

**Safka Holdings, LLC v 220 W. 57th St. Ltd
Partnership**

2014 NY Slip Op 31224(U)

May 5, 2014

Supreme Court, New York County

Docket Number: 652371/2013

Judge: Eileen Bransten

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This opinion is uncorrected and not selected for official publication.

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

-----X
SAFKA HOLDINGS, LLC,

Plaintiff,

-against-

Index No. 652371/2013
Motion Seq. No. 002
Motion Date: 2/24/2014

220 WEST 57TH STREET LIMITED PARTNERSHIP,

Defendant.

-----X

220 WEST 57TH STREET LIMITED PARTNERSHIP,

Counterclaim-Plaintiff,

-against-

SAFKA HOLDINGS, LLC,
Counterclaim-Defendant.

-----X

BRANSTEN, J.:

This action stems from failed real estate transaction, in which plaintiff Safka Holdings, LLC ("Safka") was to purchase a commercial retail building located at 220 West 57th Street, New York, New York (the "Building") from defendant 220 West 57th Street Limited Partnership ("220 West"). The parties entered into a purchase and sale contract, which provided that, after a due diligence period, plaintiff was to make a \$5 million initial deposit. In addition, the contract stated that time was of the essence, there was no financing contingency, and that the sale of the building was "as is." Plaintiff did

not make the initial deposit and claims that defendant failed to remit information and provide access to the building.

In motion sequence 002, Defendant moves for summary judgment, urging that plaintiff failed to meet the deposit deadline, or to send a notice of default as required under the contract. Defendant also contends that it responded to all of plaintiff's requests for information, the document plaintiff sought was publicly filed and available, and plaintiff was just seeking another extension of its deposit deadline because it failed to find financing.

For the reasons set forth below, defendant's motion for summary judgment is granted, the complaint is dismissed. Moreover, defendant is granted summary judgment on its fourth counterclaim for attorneys' fees.

I. Background

A. The Purchase and Sale Agreement

On May 6, 2013, Safka and 220 West entered into the purchase and sale agreement ("PSA") for the Building. *See* defendant's Rule 19-a Statement of Material Facts ("defendant's 19-a Statement") ¶ 5. The PSA contained a \$65 million purchase price, with an initial deposit of \$5 million due on June 20, 2013, and a closing date of August 7, 2013, with time being of the essence for both payment provisions. *Id.* ¶¶ 6-9; Notice of

Motion Ex. 1 §§ 2.1.1 and 6.1 ("PSA"). The PSA also provided that the Building was being sold "**AS IS, WHERE IS AND WITH ALL FAULTS,**" and that 220 West had no obligation to cure any defects or violations with respect to the Building. *See* defendant's 19-a Statement ¶¶ 10-11; PSA §§ 2.4 and 11.4. There was no financing contingency in connection with the purchase of the Building, so that Safka's payment obligations were not contingent on its ability to obtain financing by the time of the essence deadlines. *See* defendant's 19-a Statement ¶ 12; PSA 2.1.3.

Under the agreement, Safka had a 45-day period, prior to delivering its initial deposit, within which it was permitted to conduct due diligence. This period was referred to in the PSA as the "Property Approval Period" and was a time of the essence provision. *See* defendant's 19-a Statement ¶¶ 13-14; PSA § 3.1. The provision also stated that if during that period, Safka, as buyer, "determines that the Property is not acceptable to Buyer, for any reason or no reason, Buyer shall have the right, by giving written notice to Seller on or before the last day of the Property Approval Period (a 'Termination Notice') (TIME BEING OF THE ESSENCE), to terminate this Agreement." (PSA § 3.1). During this Property Approval Period, 220 West was required to provide certain documents and information in its possession to Safka upon its request. This included "all plans and specifications for the Property, logs and manuals for Equipment, if any, governmental reports and permits that Seller has in Seller's possession or control, without request to or

investigation of third parties" and any other documents or information reasonably requested by Safka and in 220 West's possession and control. *See* defendant's 19-a Statement ¶ 15; PSA § 3.2.

The PSA contained a default provision in section 10.1, which provided that if either party defaulted, and such default continued for five business days after receipt of a notice of default, the non-defaulting party could terminate the agreement, or, in the case of 220 West's default, Safka could seek specific performance of the PSA. *See* defendant's 19-a Statement ¶ 18; PSA §§ 10.1, 10.2. Section 16.5 provided that if either party engaged an attorney to enforce or construe the PSA in a legal proceeding, the prevailing party "shall be entitled to receive from the other party hereto reimbursement for all reasonable attorneys' fees and costs." *See* defendant's 19-a Statement ¶ 19; PSA § 16.5.

B. The PSA Amendment

On June 17, 2013, after a disagreement regarding the scheduling of an inspection of the Building by Safka, the parties entered into an amendment of the PSA (the Amendment) which extended the Property Approval Period for 15 days and the due date for the initial deposit to July 5, 2013 at 5 p.m. *See* defendant's 19-a Statement ¶¶ 20-21; Notice of Motion Ex. 2 at 1. In consideration for this extension, Safka waived any possible claims against 220 West based on a purported failure to cooperate with Safka in

the due diligence process prior to June 17, 2013, including with regard to providing access to the Building. *See* Notice of Motion Ex. 2 ¶ 2. Aside from the dispute regarding the scheduling of a visit to the Building, which was resolved by the Amendment, Safka has not asserted that 200 West failed to provide access to the Building. *See* defendant's 19-a Statement ¶ 25; plaintiff's Rule 19-a Counterstatement of Material Facts ¶ 25.

C. *Due Diligence*

On June 24, 2013, Safka made a request of 220 West to inspect the premises, and then, on June 26, 2013, requested another extension of the initial deposit deadline. *See* defendant's 19-a Statement ¶¶ 28-29. On June 26, 2013, Safka did a walk through of the premises, after which 220 West offered to provide access to the premises again. *Id.* ¶ 30.

On Friday, June 28, 2013, Safka forwarded an email from one of its consultants, Atalanta Advisors, to counsel for 220 West. *Id.* ¶ 32. This email, regarding the certificate of occupancy for the Building, inquired about an open New York City Department of Buildings ("DOB") Alt 1 application which had been filed in 2000, but never closed out. *See* Affidavit of Anthony Basile ¶ 21 and Ex. 5. The certificate of occupancy for the Building is a publicly filed document available from the DOB website. *See* defendant's 19-a Statement ¶ 34. The email was forwarded to 220 West on July 1, 2013. *Id.* ¶ 32.

On July 1, 2013, from 8:00 p.m. to 3:00 a.m. the next morning, July 2, 2013, Kafka's surveyor was at the Building with 220 West's representative, Anthony Basile. *Id.*

¶ 35. By email on July 2, 2013, at 10:39 a.m., Safka asked Mr. Basile to provide plans regarding the escalators on the premises, any information he had on the certificate of occupancy, and any documentation of the work 220 West had been doing to obtain the temporary certificate of occupancy, for a noon meeting Safka had with its potential lender. *Id.* ¶ 37; Notice of Motion Ex. 6. At 2:19 p.m. on that same day, Mr. Basile advised Safka that he would obtain the escalator plans from storage, and, at 2:42 p.m., he sent an email to Safka updating it as to the status of the temporary certificate of occupancy. *See* defendant's 19-a Statement ¶ 40; Notice of Motion Ex. 7. At 4:53 p.m., also on July 2, 2013, Mr. Basile informed Safka that he located the plans, and copies were made and being held at the front door of the Building for Safka to pick up. *See* defendant's 19-a Statement ¶ 41; Notice of Motion Ex. 6. On July 2, 2013, Safka again sought an extension of time of the Property Approval Period and the closing date, but 220 West would not agree. *See* defendant's 19-a Statement ¶¶ 42-43; Notice of Motion Ex. 8. Safka did not pick up the elevator plans until July 5, 2013. *See* defendant's 19-a Statement ¶ 46.

D. *Prior Proceedings*

On July 3, 2013, Safka commenced this action with a complaint and an application for a temporary restraining order and a preliminary injunction. In the complaint, Safka asserted claims for: (1) breach of contract, seeking a declaratory judgment; (2) an injunction; (3) breach of contract, seeking money damages; and (4) attorneys' fees under the PSA. In the preliminary injunction motion, it sought an order: (i) extending the time of the essence Property Approval Period, initial deposit deadline, and closing date by 30 days; (ii) prohibiting 220 West from interfering with Safka's performance of the PSA; and (iii) requiring 220 West to provide access to the Building, and to provide documents and information regarding the third and fourth floors of the Building. The parties appeared in court on July 5, 2013, and agreed to toll the Property Approval Period and initial deposit deadline until July 9, 2013 at 4:00 p.m. to permit this court to hear the matter on July 8, 2013. *See* Affidavit of Felice B. Galant ("Galant Aff.") Ex. C (July 5, 2013 Stipulation and Order).

On July 8, 2013, this Court denied the TRO, holding that if Safka did not make its \$5 million initial deposit by July 9, 2013 at 4:00 p.m., the PSA would be terminated, and the only remedy Safka would have is for money damages. *Id.* Ex. D at 50-51. The Court concluded that Safka had not been diligent in performing its due diligence and had not demonstrated irreparable injury. *Id.* at 46-51. On the issue of access to the Building, the

Court concluded that 220 West had provided access to the premises, and the parties agreed that Safka waived any argument about access in the Amendment and that there was no further issue with regard thereto. *Id.* at 47-48.

Safka failed to make its initial deposit by the tolled deadline of July 9, 2013 at 4:00 p.m. *See* defendant's 19-a Statement ¶ 62. On July 11, 2013, 220 West delivered a notice of default to Safka, informing it that 220 West was terminating the PSA for failure to deliver the initial deposit by deadline. *See* Notice of Motion Ex. 11.

On July 30, 2013, 220 West answered the complaint, denying the material allegations, asserting various defenses, including failure to state a claim, breach of the PSA, and that 220 West performed its obligations. *See* Galant Aff. Ex. G. It also asserted four counterclaims, the first three for Safka's breaches of the PSA, and the fourth seeking attorneys' fees under section 16.5 of the PSA. *Id.* Safka replied to the counterclaims, denying the material allegations. *See* Galant Aff. Ex. H.

II. Discussion

220 West now moves for summary judgment dismissing the complaint, contending that the provisions of the parties' agreement bar the breach of contract claim, as does the undisputed proof of 220 West's performance with regard to providing information and access. It contends that the declaratory judgment claim is redundant of the claim seeking

damages for breach of contract and should be dismissed, and the injunction claim should be denied for the same reasons that the TRO and preliminary injunction were already denied. 220 West further asserts that Safka's attorneys' fees claim should be dismissed, and fees should instead be awarded to it under the PSA.

A. *Summary Judgment Standard*

“[T]he 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 demonstrate the absence of any material issues of fact.” *Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733, 735 (2008) (citation and quotation omitted). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see also Lesocovich v. 180 Madison Ave. Corp.*, 81 N.Y.2d 982, 985 (1993). The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. *Breach of Contract*

To establish a breach of contract claim, Safka must establish that: (1) the parties entered into a contract; (2) Safka performed its obligation; (3) 220 West breached; and (4)

Safka suffered damages caused by that breach. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Safka' contract claim fails as a matter of law, because it cannot demonstrate that it performed its obligations, or that 220 West failed to perform.

First, with regard to Safka's performance, pursuant to section 2.1.1 of the PSA, it was obligated to make an initial deposit of \$5 million to 220 West's escrow agent by June 20, 2013, and the PSA specifically provided that time was of the essence. That date was extended under the Amendment to July 5, 2013, which was again extended due to the TRO/preliminary injunction motion to July 9, 2013. "In a real estate contract, time of the essence provisions are strictly construed, and a purchaser's failure to close on the scheduled date constitutes a material breach." *Towne House Stock LLC v. Coby Hous. Corp.*, 15 Misc. 3d 1101(A) at * 7 (Sup. Ct. N.Y. Cnty. March 12, 2007), *aff'd* 49 A.D.3d 456 (1st Dep't 2008); *Greto v. Barker 33 Assoc.*, 161 A.D.2d 109, 110-111 (1st Dep't 1990) (failure to perform a time of the essence obligation by the date agreed upon is a material breach). This material breach entitled the seller to declare the buyer in default and to rescind the contract. *See Grace v. Nappa*, 46 N.Y.2d 560, 565-566 (1979); *Donerail Corp. N.V. v. 405 Park LLC*, 100 A.D.3d 131, 137-138 (1st Dep't 2012). It is undisputed that Safka failed to deliver the initial deposit by July 9. Since under the PSA its payment obligations were not contingent on its ability to obtain financing, its failure to

secure a loan or obtain a commitment letter did not excuse its performance. *See* PSA § 2.1.3.

In addition, 220 West's refusal to further extend the time of the essence deadlines in the PSA cannot constitute a breach. 220 West was within its rights to demand compliance with this material and enforceable term. *See El-Ad 250 W. LLC v. 30 Hubert St. LLC*, 23 Misc.3d 1101(A) at * 3 (Sup. Ct. N.Y. Cnty. Feb. 23, 2009), *aff'd* 67 A.D.3d 520 (1st Dep't 2009) (buyer's "assertion that (seller's) refusal to adjourn the Closing Date was unreasonable and an example of bad faith is contradicted by the fact that the Agreement made 'time of the essence,'" which requires that all parties tender performance by that date unless there has been a mutually agreed upon extension). Thus, Safka cannot hold 220 West in breach since Safka had materially breached by failing to show that it was ready, willing, and able to perform at the time of the essence initial deposit date. *See Diplomat Prop., L.P. v. Komar Five Assoc., LLC*, 72 A.D.3d 596, 600 (1st Dep't 2010); *Atlantic Dev. Group, LLC v. 296 E. 149th St., LLC*, 70 A.D.3d 528, 529 (1st Dep't 2010).

Safka claims that it was unable to deliver the initial deposit when its lender, which it never actually identifies, became concerned because of a "serious problem" with the certificate of occupancy. *See* Affidavit of Joseph Safdieh ("Safdieh Aff.") ¶ 10. It asserts that 220 West failed to timely provide information it requested during the Property Approval Period regarding the certificate of occupancy and elevator plans, in breach of

220 West's obligations. The PSA, however, clearly states that the Building was being sold "AS IS, WHERE IS AND WITH ALL DEFECTS," and provided that 220 West had no obligation to cure defects. PSA §§ 2.4, 11.4. Where a buyer enters into an agreement with such a provision, it assumes the risk of property defects. *See El-Ad 250 W. LLC*, 23 Misc.3d 1101(A) at * 3-4. Moreover, the undisputed facts show that 220 West had timely provided the information. Safka's request for the certificate of occupancy was not made until the very end, in fact the 56th day of the 60-day Property Approval Period, and the emails submitted by both parties shows that, within that same day, 220 West had the elevator plans copied and ready for Safka's pick up, and provided a response about the progress toward the temporary certificate of occupancy. *See Safdieh Aff. Ex. I; Notice of Motion Ex. 7*. The Court notes that the certificate of occupancy is a publicly filed document on the DOB website, which was available to Safka from the very beginning of the Property Approval Period. With regard to Safka's allegations of a lack of access to the Building, the Amendment precludes Safka from relying on denial of access prior to June 17, 2013, and Safka has not alleged any denial thereafter. *See Galant Aff. Ex. D* at 48.

Further, while Safka claims that 220 West's actions defeated its rights under the PSA, Safka never called a default in accordance with the PSA's default provision, which requires that notice be given with a five-business-day cure period. *See PSA § 10.2*. By

failing to comply with the default provision, Safka failed to preserve its rights. *See El-Ad 250 W. LLC*, 23 Misc 3d 1101(A) at * 3 (where buyer failed to provide notice of default, and waited until days before closing, when default provision contained 10-day cure period, seller held not in breach). Safka fails to demonstrate, or raise any genuine issue of fact as to, 220 West's performance of its obligations.

The court has considered Safka's remaining arguments, and finds them to be without merit. Accordingly, its breach of contract claims (the first, third, and fourth causes of action) are dismissed as a matter of law.

C. *Injunctive Relief*

Defendant's motion is likewise granted as to Safka's second cause of action for injunctive relief. There is no basis for injunctive relief. Again, Safka's failure to perform its obligations, and its failure to demonstrate any breach by 220 West, demonstrates that it has no claim upon which it could succeed against 220 West.

D. *Attorneys' Fees*

In its fourth counterclaim, 220 West seeks attorneys' fees and costs pursuant to section 16.5 of the PSA. Section 16.5 provides that:

[s]hould any party hereto employ an attorney for the purpose of enforcing or construing this Agreement, or any judgment

based on this Agreement, . . . the prevailing party shall be entitled to receive from the other party hereto reimbursement for all reasonable attorneys' fees and costs, including, but not limited to, service of process, filing fees, court and court reporter costs, investigative costs, expert witness fees and the cost of any bonds . . .

Thus, under the express terms of the PSA, as the prevailing party here, 220 West is entitled to receive from Safka its reasonable attorneys' fees and costs. However, summary judgment with regard to 220 West's attorneys' fees and costs is granted as to liability only, and the issue of the amount of such fees and costs is hereby referred to a Special Referee to hear and report.

III. Conclusion

Accordingly, it is

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

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the defendant's motion for summary judgment on its fourth counterclaim for attorneys' fees, costs, and expenses is granted as to liability only; and it is further

ORDERED that the issue of the amount of the costs and expenses, including in reasonable attorneys' fees, incurred by defendant with respect to the enforcement or construction of the Purchase and Sale Agreement, and the defense of this litigation, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the partes, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this portion of the motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special referee or the designated referee; and it is further

ORDERED that counsel for the defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet¹ upon the Special Referee Clerk in the General Clerk's office in Rm.

¹ Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

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119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date.

Dated: New York, New York
May 5, 2014

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.