

Nassau Beekman LLC v Ann/Nassau Realty LLC

2012 NY Slip Op 32476(U)

September 13, 2012

Sup Ct, NY County

Docket Number: 116402/2008

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 116402/2008
NASSAU BEEKMAN
vs
ANN/NASSAU REALTY
Sequence Number : 002
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____, were read on one 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 ^{cross-} to

motion and cross-motion are decided in accordance with accompanying memorandum decision.

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

Dated: 9/13/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

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- 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: CIVIL TERM: PART 19

-----X
NASSAU BEEKMAN LLC,

Plaintiff,

- against-

Index No.: 116402/2008

Submission Date:

05/09/2012

DECISION AND ORDER

ANN/NASSAU REALTY LLC,

Defendant.

-----X
For Plaintiffs:

Claude Castro & Associates, PLLC
355 Lexington Ave., Suite 1400
New York, NY 10017

For Defendant:

Greenberg Traurig, LLP
200 Park Ave., 38th Floor
New York, NY 10166

Papers considered in review of this motion for partial summary judgment and cross motion to reargue:

Noting of Motion	1
Aff of Support.	2
Aff in Limited Opp	3
Notice of Cross Motion	4
Aff in Opp	5
Mem of Law	6
Reply Aff	7

HON. SALIANN SCARPULLA, J.:

In this action to recover damages from the unconsummated sale of real property, defendant Ann/Nassau Realty LLC (“ANR”) moves for partial summary judgment on its counterclaim to retain the down payment paid by plaintiff Nassau Beekman LLC (“Nassau Beekman”) in connection with its attempt to purchase real property from ANR. On May 9, 2012, on the record, the Court denied Nassau Beekman’s cross motion for

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leave to reargue the Court's August 2, 2011 Decision and Order dismissing Nassau Beekman's complaint, and denying Nassau Beekman's motion for summary judgment.

In a Contract of Sale dated August 14, 2007 (the "Contract of Sale"), Nassau Beekman agreed to buy, and ANR agreed to sell, real property located at 21 Ann Street and 109, 111 and 113 Nassau Street, New York, NY ("the property") for a price of \$56,700,000, later reduced to \$50,030,000. Nassau Beekman placed an initial down payment of \$5,000,000 with ANR for the property. Pursuant to Section 12.04 of the Contract of Sale, the parties agreed that retention of the Down Payment "as liquidated damages" was ANR's "sole remedy" if Nassau Beekman defaulted.

At the time they executed the Contract of Sale, the parties also entered into a separate, handwritten agreement (the "Development Rights Agreement") in which ANR represented that it intended to purchase certain development rights attributable to 21 Ann Street, and ANR agreed to assign these development rights to Nassau Beekman.

In the initial Contract of Sale, the closing date for the sale of the property was scheduled for "August 30, 2007, time of the essence for Purchaser to perform its obligations by no later than October 10, 2007." The closing date was rescheduled multiple times, through written amendments to the Contract of Sale, and the down payment was increased to a total of \$9,000,000. The last closing date memorialized in writing was September 25, 2008.

On September 25, 2008 ANR appeared at the closing and, as memorialized by a court reporter, purported to tender the documents it was required to tender under the Contract of Sale. Nassau Beekman, however, failed to appear at the September 25, 2008 closing. On November 6, 2008, ANR notified Nassau Beekman in writing of the termination of the Contract of Sale because of Nassau Beekman's breach, and of ANR's election to retain the \$9,000,000 down payment as liquidated damages. By letter dated November 13, 2008, Nassau Beekman claimed that the parties orally agreed to an extension of the closing date, that ANR was not ready, willing and able to close on September 25, 2008, and that ANR's termination of the Contract of Sale was improper.

Nassau Beekman commenced this action in December, 2008 seeking a declaration that ANR wrongfully terminated the Contract of Sale and that, as a result, Nassau Beekman is entitled to the return of its \$9,000,000 down payment and additional damages resulting from the breach. In its answer, ANR asserts a counterclaim, in which it seeks to retain Nassau Beekman's \$9,000,000 deposit as liquidated damages.

Thereafter, the parties cross moved for summary judgment. On August 2, 2011, the Court denied Nassau Beekman's motion, and granted ANR's motion insofar as it sought dismissal of Nassau Beekman's complaint (the "2011 order"). *See Nassau Beekman LLC v. Ann/Nassau Realty LLC*, 2011 NY Slip Op 32119U, at *5 (Sup. Ct. NY Co. 2011). The Court, however, denied ANR summary judgment on its counterclaim to retain the down payment. The Court ruled that ANR's failure to include the documents

listed in the closing transcript precluded summary judgment on its counterclaim to retain the down payment. The Court stated that “[t]hese documents would prove that ANR did perform, or at least had the ability to perform, under the Contract of Sale” Thus, the Court denied the motion in part, with leave to renew upon submission of these documents.

ANR now renews its motion for partial summary judgment on its counterclaim to retain the down payment. In its motion, ANR has attached the documents listed in the closing transcript. In opposition, Nassau Beekman argues that ANR was not ready, willing and able to close on September 25, 2008, and alleges that there are issues of fact as to whether the parties made an oral agreement to adjourn the closing.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgement as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, ANR has made a *prima facie* showing that it was ready, willing and able to close on September 25, 2008. In its 2011 order, the Court ruled that the documents listed in the closing transcript would establish that ANR made a valid tender at the closing, and

ANR has now provided these documents, the validity of which Nassau Beekman does not challenge.

Nassau Beekman maintains that ANR's motion is insufficient because ANR failed to present copies of checks payable to the City and State of New York for the applicable transfer taxes, the satisfaction of mortgage for the \$36,000,000 mortgage that was on the property, copies of ANR's operating agreement to establish the authority of the persons executing the closing documents, and an updated title report confirming the status of title through the date of closing. With the exception of the copies of the transfer tax checks, ANR was not required to provide these documents under the Contract of Sale.

Nassau Beekman fails to raise a question of fact, however. The fact that checks for the transfer taxes were not submitted is not sufficient to defeat this motion for summary judgment, especially because Nassau Beekman has failed to present any evidence that ANR was unable to pay the transfer taxes at the closing. Thus, Nassau Beekman has failed to raise an issue of fact, and the Court grants ANR summary judgment on its counterclaim to retain the \$9,000,000 down payment. *See Vision Enters., LLC v. 111 E. Shore, LLC*, 92 A.D.3d 868, 870 (2d Dept. 2012).

In accordance with the foregoing, it is hereby

ORDERED that the defendant Ann/Nassau Realty LLC's motion for partial summary judgment on its counterclaim to retain the \$9,000,000 against plaintiff Nassau Beekman LLC is granted; and it further

