136 W. 24th Mgr., LLC v 136 Loft Corp.
2016 NY Slip Op 31694(U)
September 8, 2016
Supreme Court, New York County
Docket Number: 156535/2015
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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136 WEST 24th MANAGER, LLC,

Plaintiff,

-against-

136 LOFT CORP.,

Defendant.

Index No.: 156535/2015

Mtn Seq. No. 001

DECISION AND ORDER

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JEFFREY K. OING, J.:

Relief Sought

Defendant, 136 Loft Corp., moves, pursuant to CPLR 3211(a)(1) and 3211(a)(7), for an order dismissing plaintiff, 136 West 24th Manager, LLC's, Amended Complaint.

Factual Background

Plaintiff and its affiliates are the owners of, or are otherwise under contract to purchase, various commercial properties located at: (1) 131 West 23rd Street; (2) 125-129 West 23rd Street; (3) 116 West 24th Street; and (4) 120 West 24th Street, all in New York, New York (Am. Compl., ¶ 8). Defendant is the owner of 136 West 24th Street (the "Building") (Am. Compl., ¶ 7). On July 25, 2014, the parties entered into a Development Rights Purchase and Sale Agreement (the "Contract") pursuant to which plaintiff agreed to purchase and defendant agreed to sell the Building's Excess Floor Area Development

Rights (the "Air Rights") for $4.5 million (Am. Compl., ¶¶ 10, 12).

The parties acknowledged that approval from the New York City Board of Standards and Appeals (the "BSA") for the transfer of the Air Rights in the form of a variance (the "BSA Approval") was needed in order to complete the sale of the Air Rights (Contract at § 5[c], Dolan Reply Affirm, Ex. 1). Plaintiff agreed to use its best efforts to obtain the BSA Approval and defendant agreed to cooperate with plaintiff's efforts in that regard (Contract at §§ 5[a], 5[c], Dolan Reply Affirm, Ex. 1). The Contract set the closing for "on or about September 30, 2014" but provided that the closing could be adjourned by plaintiff up to December 31, 2014 (Contract at § 5[a], Dolan Reply Affirm., Ex. 1). Moreover, if the BSA Approval had not yet been received by December 31, 2014, the closing could be adjourned to June 30, 2015 (Contract at § 5[a], Dolan Reply Affirm., Ex. 1). If the closing did not take place by December 31, 2014, plaintiff was required to send written confirmation to defendant (the "Confirmation Letter") on or before December 31, 2014 informing defendant that, among other things: (1) there were no impediments to closing beyond the BSA Approval; and (2) plaintiff had the ability to effect the merger of certain zoning lots so that plaintiff's property and defendant's property would be contiguous

or, if this was not possible, the parties would proceed by a pre-determined alternative method to transfer the Air Rights (Contract at § 5[a], Dolan Reply Affirm., Ex. 1 [emphasis added]).

As of December 31, 2014, plaintiff had not submitted the application for the BSA Approval to the BSA (Am. Compl., ¶ 29). Plaintiff also failed to send the Confirmation Letter to defendant by that date. In response, by letter dated January 14, 2015 (the "Termination Letter"), defendant asserted that it was terminating the Contract pursuant to section 14(b) because plaintiff had defaulted in its obligations under the Contract by failing to send the Confirmation Letter (Termination Letter, Berger Affirm., Ex. A).

Plaintiff maintains that after sending the Termination Letter defendant continued to work with plaintiff and Goldman Harris -- the law firm selected by defendant to oversee the BSA approval process -- to obtain the BSA approval (Am. Compl., ¶ 45). Goldman Harris advised defendant to withdraw the Termination Letter because its existence would compromise the parties' efforts to obtain the BSA approval (Am. Compl. ¶¶ 49-51). Anticipating that defendant would withdraw the Termination Letter, Goldman Harris postponed submission of the written BSA approval application until May 5, 2015 (Am. Compl., ¶ 54).

Defendant did not withdraw the Termination Letter (Am. Compl., ¶¶ 49, 51).

In June 2015, Goldman Harris informed plaintiff and defendant that the BSA application would not be submitted to the BSA until July 22, 2015 and that the BSA was expected to reach a decision on the application in December 2015 at the earliest (Am. Compl., ¶¶ 58, 60).

Plaintiff commenced this action on June 29, 2015. By letter dated July 17, 2015, defendant informed plaintiff that, without prejudice to defendant's position that the Termination Letter had properly terminated the Contract, time was of the essence with respect to plaintiff's performance of its obligations under the Contract, and demanded that plaintiff: (1) effectuate the zoning lot mergers by August 10, 2015; (2) obtain the BSA Approval by August 12, 2015; and (3) close on the Contract on August 17, 2015 (the "TOE Notice", Berger Affirm., Ex. D).

By letter dated August 18, 2015, defendant declared plaintiff in default of the Contract due to its failure to meet the deadlines set forth in the TOE Notice (the "August Default Notice") (August Default Notice, Berger Affirm., Ex. F).

Plaintiff now maintains that defendant's attempts to terminate the Contract were improper and asserts claims for: (1) declaratory judgment declaring that defendant is in default under

the Contract and that the Termination Letter and TOE Notice are invalid; (2) breach of contract (seeking specific performance); (3) breach of contract (seeking money damages); (4) breach of implied covenant of good faith and fair dealing; and (5) preliminary and permanent injunctions enjoining defendant from directly or indirectly selling, transferring or diminishing the scope of the Air Rights or otherwise encumbering the Building (Am. Compl., ¶¶ 83-120).

Discussion

As a preliminary matter, plaintiff's argument that defendant has waived its right to make a CPLR 3211(a)(1) motion because it failed to include this defense in its answer is unavailing given that the documentary evidence upon which defendant relies in its CPLR 3211(a)(1) motion is either annexed to the Amended Complaint or discussed in the pleading. As such, the documentary evidence may properly be considered pursuant to defendant's CPLR 3211(a)(7) motion (Rosenberg v Home Box Office, Inc., 2006 WL 5436822 [Sup Ct, NY County 2006]).

I. Defendant's Purported Termination of the Contract

Defendant argues that this action must be dismissed because it properly terminated the Contract based on plaintiff's failure to: (1) provide the Confirmation Letter by December 31, 2014; (2)

exercise its best efforts to obtain the BSA Approval; or (3) comply with the deadlines set forth in the TOE Notice.

A. Plaintiff's Failure to Send the Confirmation Letter

Defendant argues that plaintiff's failure to provide the Confirmation Letter on December 31, 2014 was a breach of the Contract sufficient to warrant termination. For a breach of contract to provide grounds for termination, however, the breach must be material (Syed v Normel Const. Corp., 4 AD3d 303, 304 [1st Dept 2004]), i.e., "so substantial that it defeats the object of the parties in making the contract (Smolev v Carole Hochman Design Group, Inc., 79 AD3d 540, 541 [1st Dept 2010]).

While defendant argues that the object of the Contract was to conclude this sale as quickly as possible, this claim is undercut by the absence of any language in the Contract making time of the essence as well as the fact that the Contract afforded plaintiff multiple opportunities to extend the closing date of the Contract, which in fact occurred. Considering the Contract as a whole, the clear objective of the parties was to effect the sale of the Air Rights. Accordingly, the failure to deliver the Confirmation Notice by December 31, 2014 did not defeat this object, as the "mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract" (ADC Orange, Inc. v Coyote

Acres, Inc., 7 NY3d 484, 489 [2006][contract obligating plaintiff to make an interim payment of $250,000 by a specific date did not make time of the essence and therefore plaintiff's failure to make payment by that date was not a material breach]).

Insofar as defendant argues that plaintiff's failure to send the Confirmation Notice was a result of its separate material breach in failing to perform the substantive acts in section 5(b) of the Contract which were the subject of the Confirmation Notice (i.e., effecting the required zoning lot mergers or transferring the Air Rights by a pre-determined alternative method), this argument is unavailing.

The Contract did not require the completion of these acts by December 31, 2014, only notice as to whether plaintiff had the ability to effectuate the zoning lot mergers or elected to pursue an alternative means to transfer the Air Rights.

Defendant also argues that the failure to send the Confirmation Letter on December 31, 2014 was a material breach because this requirement was an express condition of the Contract. This is incorrect, as a comparison with Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co., which defendant cites, demonstrates. The agreement in that case contained an express condition that there would be no contract between the parties "unless and until" plaintiff delivered a written consent to

certain work on or before a specified deadline (Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 687 [1995]). Here, by contrast, no such conditional language was used to premise the continued existence of the Contract on defendant's receipt of the Confirmation Letter. Accordingly, based on the foregoing, plaintiff's failure to send the Confirmation Letter was not a material breach justifying defendant's purported termination of the Contract.

B. Plaintiff's Best Efforts Obligation

Defendant argues that plaintiff's failure to submit the application for BSA Approval before December 31, 2014 was, ipso facto, a material breach of the Contract's requirement that plaintiff exercise its best efforts to obtain BSA approval. "[T]he precise meaning of [a] best efforts provision and whether [it has been] breached are factual issues," however, and "cannot be resolved on the face of the complaint" (Maestro W. Chelsea SPE LLC v Pradera Realty Inc., 38 Misc. 3d 522 [Sup Ct, NY County 2012][internal quotations omitted]). Accordingly, dismissal based on plaintiff's alleged failure to exercise its best efforts is inappropriate at this pre-discovery juncture.

C. Plaintiff's Failure to Meet TOE Notice Deadlines

Defendant also argues that plaintiff's failure to meet the deadlines set forth in the TOE Notice allowed defendant to

terminate the Contract. A party may convert a contract into one in which time is of the essence only if it gives the other party "clear unequivocal notice" and a "reasonable time to perform" (ADC Orange, Inc. v Coyote Acres, Inc., 7 NY3d 484, 490 [2006][internal quotations omitted]). What constitutes a reasonable time for performance is an issue of fact, however, requiring consideration of "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" (Zev v Merman, 73 NY2d 781, 783 [1988]). As the reasonableness of the TOE Notice's deadlines is an issue of fact, plaintiff's failure to satisfy the TOE Notice deadlines does not, at this pre-discovery juncture, support dismissal.

Accordingly, that branch of the motion to dismiss the causes of action for: 1) declaratory judgment declaring that defendant is in default under the Contract and that the Termination Letter and TOE Notice are invalid; 2) breach of contract seeking money damages; and 3) injunctive relief enjoining defendant from directly or indirectly selling, transferring or diminishing the scope of the Air Rights or otherwise encumbering the Building, is denied.

II. Implied Covenant of Good Faith and Fair Dealing

Defendant argues that plaintiff's implied covenant of good faith and fair dealing claim should be dismissed as duplicative of plaintiff's breach of contract claim. This claim is based on defendant's: (1) issuance of the Termination Letter, the TOE Notice, and the August Default Notice; (2) refusal to withdraw the Unwarranted Termination Letter even though defendant knew that failing to withdraw it would delay and compromise the BSA approval process; and (3) demand for additional payments from plaintiff to extend the closing date (Am. Compl., ¶ 111). These allegations do not support plaintiff's breach of the implied covenant of good faith and fair dealing claim. The issuance of the Unwarranted Termination Letter, the TOE Notice, and the Unwarranted August Default Notice are all part and parcel of plaintiff's breach of contract action, as is defendant's refusal to withdraw the Termination Letter (Am. Compl., ¶¶ 86, 88). Under these circumstances, this claim must be dismissed as duplicative (Sebastian Holdings, Inc. v Deutsche Bank, AG., 108 AD3d 433, 434 [1st Dept 2013]).

Moreover, defendant's purported demand for additional payments from plaintiff in exchange for extending the closing date of the Contract does not provide grounds to support this claim because plaintiff does not allege that it ever paid the

amounts demanded. Given that plaintiff cannot allege that it was damaged by this demand, this claim must be dismissed for failure to allege sufficient facts as to plaintiff's damages (Cicchetti v Gen. Acc. Ins. Co. of New York, 272 AD2d 500, 500 [2d Dept 2000]).

Accordingly, that branch of the motion to dismiss the cause of action for breach of implied covenant of good faith and fair dealing is granted, and it is dismissed.

III. Specific Performance

Defendant argues that plaintiff's failure to send the Confirmation Letter on December 31, 2014 precludes plaintiff from seeking specific performance because a party may not be granted specific performance if it cannot demonstrate that it was ready, willing, and able to perform its obligations under the contract "on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter" (Gindi v Intertrade Internationale Ltd., 50 AD3d 575, 575 [1st Dept 2008]). This argument is unavailing.

As time was not of the essence in the Contract, the failure to send the Confirmation Letter does not preclude plaintiff from seeking specific performance as a remedy for its breach of contract claim, as plaintiff may yet establish that it is, as it

claims in its complaint, "ready, willing and able to consummate the Contract following BSA Approval."

Accordingly, that branch of the motion to dismiss the cause of action seeking specific performance is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss the Amended Complaint is granted to the extent of dismissing the fourth cause of action for breach of the implied covenant of good faith and fair dealing, and is otherwise denied; and it is further

ORDERED that counsel shall appear in Part 48 for a preliminary conference on October 5, 2016 at 10 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/8/16

HON. JEFFREY K. OING, J.S.C.