Clearview Gardens First Corp. v Cross Is. Pkwy & 13th Ave LLC
2015 NY Slip Op 30788(U)
April 17, 2015
Supreme Court, Queens County
Docket Number: 706054/2013
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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CLEARVIEW GARDENS FIRST CORPORATION, CLEARVIEW GARDENS SECOND CORPORATION, CLEARVIEW GARDENS THIRD CORPORATION, CLEARVIEW GARDENS FOURTH CORPORATION, CLEARVIEW GARDENS FIFTH CORPORATION, and CLEARVIEW GARDENS SIXTH CORPORATION,

Plaintiffs,

-against-

CROSS ISLAND PKWY & 13TH AVE LLC, N 16TH AVE AND W UTOPIA PKWY LLC, 19TH AND 21ST AVENUES LLC, 169TH STREET & 17TH ROAD LLC, 16TH AVE AND WILLETS POINT BLVD LLC, and 17TH AVE AND WILLETS POINT BLVD LLC,

Defendants.

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Index Number 706054/ 2013

Motion Date November 3, 2014

Motion Seq. No. 1

FILED
APR 23 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 3 read on this motion by plaintiffs for summary judgment declaring, *inter alia*, that Article XI, Section 3 of their ground leases is invalid.

	Papers Numbered
Notice of Motion - Affidavits-Exhibits.....	E16-E25
Memorandum of Law in Opposition.....	E26
Reply Memorandum of Law.....	E27

Upon the foregoing papers it is ordered that the motion is denied for the following reasons:

In 1951, the plaintiff cooperative residential corporations entered into ground leases with Praver Holding Corporation, the owner in fee. The defendants now hold title to the fees. The

plaintiffs obtained their ground leases in connection with the construction of low income housing pursuant to Section 213 of the National Housing Act (12 USC 1715[c]) which authorized financing by a federal agency. The ground leases were drafted in the 1950's by the defendants' predecessor in interest, and they were for a term of 99 years with a lessee's option for an additional 99 years. During the last sixty or more years, the plaintiffs have built, maintained, and operated 1,788 garden apartments occupying more than 83 acres of land in Whitestone, New York.

The plaintiffs operate 42 oil burning boiler units which provide heat and hot water to 1,788 residential units. On or about May 1, 2012, the plaintiffs learned that because of a change in the law, they would have to convert their buildings from #6 fuel oil to #4 fuel oil, or some other more expensive grade of fuel oil, for environmental reasons. The plaintiffs decided to replace the 42 units with new dual burners which would permit them to switch between oil and gas, depending on the cost of each fuel. The cost for the replacement of the old units has been estimated to be approximately $9,000,000. The plaintiffs also decided to replace old piping from the old units with new piping at an estimated cost of $6,000,000. The plaintiffs further decided to replace their old "master meter system" with sub-meters for each residential apartment at an estimated cost of $3,000,000.

The plaintiffs intend to re-finance their present $10,000,000 mortgage with a new mortgage at a lower interest rate in order to help pay for the upgrade of the heating system. The plaintiffs obtained an offer from Meridian Capital Group to provide a $40,000,000 thirty (30) year mortgage at 4% interest, which they consider to be advantageous.

On June 18, 2012, the plaintiffs requested estoppel certificates needed to obtain the new mortgage from the defendant fee owners. On June 19, 2012, the plaintiffs transmitted financial statements and other documents pertaining to the project requested by the defendants. However, the defendants have refused to provide the estoppel certificates. Although the defendants did not submit an affidavit explaining why they have refused, they are apparently insisting on strict adherence to the terms of the leases.

Article VIII of the ground leases provides in relevant part: "The tenant shall have the right at any time and from time to time . . . to make such changes, repairs, replacements and alterations . . . to the buildings . . . as the Tenant, in its sole discretion shall deem necessary or advisable without the necessity of securing the Landlord's permission or consent, except as in this Article specifically provided. *** If the Tenant shall apply to a lending institution for, and procure a firm commitment of a building loan to be secured by a mortgage on the Tenant's leasehold estate in a

sum sufficient to pay the entire cost of any such change, repair, or alteration. . . then, in that event . . . the Tenant shall not be required to make the deposit as hereinabove provided...."

Article XI, Section 3, of the ground lease provides in relevant part: "The Tenant . . . shall have the right . . . (b) to mortgage its leasehold interest in the demised premises to secure some actual indebtedness for [an] amount not in excess of the principal sum of." The limit is $3,637,900 for plaintiff Clearview First, $2,383,800 for plaintiff Clearview Second, $2,050,000 for plaintiff Clearview Third, $3,253,400 for plaintiff Clearview Fourth, $2,207,500 for plaintiff Clearview Fifth, and $4,341,000 for plaintiff Clearview Sixth.

Article XXV of the ground leases provides in relevant part: "the Landlord agrees at any time and from time to time upon not less than ten (10) days prior written request by the Tenant to execute, acknowledge, and deliver to Tenant a statement in writing certifying that this lease is unmodified and in full force and effect . . . it being intended that any such statement delivered pursuant to this article may be relied upon by any prospective purchaser of the fee or leasehold or mortgagee...."

The defendant fee owners have taken the position that Article XI, Section 3 of the ground leases requires their consent to any financing and imposes limits on the amount of financing. The plaintiffs argue that Article XI, Section 3, of the ground leases imposing a limitation on mortgage financing conflicts with Article VIII in the ground leases which allows them to make repairs "as the Tenant, in its sole discretion shall deem necessary or advisable without the necessity of securing the Landlord's permission or consent."

"[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." (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) The plaintiffs failed to carry this burden.

A "contract must be read as a whole to determine its purpose and intent, and it should be interpreted in a way [that] reconciles all its provisions, if possible." (*In re El-Roh Realty Corp.*, 74 AD3d 1796, 1799 [internal quotation marks and citations omitted]; *A. Cappione, Inc. v Cappione*, 119 AD3d 1121.) "[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect." (*Proyecfin de Venezuela v Banco Indus. de Venezuela*, 760 F2d 390, 395-396; *Perlbinder v Board of Managers of 411 East 53rd Street Condominium*, 65 AD3d 985.)

The plaintiffs did not offer any parol evidence to shed light on the purpose of the mortgage limitation clause, noting that the leases were drafted long ago in the 1950's. The defendants submitted only a memorandum of law in opposition to the instant motion stating, *inter alia*, that plaintiffs "fail to provide documentary evidence to support their motion showing the actual cost of the repairs, whether they asked for bids from contractors, or whether the repairs can be made with loans which would not exceed the limits contained in the leases." Defendants go further to state that "[t]his raises a material issue of fact as to whether the proposed repairs would actually require a loan in excess of the limits contained in the leases and whether those limitations would actually impose some absurd or commercially unreasonable result on Plaintiffs." In any event, defendants argue that with respect to parol evidence, they should be allowed to conduct discovery.

In light of the foregoing, the motion is denied at this time. The parties are directed to appear for a preliminary conference on May 28, 2015 at 9:30 a.m. in the Preliminary Conference Part.

Dated: April 17, 2015

J.S.C.