Soldiers', Sailors', Marines' and Airmen's Club, Inc. v Carlton Regency Corp.
2013 NY Slip Op 33455(U)
December 19, 2013
Supreme Court, New York County
Docket Number: 600813/07
Judge: Charles E. Ramos
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS Justice PART 53

Index Number : 600813/2007
SOLDIERS', SAILORS', MARINES'
vs
CARLTON REGENCY
Sequence Number : 008
SUMMARY JUDGMENT

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . .

FILED

DEC 23 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/19/13

CHARLES E. RAMOS J.S.C.

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

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: COMMERCIAL DIVISION

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SOLDIERS', SAILORS', MARINES' AND AIRMEN'S CLUB, INC.,

Plaintiff,

-against-

THE CARLTON REGENCY CORP.,

Defendant.

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Index No. 600813/07

Hon. Charles E. Ramos, J.S.C.:

Motions bearing sequence numbers 008 and 009 are consolidated for disposition.

This is an action arising out of a lease and sublease executed in 1973 in connection with certain buildings located on Lexington Avenue in New York City, as well as several related agreements executed thereafter.

In motion sequence 008, defendant/third-party plaintiff The Carlton Regency Corp. (the Cooperative) moves, pursuant to CPLR 3212, for an order granting partial summary judgment: (I) dismissing third party defendant/counterclaim plaintiffs' James Conforti, III (Conforti) and Dean Stephen Lyras (Lyras) counterclaims as against the Cooperative that relate to, or rely upon, certain agreements executed by and between the Cooperative and Conforti and Lyras, or their respective fathers and predecessors-in-interest, in 1980, 2003 and 2006; (ii) awarding

the Cooperative a declaration on the first, second and third causes of action of its third-party complaint (against Conforti and Lyras), declaring that Conforti and Lyras have no rights under the 1980, 2003 and 2006 agreements; and (iii) in favor of the Cooperative against Conforti and Lyras, jointly and severally, on the sixth cause of action of its third-party complaint, for breach of Conforti and Lyras's obligations under the Cooperative's offering plan to pay certain ground lease rent reimbursements to the Cooperative, totaling $137,500 through August 1, 2012, as well as attorney's fees.

In motion sequence 009, Conforti and Lyras move for an order vacating or modifying this court's order staying discovery in this action and staying commencement of any eviction proceedings pending a decision on the Cooperative's motion for partial summary judgment (sequence 008).

1. Background

Since 1927, plaintiff Soldiers', Sailors', Marines' and Airmen's Club, Inc. (the Club) has run a charitable not-for-profit corporation providing facilities and overnight accommodations in New York City to military personnel and retirees. The Club purchased two connected buildings located at 281-283 Lexington Avenue (Clubhouse), and in 1940, purchased the building located at 285 Lexington Avenue.

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In 1972, the Club entered into a series of transactions with two developers, James Conforti, Jr. and Stephen Lyras (Developers), under which the Developers purchased the 285 Lexington property for $227,000. Additionally, the Club leased the Clubhouse to the Developers for 50 years under a ground and air rights lease, with two options to renew for 25 years each (Lease), for $30,000 per year. The Developers then subleased the Clubhouse back to the Club rent free for 25 years with one 15-year renewal term (Sublease) with an expiration date of March 12, 2013.

At the same time, the parties entered into an option agreement entitled "Demised Premises Contract" (Option Agreement) under which the Club had the option to sell the Clubhouse to the Developers for $500,000 at any point before the termination of the Sublease.

In 1980, the Developers built a residential tower at 137 36th Street using air rights acquired in the Lease. That tower and a neighboring residential tower at 136 East 37th Street, also owned by the Developers, were then converted to cooperative ownership.

As part of the conversion, the Developers assigned their rights in the Lease, Sublease, and Option Agreement to the cooperative apartment corporation, third-party plaintiff

Cooperative. The Cooperative thus became the tenant under the Lease and became responsible for paying the Club $30,000 in annual rent. The Cooperative could also be compelled by the Club to purchase the Clubhouse for $500,000.

In connection with these obligations, the Developers set forth, in the offering plan for the Cooperative, that they would place $500,000 in escrow to be available in the event that the Cooperative was compelled to purchase the Clubhouse. Further, they agreed to pay the Cooperative $30,000 per year to cover the rent obligation on the Clubhouse.

In February of 1980, the parties executed an agreement (1980 Agreement) which memorialized the Developers' obligation to secure the escrow funds. The agreement also stated that if the Cooperative were required to purchase the Clubhouse, it would either assign the purchase rights to the Developers or purchase it and then lease it to the Developers.

Both of the Developers are now deceased. Third-party defendants and counterclaim plaintiffs James Conforti, III and Dean Lyras are their sons (the Sons).

On March 30, 2003, the Sons and the Cooperative executed two agreements. The first (First Agreement) acknowledged the existence of the 1980 Agreement and further stated that, so as to determine the parties' respective obligations: 1) the Cooperative

acknowledged that it could not negotiate or renew the Sublease without the Sons' approval; and 2) in the event that the Club chose not to offer the Clubhouse for sale before March 14, 2013, the Sons would take occupancy of the premises as a subtenant of the Cooperative, pursuant to the 1980 Agreement.

The second agreement (Second Agreement) provided that the Cooperative acknowledged that: 1) the Sons had succeeded to the rights of the fathers as sponsors/sellers; 2) that among those rights was the ability to sell or sublease their apartments without approval of the Cooperative's Board; 3) the Sons would provide the Cooperative's managing agent with documentation similar to that required of prospective purchasers by the Cooperative; and 4) the Sons would agree to meet any reasonable concerns expressed by the managing agent, but the Sons would retain the right to make any final decisions as to occupancy.

Finally, in 2006, Conforti and the Cooperative executed another agreement (2006 Agreement) which provided, among other things, that if the Club chose not to compel the Cooperative to purchase the Clubhouse, the Cooperative would not permit the Club or any other party to occupy the premises after the Sublease expired in 2013. Instead, the Cooperative would sublease the Clubhouse to the Sons for the balance of the term of the Ground Lease.

The agreement also provided that Conforti would fund $375,000 of the $500,000 escrow by depositing the money with an escrow agent. He was also required to use his "best efforts" to compel Lyras to put the remaining $125,000 in the escrow account. Conforti also agreed to pay the Cooperative $75,000 for ground lease rent reimbursements and agreed to continue to make ground lease payments.

The Club commenced this action in March of 2007, seeking a declaration that the ground lease renewal options were void as a matter of public policy on the ground that they violate the rule against perpetuities.

In a decision dated November 10, 2010, this Court found, among other things, that the renewals did not violate the rule against perpetuities. *Soldiers', Sailors', Marines' & Airmen's Club, Inc. v Carlton*, 30 Misc 3d 352 (Sup Ct NY County 2010). This Court also granted the Cooperative's motion to dismiss the Sons' counterclaims for unjust enrichment and for an injunction as well as their claim for breach of the covenant of good faith and fair dealing. However, this Court declined to dismiss the Sons' claim for promissory estoppel.

In May of 2012, the First Department affirmed this Court's findings, except with respect to the dismissal of the Sons' good faith and fair dealing claim (*Soldiers', Sailors', Marines' &*

Airmen's Club Inc. v Carlton Regency Corp., 95 AD3d 687 [1st Dept 2012]).

With respect to the promissory estoppel claim, the First Department stated that:

> As to Conforti and Lyras's [the Sons'] promissory estoppel claims against [the Cooperative], since there is a bona fide dispute as to the viability of the 2003 and 2006 agreements and as to whether the 1980 agreement was breached, to the extent the claim is premised on those agreements it may proceed, even to the extent the promises asserted are subsumed by the agreements (*Id.* at 690).

With respect to the good faith and fair dealing claim, the First Department stated that:

> pursuant to the 2003 and 2006 agreements, [the Cooperative] agreed, essentially, to do nothing adverse to the rights of Conforti and Lyras, and, in fact, to aid Conforti and Lyras in obtaining further rights to the demised premises. However, after executing these agreements, it entered into a settlement agreement with plaintiff, promising, inter alia, not to confer any additional rights on Conforti and Lyras. While not every term of the settlement agreement violated the promises made by [the Cooperative] in the 2003 and 2006 agreements, [the Cooperative's] entering into the settlement agreement plainly violated the spirit of those agreements (*Id.*).

This claim arose from a settlement agreement executed in March of 2009 between the Club and the Cooperative (2009 Settlement Agreement). In that agreement, among other things,

the Cooperative agreed to pay $30,000 to the Club and thereafter to pay two thousand dollars a month for the next five years. The Club also released the Cooperative from any monetary claims which were asserted or could have been asserted in this action, other than from the obligations set forth in the settlement. The Club also transferred to the Cooperative the rights to any rents previously due under the Lease and any future rents. In return, the Cooperative agreed that it would not confer any additional rights on the Sons or their successors with respect to the Club's property.

Simultaneous with this agreement, the Cooperative and the Club executed a Zoning Lot and Development Agreement (ZLDA), pursuant to which the Club, among other things, granted air rights to the Cooperative, while retaining the right to alter or replace the Clubhouse. The ZLDA also contemplated execution of Lease Termination and Sublease Termination agreements.

2. Motion Sequence 008

The Cooperative now moves for summary judgment dismissing the Sons' first, second, sixth and tenth counterclaims, which are their remaining claims in this action, to the extent that those counterclaims arise out of the 1980, 2003 and 2006 agreements. It also seeks summary judgment awarding it a declaration on its first, second and third causes of action in the third-party

complaint, declaring that the Sons have no rights under those agreements. It further seeks summary judgment on its sixth cause of action for breach of the Sons' obligations to pay ground lease rent reimbursements to the Cooperative.

In the first counterclaim, the Sons seeks a declaration that, pursuant to the 1980, 2003 and 2006 agreements, they have the exclusive right to occupy the Clubhouse upon the expiration of the Sublease in March of 2013 and that the Cooperative is obliged to evict the Club if necessary.

The second counterclaim is for breach of contract arising from the 1980, 2003 and 2006 agreements. The sixth counterclaim is for promissory estoppel in connection with those agreements and the tenth counterclaim is for breach of the covenant of good faith and fair dealing.

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A. Consideration

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The Cooperative argues that it is entitled to summary judgment dismissing the Sons' remaining claims, to the extent that those counterclaims arise out of the 2003 and 2006 agreements, because each of those contracts is unenforceable for lack of consideration.

I. 2003 Agreements

As set forth above, in 2003, the Sons and the Cooperative executed two agreements. The First Agreement stated that the Cooperative acknowledged that it could not negotiate or renew the Sublease without the Sons' approval and that the Sons would take occupancy of the premises as a subtenant of the Cooperative, pursuant to the 1980 Agreement, in the event that the Clubhouse was not offered for sale before March 14, 2013.

The Second Agreement acknowledged that the Sons had succeeded to the rights of the fathers as sponsors/sellers and that among those rights was the ability to sell or sublease their apartments without approval of the Cooperative's Board. It also required the Sons to provide the Cooperative's managing agent with documentation similar to that required of prospective purchasers by the Cooperative and to meet any reasonable concerns expressed by the managing agent.

The Cooperative now argues that these two agreements fail for lack of consideration because the right to sell or sublease

apartments without approval of the Cooperative's Board was a right that belonged only to the original Developers, as original purchasers, under the Proprietary Lease. Consequently, the Cooperative argues that the Sons' attempt to relinquish or limit such rights was ineffective as consideration for the 2003 agreements.

The Cooperative's argument is unpersuasive. At best, questions of fact exist as to whether adequate consideration exists to support the 2003 agreements.

As a threshold matter, the First Department has already stated that there exists "a bona fide dispute as to the viability of the 2003 and 2006 agreements" (*Soldiers', Sailors', Marines' & Airmen's Club Inc.*, 95 AD3d at 690).

Moreover, according to the Sons, the 2003 agreements were executed as settlement of certain disputes which had arisen between themselves and the Cooperative. Specifically, the Sons state that, in 2002, they learned that the Cooperative was secretly negotiating with the Club to allow the Club to remain in possession of the Clubhouse beyond 2013.

They also state that they had a dispute with the Cooperative about whether the Sons had the right to sublet their apartments without approval. This dispute allegedly arose because, according to the Sons, they had previously been subletting their

apartments without approval and without objection from the Cooperative. It has been held that a "'good-faith relinquishment of a cause of action, even one which proves to be unenforceable, constitutes valid consideration'" (*Nolfi Masonry Corp. v Lasker-Goldman Corp.*, 160 AD2d 186, 187 [1st Dept 1990]).

Here, questions of fact exist as to whether the 2003 agreements were a settlement of the parties' disputes, such as would constitute consideration for such agreements. As such, the Cooperative has not demonstrated that it is entitled to summary judgment with respect to finding the that it seeks, that 2003 agreements are unenforceable for lack of consideration.

II. 2006 Agreement

In 2006, Conforti and the Cooperative executed the 2006 Agreement which provided that if the Club chose not to compel the Cooperative to purchase the Clubhouse, the Cooperative would not permit the Club or any other party to occupy the premises after the Sublease expired on March 14, 2013 and the Cooperative would sublease the Clubhouse to the Sons for the balance of the term of the Ground Lease. The agreement also provided that Conforti would fund $375,000 of the $500,000 escrow and use his "best efforts" to compel Lyras to put $125,000 in the escrow account.

First, as set forth above, the First Department has already stated that a dispute exists as to the validity of this

agreement. Moreover, unlike the 2003 agreements, the 2006 Agreement states that it is made for $10 and other valuable consideration. As with the 2003 agreements, questions of fact exist as to whether this agreement was made in settlement of certain of the parties' disputes.

Based on these factors, the Cooperative is not entitled to summary judgment with respect to a finding that the 2006 Agreement is unenforceable for lack of consideration.

B. Escrow

The Cooperative also argues that it is entitled to summary judgment because the Sons are in breach of the 1980 and 2006 agreements and, consequently, those agreements are therefore unenforceable against the Cooperative.

Specifically, the Cooperative contends that the Sons breached their obligations to maintain the $500,000 escrow, which had been set up so that the Cooperative would have funds to pay the Club if it compelled the Cooperative to purchase the Clubhouse.

The Cooperative concedes that the escrow was initially funded, in 1980, as required by the 1980 Agreement. However, it contends that the escrow funds were not maintained by the Sons, who were obliged to maintain such funds because the 1980 Agreement was binding on the Developers' heirs.

In opposition, the Sons state that, in 2006, $375,000 in escrow funds were transferred from Wachovia bank to an account (Rosen account) maintained by Mort Rosen, Esq., who is the former counsel of James Conforti, III. They state that the funds are currently in that account, on the condition that they can only be released if the Club exercises its option to sell, or upon expiration of the Sublease. They also assert that Conforti funded Lyras's obligation of $125,000 by placing those funds in escrow (Slama account) with Conforti's current counsel, Mark Slama, Esq.

The Cooperative does not dispute the amounts on deposit with Rosen and Slama. Instead, it argues that the Sons have violated their obligations because the funds must be maintained with a bank or a trust company.

"When a party has breached a contract, that breach may excuse the non-breaching party from further performance if the breach is material" (*Casita, LP v Maplewood Equity Partners [Offshore] Ltd.*, 17 Misc.3d 1137([A] *6, 2007 NY Slip Op 52322[U] [Sup Ct NY County 2007]; *see Zyskind v FaceCake Mktg. Tech., Inc.*, 110 AD3d 444 [1st Dept 2013]). "In such a case, the non-breaching party is discharged from performing any further obligations under the contract, and...may elect to terminate the contract and sue for damages" (*Id.* at *6-*7).

"For a breach to be material, it must be so substantial that it defeats the object of the parties in making the contract" (*Waterways at Bay Pointe Homeowners Assn., Inc. v Waterways Dev. Corp.*, 38 Misc 3d 1225[A],*11, 2013 NY Slip Op 50274[A] [Sup Ct Suffolk County 2013]). "The determination whether a material breach has occurred is generally a question of fact" (*Id.*).

Here, the Cooperative has not demonstrated that it is entitled to summary judgment on this issue.

First, as set forth above, the Sons have put forth evidence, in the form of an affidavit from Conforti, attesting that a total of $500,000 is being held in escrow by Rosen and Slama; the Cooperative does not dispute that such an amount is being held by those parties.

Moreover, while the escrow sums were originally to be held by a bank or trust company, the 2006 Agreement specifically states that Conforti was required to remit $375,000 to the Rosen account and was required to use his best efforts to compel Lyras to remit $125,000 to the Rosen account, in order to bring the escrow funds to $500,000. The failure to maintain the funds with a bank or trust company may not constitute a material breach of the parties' agreements.

Conforti states that he was unable to compel Lyras to deposit $125,000 in the Rosen account, and, as a result, he was

forced to commence an action against Lyras. However, Conforti states that, in either event, he deposited $125,000 in the Slama account to satisfy Lyras's obligation. The Cooperative is correct that the 2006 Agreement states only that funds would be deposited with Rosen, and does not mention the Slama account. Again, the Cooperative has not demonstrated as a matter of law that placement of the funds with Slama rather than with Rosen defeats the parties' intent in executing their agreements, such as would constitute a material breach.

The Cooperative also argues that Conforti is in breach of the 2006 Agreement because he failed to use his best efforts to compel Lyras to put $125,000 in escrow. However, as set forth above, Conforti states that he did put forth such efforts, going so far as to commence an action against Lyras and eventually putting the money in escrow himself. Thus, questions of fact exist in connection with this issue and summary judgment in the Cooperative's favor is not warranted.

C. Ground Lease Payments

The Cooperative also argues that the 2006 Agreement is unenforceable because Conforti breached it by failing to remit ground lease payments to the Cooperative, as required by the agreement.

The 2006 Agreement states that, among other things, Conforti

agreed to make ground lease payments to the Cooperative going forward from the date of the agreement. The Cooperative states that he has not made any payments since February of 2008.

In opposition, Conforti argues that the Cooperative has not submitted evidence demonstrating specific rents it paid to the Club which would require reimbursement.

Further, Conforti contends that the Cooperative stopped paying rent to the Club as a result of the 2009 Settlement Agreement. Specifically, he states that, under that agreement, the Club released the Cooperative from any payments of rent which were due and owing. Further, it assigned to the Cooperative all rent payments then due and unpaid and which became due thereafter. As such, he contends that the Cooperative was not paying rent and, therefore, it could not seek rent reimbursement from Conforti.

Conforti also states the Club, by commencing this action, anticipatorily breached its obligations under the Sublease to provide the Sons with possession of the premises upon the expiration of the sublease. Conforti states that this breach excused the Cooperative's obligation to make payments to the Club under the Sublease, which, in turn, excused Conforti's obligation to reimburse the Cooperative for such payments.

Conforti further argues that the Cooperative then committed

an anticipatory breach of the 2006 Agreement. Specifically, he notes that the 2006 Agreement required the Cooperative, once the Sublease ended, to ensure that no party other than the Sons could occupy the Clubhouse without the Sons' written permission. However, Conforti states that, in April 2008, the Cooperative's attorney advised Conforti's attorney that the Cooperative reserved its right not to defend the Sons' right to occupy the premises in the instant action, despite believing that the Club's claim was without merit. The Cooperative asserts that this statement is not definitive enough to constitute an anticipatory breach of the 2006 Agreement.

Finally, Conforti states that he has put $150,000 in escrow to cover rent reimbursement from February 2008 to March 2013, in the event that such is required as the result of this action.

The Court finds that numerous factual issues exist, requiring discovery, which preclude summary judgment on this issue. Among other things, it is not clear how many ground lease payments the Cooperative made to the Club and in what amount. It is also unclear whether the Cooperative extinguished its obligation to make such payments under the terms of the 2009 Settlement Agreement, such as would excuse Conforti's obligation to reimburse the Cooperative for such payments.

Further, it is unclear whether there were any definite and

final communications by the Cooperative to Conforti to indicate that it intended to forgo its obligations under the 2006 Agreement, such as would constitute an anticipatory breach of that agreement (*see Jacobs Private Equity, LLC v 450 Park LLC*, 22 AD3d 347 [1st Dept 2005]; *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56 [2d Dept 2013]). Therefore, the Cooperative's motion for partial summary judgment is denied.

3. Motion Sequence 009

At the conclusion of the oral argument of motion sequence 008, this Court granted the Cooperative's application for a stay of this action pending a determination of the motion for partial summary judgment. Specifically, the Court stayed discovery and stayed any potential eviction proceedings arising out of the 2006 Agreement, until 10 to 20 days after a determination of the underlying motion.

The Sons now seek to vacate or modify that order and request that the Court vacate the stay of this action. The Sons' motion is granted to the extent that the Court will modify the order in light of its foregoing determination of motion sequence 008.

As set forth above, the Cooperative's motion for summary judgment is denied, and this action will proceed. Therefore, the stay of discovery will be vacated. The stay of any eviction proceedings will continue pending final determination of the

enforceablity of the 2006 agreement.

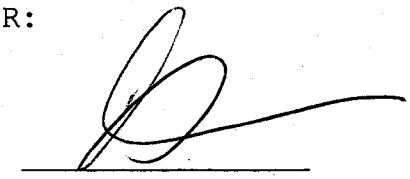
Accordingly, it is

ORDERED that the motion for partial summary judgment by defendant/third-party plaintiff The Carlton Regency Corp. is denied; and it is further

ORDERED that the stay of discovery in this action shall be automatically vacated twenty days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to contact the Part Clerk in order to schedule a status conference.

DATED: December 19, 2013 ENTER:



J.S.C.