Charles Condominiums, LLC v Victor RPM First, LLC

2025 NY Slip Op 30252(U)

January 8, 2025

Supreme Court, New York County

Docket Number: Index No. 657040/2019

Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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THE CHARLES CONDOMINIUMS, LLC,

Plaintiff,

- v -

VICTOR RPM FIRST, LLC,VRE DEVELOPMENTS INC. D/B/A VICTOR GROUP, MOSHE SHUSTER, RAN KOROLIK, 1355 FIRST AVENUE FEE HOLDER LLC,1355 FIRST AVENUE LAND OWNER LLC, RAMIN KAMFAR, and PHILIP MENDLOW

Defendants.

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INDEX NO. 657040/2019

MOTION DATE 04/17/2024

MOTION SEQ. NO. MS 006

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

This action arises out of a burst pipe that caused millions of dollars in damages to a luxury residential condominium owned by plaintiff The Charles Condominiums, LLC (Charles or plaintiff). Charles commenced this action against defendants, including defendant Victor RPM First LLC (Victor), for breach of contract for construction defects that allegedly led to the pipe burst (NYSCEF # 1, Complaint). Charles thereafter moved for partial summary judgment against Victor on the issue of liability only, and by Decision and Order dated April 5, 2024, this court denied the motion (NYSCEF # 173, Prior Decision). Charles now moves to renew its motion pursuant to CPLR 2221 (NYSCEF # 175, Notice of Motion). Victor cross-moves to renew and reargue pursuant to CPLR 2221 (NYSCEF # 186, Notice of Cross-Motion). For the following reasons, Charles's motion to renew is granted and Victor's motion to renew and reargue is denied. Upon renewal, Charles's motion for partial summary judgment on Victor's liability for breach of contract is granted.

Background

As explained in the Prior Order, Charles and Victor entered into an Amended and Restated Development Management Agreement (Development Agreement) regarding the construction of a luxury high-rise condominium in Manhattan's Upper East Side neighborhood (the Condominium or the Project) (NYSCEF # 118, Development Agreement). The gist of the agreement was that Charles would provide all equity capital while Victor would "undertake and complete all tasks

necessary to construct a luxury residential condominium" (*id.* at Third WHEREAS Clause). Specifically, Victor was "solely responsible for the supervision of all of the Project Work" (*id.* § 5 [b]). However, Charles also was allowed to choose Triton Construction (Triton) to perform the actual construction work (*id.* § 4 [a]).

Most relevantly, Victor was to "complete" the Project, defined as the point at which "all of the conditions specified in the definition of 'Complete the Project' in the *Construction Loan Documents* have been met" (*id.* § 5 [d] [emphasis added]). Neither party filed the Construction Loan Documents at the time of the original motion.

In July 2016, the now-finished Condominium was damaged when a pipe on the 16th floor burst, leaking water and glycol through several units (the Incident) (NYSCEF # 116, Michael Konig Aff, ¶ 18; NYSCEF # 123, Exh F of Konig Aff, at 46). Several uncontroverted reports determined the Incident was caused by construction defects (NYSCEF # 116 ¶¶ 20-29; *see* NYSCEF #s 120-124, Exhs D, E, F, G to Konig Aff.). Charles ultimately spent $2 million on repairs and allegedly lost opportunities to sell six units at favorable prices (NYSCEF # 116, ¶¶ 52-53, 65-69; NYSCEF # 140, Settlement Agreement Bt/wn Charles & Condo. Bd.; NYSCEF # 141, Amendment to Condo Offering Plan; NYSCEF # 142, Sales Analysis).

Charles filed the complaint in this case on November 26, 2019, alleging that Victor breached the Development Agreement by allowing the construction defects to occur (NYSCEF # 1). On July 14, 2023, Charles moved for partial summary judgment regarding Victor's liability only (NYSCEF # 115). Charles argued that the Development Agreement undisputedly gave Victor the obligation to "perform," "cause," and "supervise" the construction, and therefore Victor was responsible for any construction defects (NYSCEF # 147, Charles's Original MOL). Victor opposed, arguing that (1) the motion should be denied as premature given the lack of discovery; (2) the terms "perform," "cause," and "supervise" in the Development Agreement were ambiguous such that Victor had no obligation regarding the ultimately "quality" of the construction; (3) Triton and its subcontractors were in fact responsible for causing the construction defects, not Victor; and (4) Victor had no obligation to pay for any damage pursuant to § 9(e) and other sections of the Development Agreement (NYSCEF # 170, Victor's Original MOL). Neither party made any arguments about or filed copies of the Construction Loan Documents.

On April 5, 2024, this court issued the Prior Order denying the motion (NYSCEF # 173) on the basis that there was no question that there were construction defects and that Victor could not shift blame for those defects to other parties if responsibility was truly Victor's (*id.* at 5, 6). The only real dispute was whether Victor was contractually responsible for the "quality" of construction—*i.e.*, those defects (*id.*). But that question could not be answered without the Construction Loan Documents. Specifically, the Development Agreement gave Victor "sole responsibility" to "supervise" the Project (*id.*). "Supervise" in turn is

defined in the dictionary as "to watch a person or activity to make certain that everything is done correctly, safely, etc." (*id.*, quoting "Supervise." Cambridge Online Dictionary, https://dictionary.cambridge.org/us/dictionary/english/supervise [retrieved February 24, 2024]). Turning to the text of the Development Agreement to determine what "done correctly" meant in context, the Third Whereas Clause proved helpful by clarifying that the goal of the Development Agreement was for Victor to "undertake and *complete* all tasks necessary to construct" the Project (*id.*, quoting NYSCEF # 118 at Third WHEREAS Clause [emphasis added]). The Development Agreement further defined "complete" as "when all of the conditions specified in the definition of 'Complete the Project' in the Construction Loan Documents have been met" (*id.*, quoting NYSCEF # 118 § 5[d]). Thus, without the Construction Loan Documents, a determination could not be made as to what is required to "complete" the Project, necessitating denial (*id.* at 6).

Charles now moves for renewal under CPLR 2221, while Victor cross-moves to renew and reargue. Charles files in support of its motion three documents that it claims are the missing Construction Loan Documents: (i) an Acquisition Loan Agreement (ALA) between Charles as borrower and non-party Starwood Property Mortgage LLC (Starwood) as lender; (ii) a Building Loan Agreement (BLA) between Charles and Starwood; and (iii) a Soft Costs Loan Agreement (SCLA) between Charles and Starwood (NYSCEF # 183, Charles Renew Br., at 4; *see also* NYSCEF # 179, ALA; NYSCEF # 180, BLA; NYSCEF # 181, SCLA).

The ALA does not define "complete" and instead incorporates the definition from the BLA (NYSCEF # 179 at *12). The BLA in turn defines "Complete, Completion, or Completion of the Project" as

> "The stage at which the development, construction and equipping of the Project shall be one hundred percent (100%) complete in accordance with the Approved Plans for the Project, all Laws, and all Governmental Approvals, all as determined by Lender [Starwood] in its sole reasonable discretion"

(NYSCEF # 180 at *13-*14). The SCLA contains an identical definition (*see* NYSCEF # 181 at *14).

Section 7.15 of both the BLA and SCLA elaborate on that definition by specifying fourteen conditions for the ultimate completion of the Project (NYSCEF # 180 § 7.15 ["Completion of the Project"]; NYSCEF # 181 § 7.15 [same]). Charles highlights § 7.15(a) in particular, which says "development, construction, equipping and finishing of the Project has been 100% completed substantially in accordance with the Approved Plans . . . " (NYSCEF # 180 § 7.15 [a]; NYSCEF # 181 § 7.15 [a]; *see also* NYSCEF # 183 at 10-11).

Charles points out that § 10.1 of both the BLA and SCLA contain the same language about "development, construction, equipping and finishing of the Project"

as § 7.15(a) (NYSCEF # 180 § 10.1 ["Construction"]; NYSCEF # 181 § 10.1 [same]; *see also* NYSCEF # 183 at 11). Section 10.1 in both contracts goes on to require that the Project "be completed in a *good and workmanlike manner* with materials of high quality in accordance with the Approved Plans, *free of defects*, and free from liens or security interest other than the Permitted Exceptions" (NYSCEF # 180 § 10.1 [b] [emphasis added]; NYSCEF # 181 § 10.1 [b] [same]).

In its motion to renew, Charles argues that the court may consider these Construction Loan Documents because the court *sua sponte* raised the definition of "complete" as it relates to Victor's liability for the "quality" of construction (*see* NYSCEF # 183 at 6-7). Charles further argues that the court erred by applying the Development Agreement's technical definition of "complete" to the Third Whereas clause because that term is not capitalized ("Complete") in that clause (*id.* at 9-10). Charles argues in the alternative that even if the technical definition did apply, the Construction Loan Documents contain several provisions that expressly require the Project to be completed "in a good and workmanlike manner . . . free of defects" (*id.* at 10-11, quoting NYSCEF # §§ 7.15 [a], 10.1 [b]).

Victor opposes and files its own cross-motion to renew and reargue raising a bevy of arguments largely unrelated to the Construction Loan Documents (NYSCEF # 195, Victor Cross Br.). For instance, in support of reargument, Victor argues that the court erred in treating Victor as conceding there were construction defects when Victor failed to produce evidence contradicting the various reports (*id.* at 17). Victor also argues the court failed to consider various provisions of the Development Agreement that put the burden of design and construction on other parties hired by Charles (*id.* at 18-19). Victor claims that the court erred in applying the ordinary definition of "supervise" rather than the legal definition from Black's Law Dictionary (*id.* at 20-21). In support of renewal, Victor points to the BLA's definition of "substantially complete" to argue that Victor's duties had ended long before the Incident (*id.* at 27-29). Victor also submits two "Completion Guaranties" that it argues are incorporated by the Construction Loan Documents and which remove responsibility for any construction defects (*id.* at 24-25). Finally, Victor argues that the Project was ultimately delivered without defects (*id.* at 25-26).

Discussion

CPLR 2221(e)(2) and (3) provides that a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination.... [and] ... contain reasonable justification for the failure to present such facts on the prior motion." A motion for renewal "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Alternatively, renewal is appropriate where the new facts "address[] an issue raised *sua sponte* by the court in the original decision"

(*First Mercury Ins. Co. v Nova Restoration of NY, Inc.*, 203 AD3d 598 [1st Dept 2022] quoting *Hernandez v New York City Hous. Auth.*, 129 AD3d 446, 446 [1st Dept 2015]).

The standards for reargument are well-settled. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Motions for reargument based on a misapprehension of the law must show that the court misapplied a controlling principle of law or improperly presented arguments not previously advanced. (*Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 472 [1st Dept 1984]). Reargument is not designed to afford the unsuccessful party successive opportunities to present arguments different from those originally asserted (*id; citing Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

I. *Charles's Motion to Renew*

Applying the above principles, the court concludes that renewal is appropriate here because the court *sua sponte* raised an issue about whether the Construction Loan Documents defined "complete" in such a way that gave Victor responsibility for the "quality" of the ultimate construction (*see First Mercury*, 203 AD3d at 598).

To the extent that Charles argues that the technical definition of "complete" should not apply to the Third Whereas clause and/or that the Construction Loan Documents are irrelevant, this argument is denied and Charles is referred to the Prior Order. The only thing to add is that the Third Whereas Clause leads to the technical definition of "complete" whether or not the clause itself uses that definition. That clause clarifies that the goal of the Development Agreement is for Victor to "undertake and complete all tasks necessary to construct" the Project (NYSCEF # 118 at Third Whereas Clause). It is therefore vital to define what it means to "complete" the Project to know whether it is finished and what is promised in so finishing. Thus, the technical definition of "complete" is necessary.

Regardless, the Construction Loan Documents that Charles submitted show that Victor is responsible for the quality of the work. Pursuant to the BLA and SCLA § 7.15(a), "[t]he development, construction, equipping and finishing of the Project has been 100% completed substantially in accordance with the Approved Plans . . . " (NYSCEF # 183 at 10-11, citing NYSCEF # 180 § 7.15[a]). By extension, section 10.1(b) adds that the work needed to be completed in "in a good and workmanlike manner with materials of high quality in accordance with the Approved Plans, free of defects" (*id.*, citing NYSCEF # 183 § 10.1[b]). Thus, despite Victor's arguments to the contrary, Victor was responsible for the quality of the construction and is therefore liable for the construction defects.

II. Victor's Cross-Motion to Renew and Reargue

Based on the above analysis, Victor's cross-motion is moot. In any event, the motion fails on the merits.

Victor's three arguments in support of renewal are without merit. Victor first argues that the Project was "substantially completed" as defined in the BLA and SCLA and therefore Victor had no responsibility for the construction defects (NYSCEF # 195 at 27-29). But as Charles points out, the definition of "substantial completion" in the BLA is irrelevant to whether Victor is liable for the quality and by extension the construction defect which led to the Incident (*see* NYSCEF # 196, Charles Reply, at 8-9).

Victor next argues that two Completion Guaranties signed by principals of Charles and Victor expressly revoke Victor's responsibility for the any construction defects (NYSCEF # 195 at 24-25). As an initial matter, if these documents were as powerful as Victor claims, Victor should have filed them in opposition to the initial motion (*see Kassis*, 182 AD2d at 27). Victor responds that the Completion Guaranties were incorporated by the BLA, implying that they should be considered as Construction Loan Documents (NYSCEF # 195 at 24). But unlike the Construction Loan Documents submitted by Charles, the Completion Guaranties do not address the issues about "quality" raised *sua sponte*. Because Victor does not offer any other justification for failing to raise the Completion Guaranties, they cannot be considered (*see Kassis*, 182 AD2d at 27).

Finally, Victor cannot seriously argue that the Project was delivered without defects given the Incident.

Victor's arguments in support of re-argument fair no better. Victor fails to point to any particular facts, case law, or precedent the court misapplied (*see Kassis*, 182 AD2d at 27). Victor's essential assertions in this regard are that the court (a) failed to address the provisions of the Development Agreement putting other companies in charge of construction, (b) did not address that § 9(e) of the Development Agreement prohibited money damages, and (c) applied the standard dictionary definitions of "supervise" rather than definitions from Blacks Law Dictionary (NYSCEF # 195 at 19). However, defendants raised the arguments about § 9(e) and other construction companies in the original briefing (NYSCEF # 170 at 9-10), and so, to be clear, those arguments were rejected. As for the dictionary definitions, the Blacks definitions do not seriously shift the analysis. Victor's remaining arguments merely raise alternative logic that could have been advanced by Victor at the time of the original motion.

In short, Victor's motion is based solely on arguments and evidence it had in its possession at the time of the original motion but chose not to raise. Victor cannot

now raise new arguments and old evidence just because its original arguments failed.

Conclusion

Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff The Charles Condominiums LLC's motion to renew pursuant to CPLR 2221 is granted, and defendant Victor RPM First LLC's motion to renew and reargue is denied; and it is further

ORDERED that, upon renewal, plaintiff's motion for partial summary judgment on Victor RPM First LLC's liability for breach of contract (MS 005) is granted.

1/8/2025
DATE

MARGARET A. CHAN, J.S.C.

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