STATE OF VERMONT

SUPERIOR COURT Windsor Unit	CIVIL DIVISION Docket No. 44-2-16 Wrcv
Blackner Stone & Associates, P.A, Plaintiff v. U.S. Bank National Association, Business Loan Center, LLC, The Barton Group/Four Seasons, Stewart Title Guaranty Company, Defendants	DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Blackner Stone & Associates, P.A. ("Plaintiff") moves for partial summary judgment against U.S. Bank National Association, Business Loan Center, LLC, The Barton Group LLC/Four Seasons Sotheby's Sir, and Stewart Title Guaranty Company, with respect to Counts I (breach of representation and warranty) and II (rights of access to the [property] had been taken and/or closed by the State of Vermont), based on breach of contract.

UNDISPUTED FACTS

Plaintiff and Defendant Bank entered into an Agreement of Purchase and Sale ("Agreement") on August 14, 2015, in which Plaintiff agreed to purchase the subject property for $500,000 and to deliver an Earnest Money Deposit in the amount of $50,000. That money is being held in an escrow account with the defendant title company, Stewart Title Guaranty Company, named in the Agreement in Paragraph 14.

The Review Period clause (subdivision C of paragraph 3 pertaining to requirements and conditions of closing) states that as of the "effective date" of the agreement, the Purchaser has 10 business days to "perform whatever tasks reasonably necessary or appropriate to verify the accuracy of the information concerning the Property provided to Purchaser[.]" The Review Period clause also provides that if Purchaser decides to terminate the Agreement and notifies Seller in writing within the Review Period, then Purchaser is entitled to return of the Earnest Money Deposit without further obligation.

Under Paragraph 11, pertaining to Seller's covenants, representations and warranties, Seller represents that "[t]here is no pending or to the best of Seller's knowledge, *threatened condemnation or similar proceeding or special assessment affecting the Property* contemplated by any governmental authority." Agreement at Paragraph 11 (emphasis added).

In addition, Paragraph 10, pertaining to "CONDEMNATION," states as follows:

In the event that *any portion* of the Property is taken or *any right of access is taken or closed* or any notice is received of a threatened taking *or closure by right of* eminent domain or *condemnation* prior to Closing, Purchaser shall elect in writing, at its option, one of the following:

A. To terminate this Agreement, in which event each party shall be released from all obligations hereunder and the Earnest Money Deposit shall immediately be returned to Purchaser by the Title Company, or
B. To accept the condemnation proceeds (or an assignment thereof, as applicable) and to proceed with Closing.

Agreement at Paragraph 10 (emphasis added).

A Fire Inspection Results report prepared by the Vermont Department of Public Safety Division of Fire Safety dated September 21, 2015 cites 23 violations of various applicable codes and states that the subject property "is currently unoccupied, and shall remain unoccupied until the building is brought into code compliance." A Fire Inspection Results report dated May 29, 2013 cites 24 code violations which must be addressed before the third floor can be used and/or for continued use of the first and second floors. A Fire Inspection Results report dated October 11, 2013 states that the property has "open violations that must be addressed before 3rd floor is open" and orders the closure of the facility on November 1, 2013, with re-inspection to occur before reopening.

In a letter dated September 24, 2015, before the parties had closed on the purchase and sale, Blackner Stone, via counsel, provided notice that it was terminating the Agreement and demanded the immediate return of the deposit.

PLAINTIFF'S MOTION

Plaintiff asserts that Paragraph 10 of the Agreement requires the return of the Earnest Money Deposit because the 2013 and 2015 Fire Inspection Results prohibit the occupancy of several portions of the building and/or the building in its entirety until numerous code violations are corrected. Plaintiff contends that the property in question was "condemned" under the plain meaning of the term, that condemnation satisfies the requirement of Paragraph 10, and that the Division of Fire Safety has the authority to make an official pronouncement. Additionally, Plaintiff argues that it reasonably believed there were no governmentally imposed legal restrictions against using the property based on the information disclosed by Defendants. Plaintiff contends that the misleading information supplied by Defendants was material, where the cost to bring the property into compliance with the various codes exceeded $300,000. Thus, Plaintiff seeks the return of its deposit with interest, attorney's fees, and costs.

Defendant Four Seasons International Realty, LLC opposes the motion for summary judgment against it, arguing that it is not liable for breach of contract as a matter of law because it is not a party to the Agreement. Defendant Four Seasons also asserts that *Carter v. Gugliuzzi* does not impact the outcome of this motion because breach of contract and consumer fraud "are entirely distinct claims," Plaintiff has not moved for summary judgment on its consumer fraud claim, and, in any event, Plaintiff has not demonstrated that Four Seasons or

its agents knew or should have known about the Division of Fire Safety reports but failed to disclose the information.

Defendants U.S. Bank and Business Loan Center, LLC ("Defendants"), too, oppose Plaintiff's motion, arguing that because Plaintiff did not terminate the Agreement by August 28, 2015, the deposit became non-refundable. Defendants assert that Plaintiff's actions "were the direct opposite of someone who intended to terminate," in light of its request for drafts of closing documents sent on September 1, 2015. Defendants also assert that the 2015 Fire Inspection Results report did not indicate that the property "was condemned or had to be demolished or destroyed." Defendants argue that "a number of factual issues" preclude summary judgment, including: whether the condemnation provision of the Agreement is applicable; whether the building was "condemned"; when Defendant bank and its agents knew about any Division of Fire Safety reports; and whether the contractor estimates provided to Plaintiff included the repairs that necessarily would have remedied much of the code violations. Further, Defendants contend that the "most reasonable and harmonious interpretation of paragraph 10" is that it "contemplates a formal notice of a governmental authority, acting on its own to a condemn a structure." It is Defendants' position that Plaintiff should have initiated inspections during the review period. Because no "formal notice" that the building was to be "condemned" resulted from inspections carried out "within the Review Period," Plaintiff forfeited the deposit.

Stewart Title Guaranty Company has not filed an opposition to Plaintiff's motion.

DISCUSSION

Here, the motion must be denied as to Defendant Four Seasons. It is undisputed that Four Seasons was not a party to the Agreement at issue. Because there was no privity of contract between Four Seasons and Plaintiff, Four Seasons cannot be liable for breach of contract stemming from any breach of the Agreement. See *Ferrisburgh Realty Investors v. Schumacher*, 2010 VT 6, ¶ 12, 187 Vt. 309, 316.

On the other hand, the motion will be granted as to U.S. Bank, Business Loan Center, LLC, and Stewart Title Guaranty Company. The Court does not find that Paragraph 3 "Requirements and Conditions of Closing" is the relevant clause. Rather, the Court agrees with Plaintiff that Paragraph 10 of the Agreement concerning "Condemnation" applies. That paragraph is clearly separate from Paragraph 3 and does not contain a particular deadline. Additionally, the Court concludes that the property in question has been "condemned."

"Condemnation" has been defined as "[a]n official pronouncement that a building is unfit for habitation" or "the act of making such a pronouncement." Black's Law Dictionary (10th ed. 2014). Similarly, "condemn" has been defined to mean "to adjudge unfit for use or consumption," as in, to "condemn an old apartment building."[1] These definitions are consistent with their usage in Vermont case law. For example, in referencing a federal case involving

[1] Merriam-Webster Dictionary, "condemn," *available at* https://www.merriam-webster.com/dictionary/condemn?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Feb. 3, 2017).

tenants ordered by the City of Milwaukee to temporarily vacate their residence without compensation in order for repairs to be carried out, the Vermont Supreme Court explained that the federal court had allowed the governmental entity to "*condemn* uninhabitable residential apartments," despite the fact that the federal court did not actually use this term. See *Alger v. Department of Labor & Industry*, 2006 VT 115, 181 Vt. 309 (citing *Devines v. Maier*, 728 F.2d 876, 884 (7th Cir. 1984)) (emphasis added). The Vermont Supreme Court has similarly referred to "condemnation" in actions involving determinations that a building was unsafe and dangerous due to fire or health hazards. See, e.g., *Eno v. City of Burlington*, 125 Vt. 8 (1965). In this vein, whenever the Commissioner of the Fire Safety Division finds that "premises or any part of them" do not meet certain standards set forth under Title 20, the Commissioner is authorized to order the premises to be "repaired or rehabilitated." 20 V.S.A. § 2733(a). If the premises are "not repaired or rehabilitated within a reasonable time as specified by the commissioner in his or her order, the commissioner may order the premises or part of them closed." *Id*. While the statute does not expressly use the term, it is clear to the Court that Title 20 empowers the Fire Safety Division, a governmental entity, to "condemn" a building or a portion thereof.

It is undisputed that prior to closing the transaction in the instant case, the Fire Safety Division prepared a Fire Inspection Results report on September 21, 2015 stating that the subject property "is currently unoccupied, and shall remain unoccupied until the building is brought into code compliance." Because the Fire Safety Division is a governmental entity that has clearly ordered the building closed due to failure to meet required standards, the Court determines that Paragraph 10 of the Agreement has been satisfied. Importantly, Paragraph 10 does not require knowledge of any condemnation on the part of the Seller. Nor does it require that Purchaser to make efforts to remedy the conditions giving rise to the condemnation. It requires only that Purchaser provide written notice to Seller of its intent to terminate the Agreement. See Agreement at Paragraph 10. And, because this motion involves only Plaintiff's breach of contract claims, Defendants' knowledge of the condemnation is not relevant. As such, Seller was to "immediately" return the Earnest Money Deposit. Accordingly, Plaintiff's motion for summary judgment against U.S. Bank, Business Loan Center, LLC, and Stewart Title Guaranty Company as to Counts I and II is granted.

Plaintiff also seeks an award of attorney's fees. The question of attorney's fees is not adequately briefed. The Court notes that this order is an interlocutory order. To the extent Plaintiff seeks summary judgment on its request for attorney fees, the motion is denied.

ORDER

Plaintiff's motion for partial summary judgment is GRANTED for the reasons stated herein. The request for summary judgment on the demand for attorney's fees is DENIED.

Electronically signed on February 03, 2017 at 11:19 AM pursuant to V.R.E.F. 7(d).

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Robert P. Gerety, Jr.
Superior Court Judge