

Belnord Partners LLC v Horizon Select LLC

2024 NY Slip Op 30735(U)

March 7, 2024

Supreme Court, New York County

Docket Number: Index No. 655332/2020

Judge: Judy H. Kim

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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. JUDY H. KIM **PART** **04**

Justice

-----X

BELNORD PARTNERS LLC,

Plaintiff,

- v -

HORIZON SELECT LLC,

Defendant.

-----X

INDEX NO. 655332/2020

MOTION DATE 10/28/2021

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, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69

were read on this motion for SUMMARY JUDGMENT.

In this action, plaintiff Belnord Partners LLC (“Belnord”) seeks a judgment declaring that defendant Horizon Select LLC (“Horizon”) failed to complete the purchase of Unit 806 in a building known as 2360-2376 Broadway, New York, New York (“The Belnord”) pursuant to a Purchase and Sale Agreement between the parties, and that plaintiff is therefore entitled to retain Horizon’s \$312,500.00 deposit. Horizon interposed an answer asserting various affirmative defenses as well as counterclaims for: (1) a declaratory judgment that Horizon is entitled to the return of its deposit based on Belnord’s default under the Purchase and Sale Agreement in failing to timely complete construction on Unit 806; and (2) indemnification under an “Investment Agreement” executed by the parties contemporaneously with the Purchase and Sale Agreement¹ (NYSCEF Doc. No. 7).

¹ Plaintiff has also commenced two actions against Dhruv Pilani, the owner of Horizon, alleging that he failed to close on the sale of Unit 1003 in The Belnord and to pay rent on Unit 1003, under index numbers 160545/2020 and 655330/2020. On November 29, 2021, all three actions were consolidated for all pre-trial purposes by order of the Court (Hon. Verna L. Saunders) (NYSCEF Doc. No. 59).

Plaintiff now moves for an order granting it partial summary judgment on its complaint and dismissing defendant's first and second counterclaims, arguing that the Investment Agreement is not enforceable against plaintiff because it is not a signatory to that agreement.

FACTUAL BACKGROUND

The following is undisputed unless otherwise noted.

The Belnord is a luxury residential condominium building located at on the Upper West Side of Manhattan. Plaintiff Belnord Partners LLC is the sponsor of The Belnord's conversion to condominiums and in that capacity sold individual condominium units to purchasers.

On or about February 26, 2020, plaintiff entered a Purchase and Sale Agreement with Horizon providing that plaintiff would sell Unit 806 of The Belnord to Horizon for a purchase price of \$6,516,532.00 (the "Purchase Agreement") (NYSCEF Doc. No. 23). This Purchase Agreement required Horizon to make a deposit of ten percent of the nominal purchase price (i.e., \$635,000.00) in two installments, with the first installment of \$312,500.00 due upon signing and the second installment of \$322,500.00 due ninety days after the execution of the Purchase Agreement or thirty days after the Offering Plan was declared effective (*Id.* at §4.1 and Rider at §2). Horizon paid the first installment upon the execution of the Purchase Agreement.

The Purchase Agreement also provided that if Horizon defaulted under the Purchase Agreement and failed to cure such default within thirty days after notice of same, plaintiff could cancel the Purchase Agreement and "retain all sums deposited by [Horizon] . . . as liquidated damages" (*Id.* at §§16.1, 16.2). The Purchase Agreement further provided that "any changes or additional provisions must be set forth in a rider attached hereto or in a separate written agreement signed by the parties hereto or by an amendment to the plan" (*Id.* at §45 [emphasis added]). The

Purchase Agreement was signed by Dhruv Piplani and by Ziel Feldman as authorized signatory of Belnord.

On or about June 30, 2020, plaintiff provided Horizon with a notice of default based upon its failure to pay the second installment of the deposit and directed Horizon to cure this default by July 30, 2020. Horizon did not do so. As a result, plaintiff cancelled the Purchase Agreement and directed the escrow agent to release Horizon's initial deposit from escrow. Horizon objected to such release, necessitating plaintiff's commencement of this action pursuant to section 12.10 of the Purchase Agreement.

In its Answer and its opposition to plaintiff's motion, Horizon asserts—and plaintiff strongly disputes—that that the parties entered into other agreements before and contemporaneously with their execution of the Purchase Agreement and that, under this latter agreement, plaintiff effectively assumed Horizon's obligations under the Purchase Agreement.

Horizon asserts, specifically, that in 2013 Piplani loaned three million dollars to non-party HFZ Capital Group LLC—a New York real estate developer that, at the time of the loan, controlled the managing partner of plaintiff through an indirect subsidiary,² which funds would be spent on The Belnord. Horizon adds that on or about February 26, 2020 (i.e., the same date as the parties executed the Purchase Agreement), Piplani entered into another contract with plaintiff. This agreement, entitled “Unit 806 Investment Agreement” provided, in pertinent part, as follows:

THIS INVESTMENT AGREEMENT (as may be amended, this “Agreement”) is dated as of February 26, 2020 and is made by and between Belnord Partners LLC, a Delaware limited liability company with its principal place of business at c/o HFZ Capital Group LLC, 600 Madison Avenue, 16th Floor, New York, NY (the “Sponsor”), HFZ Capital Group LLC, a New York limited liability company with its principal place of business at 600 Madison Avenue, 16th Floor, New York, NY

² Horizon's principal, Dhruv Piplani, states that “HFZ through a subsidiary was the sole managing member of the Sponsor until some time in 2018 or 2019, when an affiliate of Westbrook Partners (“Westbrook”), a large international investment fund with more than \$20 billion under management, became a co-managing member. In or about January 2021, Westbrook became the sole managing member” (NYSCEF Doc. No. 40 [Piplani Aff. at fn. 1]).

10022, and its affiliated entities for the properties located at 255 West 86th Street (the “Belnord”) (collectively as “HFZ”) and Dhruv Piplani, 16A 152 Tai Hang Road, Hong Kong (“Investor”). HFZ and Grantee are sometimes each referred to herein as a “Party” and collectively as the “Parties”).

A. On July 30, 2013, Investor made a loan to HFZ in the original principal amount of Three Million and 00/100 (\$3,000,000) Dollars (the “Original Loan”), which was evidenced by that certain Promissory Note for such amount (the “Original Note”), and which was personally guaranteed by Nir Meir and Ziel Feldman (each a “Guarantor” and together the “Guarantors”) pursuant to that certain Guaranty (the “Original Guaranty”, and together with the Original Note, the “Original Loan Documents”), each dated as of July 30, 2013.

B. On and as of December 31, 2014, the Original Loan Documents were modified, amended and restated to, among other things, reflect an outstanding principal balance on the Original Loan of Three Million Five Hundred Forty Thousand and 00/100 (\$3,540,000) Dollars (the “Modification” and the Original Loan, as modified by the Modification, the “Loan”) and HFZ granted Investor rights resembling membership interests in HFZ RES Portfolio Member LLC.

C. On and as of December 31, 2017, the Modification and the Loan were amended and restated to, among other things, reflect an outstanding principal balance on the Loan of Five Million Eight Hundred Thirty Two Thousand Two Hundred Sixty Eight and 44/100 (\$5,832,268.44) Dollars and an extension of the Maturity Date to December 31, 2018 and HFZ and Investor agreed to convert the Loan into a credit against the purchase of a unit at the Belnord for a purchase price equal to \$1500 per square foot, fully renovated.

D. On and as of December 31, 2018, the Modification and the Loan were amended and restated to, among other things, reflect an outstanding principal balance on the Loan of Six Million Eight Hundred Eighty Two Thousand Seventy Six and 76/100 (\$6,882,076.76) Dollars and an extension of the Maturity Date to December 31, 2019

E. Investor has entered in a purchase agreement (the “Contract”) through its wholly owned affiliate, Horizon Select LLC, with Belnord Partners LLC (the “Sponsor”) for the purchase of the unit 806 (the “Unit”) at 255 West 86th Street (the “Belnord”) as of the date hereof.

NOW THEREFORE, the Parties agree as follows:

1. HFZ or Sponsor shall pay any deposit required under the Contract when required by the Contract. At the Closing, HFZ or Sponsor shall pay, credit or cause to be paid or credited at the Closing, for the Benefit of the Investor, amounts equal to (i) the purchase price under the Contract, and (ii) all other amounts required to be paid by purchaser under the Contract or in connection with the Closing, including,

without limitation, any New York City “Mansion” taxes due on the purchase price (together, the “HFZ Credits”).

2. HFZ shall cause the Sponsor to cause the Closing to occur no later than eighteen (18) months from the date hereof (the “Outside Closing Date”). If the Closing does not occur by the Outside Closing Date, the Investor may, at any time after the Outside Closing Date, elect to call for the repayment of the Loan, in which case (i) the Loan and all accrued interest thereon shall become immediately due and payable and (ii) HFZ shall cause the Sponsor to terminate the Contract and pay the Deposit to the Investor and the amount of the Deposit paid to the Investor shall be credited against the outstanding balance of the Loan, and Guarantors shall indemnify Investor against any obligations under the Contract and guaranty the payment of the Deposit to the Investor.

3. Provided that the Closing occurs as provided in Paragraph 2 above and the balance of the Loan is paid in full on the Closing Date, the principal balance of the Loan shall be reduced by \$6,250,000 to \$632,076.76. If the Closing shall not occur as provided in Paragraph 2 above or the balance of the Loan is not paid in full on the Closing Date, the Loan shall continue to accrue interest until repaid in full

...

5. The outstanding balance of the Loan shall be reduced by the amount of the HFZ Credit upon the Closing. The balance of the Loan shall be paid within 30 days of the Closing Date unless extended by HFZ and the Lender.

6. The payment of the Loan, as modified by this Agreement, shall continue to be guaranteed pursuant to the terms of the Original Guaranty. Attached hereto as Exhibit B is a true and correct structure chart showing HFZ’s ownership interest in the Belnord and its management of the Sponsor. The Guarantors are authorized signatories and signing on behalf of the Sponsor and HFZ for this agreement and the Guarantors will cause HFZ or Sponsor to apply the Loan at the Closing pursuant to paragraph 1 above. The Guarantors hereby indemnify and hold harmless Investor from any and all claims and expenses, including legal fees and expenses, arising out of any claim for any amount due under the Lease from Investor that arises prior to the Closing.

7. The timing of the closing of the Unit pursuant to the Contract, and funding of the amounts owed to Sponsor are under the control of HFZ and any default by Investor under the Contract would be caused by HFZ or Sponsor. HFZ, Sponsor and the Guarantors (each an “Indemnitor” collectively the “Indemnitors”) therefore will, jointly and severally, at all times, indemnify, defend, and hold harmless Investor from and against any and all damages, losses, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, charges, or expenses of whatsoever kind or nature, including reasonable attorneys’ fees and disbursements that are incurred by the Investor (collectively, “Losses”) arising out

of or related to the Contract, including, without limitation from any and all obligations, covenants, representations, and warranties contained therein (such obligations are collectively referred to as the “Indemnity Obligations”. The Indemnitor shall not indemnify an Indemnitee for any Losses which result from the Investor’s willful misconduct.

(NYSCEF Doc. No. 46 [Investment Agreement] [emphasis added]).

The Investment Agreement was signed by Piplani and by Nir Meir as “Authorized Signatory” of HFZ.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). “Once this 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]). In reviewing a motion for summary judgment, the Court “must view the evidence in the light most favorable to the nonmoving party, including drawing all reasonable inferences in favor of the nonmoving party” (Vega v Metro. Transportation Auth., 212 AD3d 587, 588 [1st Dept 2023]).

Plaintiff’s motion is denied. While plaintiff has met its initial burden through undisputed evidence that defendant failed to pay the second installment of the deposit as required under the Purchase Agreement and that plaintiff is entitled, under the Purchase Agreement, to retain the deposit upon such default (361 Broadway Assoc. Holdings, LLC v Morales, 195 AD3d 497 [1st Dept 2021]), Horizon has raised an issue of fact as to whether its obligations under the Purchase Agreement were effectively assumed by plaintiff through its execution of the Investment

Agreement, which obligates plaintiff or HFZ Capital Group LLC to, inter alia, pay all outstanding amounts due under the Purchase Agreement at the closing.

Plaintiff asserts that the Investment Agreement is not signed by plaintiff or anyone acting on plaintiff's behalf and argues that, as a result, enforcement of the Investment Agreement against plaintiff is barred by General Obligations Law sections 5-701(a)(2) and 5-703—which require, respectively, that an agreement containing a “promise to answer for the debt, default or miscarriage of another person” or “concerning real property” are in writing and subscribed by either the party to be charged or that party's lawfully authorized agent—as well as section 45 of the Purchase Agreement, which requires that any amendments must be set forth in a separate written agreement signed by the parties to the Purchase Agreement, and the “hornbook law” principle that a contract cannot be enforced against a non-signatory who has not affirmatively assumed the contract.

The Court disagrees. Assuming, for purposes of this motion, that Meir had authority through HFZ Capital Group LLC to bind Belnord Partners LLC, his signature on the Investment Agreement satisfies the requirement of the Statute of Frauds³ and Purchase Agreement, in light of the fact that the Investment Agreement names Belnord Partners LLC as a party to the agreement, states that Belnord Partners LLC is affiliated with and managed by HFZ Capital Group LLC, and, most importantly, provides that Meir is signing on behalf of HFZ Capital Group LLC and Belnord Partners LLC (See Sweedler v DSJS, Inc., 111 AD3d 416 [1st Dept 2013]; see also Discovision Assoc. v Fuji Photo Film Co. Ltd., 2008 NY Slip Op 31697[U] [Sup Ct, NY County 2008] [“While it is true ... that generally a contract binds only the signatory, where the signatory has the authority to bind its affiliates, those affiliates can also be bound”], affd 296 AD2d 318 [1st Dept 2002]). The absence of Belnord Partners LLC from the signature block does not undercut this conclusion.

³ For purposes of this motion the Court assumes, without deciding, that the Investment Agreement falls within the ambit of GOL §5-703.

Moreover, even if the Court construed the omission of Belnord Partners LLC in the signature block as indicating an intent to bind only HFZ Capital Group LLC, such a contradiction would not be grounds for summary judgment but an ambiguity to be resolved at trial (See Georgia Malone & Co., Inc. v E & M Assoc., 163 AD3d 176, 177 [1st Dept 2018]; see also Emerald Dev. Corp. v Real Equities, Inc., 251 AD2d 180, 181 [1st Dept 1998]).

The cases relied on by plaintiff, Mercator Corp. v Windhorst and Amerimax Capital, LLC v Ender, are readily distinguishable—while both cases involve claims for breach of contract which were dismissed against defendants who were not signatories to the alleged contract, nothing within the text of those agreements set out a clearly stated intent to bind the defendant in question (Mercator Corp. v Windhorst, 159 F Supp 3d 463 [SDNY 2016]; Amerimax Capital, LLC v Ender, 2017 NY Slip Op 30263[U], 4 [Sup Ct, NY County 2017] [emphasis added]).

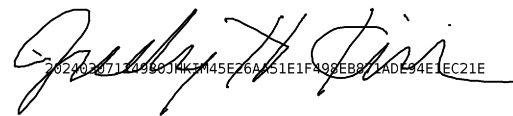
Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment is denied; and it is further

ORDERED that defendant is to serve a copy of this decision and order, with notice of entry, on plaintiff within thirty days of the date of this decision and order; and it is further

ORDERED that the parties are to appear for a preliminary conference in Part 4 (80 Centre Street, room 308) at 10:00 a.m. on May 31, 2024.

This constitutes the decision and order of the Court.



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HON. JUDY H. KIM, J.S.C.

3/7/2024
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: