

Bond & Broadway, LLC v Funding Exch., Inc.

2014 NY Slip Op 33359(U)

December 19, 2014

Supreme Court, New York County

Docket Number: 158917/2013

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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BOND & BROADWAY, LLC,

Index No. 158917/2013

Plaintiffs,

vs.

FUNDING EXCHANGE, INC.
and FROGGY ASSOCIATES, LLC,

Defendants.

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Hon. Charles E. Ramos, J.S.C.:

This case arises out of the prospective sale of a condominium unit (the Unit) in the building located at 666 Broadway, New York, New York by defendant Funding Exchange (FE) to plaintiff Bond & Broadway (B&B), in which defendant Froggy Associates, LLC (Froggy) purported to exercise its right of first refusal to a contract of sale (Contract) as provided for in the condominium by-laws.

Plaintiff B&B is seeking specific performance to require Funding Exchange to convey the Unit and asks this Court to declare that Froggy forfeited its right of first refusal. In motion sequence 004, B&B moves for summary judgment as to liability and asks this Court to direct FE to specifically perform its obligations under the Contract.

In motion sequence 003, FE moves for summary judgment pursuant to CPLR 3212 dismissing B&B's causes of action.

In motion sequence 005, Froggy moves for summary judgment pursuant to CPLR 3212 dismissing B&B's causes of action and seeks

a declaration that Froggy validly exercised its option to purchase the Unit and is the rightful contract purchaser of the Unit pursuant to its right of first refusal.

These motions are consolidated herein for disposition.

Background

The facts set forth herein are taken from the parties' Rule 19-A statements and submissions, which are undisputed except where noted.

FE is a not-for-profit corporation organized under the laws of New York and since 1986 has been the owner of a commercial condominium unit (Unit 5) consisting of the entire fifth floor at 666 Broadway, New York, New York.

The building is governed by a set of by-laws that addresses the rights and responsibilities of unit owners wishing to sell their units, and giving amongst other things, a right of first refusal to the contiguous owners of any unit put up for sale (§7.3 of the By-Laws).

In 2011, FE, as landlord, leased a portion of its Unit to non-party Footsteps, Inc. (Footsteps), as tenant.

On August 12, 2013, B&B entered into a written contract (the Contract) with FE to purchase the Unit for \$5,600,000. B&B deposited \$560,000 in escrow with FE's counsel, simultaneously with the Contract's signing, as provided for in paragraph 3(a)(I) of the Contract (Schwartz Aff. Ex. D).

Under paragraphs 40 and 56 of the Contract, B&B is required to purchase the Unit "subject to" the Footsteps lease. Paragraph 56 of the Contract states that "Notwithstanding anything to the contrary contained herein, at Closing the Seller shall convey title to the Unit subject to the Footsteps Lease [...]" (Schwartz Aff. Ex. D).

Froggy is the owner of Unit 4 in the building located at 666 Broadway, New York, New York, and as such, is a contiguous owner. Section 7.3(a) of the By-laws requires a Unit owner to notify the contiguous owners of any sale or lease agreement of their Unit: "Promptly after any Sale or Lease Agreement shall be fully executed, the Unit owner executing the same[...] shall send written notice thereof to the condominium board and to each Unit Owner contiguous to (i.e. having a common wall, floor or ceiling with) the Unit being sold or leased [...] which notice shall be accompanied by a photocopy of the fully executed Sale or Lease Agreement, containing all of the terms offered in good faith by the Outside Offeror".

After receiving said notice of this Contract pertaining to the sale of Unit 5 (as required by the By-laws), on September 11, 2013, Froggy purported to exercise its right of first refusal under section 7.3 of the By-laws by notice. In its notice, Froggy "signifies its intention to take the Property ... described in the Sale Agreement [contract] pursuant to the terms thereof" and

notifies that it is "ready, able and willing to perform the terms of the option to purchase ... pursuant to the terms of the Sale Agreement, and for that purpose is ready, able and willing to deposit ... \$560,000 as and for a down payment" (Schwartz Aff. Ex. J). In its notice, Froggy also sought to receive information regarding B&B's financial abilities to purchase the Unit and a copy of the Footsteps lease.

On September 17, 2013, FE's counsel informed B&B's counsel of Froggy's exercise of its right of first refusal (Ex. L). However, FE did not return B&B's deposit and continued to hold the money in escrow.

By mid-September, FE and Froggy began to negotiate an obvious amendment to the Contract, to substitute Froggy's name for B&B as the purchaser, and Froggy raised questions regarding the transaction, such as compliance with the procedure for the sale, notices or, authorizations (Schwartz Aff. Ex. M). FE's counsel provided the answers to those questions, but repeatedly informed Froggy that the obligation to deposit the down payment was unconditional.

However, by the end of September, Froggy still had not deposited its down payment and FE had still not returned B&B's deposit.

On October 1, Froggy's counsel sent the proposed amendments together with a check for \$560,00 (the required deposit as

required by the Contract) but required that the check not be deposited pending "receipt, review and acceptance of the Footsteps lease" (EX. N). FE's counsel thereafter reiterated to Froggy that, by exercising its right of first refusal, it stepped into the shoes of B&B and was therefore obligated to post the down payment, unconditionally. FE's counsel sent the Footsteps lease to Froggy indicating that it was sent only as a professional courtesy.

On October 4, 2013, Froggy's counsel finally informed FE's counsel that it could deposit the check for the down payment. By October 9, 2013, both FE and Froggy had signed the amendment to the Contract. On that date, FE finally returned to B&B its down payment.

The By Laws also provide at §7.3 (C), that the election to exercise the right of first refusal must be made within 15 days of notice of the proposed sale.

B&B brings this action seeking a declaration that Froggy improperly exercised its right of first refusal and therefore forfeited its right to purchase the Unit. As a consequence, B&B seeks the right to purchase the Unit from FE and specific performance.

Discussion

B&B moves for summary judgment as to liability, and for a declaration that FE is obligated to perform under the Contract,

and that Froggy's exercise of its right of first refusal was improper. FE and Froggy both move for summary judgment for dismissal.

When there is no triable issue of fact, a motion for summary judgment may be granted (CPLR 3212). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (Zuckerman v City of New York, 49 NY2d 557 [1980]).

The only issue here is whether Froggy timely exercised its right of first refusal or, by its failure to do so, forfeited its rights in the Unit. The right of first refusal, as described in §7.3 of the By-laws grants certain of the other unit owners of the building an option to step into the shoes of a prospective buyer and, to substitute the buyer: "The sending of the notice [of the Sale or Lease Agreement] [...] shall constitute an offer by the Offeree Unit Owner to sell its Unit, together with its Appurtenant Interests [...] to each Contiguous Owner [...] upon the same terms and conditions as are contained in such Sale or Lease Agreement [...]" (Schwartz Aff. Ex. F).

The holder of the right of first refusal is holder of an option to purchase the real property "if and when the owner decides to sell to a third party at an agreed price" (Morrison v.

Piper, 77 NY2d 165, 170[1990]).

Before a Unit owner fully executes a sale agreement to convey its property to a third party, notice must be given to the other owners in the condominium. As described in §7.3(B) of the By-laws, the sending of the notice "shall constitute an offer by the Offeree Unit Owner to sell its Unit, together with its appurtenant interest [...] to each contiguous Owner and the Condominium Board [...] upon the same terms and conditions as are contained in such Sale or Lease Agreement" (Ex. F). Therefore, the election to purchase the property by one of the holders of the right of first refusal would constitute an acceptance of the offer (created by sending the notice).

"It is a fundamental principle of contract law that a valid acceptance must comply with the terms of the offer... and, if qualified with conditions it is equivalent to a rejection and counteroffer" (Lamanna v Wing Yuen Realty, Inc., 283 AD2d 165, 166 [1st Dep't], appeal denied 96 NY2d 719 [2001]). In exercising its right of first refusal, the option holder steps into the shoes of the prospective buyer and has an obligation to strictly comply with the contract provisions.

The holder of an option, by placing a requirement that a building be vacant at the time of transfer, as a condition to his exercise of the option to purchase the building has accomplished nothing more than making a "counteroffer", which the current

owner is free to accept or reject (Lamanna, 283 AD2d 165).

In this case, the Contract between B&B and FE contained certain specific provisions. By exercising its right of first refusal, Froggy stepped into the shoes of B&B. As a consequence, it takes the Contract as it is and has to comply with all its terms.

The contract expressly states in paragraphs 40 and 56 that the sale is subject to the Footsteps lease (Schwartz Aff. Ex. D). However, after stating its intention of exercising its option, Froggy made several references to the need for approval of the Footsteps lease as a condition to going forward with the purchase. This appears to be conduct not in conformity with Froggy's obligations with respect to the contract. By conditioning Froggy's consummation of the contract to the "receipt, review and acceptance" of the lease, Froggy effectively made a "counteroffer" (Lamanna, 283 AD2d at 165).

As a consequence, when Froggy refused to make the unconditional down payment, a question arises as to whether it effectively exercised its right of first refusal and entered the contract "upon the same terms and conditions as are contained in such Sale or Lease Agreement" (Schwartz Aff. Ex. F).

Furthermore, the Contract required in paragraph 3(a)(I) that the down payment be deposited and paid simultaneously with the signing of the Contract. Because the By-laws require the holder

of the right of first refusal to strictly comply with the terms of the Contract, Froggy had to deposit the down payment. However, in spite of several requests by FE's counsel, Froggy did not simultaneously deposit the down payment upon execution. Froggy first sought to exercise its option on September 3, 2013, but without a down payment. On October 1, 2013, when Froggy finally sent a check to FE's counsel, it was accompanied by a condition that it be held pending "receipt, review and acceptance of the lease". Not until a letter dated October 4, 2013, did Froggy finally inform FE that it could deposit the down payment (Schwartz Aff. Ex. P). This was clearly more than 15 days after notice of the pending sale to B&B.

By its October 1, 2013 letter, in which Froggy sent the signed amended Contract to FE, but not agreeing to the immediate deposit of the down payment, the issue arises as to whether Froggy complied with section 3(a)(I) which states that the down payment is payable "on the signing of this Contract by check subject to collection, receipt of which is hereby acknowledged, to be held in escrow [...]" (Schwartz Aff. Ex. D).

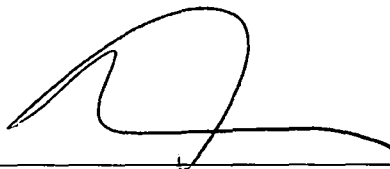
However, as stated above, at some point, Froggy finally did agree to make the down payment. In light of the foregoing, this Court finds the remedy of summary judgment to any of the parties to be unwarranted. There are triable issues of fact this Court must consider in order to determine if and when Froggy's actions

finally constituted its exercise of the right of first refusal.

All motions for summary judgment are denied.

This shall constitute the decision and order of this Court.

Dated: December 19, 2014.



A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a horizontal line extending to the right.

J.S.C.

HON. CHARLES E. RAMOS