| **ACP Hous. Assoc., L.P. v ABJ Milano, LLC** |
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| 2023 NY Slip Op 33469(U) |
| October 5, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 156320/2019 |
| Judge: Joel M. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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ACP HOUSING ASSOCIATES, L.P.,

Plaintiff,

- v -

ABJ MILANO, LLC,

Defendant.

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**INDEX NO.** 156320/2019

**MOTION DATE** N/A

**MOTION SEQ. NO.** 007

**DECISION + ORDER ON MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 249, 250

were read on this motion for SUMMARY JUDGMENT.

This case involves an alleged mutual mistake in a commercial real estate transaction. The Plaintiff ACP Housing Associates, L.P. ("Plaintiff" or "Seller") asserts that its contract with ABJ Milano, LLC ("Defendant" or "Buyer") mistakenly conveyed a vacant lot that was not intended to be included in the sale of an adjacent developed property. Plaintiff seeks reformation of the contract to exclude the vacant lot from the transaction or, in the alternative, recovery for unjust enrichment. Defendant now moves for summary judgment dismissing Plaintiff's Complaint in its entirety. For the following reasons, Defendant's motion is granted.

## FACTS

In the Complaint, Seller alleges that the Deed delivered in connection with the sale of real property at 165 West 122nd Street, New York, NY (the "165 Property") mistakenly included the description of an adjoining parcel of property owned by Seller, located at 163 West 122nd Street, New York, NY (the "Vacant Lot"), which was not intended to be part of the sale transaction.

Seller brought this action to reform the deed to remove the Vacant Lot from the sale transaction (NYSCEF 207 ["Complaint"] ¶1).

Seller purchased the property subject to this action from the City of New York subject to a regulatory agreement to provide low-income housing (Compl. ¶ 18) dated as of June 29, 1994 (NYSCEF 212). The Regulatory Agreement has a term of 30 years (thus expiring in 2024) and imposes restrictions on three parcels: 2041 Adam Clayton Powell Jr. Boulevard, the 165 Property, and the Vacant Lot (NYSCEF 212). The Regulatory Agreement provides that the Vacant Lot cannot be developed and shall be maintained "as open and recreational space" (NYSCEF 212 ⁋6) until 2024. The Vacant Lot is approximately 18 feet wide (Defendant's Statement of Material Facts ["DSOF"] ⁋2 [admitted]). The Vacant Lot has a tax lot identifier of Block 1907, Lot 5 (DSOF ⁋1). It has also been referred to in public filings without any street address, or with the address "N/A West 122nd Street." (*id.*).

In or about 2015, Seller engaged the brokerage firm of Ariel Property Advisors ("Ariel") to market the 2041 Adam Clayton Powell Jr. Boulevard and 165th Street Properties as part of the sale of a total portfolio of five multi-family buildings primarily located in central Harlem (NYSCEF 214 ["Sozio Tr."] at 23:23-34:2; DSOF ⁋10 [admitted]). Thereafter, Ariel procured Buyer as a prospective purchaser (Sozio Tr. at 36:20-37:8; DSOF ⁋11 [admitted]).

In October 2015, Michael Kessler ("Kessler"), representative of Seller, and Victor Sozio ("Sozio"), on behalf of Ariel, communicated as to whether or not the Vacant Lot was to be included in sale. Sozio wrote that "[t]he vacant lot is not included in the $16 million purchase price. They were told it will not be included. Let me know if we should discuss further. Thanks." (NYSCEF 213). Sozio could not recall exactly what he told Buyer (Sozio Tr. at 62: 9-15 ["No. I - I don't remember the exact conversation. But this email - if I said it in an e-mail, I believe it to

be 100 percent true. I wouldn't have put it in the e-mail if it wasn't true. But I can't remember the exact conversation from seven years ago."]). However, Buyer's principal, Benjamin Soleimani ("Soleimani"), confirmed that he was told that the lot was not included when Seller was "originally marketing the property," referring to marketing materials it received from Ariel in or around 2015, and that as late as October 9, 2015, it did not intend to purchase the Vacant Lot (NYSCEF 215 ["Soleimani Tr."] at 16:17-25; 37:23-38:3; Soleimani Tr. 61:13-24). It is undisputed that the Vacant Lot was not included in the marketing materials (NYSCEF 239), the October 2015 term sheet (NYSCEF 240), or the prospectus circulated by Buyer in October 2015 (NYSCEF 241).

On November 6, 2015, Seller's attorney emailed Buyer's attorney and stated, "[p]lease find three (3) Contracts for Purchase and Sale (the "Contracts") in connection with those real properties located at: (i) 2041-2055 Adam Clayton Powell Jr. Blvd., New York, New York and ***163- 165 West 122nd Street***, New York, New York . . ." (NYSCEF 217 [emphasis added]).

It is also undisputed that the parties did not have direct contact about the scope or details of the transaction. Instead, the negotiations were handled through their respective attorneys (NYSCEF 216 ["Kessler Tr."] at 26:7-24; 36:13-19 ["Q. . . .Were you involved in the negotiation of this document? A. No, the lawyers were."]; Soleimani Tr. 86:23-87:3 [agreeing "the parties' attorneys started working on a purchase and sale agreement to embody the terms of this sale"]). Seller's counsel drafted the first version of the purchase agreement (Soleimani Tr. 142:4-5 [". . .[Seller] drew up the contract."]; NYSCEF 209 ["Wolf Tr."] at 39:15-16 ["I drafted the initial draft of the PSA. . ."]). Seller confirmed the Contract was the only agreement concerning the transaction and that there was no oral agreement between Buyer and Seller with respect to the transaction (Kessler Tr. 76:17-25 ["Q. Now, is it your position that ACP Housing

had some kind of oral agreement with ABJ Milano, with respect to this transaction? A. Oral agreement, no. It was a contract of sale."]).

The parties entered into the Agreement of Purchase and Sale dated as of March 28, 2016 (NYSCEF 218). The Contract conveys "all right, title and interest of Seller in and to (a) those certain lots, pieces or parcels of land located at (i) 2041 Adam Clayton Powell Jr. Boulevard; and (ii) 165 West 122nd Street, each in the Borough of Manhattan, City, County and State of New York, as more particularly bounded and described in **Exhibits A-1 and A-2**, respectively. . ." (*see* NYSCEF 218 ["Contract"] at 2 [emphasis in original]). Exhibits A-1 and A-2 referenced in the Contract are both titled "Schedule A," and appear immediately following the Contract signature pages (*see id.* at 64-67). Both Exhibits A-1 and A-2 include the metes and bounds for the Vacant Lot, describing the property as "163-165 West 122nd Street." (*id.*).

The Contract required Seller and Purchaser to prepare, execute and deliver to each other a closing package (Contract at § 8.4). The deal closed in September 2016 (Singer Tr. 57:2-8; *see also* Wolf Tr. 40:17-41:6; DSOF ⁋22). The Closing Deliverables, including the Deed, the tax documents, and Certification of Non-Foreign Status, all either explicitly include the Vacant Lot or make reference to it by its Block Lot Number (NYSCEF 219-222). Specifically, the Summary of Transaction provides that "Seller agreed to sell, and Purchaser agreed to purchase, the premises known as 2041 Adam Clayton Powell Jr. Boulevard, ***163-165 West 122nd Street*** . . . ." (NYSCEF 219 at 2 [emphasis added]).

The Deed, executed at the Closing by Seller's Authorized Signatory, explicitly describes the sale property as "163-165 West 122nd Street, New York, New York" on its first page and final pages, and includes the tax lot identifier in the last page (*see* NYSCEF 219 at 84, 85, 88). The Deed also incorporates by reference a more detailed description of the Premises at its

Schedule A which is the "Legal Description," which identifies Block 1907/Lot 5 Property, along with a description of the metes and bounds of that property (NYSCEF 219 at 90).

The tax documents, including the New York City Department of Finance Real Property Transfer Tax Return and Form RP-5217, lists the property as Block 1907, Lot 5 (NYSCEF 219 at 98, 106). The Tax Adjustment Schedule, which reflects the portion of quarterly taxes Buyer was to reimburse Seller for the mid-tax quarter sale, refers to the Vacant Lot by tax lot identifier (NYSCEF 219 at 9).

The Purchase and Mortgage Loan, the Certification of Non-Foreign Status, Assignment of Leases, and Assignment of Service Contracts all reference the property as 163-165 West 122nd Street, New York (NYSCEF 219 at 3, 115, NYSCEF 220 at 1; NYSCEF 221 at 1), thus again including the Vacant Lot. Finally, the Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate, DEP Customer Registration Form for Water and Sewer Billing, and the HPD Affidavit in Lieu of Registration Statement all reference the address as "N/A West 122 Street" along with "Block 1907, Lot 5" (NYSCEF 219 at 94, 111, 114).

Both Buyer and Buyer's counsel testified that they believed the Vacant Lot was included in the transaction by virtue of the plain language of the governing documents. Buyer's counsel testified that he reviewed the legal descriptions of the properties being conveyed, believed the Vacant Lot was included, and "never had reason to believe that that property was not supposed to be sold to us" (NYSCEF 210 ["Singer Tr."] at 113:16-114:8, 117:18-19). Buyer testified that he believed the Seller had thereby offered to include the Vacant Lot in the sale (Soleimani Tr. 135:21:136-5 ["Q. Well, did the seller offer to include it in the purchase? A. I believe so. … Q. How was that offer transmitted? A. Through the attorney negotiations when they were drawing up the contracts and sale process."]; *id.* at 143:12-16 ["Q. How did they communicate that

intention? A. In discussions with the attorneys and negotiation of the contract, it was included."]; *id.* at 174:23-175:5).

Seller's counsel confirmed that compliance with the Regulatory Agreement was extensively negotiated by the parties (Wolf Tr. 43:19-44:4). Buyer testified that he understood that the Regulatory Agreement encumbered the properties being conveyed, which supported his belief that the Vacant Lot was part of the sale (Soleimani Tr. 73:17-25; 137:13-1 ["It was tied with the building next door."]; Soleimani Tr. 142:12-16 ["[I]t was encumbered by the same regulatory agreement as the buildings next door. It was difficult for them to bifurcate it they said"]). Buyer also testified that he did not find it strange that the Vacant Lot would be included without any increase in purchase price because the 165 Property and the Vacant Lot were burdened by the same regulatory agreement (Soleimani Tr. 179:6-18 [testifying that he had included a property for no additional price when it was encumbered by a regulatory agreement with an adjoining building he was selling]).

Plaintiff did not contest the conveyance of the Vacant Lot until 2019, almost three years after the transaction (NYSCEF 223; DSOF ⁋ 57 [admitted]). Mr. Kessler asserted that Seller did not realize the Vacant Lot had been conveyed until approximately April 17, 2019 (Kessler Tr. 67:7-14; DSOF ⁋ 57 [admitted]).

Since the Closing, Buyer has paid carrying costs on the acquired property (including the Vacant Lot) (DSOF ⁋ 58; NYSCEF 224). While there may be some dispute between the parties as to whether Buyer was delinquent in paying taxes on the acquired properties (*see* Tr. at 38:25, 39-40), there appears to be no dispute that *Seller* was not paying taxes on any of the properties (including the Vacant Lot) after the transaction (*id.*).

## DISCUSSION

A defendant moving for summary judgment 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" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]). "Once [the movant's prima facie] showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

***Reformation***

"It is well established that in order to reform a written agreement, it must be demonstrated that the parties came to an understanding but, in reducing it to writing, through mutual mistake or through mistake on one side and fraud on the other, omitted some provision agreed upon or inserted one not agreed upon" (*Slutzky v Gallati*, 97 AD2d 561, 561 [3d Dept 1983]). "Reformation on grounds of mutual mistake requires proof, by clear and convincing evidence, that an agreement does not express the intentions of either party. Reformation based upon a scrivener's error requires proof of a prior agreement between parties, which when subsequently reduced to writing fails to accurately reflect the prior agreement" (*US Bank Nat. Ass'n v Lieberman*, 98 AD3d 422, 424 [1st Dept 2012]). "[T]here is a 'heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties,' and a correspondingly high order of evidence is required to overcome that presumption" (*Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986] [citation omitted]). Defendant has the "initial burden of showing that there was no mutual mistake with respect to the [] property conveyed;"

thereafter, the burden shifts "to plaintiff to raise a material question of fact" (*Williams v Sowle*, 209 AD3d 1165, 1167 [3d Dept 2022]).

Here, Buyer has made a *prima facie* showing of entitlement to judgment as a matter of law on Seller's claim for reformation of the agreement by either a scrivener's error or through mutual mistake. Seller has failed to raise an issue of fact as to Buyer's or its counsel's state of mind or their intention to purchase the Vacant Lot at the time the Contract was signed. Seller relies on marketing materials, a conversation between its broker and Buyer which was communicated to Seller in an email, and the Term Sheet—all of which occurred in or prior to October 2015, before any transaction documents were shared. Seller prepared the transaction documents, including the November 2015 email cover letter which included the Vacant Lot, and sent the deed descriptions expressly did so as well.

Moreover, the inclusion of the Vacant Lot in the transaction documents cannot credibly be characterized as a stray reference in the contract or an isolated scrivener's error. The Vacant Lot is included in several, separately-prepared Closing Deliverables (NYSCEF 219-221; SOF ⁋39). For example, the Deed describes the premises as "163-165 West 122nd Street" (NYSCEF 222 at 14-15). The multiple affirmative explicit inclusions of the Vacant Lot in the transaction documents are inconsistent with the claim of an inadvertent scrivener's error, which must be shown by clear and convincing evidence.

Furthermore, because reformation is grounded in equity, courts consider the length of delay in discovering the mistake, as well as a party's detrimental reliance on the contract terms (*Loyalty Life Ins.*, 214 AD2d at 300 ["Inasmuch as reformation is an equitable matter, we also note the length of the delay in discovering the mistake and defendants' detrimental reliance on the amended policy in structuring the finances of their business"]; *see also Designcraft Jewel*

*Indus. v Rampart Brokerage Corp.*, 63 AD2d 926, 927 [1st Dept 1978], *aff'd*, 46 NY2d 981 [1979] [ample time between issuance and time of loss to inspect and return contract for correction in holding no mutual mistake or scrivener's error had occurred]). Seller's delay of nearly three years in asserting its alleged mistake, while at the same time leaving it to Buyer to pay carrying expenses and taxes, weighs against Seller.

In sum, the summary judgment record demonstrates that to the extent there was any mistake, it was a unilateral mistake or misunderstanding by Seller, which cannot support a reformation claim (*Burnside Bargain Store v. Carmel*, 156 AD2d 248 [1st Dept 1989]). Accordingly, Seller has failed to raise triable issues of fact to defeat summary judgment in favor of Defendant on Seller's reformation claim.

***Unjust Enrichment***

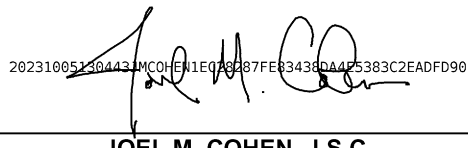
Because the transfer of the subject properties is governed by a written contract, Seller's quasi-contract claim for unjust enrichment fails (*Clark-Fitzpatrick v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter]).

Accordingly, it is

**ORDERED** that Defendant's motion for Summary Judgment dismissing Plaintiff's Complaint is **GRANTED** and the complaint is dismissed with prejudice, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



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| 10/5/2023 | | | JOEL M. COHEN, J.S.C. | | |
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