2626 BWAY LLC v Broadway Metro Assoc., L.P.
2010 NY Slip Op 33846(U)
January 21, 2010
Sup Ct, NY County
Docket Number: 106287/09
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ______ Justice PART 3

Index Number : 106287/2009
2626 BWAY LLC
vs.
BROADWAY METRO ASSOCIATES, L.P.,
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 106287-09
MOTION DATE 8/19/09
MOTION SEQ. NO. #001
MOTION CAL. NO. ______

were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

RECEIVED
JAN 22 2010
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NYS SUPREME COURT - CIVIL

Dated: 1-21-10.

Eileen Bransten, J.S.C.
HON. EILEEN BRANSTEN

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3
---X

2626 BWAY LLC,

Plaintiff,

-against-

BROADWAY METRO ASSOCIATES, L.P.,
HOWARD W. SEGAL, P.C., and
HOWARD W. SEGAL, ESQ.

Defendants.

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Index No.: 106287/09
Motion Date: 8/19/09
Motion Seq. No.: 01

EILEEN BRANSTEN, J.:

In this action involving an alleged breach of a contract to purchase a building, defendants Broadway Metro Associates, L.P. ("Broadway Metro"), Howard W. Segal, P.C., and Howard W. Segal, Esq., move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) or for an order converting this motion to one for summary judgment, pursuant to CPLR 3211 (c).

I. Background

In August of 2008, Broadway Metro agreed to sell property located at 2624-2626 Broadway, New York, New York (the "Premises") to plaintiff 2626 BWAY LLC ("Plaintiff"). Plaintiff leased the Premises at that time. On August 18, 2008, Broadway Metro and Plaintiff entered into the Contract of Sale (Notice of Motion to Dismiss, Ex 1,

hereinafter, the "Contract"), in which Broadway Metro agreed to sell the Premises to Plaintiff for $9,000,000. Plaintiff provided to Broadway Metro a contract deposit of $525,000, which was held in escrow by Broadway Metro's counsel, in furtherance of the Contract.

Pursuant to the Contract, Plaintiff agreed to take title to the Premises subject to certain "Permitted Exceptions" (Contract, ¶ 3.2 *et seq.*, the "Exceptions"). The Exceptions include, *inter alia*, ".1 [a]ll present and future building, zoning and other restrictions, regulations, requirements, laws, ordinances, resolutions and orders of any State, municipal, Federal or other governmental authority ..."; ".2 [a]ll covenants, restrictions, easements and agreements of record provided same do not prohibit the existence and use of the structure or structures now on the Premises"; ".3 [a]ny state of facts which would be shown by a current survey or inspection of the Premises, provided title is not thereby rendered unmarketable"; and, importantly for this motion, ".4 [t]hat certain Zoning Lot Development Agreement dated August 30, 2004 between Seller [Broadway Metro] and IMICO Metro LLC . . ." (*id.*).

Plaintiff agreed under the Contract to take the Premises "as is"; that it had inspected the Premises and was "fully familiar with their physical condition and state of repair"; and that Broadway Metro was not responsible for latent or patent defects in the Premises (Contract ¶ 5.2). Plaintiff further agreed that Broadway Metro made no representations or warranties concerning the physical condition of the Premises except as specifically stated within the Contract (Contract ¶ 5.3).

The Contract additionally states that Plaintiff took the Premises:

> **SUBJECT TO** all of the rights, obligations, terms and conditions of a certain Zoning Lot Development Agreement between Seller [Broadway Metro] and IMICO Metro LLC dated as of August 30, 2004 and recorded under CRFN 2005000193988 in the office of the New York City Register, County of New York.

(Contract, ¶ 1.1 (emphasis in original)). IMICO Metro LLC ("IMICO") owns the lot at adjoining the Premises, 2628 Broadway. The Zoning Lot Development Agreement (Notice of Motion to Dismiss, Ex 4, hereinafter "the ZLDA") sets out rights and obligations with regard to 2626 Broadway, New York, New York, part of the Premises here at issue. Pursuant to the ZLDA, Broadway Metro and IMICO entered into a "Light and Air Easement," dated September 19, 2005, which was recorded in the New York City Register's office (ZLDA, Ex F (the "Light and Air Easement").

Plaintiff alleges that the ZLDA, including the Light and Air Easement, set forth the right to expand the Premises upwards 15 feet above the Premises' parapet wall (for a total of approximately 20 feet above the existing structure (Affidavit in Opposition ("Souto Aff"), ¶¶ 7, 14). Plaintiff claims that the alleged right to expand the Premises was a "substantial element of the Contract" that it "specifically negotiated for" (Souto Aff, ¶ 7).

The Contract provided for a closing date to occur within six months of the August 18th, 2008 execution of the Contract, thus by February 18, 2009, "or such earlier date as the Purchaser [Plaintiff] shall designate in writing upon twenty (20) days prior written notice to

Seller [Broadway Metro]" or upon a date agreed upon by the parties (Contract, ¶ 7). On February 17, 2009, Plaintiff sent a letter to Broadway Metro requesting a two-month adjournment of the closing, to April 17, 2009 (Notice of Motion to Dismiss, Ex 12). Broadway Metro responded to Plaintiff's request by letter that same day, and proposed instead a three week adjournment, to March 11, 2009. Broadway Metro included in its letter a "time-of-essence" clause, and requested Plaintiff's agreement to the date and clause (*id.*, Ex 13). Two days later, on February 19, 2009, Broadway Metro sent another letter to Plaintiff in which Broadway Metro reiterated the March 11, 2009 closing date and the "time-of-essence" declaration (*id.*, Ex 14). On February 20, 2009, Plaintiff objected to the "time-of-essence" clause and proposed closing date and offered instead a closing date of April 1, 2009, without the "time-of-essence" restriction (*id.*, Ex. 15). Despite Plaintiff's objection to the proposed closing date, Broadway Metro prepared for the closing to be held on March 11, 2009.

On March 10, 2009, Plaintiff stated by letter to Broadway Metro that it believed Broadway Metro incapable of passing clear title to the Premises. Plaintiff alleged that Broadway Metro could not transfer clear title because a neighboring building had been constructed such that habitable rooms overlooked the Premises and those habitable rooms were subject to zoning requirements that prevented Plaintiff's planned enlargement of the Premises. Plaintiff claimed that being unable to enlarge the Premises thwarted its valuable

rights under the Contract. Further, Plaintiff claimed that Broadway Metro was required under the ZLDA to obtain a Certificate of Occupancy in connection with the Premises and the adjoining building, that Broadway Metro had not done so and that this situation also prevented Broadway Metro from passing good title. Plaintiff stated that as a result of its alleged findings, Plaintiff would not be attending the March 11, 2009 closing (*id.*, Ex 17).

When Plaintiff did not appear to close on March 11th, Broadway Metro declared, and recorded, Plaintiff's alleged default (Notice of Motion to Dismiss, Ex 18). Plaintiff's deposit was thereafter released to Broadway Metro (Compl, ¶ 63; Souto Aff, ¶ 42).

Plaintiff argues that it became aware of the alleged impossibility of performing the ZLDA when, in early 2009, the New York City Landmarks Preservation Commission required it to take photographs of the Premises. Plaintiff alleges that it could only take the required pictures from the vantage point of the adjoining property (Souto Aff, ¶¶ 20-22). Upon gaining access to apartments in the adjoining property, Plaintiff then discovered that the rooms facing the Premises were living rooms and bedrooms (*id.*). Plaintiff contends that only then did it realize that it could not expand the Premises above the parapet walls.

Plaintiffs allege that zoning restrictions require a thirty foot minimum distance between buildings in combined zoning lots that have windows of living spaces facing an adjoining building. Thus, Plaintiff claims that 30 feet was required between the Premises and the adjoining building at 2628 Broadway (*see* Affidavit in Opposition ("Carrano Aff"); ¶¶

7-8, Ex. J, "Zoning Resolution § 23-711"). Plaintiff claims that Zoning Regulation § 23-711 makes performance under the ZLDA impossible, as any expansion above the parapet wall would place the windows of the adjoining building within thirty feet of the Premises and would therefore be a violation of Section 23-711. Plaintiff therefore complains that as a result Broadway Metro can never pass clear title to the Premises; that its own non-performance is thus excused; and that it is entitled to refuse to close the Contract and to recover its down payment.

Plaintiff brings six causes of action: (1) seeking a declaration that Broadway Metro did not have the right to set a "time-of-essence" closing date; (2) for specific performance, requiring Broadway Metro to deliver title pursuant to the terms of the Contract; (3) seeking a declaration that Broadway Metro is in breach of the Contract; (4) seeking a declaration regarding Broadway Metro's obligations under the Contract and Plaintiff's right to obtain a return of its contract deposit; (5) for breach of contract seeking monetary damages; and (6) for a judgment directing Howard W. Segal, P.C. and Howard W. Segal, Esq. to return Plaintiff's contract deposit to Plaintiff, with interest.

Broadway Metro asserts that any difficulty in performance under the ZLDA was a condition which, under the Contract, Plaintiff could have discovered "upon reasonable examination of public records or by physical inspection" prior to the execution of the Contract (Affidavit in Support of Motion to Dismiss ("Bailek Aff"), ¶ 27), and that Plaintiff

[* 8]

specifically represented in the Contract that it was familiar with any conditions and aspects of the Premises—such as the ZLDA and the Light and Air Easement—which might affect its investment. Broadway Metro moves to dismiss Plaintiff's Verified Complaint pursuant to CPLR 3211 (a) (1) and (a) (7) based upon documentary evidence and for failure to state any claims.

II. Discussion

On a motion to dismiss pursuant to CPLR 3211, the court must:

> accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

(*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *see also Leon v Martinez*, 84 NY2d 83 [1994]). A motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'"(*Held v Kaufman*, 91 NY2d 425, 430-431 [1998], quoting *Leon*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007]).

"[W]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms" (*South Road Associates, LLC v International Business Machines Corp.*, 4 NY3d 272, 277 [2005] [internal quotations and citation omitted]). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent [and that] [t]he best evidence of what parties to

a written agreement intend is what they say in their writing" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002] [interior quotation marks and citation omitted]; *see also Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25 [2008]). Where the contract language is unambiguous, the matter is one of law for the court to determine (*Greenfield*, 98 NY2d at 569, *supra*; *see also Wallace v 600 Partners Co.*, 86 NY2d 543 [1995]).

Plaintiff's Third, Fourth and Fifth Causes of Action

A review of the ZLDA shows that the agreement intended to allow IMICO to combine two separate zoning lots into one combined zoning lot in order to provide room to develop a new structure, the "Developer Building" (ZLDA, p.2, first "WHEREAS" clause). The ZLDA does not provide an express grant of a right to Broadway Metro to build up to 15 feet above the parapet wall. Rather, the ZLDA simple includes an air and light easement in IMICO's favor which begins 15 feet above the parapet wall (ZLDA, ¶ 2 [a] [vi]).[1]

Initially, this court notes that the provisions of the Contract upon which Broadway Metro relies to show that Plaintiff took the Premises "as is" (Contract, ¶ 5) do not pertain to the ZLDA. Rather, the clear language of the Contract shows that these provisions pertain to Plaintiff's familiarity with the physical structure of the existing Premises, not to any right to

[1] This interpretation of the Contract is explored in the affidavit of Adam Rothkrug, Plaintiff's "expert" land use attorney. However, the court notes that neither the affidavit of Mr. Rothkrug, nor that of Chris Carrano, an architect retained by Plaintiff, may be used as probative evidence in this motion. Experts have no authority to testify as to the legal implication of agreements; rather, courts determine this issue. *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 68-69 (1st Dept 2002).

expand the Premises (*id.*). Further, for the same reason, all merger clauses concerning Plaintiff's acceptance of the physical condition of the Premises "as is" are without effect upon the rights accorded in the ZLDA. Therefore, the provisions regarding Plaintiff's acceptance of the property "as is" do not alone form the basis dismiss the complaint.

Broadway Metro argues that the ZLDA was a public record that Plaintiff could have reviewed prior to purchase, whereby it might have discovered the impediment to the expansion of the building. However, a review of the ZLDA would not have revealed that the building adjoining the Premises had living spaces with windows facing the Premises that allegedly prevent Plaintiff's expansion of the Premises due to existing zoning restrictions. Plaintiff could only have detected this problem by reviewing the plans for, or the physical aspect of, the property adjoining the Premises.

Plaintiff, however, does not explain why Broadway Metro, rather than itself, should have born the burden of inspecting the adjoining building or the building's plans on file with the Department of Buildings prior to closing. Plaintiff further does not explain why Broadway Metro was obligated to notify the Plaintiff that the existence of living spaces in the adjoining building that would subject the Premises owner to Zoning Resolution § 23-711. Neither does Plaintiff explain why Broadway Metro should have known about any impediment to expansion of the Premises at the time of the execution of the Contract or on the proposed closing date.

The Contract's Exceptions explicitly state that the Premises were sold subject to "[a]ll present and future building, zoning and other restrictions, regulations, requirements, laws, ordinances, resolutions and orders of any State ... or other governmental authority ..." (Contract, ¶ 3.2.1). Reading this Exception together with the ZLDA, as this court must (*Lovelace v Krauss*, 60 AD3d 579, 579 [1st Dept 2009]("[i]t is an elementary rule of contract construction that clauses of a contract should be read together contextually in order to give them meaning" [internal quotation marks and citation omitted]), shows that the Light and Air Easement allowance to the Premises of light and air 15 feet above the parapet wall was not inconsistent with IMICO's right to build living quarters in the adjoining building at 2628 Broadway with windows facing the easement area. The Light and Air Easement did not provide Broadway Metro an express right to build in the easement area and contained no restriction on the adjoining building.

Pursuant to Contract Exception paragraphs 3.2.1 and 3.2.4, the Premises were subject to all zoning restrictions as well as the ZLDA. Thus, Plaintiff was obliged to read the ZLDA as incorporating any zoning regulations which directly effected the rights in the ZLDA. This was Plaintiff' s obligation of due diligence. Hence, Broadway Metro was not remiss by not ensuring that Plaintiff could build above the parapet wall under the ZLDA. Broadway Metro was not incapable of performance of the Contract on March 11, 2009.

Plaintiff, by reference to its expert Rothkrug's affidavit[2], asserts that Broadway Metro also acted in violation of the ZLDA by failing to comply with paragraph 3 [ii] of the document. Paragraph 3 [ii] of the ZLDA calls for Broadway Metro to obtain an amended certificate of occupancy ("COO") for the Premises, recording the existence of the combined zoning lot at 2626 -2628 Broadway. However, plaintiff fails to read the provision further, which states that Broadway Metro's obligation is dependant on the conditions that "(A) the Application . . . be prepared by [IMICO] at [IMICO's] expense and forwarded to [Broadway Metro] for [Broadway Metro's] execution . . . and (B) [that IMICO] pay the reasonable professional fees incurred by [Broadway Metro] for the review of the application and any permit or application fees imposed on such application" (ZLDA ¶ 3 [ii]).

IMICO has not alleged that it has either prepared a COO for Broadway Metro or forwarded a COO for Broadway Metro's review. Further, it is clear that the ZLDA paragraph 3 [ii] is concerned with the combination of zoning lots, and not with any right to build above the parapet wall. Plaintiff's contention that Broadway Metro's failure to obtain the amended COO rendered performance under the Contract impossible is without merit.

For the above reasons, documentary evidence mandates that Plaintiff's third, fourth and fifth causes of action must be dismissed.

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[2] See footnote 1.

Plaintiff's First Cause of Action

Broadway Metro has also established a legal right to incorporate a time-of-the-essence provision in the sale of the Premises sufficient to require dismissal of Plaintiff's first cause of action. The Court of Appeals has stated that "it is possible for the seller to convert a non-time-of-the-essence contract into one making time of the essence by giving the buyer clear, unequivocal notice and a reasonable time to perform." (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006] [internal quotations and citation omitted]). "A time-of-the-essence letter which does not give the purchaser sufficient time to perform constitutes a nullity." *(Iannucci v 70 Washington Partners, LLC*, 51 AD3d 869, 871 [2d Dept 2008]).

> What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case. Included within a court's determination or reasonableness are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance [interior citations omitted].

Zev v Merman, 73 NY2d 781, 783 [1988]). Broadway Metro's February 17th and 19th, 2009 letters provided Plaintiff a three-week extension to close. The court finds that Broadway Metro's three-week extension, which immediately followed the Contract's six-month period in which to close, was a reasonable period of time for performance. The court notes that upon reception of Broadway Metro's February 17th and 19th letters, Plaintiff had already discovered its reason for refusing to close before the time-of-the-essence closing date, and

could have responded earlier to Broadway Metro concerning Broadway Metro's alleged inability to close.[3]

Plaintiff's Second Cause of Action

The court finds that Plaintiff's second cause of action for specific performance of the Contract—to allow Plaintiff the right to expand the Premises—must also be dismissed. The thrust of Plaintiff's complaint is the impossibility of performance under the ZLDA. Plaintiff alleges that zoning restrictions prevent Broadway Metro from delivering the building together with the expansion rights Plaintiff claims it is owed. Plaintiff may not therefore request specific performance against the alleged impossibility. The cause of action for specific performance is therefore logically without merit and must be dismissed.

Plaintiff's Sixth Cause of Action

Broadway Metro made no anticipatory (or actual) breach of the Contract. The release of the money in escrow to Broadway Metro was therefore appropriate. Plaintiff's sixth cause of action against the escrow holders Howard W. Segal, P.C. and Howard W. Segal, Esq. is therefore without support and must be dismissed.

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[3] Plaintiff's time-of-the-essence argument is additionally without merit as it is clear that Plaintiff would have refused to close at any date after February 2009, based on the alleged frustration of its presumed ZLDA rights.

III. Conclusion

The documentary evidence shows that Broadway Metro acted appropriately under the Contract and that it was in full possession of transferrable good title. Broadway Metro did not owe Plaintiff expansion rights under the ZLDA. Consequently, Plaintiff has failed to state any claim and the complaint must be dismissed in its entirety.

Accordingly, it is

ORDERED that the motion to dismiss the complaint brought by Broadway Metro Associates, L.P., Howard W. Segal, P.C., and Howard W. Segal, Esq. is granted; and it is further

ORDERED that the complaint is dismissed without costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
January 21, 2010

ENTER:

Hon. Eileen Bransten, J.S.C.