The Plaza PH2001 LLC v Plaza Residential Owner LP
2015 NY Slip Op 30854(U)
May 18, 2015
Supreme Court, New York County
Docket Number: 602673/2008
Judge: Joan M. Kenney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

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THE PLAZA PH2001 LLC,

Plaintiff,

-against- Index No. 602673/2008

PLAZA RESIDENTIAL OWNER LP,
EL-AD PROPERTIES NY LLC, and
STRIBLING MARKETING ASSOCIATES,

Defendants.

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Joan M. Kenney, J.

Defendants Plaza Residential Owner LP, El-Ad Properties NY LLC, and Stribling Marketing Associates move, pursuant to CPLR 3212, for an order granting summary judgment in their favor, dismissing the amended complaint with prejudice, awarding them reasonable attorneys' fees and costs pursuant to contract, and directing that all deposits held in escrow, including all accrued interest, be released to Plaza Residential Owner LP.

This action arises out of two condominium purchase and sale agreements (both, Purchase Agreements) for a penthouse, Unit PH2001, and a smaller unit, Unit 1602, into which plaintiff The Plaza PH2001 LLC (Plaza PH2001) and Plaza Residential Owner LP entered on August 28, 2007, prior to construction of the units. Pursuant to the Purchase Agreements, Plaza PH2001 agreed to buy, and defendants agreed to sell, a luxury duplex penthouse condominium and a smaller condominium unit, to be built atop the former Plaza Hotel, located at One Central Park South in Manhattan. The Purchase Agreements differ only in the identity of the unit sold, and the dollar amounts of the purchase price and deposit. Both incorporate by reference The Plaza

Condominium Residences Offering Plan (Offering Plan), and bind Plaza PH2001 to its terms and duly filed amendments (*see* Purchase Agreements §§ 11.2, 11.3). On January 27, 2007, Sponsor added a ninth amendment to the Offering Plan that includes unit floor plans.

Plaza PH2001 is owned by nonparty Scott Shleifer, a New York-based hedge fund manager. Plaza Residential Owner (Sponsor) is the condominium sponsor. El-Ad Properties is the owner of the Plaza Hotel, and is affiliated with Plaza Residential and the previous condominium sponsor, nonparty CPS 1 Realty LP. Stribling Marketing is the exclusive sales and marketing agent for the residential condominium units.

There is no dispute that Plaza PH2001 was represented by competent counsel during the contract negotiations.

The penthouse purchase agreement provides for a purchase price in the amount of $31 million and a total deposit in the amount of $6.2 million. The Unit 1602 purchase agreement provides for a purchase price in the amount of $1,535,000 and a deposit in the amount of $307,000. In compliance with the Purchase Agreements' terms, Plaza PH2001 timely delivered to the Sponsor's escrow agent deposits totaling $6,507,000. (*See* Purchase Agreements § 3.1.)

The Purchase Agreements provide that, in the event of Plaza PH2001's default on its obligations to close, Sponsor is entitled to retain the deposits, together with accrued interest, as liquidated damages for the breach (*see id.* §§ 12 [a] [i], 12 [c]).

They also obligate Sponsor to construct the building and the units substantially in accordance with the Offering Plan and certain plans and specifications (*see id.* § 17.1). The Offering Plan defines the term "Plans and Specifications" as "[t]he plans and specifications for the renovation of the Building which (to the extent required by applicable Legal Requirements)

have been or will be filed with the Department of Buildings [DOB] and which may, from time to time, hereafter be amended in accordance with the provisions of the [Offering] Plan" (Offering Plan § A [6]). The Offering Plan provides that, should Sponsor make any material changes to the floor plan, it must offer the materially adversely affected purchasers the right to rescind their purchase agreements and receive a refund of their deposits, together with accrued interest (*see id.* § P [1] [a]).

On May 9, 2008, prior to completion of construction, Scott Shleifer and nonparty Elena Shleifer, his wife, together with nonparty Tristan Harper, then Plaza PH2001's real estate broker, viewed the penthouse for the first time, and Elena Shleifer took photographs. During the walk-through, they allegedly discovered that the structure of the penthouse deviated materially from the structure described in the Offering Plan and the penthouse purchase agreement.

Sponsor scheduled the closing of the transaction for Unit 1602 to occur on May 13, 2008. Plaza PH2001 refused to close, and Sponsor issued a notice of default dated May 22, 2008 in which it advised that time was of the essence, and provided a cure date of June 23, 2008 for the closing of the transaction on that unit.

Sponsor scheduled the closing of the penthouse transaction to occur on May 13, June 23, and August 1, 2008. Plaza PH2001 failed to appear on any of the scheduled dates.

By notice of default dated August 4, 2008, Sponsor advised Plaza PH2001 that time was of the essence, and demanded that Plaza PH2001 cure the default on or before September 3, 2008. In that notice, Sponsor further advised that, if Plaza PH2001 failed to cure and close by that date, the penthouse purchase agreement would be deemed terminated. Sponsor also advised that, upon such termination, it would retain the escrowed deposit and accrued interest as

liquidated damages, in accordance with the penthouse purchase agreement terms.

By letter dated August 7, 2008, Plaza PH2001 advised Sponsor that it had rescinded both Purchase Agreements on the grounds that the as-built penthouse that Sponsor attempted to deliver materially deviated from the penthouse as designed, the unit that Plaza PH2001 purchased, that substantial changes and alterations had been made to that unit without Plaza PH2001's knowledge or consent, and that the changes materially and adversely affected the quality and value of the unit. Plaza PH2001 also advised that Unit 1602 was sold as a companion unit to the penthouse, and that any attempt to invade that unit's escrowed deposit would be deemed an unlawful conversion.

By termination letters dated September 4, 2008, Sponsor advised Plaza PH2001 that, as a result of its failure to cure, Sponsor had terminated each Purchase Agreement, resulting in its release and discharge from all further liability and obligations under the agreements, and that it may sell each unit to another party, as if each Purchase Agreement had never been signed. Sponsor also advised that it will direct the escrow agent to release both escrowed deposits and all accrued interest to it.

Subsequently, Plaza PH2001 commenced this action. In the amended complaint, Plaza PH2001 alleges that defendants breached the Purchase Agreements by unilaterally significantly modifying the specifications set forth in the Offering Plan and the plans and specifications filed by Sponsor with the DOB on December 7, 2005. The breach and modifications, as alleged, occurred only with respect to the penthouse, and include lowering the ceiling heights in several areas, installing fewer and smaller windows in the living room and kitchen/breakfast area, reducing the overall square footage, particularly in the living room, and installing an outdoor

drainage grate that partially obscured the views of Central Park. Plaza PH2001 further alleges that defendants' unauthorized changes significantly reduced the penthouse living space and diminished the views of Central Park from the penthouse.

On those allegations, Plaza 2001 asserts claims for breach of the Purchase Agreements, and seeks a judgment declaring that it has the right to rescind both Purchase Agreements, and that the escrow agent is precluded from releasing either deposit to Sponsor, and must return the deposits, together with accrued interest, to Plaza PH2001. Plaza PH2001 also seeks a judgment directing Sponsor to file an amendment to the Offering Plan detailing the unauthorized changes and alterations to the penthouse plans and specifications, and to offer Plaza PH2001 a 15-day right of rescission and return of its deposits. Last, Plaza PH2001 seeks return of both deposits, totaling $6,507,000, together with accrued interest.

Defendants now seek summary judgment in their favor, and dismissal with prejudice of the amended complaint, on the ground that discovery has failed to reveal any credible evidence that they breached any of the terms of the Purchase Agreements or the Offering Plan by failing to construct the units in substantial compliance with the Offering Plan, as amended, and the plans and specifications filed with the DOB by Sponsor.

In opposition, Plaza PH2001contends that defendants have failed to demonstrate that they constructed the penthouse in accordance with those agreements.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Cox v Kingsboro Med. Group*, 88 NY2d 904, 906 [1996] [internal quotation marks and citations omitted]; *see* CPLR 3212). The moving seller of real

property may establish its prima facie entitlement to summary judgment by demonstrating the existence of a valid contract of sale with a time-is-of-the-essence clause, and that it was "ready, willing and able to deliver good and marketable title at the scheduled closing" (*Sikander v Prana-BF Partners*, 22 AD3d 242, 243 [1st Dept 2005]).

Once the moving seller has met its initial burden of proof, the burden shifts to the buyer to establish with probative evidence the existence of a triable issue of fact that would excuse its failure to close (*Morgan Barrington Fin. Servs. v Roman*, 27 AD3d 385, 385 [1st Dept 2006]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*Leggio v Gearhart*, 294 AD2d 543, 545 [2d Dept 2002]).

Defendants have demonstrated their prima facie entitlement to summary judgment. There is no dispute that the purchasing agreements and the Offering Plan are valid and enforceable contracts for the sale of real property. There is no dispute that Sponsor was ready, willing, and able to deliver good and marketable title for the penthouse on the August 1, 2008 scheduled closing date. In addition, defendants have produced temporary certificates of occupancy (TCOs) for the units.

Pursuant to the express terms of the Purchase Agreements, the issuance of TCOs constitutes presumptive evidence that the penthouse was substantially completed in accordance

with the Offering Plan, as amended, and the plans and specifications filed with the DOB by Sponsor. The Purchase Agreements expressly obligate Sponsor to construct the building and the units substantially in accordance with the Offering Plan and the filed plans and specifications (*see id.* § 17.1).

"[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 214 [2009] [internal quotation marks omitted]). That "rule has even greater force in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks and citation omitted]). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Willsey v Gjuraj*, 65 AD3d 1228, 1230 [2d Dept 2009] [internal quotation marks omitted]).

The Purchase Agreements provide that "[t]he issuance of a temporary or permanent Certificate of Occupancy for the Building shall be deemed presumptive evidence that the Building and the Unit have been completed in accordance with the [Offering] Plan and the Plans and Specifications" filed by Sponsor with the DOB (Purchase Agreements § 17.1 [TCO disclaimer]).

The Offering Plan similarly provides as follows:

> "[t]he issuance of a temporary or new permanent Certificate of

> Occupancy for all or any portion of the Building shall be deemed presumptive evidence that the renovation of the Building or of such portion of the Building and its appurtenances and the Residential Units therein has been substantially completed in accordance with this [Offering] Plan and the Plans and Specifications [filed with the DOB]"

(Offering Plan § P [1] [a]).

Sponsor obtained TCOs covering both the penthouse and the smaller unit from the DOB, prior to the August 1, 2008 scheduled closing date. With those TCOs, defendants have demonstrated a presumption that they fulfilled their contractual obligation to construct the penthouse substantially in accordance with the Offering Plan, as amended by the ninth amendment, and the filed plans and specifications.

Plaza PH2001 has failed to raise any triable issues sufficient to preclude summary judgment in favor of defendants.

Plaza PH2001's contention that the TCOs cannot be held to constitute presumptive evidence because the penthouse deviates materially from the relevant plans and specifications is without merit. Contrary to Plaza PH2001's contention, no conflict exists between the TCO presumption clause and the requirement that Sponsor construct the penthouse substantially in compliance with the Offering Plan, the ninth amendment, and the filed plans and specifications.

Both provisions are set forth in succeeding sentences in the same section of each Purchase Agreement, as follows:

> "The construction of the Building and the Unit, including the materials, equipment and fixtures to be installed therein, shall be substantially in accordance with the [Offering] Plan and the Plans and Specifications (as defined in the [Offering] Plan), subject to the right of Sponsor to amend the [Offering] Plan and the Plans and Specifications in order to substitute materials, equipment or

> fixtures of equal or better quality, provided that the approval of any governmental authorities having jurisdiction is first obtained (if required). The issuance of a temporary or permanent Certificate of Occupancy for the Building shall be deemed presumptive evidence that the Building and the Unit have been fully completed in accordance with the [Offering] Plan and the Plans and Specifications. However, nothing herein contained shall excuse Sponsor from its obligation to correct any defects in construction in accordance with the conditions set forth in the [Offering] Plan in the Section entitled 'Rights and Obligations of Sponsor'"

(Purchase Agreements § 17.1).

To accept Plaza PH2001's proposed interpretation would require the court to enforce one sentence of the section, and negate the other, in violation of the well established rules of contract interpretation.

Reading the section in its entirety, and giving effect to each of its parts, it is clear that the individual sentences are not in conflict. "All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency" (*National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969]). "[T]he rule is that where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (*Steadfast Ins. Co. v Sentinel Real Estate Corp.*, 283 AD2d 44, 51 [1st Dept 2001] [internal quotation marks and citation omitted]). In the first sentence of the section, Sponsor agreed to build the units substantially in accordance with the relevant plans and specifications. In the second sentence, Plaza PH2001 agreed that, once a TCO covering each unit was issued, it would be deemed presumptive evidence that Sponsor had fully complied with the first sentence. The third sentence obligates Sponsor to correct any construction defects, thus protecting Plaza PH2001's contractual rights.

Those rights are also protected by other provisions in the Purchase Agreements. The TCO presumption clause "cannot invalidate or negate the requirement of the offering plan, incorporated into the Purchase Agreements, that if the sponsor intends to implement material changes to the filed plans and specifications, it must amend the plans and notify the purchasers and allow for the right of rescission" (*Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 100-101 [1st Dept 2012]; *see* Offering Plan § P [1] [a]). However, Plaza PH2001 has failed to demonstrate the existence of triable issues sufficient to rebut the presumption raised by the TCOs' existence of Sponsor's compliance with the Purchase Agreements and Offering Plan.

The findings by Plaza PH2001's expert witness are not sufficient to preclude summary judgment in favor of defendants because they lack proper evidentiary foundation, and are, instead, based on mere speculation and conjecture. "An expert's affidavit – offered as the only evidence to defeat summary judgment – must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor" (*Ramos v Howard Indus. Inc.*, 10 NY3d 218, 224 [2008] [internal quotation marks and citation omitted]). "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

In his report and affidavit dated July 8, 2014, Plaza PH2001's expert witness Lee S. Jablin, AIA, LEED-AP, a founding partner of Harman Jablin Architects LLP, concluded that, with a reasonable degree of professional certainty, the penthouse "as-built is materially different from the Unit as described in the Offering Plan and its Ninth Amendment, the floor plans

contained in the Offering Plan and its Ninth Amendment, and the construction plans prepared by Costas Kondylis [& Partners LLP] and filed with the [DOB]" (Jablin aff, ¶ 94).

In reaching that conclusion, Jablin compared a three-dimensional computer model based on the photographs of the penthouse taken during the May 9, 2008 walk-through with a three-dimensional computer model based on certain architectural drawings (*see id.*, ¶ 10). Jablin does not attest that he personally inspected the penthouse, nor could he, given that he was hired more than six years after the August 2008 scheduled closing, during which time the as-built penthouse had been sold, resold, and remodeled. Jablin does not attest that he reviewed any actual measurements taken of the penthouse during the walk-through, or at any time prior to the scheduled closing date. An expert's failure or inability to personally inspect the subject matter of his testimony presents a ground upon which to grant summary judgment to the opposing party, as does his failure to use actual measurements, or other objective data (*see e.g. Parker v Mobil Oil Corp.*, 7 NY3d 434, 449-450 [2006]; *Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d 1007, 1009 [2d Dept 2010]; *Tedone v Success Homes, Inc.*, 31 AD3d 745, 746 [2d Dept 2006]; *Leggio v Gearhart*, 294 AD2d at 544).

Jablin's creation of the computer generated model of the as-built penthouse and his analysis of that model are fatally flawed. That model is based solely on seven photographs taken by Elena Shleifer, an interested party, who is not a professional photographer or architect. She took the photographs with her telephone's camera, without making contemporaneous records regarding where she stood or how she positioned the camera. The photographs were taken on a date almost three months prior to the completion of construction of the penthouse (*see* Elena Shleifer Sept. 25, 2013 dep tr at 47, lines 4-14). An expert's reliance on information or data from

a time frame other than the legally relevant time constitutes a ground upon which to grant summary judgment in favor of the opposing party (*see e.g. Clement v Delaney Realty Corp.*, 45 AD3d 519, 521 [2d Dept 2007]; *Sarmiento v C & E Assoc.*, 40 AD3d 524, 526 [1st Dept 2007]).

Although Jablin opined that the photographs revealed detail regarding the dimensions of the as-built living room adequate to render the computer models accurate (*see id.*, ¶ 11), he also found it necessary to create three different options, or, alternatives of what the as-built penthouse living room might have looked like, at the time the photographs were taken (*see id.*, ¶¶ 60-64).

Similarly deficient are Jablin's computer model of the as-designed penthouse and Jablin's analysis of that model. In creating the model, Jablin relied on the Offering Plan, the ninth amendment to that plan, and five architectural drawings (*see id.*, ¶¶ 5, 43, 71). The drawings do not bear DOB date stamps demonstrating that they were actually filed with the DOB, nor do they bear any Bates stamp numbers indicating that they were previously produced in this litigation. Instead, the drawings bear dates prior to the dates that the plans and specifications were filed with the DOB beginning in May 2007, and which were on file at the time that Plaza PH2001 executed the Purchase Agreements.

Inasmuch as Plaza PH2001's breach of contract claims are entirely premised on the allegation that the penthouse delivered by Sponsor differed materially from the penthouse as described in the Offering Plan, the ninth amendment to that plan, and the plans and specifications on file with the DOB at the time that Plaza PH2001 executed the Purchase Agreements, Jablin's failure to rely primarily on those plans renders Jablin's report insufficient to preclude summary judgment. It appears that Jablin used the Offering Plan amended floor plan in only two of the nine as-designed computer models upon which he based his conclusions.

Moreover, Plaza PH2001 has failed to demonstrate that Jablin's methodology is generally accepted in the practice of architecture. Expert testimony must be based "upon a scientific principle or procedure which has been sufficiently established to have gained general acceptance in the particular filed in which it belongs" (*Marso v Novak*, 42 AD3d 377, 378 [1st Dept 2007] [internal quotation marks and citation omitted]). "An expert's inability to show that his or her proffered theories have achieved general acceptance requires that his or her testimony be excluded" (*Styles v General Motors Corp.*, 20 AD3d 338, 342 [1st Dept 2005]). Plaza PH2001 has not demonstrated that Jablin's creation of virtual computer models for the as-built penthouse, without the benefit of measurements taken from the actual as-built unit, constitute a forensic methodology generally accepted in the architectural field.

For the foregoing reasons, the Jablin affidavit and report are excluded from consideration in resolving defendants' motion.

The deposition testimony given by Scott Shleifer and Elena Shleifer regarding their visual observations of the penthouse during their May 2008 walk-through is insufficient to raise any triable issues regarding whether Sponsor breached its contractual obligation to build a penthouse substantially in accordance with the relevant plans and specifications. There is no dispute that neither Scott Shleifer or Elena Shleifer is a licensed architect or engineer, and that neither inspected the penthouse after its completion and before the scheduled August 2008 closing date.

The photographs themselves are insufficient to raise any triable issues regarding whether the as-built penthouse substantially conformed to the relevant plans and specifications. Contrary to Plaza PH2001's contention, the deposition testimony given by Scott Shleifer and Elena Shleifer identifying each of the photographs as accurate depictions of the penthouse on the date

of the walk-through (*see* Elena Shleifer dep tr at 49, line 13, to 64, line18; Scott Shleifer Aug. 9, 2013 dep tr at 112, line 12, to 137, line 8) is irrelevant. As discussed above, the photographs were admittedly taken almost three months prior to the completion of construction. To constitute admissible proof, photographs must be taken contemporaneously with the injury of which the plaintiff complains (*see Santiago v Burlington Coat Factory*, 112 AD3d 514, 515 [1st Dept 2013]; *Decker v Schildt*, 100 AD3d 1339, 1341 [3d Dept 2012]).

Contrary to Plaza PH2001's contention, defendants were not under a burden to preserve the units until conclusion of the action at bar. In the prior order dated January 17, 2014, this court denied Plaza PH2001's application for sanctions against defendants for failure to preserve the condition of the units at the time of the scheduled closing on the ground that Plaza PH2001 had failed to demonstrate its entitlement to such relief.

For the foregoing reasons, that branch of defendants' motion for summary judgment on all claims arising out of the penthouse Purchase Agreement and the Offering Plan, as amended, is granted, and those claims are dismissed.

In addition, that branch defendants' motion for summary judgment on all claims arising out of the Unit 1602 purchase agreement and the Offering Plan, as amended, is granted, and those claims are dismissed. Plaza PH2001 has failed to oppose that branch of the motion.

Therefore, defendants are entitled to retain the deposits, together with accrued interest, escrowed pursuant to both Purchase Agreements.

Last, that branch of defendants' motion to recover the costs of enforcing and defending each Purchase Agreement, including reasonable attorneys' fees and disbursements is granted. "[A]ttorneys' fees and disbursements are incidents of litigation and the prevailing party may not

collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). The Purchase Agreements each expressly provide that the prevailing party in any action or proceeding will be entitled to recover its reasonable attorneys' fees and costs (*see* Purchase Agreements § 35).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that the portion of defendants' motion to recover reasonable attorneys' fees and disbursements is severed and the issue of the amount of these fees is referred to a Special Referee to hear and report; and it is further

ORDERED that defendants' counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, upon the Special Referee Clerk in the General Clerk's Office (room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 18, 2015

ENTER:

JOAN M. KENNEY J.S.C.

J.S.C.