SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: HON. CAROLYN E. WADE, J.S.C.

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733 DEVELOPMENT LLC,

Plaintiff,

-against-

PARK PREMIUM ENTERPRISES INC. d/b/a PARK DEVELOPERS AND BUILDERS, and AARON LEBOVITS,

Defendants.

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Index No. 523644/2021

DECISION AND ORDER

Mot. Seq. No. 7

Upon the foregoing cited papers, and after oral argument, defendant Park Premium Enterprises Inc. d/b/a Park Developers and Builders ("Defendant"), moves for summary judgment on all of plaintiff, 733 Development Corp.'s ("Plaintiff") claims, pursuant to CPLR § 3212.

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of triable issues" (*Dal Constr. Corp. v. New York*, 108 AD2d 892 [2d Dept 1985]). "Moreover, the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990] [quotation marks omitted]; *see also F. Garofalo Elec. Co. v. NY Univ.*, 300 AD2d 186, 188 [1st Dept 2002] ("In deciding a motion for summary judgment, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues").

Defendant was hired by Plaintiff to act as the general contractor for the ground up construction of a nine-story, thirty-unit residential condominium building located at 733 Ocean

Avenue, Brooklyn, N.Y. (*See* NYSCEF Doc. No. 126). Defendant seeks summary judgment on Plaintiff's breach of contract, unjust enrichment and trust fund diversion claims.

Defendant argues that Plaintiff materially breached the parties' construction contract by failing to remove a Stop Work Order ("SWO") that was in place at the property, and which precluded construction work from commencing (*see* NYSCEF Doc. No. 127). Defendant argues that under their contract, the responsibility for removing the SWO lay with Plaintiff, pursuant to section 7.6.3. Defendant further argues that Section 14.1.2 allows the Contractor to terminate the contract due to delays not attributable to its own actions, including the SWO.

In opposition to the motion, Plaintiff argues that the SWO was not lifted because Defendant refused to obtain an acceptable insurance policy and further refused to perform any work unless Plaintiff accepted its existing policy. Plaintiff further argues that after the contract was terminated, Defendant wrongfully retained a $100,000 refundable deposit of funds that Defendant did not earn under the contract.

Plaintiff has presented evidence that the contract required Defendant to obtain an insurance policy that was acceptable to Plaintiff's insurance broker (*see* NYSCEF Doc. No. 126, Rider ¶ 22). Plaintiff also has presented evidence that Defendant's Commercial General Liability ("CGL") Policy in place at the time was not acceptable to Plaintiff or its broker, because the policy would not provide coverage for the construction of the planned eighty-foot-tall building (*see* NYSCEF Doc. No. 131; NYSCEF Doc. No. 150 at p. 71). Plaintiff raised these issues with Defendant, but Defendant disagreed as to the sufficiency of its policy. Defendant refused to perform any work at the project while the insurance issue was disputed (*see* NYSCEF Doc. No. 140 ¶ 29). Subsequently, Defendant's insurance policy expired, which Plaintiff claims precluded the SWO from being lifted, because the required forms could not be submitted to the Department of

Buildings without the general contractor having a valid policy in place (*see* NYSCEF Doc. No. 140 ¶¶ 32-36).

The facts recited above demonstrate the existence of disputed issues of material fact that preclude summary judgment as to Plaintiff's breach of contract claim. Viewed in a light most favorable to the party opposing the motion, the Court can not find, at this juncture, that Defendant held no responsibility for the continuation of the SWO.

Plaintiff has also presented evidence that, under the contract, it provided Defendant with a refundable $100,000 deposit, which was to be used for Defendant's construction manager fee, "earned as a percentage of total work completed" (*see* NYSCEF Doc. No. 126, Rider ¶¶ 32-33). Plaintiff further presented evidence that Defendant has refused to return the deposit money (*see* NYSCEF Doc. No. 125, Tr. 30:3-32:18). On the other hand, Plaintiff alleges that Defendant failed to present any evidence that it earned the funds that it has wrongfully retained. This also demonstrates the existence of disputed issues of material fact concerning Plaintiff's breach of contract claim and whether Defendant materially breached the contract. The same facts also preclude summary judgment in favor of Defendant on Plaintiff's unjust enrichment claim (*see Mobarak v. Mowad*, 117 AD3d 998, 1001 [2d Dept 2014] [elements of unjust enrichment claim are "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered"].

Finally, Plaintiff has presented evidence that Defendant testified that the $100,000 deposit was not held in a trust account, pursuant to N.Y. Lien Law § 70, but was commingled with Defendant's general operating account (*see* NYSCEF Doc. No. 125, Tr. 30:3-32:18). Conversely, Defendant maintains that the deposit was to be applied solely as a management fee, pursuant to

sections 6.12 and 33 of the Rider. This dispute further precludes judgment in favor of Defendant on Plaintiff's trust fund diversion claim.

In accordance with the foregoing, it is hereby

ORDERED that Defendant's motion for summary judgment, pursuant to CPLR § 3212, is hereby **denied in its entirety**.

This constitutes the Decision and Order of the Court.

DATE: 10/7/2024

HON. CAROLYN E. WADE, J.S.C.

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT

KINGS COUNTY CLERK
FILED
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