Empire Blvd. Holdings LLC v Empire McKeever Hgts. LLC
2026 NY Slip Op 30226(U)
January 12, 2026
Supreme Court, Kings County
Docket Number: Index No. 532561/2025
Judge: Reginald A. Boddie
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At an IAS Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 12th day of January 2026.

P R E S E N T:
Honorable Reginald A. Boddie
Justice, Supreme Court

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EMPIRE BOULEVARD HOLDINGS LLC,

Plaintiff,

-against-

EMPIRE MCKEEVER HEIGHTS LLC,

Defendant.

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Index No. 532561/2025

Cal. No. 8 MS 1

Decision and Order

The following e-filed papers read herein: NYSCEF Doc. Nos.
MS 1 5-17

Defendant's motion seeking an order dismissing plaintiff's complaint in its entirety pursuant to CPLR 3211[a][1] and [7] is decided as follows:

On or about December 31, 2024, the parties entered into a Purchase and Sale Agreement (the "PSA") for the sale of real property known as 73-97 Empire Boulevard, 79 McKeever Place, and 99-101 Empire Boulevard, in Brooklyn, New York (the "Property"). Under section 20 of the PSA, defendant buyer was prohibited from assigning its rights under the PSA, engaging in any resale of the Property through a "double escrow" or similar procedure, or effectuating a change in control or ownership interests in defendant without plaintiff's prior written consent as per the terms set forth in section 20 of the PSA. Although section 20 of the PSA permitted defendant to assign its interests

to a "Controlled Affiliate" (as that term is defined in the PSA) under limited circumstances, defendant was required to give timely notice, deliver and execute documentation to that effect, and provide proof of "affiliate status" to plaintiff.

According to plaintiff's complaint, defendant discussed with plaintiff a proposed assignment by defendant in connection with a ground lease transaction in May or June 2025. Under defendant's purported proposal, it would assign the Property and obtain financing that would be invested into the development of the Property, but the assignee would lease the Property to defendant pursuant to a long-term ground lease, such that defendant would remain in control of the Property. Accordingly, in or about June 2025, the parties entered into an amendment to the PSA (the "June Amendment"). Under the June Amendment, plaintiff consented to defendant's assignment of the Agreement to Montgomery Street Partners (or an affiliate thereof, including, without limitation, GLR Capital Investment LLC) provided that certain conditions were met. However, plaintiff alleges that defendant thereafter represented that it was no longer proceeding with the assignment and ground lease transaction.

On or about August 18, 2025, the parties closed on the sale of the Property (the "Closing"). By the instant action, plaintiff alleges that defendant breached section 20 prior to the Closing by assigning its interests to a third party without notice to plaintiff and, to the extent the assignee was a "Controlled Affiliate," defendant failed to provide proof of "affiliate status," as required by section 20 of the PSA. Plaintiff claims that it learned for the first time that defendant had breached section 20 of the PSA after the Closing. Plaintiff alleges that defendant's principal, Cheskie Weisz, enriched himself by at least $11,000,000.00 in connection with "an assignment transaction occurring at Closing," in violation of section 20 of the PSA.

In moving to dismiss plaintiff's complaint, defendant argues that plaintiff's breach of contract claim is precluded by the doctrine of merger since the Property closed, the deed was

delivered, and section 15 of the PSA indicates that no provision of the contract would survive delivery of the deed except as otherwise provided. Further, defendant argues that plaintiff's alleged discovery of the facts after the Closing is irrelevant under caselaw. In addition, because plaintiff was paid the entire amount contained within the PSA, defendant contends plaintiff suffered no damages from any alleged breach of contract. To the extent plaintiff claims that that there could be potential exposure from defendant's purported failure to pay transfer taxes on the LLC assignment, defendant submits this is pure conjecture, and, even if taken as true, that such damages are barred from qualifying as damages under the terms of the PSA.

Regarding the additional claims raised by plaintiff in its complaint for breach of the implied covenant of good faith and fair dealing and for declaratory judgment, defendant argues that these claims should be dismissed as duplicative of the breach of contract claim. Moreover, defendant contends that these claims fail since plaintiff received the "fruits of the contract" by proceeding to Closing.

Finally, defendant argues that it is entitled to sanctions because plaintiff's counsel was given ample opportunity to withdraw the instant action by letter dated September 22, 2025, which cited relevant law to show that a breach of contract claim could not have survived the Closing. Because plaintiff refused to withdraw the instant action, defendant contends it should be awarded fees, costs and sanctions in its favor.

In opposition, plaintiff argues that its breach of contract claim is not precluded by the merger doctrine since the language of section 20 indicates that it was intended to survive the Closing. In support, plaintiff points to the part of section 20 stating that "[a]n assignment...shall not relieve [McKeever] of any of its obligations...and [McKeever] shall remain liable on a joint and several basis with such assignee for the payment and performance of [McKeever's] obligations...which accrued prior to the date of such assignment." In addition, plaintiff states that section 20 references

section 17 of the PSA—a provision stating that it "shall survive the Closing"—and that the PSA "shall be binding upon, and shall inure to the benefit of, the undersigned parties and their respective successors and permitted assigns." Plaintiff contends that, if the obligations of section 20 were not intended to survive the Closing, it would make no sense for section 20 to be binding upon, inter alia, "successors."

Even if the language of section 20 did not expressly indicate that the parties intended for it to survive, plaintiff argues it would still have a claim because section 20 represents a "collateral undertaking," i.e., a contractual obligation that is extraneous to the sale of the realty, such as the obligation to build on the property. Because defendant made no attempt to demonstrate that section 20 was not collateral, plaintiff argues that defendant cannot attempt to do so in reply. Moreover, plaintiff contends that it makes no sense that defendant could breach the PSA, conceal its wrongdoing until the Closing, and then get away with the wrongdoing simply because the truth came out after the Closing. Plaintiff emphasizes that the situation herein differs from the cases cited by defendant because plaintiff was never provided any evidence of the assignment at or prior to the Closing and defendant's breach could not be discovered through publicly-available sources prior to Closing.

As for damages, plaintiff submits it has adequately alleged same insofar as it is seeking "amounts Plaintiff could have recovered had Defendant not deprived Plaintiff of the benefit it bargained for by breaching Section 20, and Plaintiff's potential tax-related exposure based upon Defendant's misconduct." Plaintiff contends that the uncertainty of the damages amount does not permit defendant to escape liability under settled caselaw.

Finally, regarding its other claims, plaintiff contends that it is entitled to plead in the alternative and that it would be premature to declare its alternative claims duplicative. Further, it is plaintiff's position that defendant's request for sanctions is frivolous since its claims are amply

supported by the law and, even if the court is ultimately unpersuaded by plaintiff's arguments, that that would not be a basis for sanctions.

In reply, defendant argues that plaintiff's complaint does not allege that section 20 is a collateral undertaking and, therefore, on a motion to dismiss the complaint, defendant was not required to refute the argument. Rather, that as the proponent, plaintiff is obligated to establish that the clause alleged is a collateral undertaking. In this regard, defendant argues plaintiff has failed to do so insofar as (1) section 20, titled "Assignments," unquestionably deals with the title and possession of land while a collateral undertaking is a contractual commitment that is not connected with the title or possession of land; and (2) the language highlighted by plaintiff to indicate post-closing obligations is misleading since plaintiff omits the relevant language stating "in the event of an assignment pre-closing," which establishes that the obligations of the buyer were up until the performance of buyer's obligation to close, a situation that has already occurred.

Discussion

"Generally, the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title" (*Davis v Weg*, 104 AD2d 617, 619 [2d Dept 1984] [citation omitted]). "However, this rule does not apply where there is a clear intent evidenced by the parties that a particular provision shall survive delivery of the deed, or where there exists a collateral undertaking" (*id.* [citations omitted]). "An undertaking that is collateral to the conveyance is not extinguished by the acceptance of the deed, regardless of the terms of the contract, because it is 'not a part of the main purpose of the transaction, that is, the conveyance of real estate, [and therefore] by [its] very nature may show an intent that [it] should not be merged in the deed'" (*Novelty Crystal Corp. v PSA Institutional Partners, L.P.*, 49 AD3d 113, 116 [2d Dept 2008] [internal and external citations omitted]). "The term "collateral undertaking" has been defined as a contractual commitment 'that is not connected with the title, possession or quantity of

land'" (*id. citing Alexy v Salvador*, 217 AD2d 877, 878 [1995]). The following contractual obligations have been found to be collateral: an obligation to build on the property; a seller's agreement to construct improvements on the property for the purchaser after the closing of title, to correct construction defects, or pay for the future maintenance of a common bulkhead; the designation of a particular area of a condominium development as common area; or an agreement to remodel an existing house (*id.* [internal citations omitted]).

Here, as asserted by defendant, under section 15, no provision of the PSA was to survive Closing "[e]xcept as otherwise expressly set forth" in the PSA. Although certain sections of the PSA reflect that they will survive Closing, as explicitly indicated in sections 17, 23, 24, 27, and 30, there is no similar language in section 20 that the obligations therein would survive. Given the foregoing, it is clear that the parties did not intend for section 20 to survive delivery of the deed (*see 19 Stanton St. LLC v 19 Stanton Realty LLC*, 199 AD3d 554, 554 [1st Dept 2021] ["The motion court correctly determined that under the merger doctrine, section 30.3 of the parties' agreement, which provided for attorneys' fees, did not survive the real estate closing, because, unlike other clauses of the agreement, section 30.3 did not state that it would survive the closing and transfer of the deed"]).

Plaintiff's contentions to the contrary, specifically, that section 20 is binding on "successors" and that it references section 17, which contains an explicit survival clause, are unavailing. The language within section 20 cited to, which provides: "Except as set forth in Section 17 above, this Agreement and the terms, covenants, conditions, and provisions hereof, and the obligations, undertakings, rights and benefits hereunder, including the exhibits and schedules hereto, shall be binding upon, and shall inure to the benefit of, the undersigned parties and their respective successors and permitted assigns" fails to imply that section 20 would survive Closing.

In addition, plaintiff fails to demonstrate that section 20 represents a collateral undertaking. Rather, section 20 unambiguously relates to title to the Property since the section concerns the parameters under which the buyer may assign its rights to the Property. As such, plaintiff's breach of contract claim is precluded by the merger doctrine.

For the same reason, plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing claim also fails (*see 98 Gates Ave. Corp. v Bryan*, 225 AD3d 647, 650 [2d Dept 2024]; *see also Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014] ["Further, the breach of the implied covenant of good faith and fair dealing claim 'may not be used as a substitute for a nonviable claim of breach of contract'"]). Plaintiff's remaining cause of action for declaratory judgment, which seeks a declaration that defendant "remains liable for pre-Closing breaches of the PSA, notwithstanding the PSA's survival provision" is duplicative of the breach of contract claim and without merit given the court's analysis above.

Lastly, the court declines to award sanctions to defendant. Defendant failed to establish that plaintiff engaged in frivolous conduct by commencing the instant action.

Conclusion

Based on the foregoing, that part of defendant's motion seeking dismissal of plaintiff's complaint pursuant to CPLR 3211 is granted. The complaint is hereby dismissed. The motion is otherwise denied.

ENTER:

Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.