SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Jeffrey K. Oing **PART** 48
Justice

Index Number : 603299/2009
LATIPAC CORP.
vs.
BIRCHARD, THOMAS R.
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

"This motion is decided in accordance with the annexed decision and order of the Court."

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/30/12

JEFFREY K. OING, J.S.C.
J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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LATIPAC CORP.,

Plaintiff,

-against-

THOMAS R. BIRCHARD and SARAH HADDOCK, a/k/a SALLY HADDOCK,

Defendants.

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Index No.: 603299/09

Mtn Seq. No. 002

DECISION AND ORDER

JEFFREY K. OING, J.:

Defendants, Thomas R. Birchard and Sarah Haddock, a/k/a, Sally Haddock, move, pursuant to CPLR 2221, for an order granting them leave to reargue a decision and order of this Court, entered June 23, 2011, denying their cross-motion for summary judgment.

Background

In the prior cross-motion, defendants moved to dismiss the complaint and for a declaration that plaintiff, Latipac Corp., breached the parties' contract entitling defendants to retain a $150,000 deposit. Defendants contend that in denying their cross-motion for summary judgment, this Court misapprehended and misinterpreted the terms of the written contract (the "contract") and two accompanying riders (the "first rider"; the "second rider"), dated January 2009, for the purchase and sale of the real property known as 115 Avenue A, New York, New York (the "premises")(Moving Papers, Ex. D).

Pursuant to the contract, plaintiff was to purchase the premises from defendants for $3 million. Simultaneously with the

execution of the contract, plaintiff delivered to defendants a contract deposit in the amount of $150,000. The parties designated June 18, 2009 as the "time of essence" closing date (Moving Papers, Ex. I; Ex. D, ¶ 24).

On May 20, 2009, plaintiff's counsel sent defendants' counsel a letter providing the following:

> Purchaser [plaintiff] has learned that the two commercial units in the Premises have been combined into a single unit in contravention of the certificate of occupancy for the Premises. Compounding that problem is the fact that a review of Department of Buildings records reveals that the alteration of the two units into one was performed without proper application, permitting, inspection and sign off. The alteration was, and is, illegal.
>
> Paragraph 6 of the Contract expressly provides that Purchaser [plaintiff] is not required to accept title to the Premises where the existing structure of the Premises violate applicable regulations and ordinances. It appears that Seller [defendants] cannot meet its contractual obligations due to this illegal alteration.
>
> Purchaser [plaintiff] has several other issues that appear to remain unperformed or unsatisfied by Seller [defendants], but given the significance of the illegal alteration and Seller's [defendants] apparent inability to deliver the Premises as required, the other issues are likely rendered moot.

(Moving Papers, Ex. E).

Defendants argue that paragraph 6 of the contract is inapplicable to the facts and circumstances of this action. Paragraph 6 provides as follows:

> Said premises are sold and are to be conveyed subject to:

> a. Zoning regulations and ordinances of the city, town or village in which the premises lie which are not violated by existing structures.

Defendants argue that paragraph 6 of the contract applies only to "zoning regulations and ordinances" and does not apply to any and all regulations and ordinances, as alleged by plaintiff. The phrase "zoning regulations and ordinances" refers solely to issues of zoning, not the building code or any Department of Buildings ("DOB") violations. Further, paragraph 8(c) of the first rider, which supersedes any conflicting provisions of the printed form of the contract, applies to "[v]iolations filed in any governmental department having jurisdiction, against or affecting the premises" (Moving Papers, Ex. D).

Paragraph 8(c) provides that:

> The following shall not be considered objections to title:
>
> (c) Violations filed in any governmental department having jurisdiction, against or affecting the premises. The Purchaser acknowledges that will make the necessary searches made therefor. Purchaser agrees to assume the duty and obligation of complying with any such violations after closing. Seller shall pay all fines levied prior to closing. This clause shall survive the delivery of the deed.

(Moving Papers, Ex. D). Defendants claim that as of the date of the contract, and also at the present time, there were no New York City zoning violations or DOB violations in existence against the premises (Moving Papers, Ex. F).

Defendants assert that the record is devoid of any evidence that the purported condition at the premises violates the New

York City zoning regulations and ordinances as set forth in paragraph 6 of the contract. Defendants further point out that plaintiff's architect's, Christopher Menziuso, affidavit does not provide that the alleged condition complained of by plaintiff violates any zoning regulations or ordinance, and does not allege that the existing structure violates any zoning regulation or ordinance. Mr. Menziuso only refers to DOB regulations, and specifically states in his affidavit that the owner of the premises "could be liable for fines imposed by the Department of Buildings" (Moving Papers, Ex. G). Furthermore, defendants' engineer, Ronald Ogur, confirms in his affidavit submitted in support of defendants' original cross-motion for summary judgment, the following:

> (a) the current configuration of the two stores does not violate the New York City zoning laws (b) the current use of the two stores is one of the legal uses pursuant to the New York City zoning laws and (c) the Premises is not in violation of the New York City zoning laws

(Moving Papers, Ex. H, ¶ 5).

Thus, defendants argue because the alleged condition at the premises does not fall within the scope of the New York City zoning regulations and ordinances, and may only potentially subject the owner of the premises to DOB violations, it is clear that paragraph 6 of the contract is inapplicable to the claims made by plaintiff. Further, paragraph 8(c) of the first rider

makes it clear that any DOB violations are "not considered objections to title" (Moving Papers, Ex. D).

Plaintiff, on the other hand, argues that paragraph 6(a) does not contain a single condition to which the premises are sold subject to, but rather, sets forth multiple conditions. In that regard, paragraph 6(a) establishes that so long as not violated by existing structures the premises are sold subject to "zoning regulations" and "ordinances of the city, town or village in which the premises lie." Thus, plaintiff argues, even if the illegal renovations do not violate zoning regulations, to the extent that they violate the City's building and fire ordinances and regulations, they fall within the ambit of paragraph 6.

Plaintiff also argues that defendants' invocation of paragraph 8(c) of the first rider to the contract is misguided. In that regard, there are many violations in the City of New York that are not the result of existing structure, such as housing violations, non-structural building violations, and environmental violations. Plaintiff argues that paragraphs 6(a) and 8(c) should be read together. Further, although paragraph 8(c) of the first rider establishes that plaintiff would take title to the premises subject to violations, paragraph 6(a) of the contract qualifies that by excepting violations that are resulting from the "existing structure."

Discussion

To begin, plaintiff's reading of paragraph 6(a) is unpersuasive. Paragraph 6(a) of the contract applies only to "zoning regulations and ordinances" [emphasis added], i.e., zoning regulations and zoning ordinances. Paragraph 6(a) does not, as plaintiff argues, apply to any and all New York City ordinances (see Pamerqua Realty Corp. v Dollar Service Corp., 93 AD2d 249 [2nd Dept 1983] ["[T]he phrase 'subject to: a. Zoning regulations and ordinances ... which are not violated by existing structures' is an assertion on the seller's part that the structures standing on the parcel described in the contract ... are in compliance with the relevant zoning ordinances"]). For the reasons that follow, however, I adhere to my original decision and order.

"The general rule is that 'where a person agrees to purchase real estate, which, at the time, is restricted by laws or ordinance, he will be deemed to have entered into the contract subject to the same. He cannot thereafter be heard to object to taking the title because of such restriction' ... An exception exists where the contract contains a provision whereby the seller warrants and represents that, upon purchase, the property and its structures will not be in violation of any zoning ordinance or regulation" (Pamerqua Realty Corp. v Dollar Service Corp., 93 AD2d 249 [2nd Dept 1983], quoting Lincoln Trust Co. v Williams Bldg. Corp., 229 NY 313 [1920]). If a purchaser determines that

the property is not in compliance with the zoning regulations and ordinances, the purchaser has the right to demand that the seller rectify the situation with the authorities or to receive a refund of its down payment (Kopp v Boyango, 67 AD3d 646 [2nd Dept 2009]).

Here, there are factual issues as to what steps, if any, defendants took to rectify the situation. Defendants proffer the letter from their attorney to plaintiff's counsel, dated May 26, 2009, rejecting plaintiff's claim that defendants were in default under the terms of the contract (Moving Papers, Ex. E). Plaintiff, however, claims that in the weeks following its May 20th letter, and up to the closing date, the parties engaged in negotiations as to how to address the door between the two commercial units. Thus, defendants were on notice prior to the scheduled closing that plaintiff considered the door opening between the two commercial units a defect under paragraph 6(a). While defendants now proffer an affidavit from an engineer providing that "the current configuration of the two stores does not violate the New York City zoning laws" (Moving Papers, Ex. H), defendants do not claim to have provided the affidavit, or any proof, to plaintiff before the closing date to show that the premises did not violate paragraph 6(a) of the contract (see Kopp v Boyango, 67 AD3d 646, supra, ["'when the vendor is given notice of the defect prior to the scheduled closing date and does nothing to correct it until after the closing date, the purchaser

need not tender performance as such tender would be meaningless'"]).

Further, while it is defendants' position that there was no defect to correct, defendants do not dispute plaintiff's claim that the parties were discussing how to settle the issue in the time period before the closing. Not clear from this record is what exactly defendants' position was regarding the door in the time period between receiving plaintiff's May 20th letter and the closing date.

Accordingly, defendants' motion to reargue their cross-motion for summary judgment is denied. Counsel are directed to telephone IA Part 48 at 646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/31/12

JEFFREY K. OING
J.S.C.

HON. JEFFREY K. OING, J.S.C.