGHWAY, LLC

Plaintiff,

- v -

CTL PROPCO I LLC,

Defendant.

INDEX NO. 650421/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 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

were read on this motion for SUMMARY JUDGMENT.

This action involves a contract to sell a two-story retail department store in a New Hampshire shopping mall. The parties' Purchase and Sale Agreement ("PSA") contained an express condition precedent to closing requiring that the existing store tenant execute a "New Lease" substantially in the form of an exhibit attached to the PSA. As it turned out, however, Defendant CTL Propco I LLC (the "Seller") tendered to Plaintiff Nashua Daniel Webster Highway, LLC (the "Buyer") a "New Lease" with modifications from the version that had been attached to the PSA. Buyer objected to the changes, the Closing did not proceed, and the Buyer sued for return of its $550,000 deposit. Seller countersued for breach of contract for Buyer's failure to complete the transaction.

Buyer now moves for Summary Judgment in its favor on its claim for breach of contract and dismissing Seller's Counterclaim for breach of contract. For the following reasons, Buyer's motion is granted.

BACKGROUND

On or about November 3, 2021, the Parties entered into the PSA, pursuant to which Buyer agreed to purchase from Seller an approximately 104,000 square-foot, two-story retail department store and appurtenant parking areas in Nashua, New Hampshire (the "Property") for $6.33 million (NYSCEF 42 [Plaintiff's Statement of Material Facts and Defendant's Responses ("PSOF")] ¶ 4, 6; NYSCEF 45 [Defendant's Statement of Material Facts and Plaintiff's Responses ("DSOF")] ¶ 1). As provided in the PSA, Buyer delivered a deposit of $550,000 into escrow (PSOF ¶ 5).

The Property is a part of Pheasant Lane Mall (the "Shopping Center"), one of the largest malls in New Hampshire (PSOF ¶ 6). The Property is leased to a JC Penney-affiliated entity ("Tenant") who has operated a JC Penney retail department store for over thirty (30) years at the Property (PSOF ¶ 7, 8).

The Shopping Center is owned and controlled by Simon Property Group, Inc. ("Simon"), a major mall owner and developer (PSOF ¶ 9, 10; DSOF ¶ 2). Simon, along with Brookfield Asset Management Inc. ("Brookfield"), acquired an interest in JC Penney in bankruptcy proceedings (NYSCEF 3 ["Compl."] ¶ 9; PSOF ¶ 11). Before and during negotiation of the PSA, and until the proposed sale of the Property to Buyer, Tenant leased the Property from Seller pursuant to a master lease agreement (the "Master Lease") covering numerous JC Penney locations throughout the country, including the Property (PSOF ¶ 12; DSOF ¶ 3-4). Over the course of two months, Buyer and Seller negotiated the "New Lease Documents" that would govern the Buyer-Tenant relationship with respect to the Property after Closing and attached them as exhibits to the PSA.

Article 5 of the PSA provides:

> **Section 5.1 Sale Subject to New Lease Documents**. Buyer acknowledges and agrees that: (a) the sale of the Property is subject to the New Lease Documents and the New Lease Tenant's rights as tenant under the New Lease; and (b) the Property at Closing will be encumbered by the New Lease. Buyer acknowledges that on the Effective Date the Property is encumbered by the Master Lease Documents, but Seller agrees the Master Lease Documents will be effectively extinguished and replaced (as pertains to the Property) by the New Lease Documents at Closing.
>
> **Section 5.2 New Lease Documents**. To facilitate the consummation of the Closing, the Parties have, prior to the Effective Date, finalized the drafting of the New Lease, New Guaranty, New EIA and New Collateral Access Agreement and attached the forms of the same to this Agreement. Notwithstanding the foregoing or the defined terms for such documents, no changes shall be made to such documents from the forms attached hereto that modify the economic terms thereof, add material obligations on the part of the landlord under the New Lease, or diminish the obligations on the part of the New Lease Guarantor and New Lease Tenant in any material respect.

(NYSCEF 13 ["PSA"] Art. 5). In the Definition section of the PSA, it provides that

> "New Lease" shall mean a new lease, dated as of the Closing Date, in substantially the form of Exhibit D-1 attached hereto, executed by Buyer, as landlord, and New Lease Tenant, as tenant, relating solely to the Property and from and after the Closing Date.

(PSA, Art. 1).

Section 7.1, titled "Conditions Precedent Favoring Buyer," includes a condition that "Seller has caused (A) the Master Lease Documents (as pertain to the Property) to be terminated with no ongoing liability thereunder to the Property Owner and (b) the execution by New Lease Tenant and New Guarantor of the New Lease Documents (as applicable) and the delivery thereof to Escrow Agent to be released to Buyer (upon the Closing) (PSA, Sec. 7.1[a][v]). The form of the New Lease to be executed by Tenant was appended as Exhibit D-1 to the PSA (PSA, Ex. D-1; PSOF ¶ 17).

In December 2021, at Tenant's request, Seller proposed to Buyer a change to one of the defined terms in the form of the New Lease—specifically, the definition of "S/B Property"

(referring to Simon and Brookfield) (PSOF ¶ 25 [response]; DSOF ¶ 13 [response]). At issue in this case are the following specific changes proposed by Seller (new text in italics, deleted text struck through):

> **"S/B Property"**: The Property for so long as Simon or Brookfield or any of their respective Affiliates ***is the Developer or*** has any equity ownership interest in the ~~**Property**~~ ***Shopping Center***. Upon the divestiture of ~~**an S/B**~~ ***the*** Property by Simon or Brookfield (or their respective Affiliates) after the Commencement Date such that neither Simon nor Brookfield nor any of their respective Affiliates has any remaining equity ownership interest in ~~**such S/B Property (an "After-Divested S/B Property")**~~ ***the Shopping Center***, Tenant shall, within thirty (30) days of such divestiture, provide Landlord with Notice of such divestiture, in which event ~~**such After-Divested S/B**~~ ***the*** Property shall no longer constitute an "S/B Property" hereunder for purposes of the provisions of Sections 7.3(b) ~~**and (g)**~~.

According to Buyer, the modifications requested by Tenant would change the definition of "S/B Property" by: (1) stating that the Property would be considered an "S/B Property" post-Closing for so long as either Simon or Brookfield was the "Developer" (which was a newly introduced term and not defined) or had an interest in the Shopping Center; (2) implying that Simon and Brookfield would actually own the Property after the Closing, and (3) erasing altogether the concept of an "After-Divested S/B Property." (Compl. ¶23). The definition of S/B Property affects Sections 7.3(b) & (c) of the New Lease, which address Tenant's right to modify reciprocal easement agreements ("REAs")[1] encumbering the Property. Buyer argues that it did not agree for Simon, as owner of the Shopping Center, to have rights under the New Lease to

[1] "REAs" is defined as "All reciprocal easement, operating and/or construction agreements, easements, rights of way, covenants, conditions, restrictions, declarations and similar agreements or encumbrances affecting the access, ingress, egress, use, maintenance, construction, parking, signage, occupancy or operation of the Demised Premises, Property or Common Areas, in each case as the same may be in effect from time to time and whether or not the same may be of record" (PSA, Ex. D-1, New Lease at 29).

amend or modify the REAs affecting the Property, or to have any interest in the Property after the Closing (*id.* ¶25).

On December 26, 2021, Buyer informed Seller that the proposed changes were unacceptable (PSOF ¶ 27). The parties exchanged emails in December 2021 concerning the definition of S/B Property (PSOF ¶ 28). The parties exchanged demands with respect to the return or release of the Deposit (PSOF ¶ 29-31). By letter dated January 21, 2022, Seller wrote Buyer and stated that it "delivered to Escrow Agent original signature pages executed by Seller and [JC Penney]" to all the closing documents, including the New Lease (PSOF ¶ 32). Following Buyer's demand for the documents, Seller delivered copies of the New Lease executed by Tenant (PSOF ¶ 34). The documents delivered by Seller included a revised New Lease containing the language to which Buyer had objected (PSOF ¶ 35). The transaction did not proceed.

Buyer subsequently commenced this lawsuit for breach of contract seeking a return of its deposit on February 24, 2022 (NYSCEF 3). Seller filed an Answer and Counterclaim on April 18, 2022 (NYSCEF 6). Buyer moved for summary judgment on June 30, 2022.

DISCUSSION

Pursuant to CPLR 3212, the moving party has the initial burden to establish its entitlement to judgment as a matter of law by adducing evidentiary proof in admissible form (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 326 [1986]). On a breach of contract claim, once the moving party submits admissible evidence demonstrating the defendant's breach, the burden shifts to the non-moving party to adduce relevant admissible evidence "establishing the existence of material questions of fact." (*id.; see also Sears Holdings Mgt. Corp. v Rockaway Realty Assoc., LP,* 176 AD3d 433, 433 [1st Dept 2019]).

A. Plaintiff's Complaint for Breach of Contract.

Here, there is no dispute that the Parties entered into an agreement (the PSA) or that Buyer performed by tendering the $550,000 Deposit to the Escrow Agent. The parties further agree that the Property had been subject to the terms of a Master Lease between Seller and Master Lease Tenant, but was to be subject to a New Lease to be signed in connection with the sale of the Property to Buyer. The main dispute is whether Seller delivered at Closing a New Lease executed by Tenant (*i.e.*, J.C. Penney) "substantially in the form of" the New Lease appended to the PSA.

Per Section 7.1 of the PSA, a condition precedent to closing is that Seller has terminated the Master Lease Documents as they pertain to the Property, and the New Lease has been executed by the New Lease Tenant and New Guarantor. The PSA provides that Seller is to deliver the New Lease substantially in the form of the New Lease appended to the PSA. To be "substantially in the form" of the New Lease, the PSA provides that "no changes shall be made to such documents from the forms attached hereto that modify the economic terms thereof, add material obligations on the part of the landlord under the New Lease, or diminish the obligations on the part of the New Lease Guarantor and New Lease Tenant in any material respect."

The Court finds that the changes Seller made to the definition of S/B Property are material and significant changes to the New Lease as compared to the version attached to the PSA. The original language made clear that the Property **would not be** an "S/B Property" after the Closing, because neither Simon nor Brookfield would have "any equity ownership interest in the Property" post-Closing. But Seller's proposed changes modified that definition so the Property **would be** an S/B Property after the Closing by making the definition contingent on whether Simon or Brookfield had an interest in the ***Shopping Center*** after the Closing.

The definition of S/B Property is critical to Sections 7.3(b) & (c) of the New Lease, which address Tenant's right to modify REAs encumbering the Property. If the Property ***is not*** an S/B Property, which was the case under the version attached to the PSA, then "Tenant shall not take or enter into any REA Action . . . without Landlord's prior written consent, which consent may be granted or withheld in Landlord's sole discretion." (Section 7.3[c]). If the Property ***is*** an S/B Property, by contrast, then (i) Buyer would have to be commercially reasonable in deciding whether to grant or withhold consent to proposed material REA changes, and (ii) immaterial REA changes could be made without Buyer's consent at all.

The imposition of a requirement that Buyer exercise "commercially reasonable" rather than "sole and absolute" discretion in some instances and lose any consent right in others is a modification "adding material obligations on the part of the landlord under the New Lease, or diminishing the obligations on the part of the New Lease Guarantor and New Lease Tenant in [a] material respect" which "changes the legal effect of the original contract, [and] clearly constitutes a material alteration thereof" (*Edward C. Flaherty Corp. v State*, 102 Misc 2d 438, 441 [Ct Cl 1979]). Buyer was purchasing the property in fee simple absolute. Allowing Tenant, whose owner is also the owner of the adjoining property, to make decisions regarding REAs conveys rights that are incidental to ownership, which in turn diminishes the value of fee simple absolute ownership.

In response, Defendant/Seller argues that the proposed change to the definition of S/B Property in the New Lease was immaterial. Seller's argument rests on a supposed agreement or understanding that the Parties "always intended the terms of the New Lease to comport with the Master Lease" and "to incorporate the terms of the Master Lease into the New Lease" (Opp. at 11; *see also* Opp. at 17). However, the Master Lease is not incorporated by reference in the New

Lease, nor is there any provision in the PSA or New Lease that indicates any provision was intended to track the language of the Master Lease. Defendant's reliance on the "Permitted Exceptions" under section 4.1 of the PSA, which in turn references the "Commitment for Title Insurance" in Schedule B Part II, is unavailing. This provision only indicates that Buyer could not terminate the deal if the Master Lease appeared as an exception to coverage on Buyer's policy of title insurance (*see* PSA, Schedule E, p. 16 of 16). In contrast, the PSA explicitly provides that "the Master Lease Documents will be effectively extinguished and replaced (as pertains to the Property) by the New Lease Documents at Closing" (PSA, Art. 5.1). Defendant do not and cannot refute this.

Accordingly, Defendant has failed to adduce relevant admissible evidence establishing the existence of material questions of fact. Per the PSA, Seller promised to deliver at Closing the New Lease executed by Tenant substantially in the form of the New Lease appended to the PSA. Seller failed to do so. Seller therefore failed to comply with an express condition precedent to Closing and Buyer is entitled to summary judgment as a matter of law.

Seller's request to proceed with discovery is unavailing. Seller's proposed discovery seeks to prove the existence of an alleged understanding that is contradicted by the unambiguous language of the PSA and New Lease. Seller does not point to any ambiguity in the PSA or the New Lease that would justify considering parol evidence (*AFA Protective Sys., Inc. v Orange Regional Med. Ctr.*, 128 AD3d 869, 870 [2d Dept 2015] [holding that where plaintiff established its prima facie case for breach of a contract that was clear and unambiguous, and defendant failed to raise a triable issue of fact, defendant's contention that the motion was premature was without merit]; *1375 Equities Corp. v Buildgreen Sols., LLC*, 120 AD3d 783, 783 [2d Dept 2014]

["Where a court determines that the terms of the agreement are ambiguous and the intent of the parties becomes a matter of inquiry, parol evidence is permitted to determine that intent"]).

The PSA is clear that as a result of Seller's breach, Buyer is entitled to the return of its $550,000 Deposit, plus (i) up to $75,000 in transaction costs (PSA, Sec. 12.3 [ii]), plus an award of attorneys' fees and other costs incurred in pursuing this action (PSA, Sec. 15.8 ["In the event of a judicial or administrative proceeding or action by one Party against the other Party with respect to the interpretation or enforcement of this Agreement, the prevailing Party shall be entitled to recover reasonable out-of-pocket costs and expenses, including reasonable attorneys' fees and expenses, whether at the investigative, pretrial, trial or appellate level."]).

B. Defendant's Counterclaim for Breach of Contract.

Seller's Eleventh Defense and Counterclaim contends that Buyer breached the PSA by failing to close, and that Seller was ready, willing and able to deliver a New Lease "in substantially the same form" as appended to the PSA (NYSCEF 6 at 24). As discussed above, there is no genuine issue of material fact that Seller failed to deliver to Buyer the New Lease at the Closing in substantially the form of the New Lease appended to the PSA. Accordingly, the Court grants summary judgment in favor of Plaintiff dismissing this counterclaim.

Accordingly, it is

ORDERED that Plaintiff's motion for Summary Judgment in its favor on its Cause of Action for breach of contract (entitling Plaintiff to the release from escrow of its $550,000 Deposit) and dismissing Defendant's Counterclaim for breach of contract is **GRANTED**; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the Buyer's monetary damages up to $75,000 for Buyer's transaction

costs, plus Buyer's reasonable attorneys' fees, costs and expenses incurred in connection with this dispute, plus interest at the statutory rate on the Deposit from January 10, 2022 until the Deposit is returned to Buyer by the Escrow Agent; it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; it is further

ORDERED that Plaintiffs' counsel shall serve a copy of this order with notice of entry on Defendants within five days and that counsel for Plaintiffs shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, along with an amended caption, who are directed to mark the court's records to reflect the parties being removed pursuant hereto; it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website). This constitutes the Decision and Order of the Court.

This constitutes the Decision and Order of the Court.

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7/26/2023
DATE

JOEL M. COHEN, J.S.C.

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