Vance Assoc., LLC v One Flatbush Ave. Prop., LLC
2017 NY Slip Op 32157(U)
October 11, 2017
Supreme Court, Kings County
Docket Number: 508278/2016
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of October, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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VANCE ASSOCIATES, LLC,

Plaintiff(s),

- against -

ONE FLATBUSH AVENUE PROPERTY, LLC,

Defendant(s).

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DECISION AND ORDER

Index # 508278/2016

Mot. Seq. 1 & 2

The following e-filed papers numbered 3 to 27 read herein: Papers Numbered

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After oral argument and upon the foregoing papers, Defendant's motion to dismiss the complaint is denied. Plaintiff's cross-motion for summary judgment is also denied.

Plaintiff, VANCE ASSOCIATE, LLC, brings this action for breach of contract against Defendant, ONE FLATBUSH AVENUE PROPERTY, LLC, for Defendant's failure to pay additional compensation in accordance with the parties' written agreement dated April 6, 2015.

Prior to April 6, 2015, Plaintiff owned the property located at 11-17 Flatbush Avenue in Brooklyn, New York ("Flatbush Property"). By agreement dated May 29, 2014 (the "PSA"), Plaintiff agreed to sell the Property to 1 Flatbush Avenue Property Owner, LLC. ("1 Flatbush"). Before the closing date of April 6, 2015, the parties agreed to allow the name of the purchaser to be changed from 1 Flatbush to that of One Flatbush Avenue Property, LLC. The Flatbush Property is situated in the middle of two properties that adjoin it – one located on the corner of Flatbush Avenue and

Fulton Street ("Corner Property") and the other known as 570 Fulton Street ("Fulton Property"). Around the time that the PSA was entered into, Defendant, or a company affiliated with Defendant, owned the Corner Property and an unrelated entity owned the Fulton Property, which was also on the market for sale.

On April 6, 2015, at the closing for the Flatbush Property, the parties entered into a security agreement ("Security Agreement"), which provides, in relevant part, as follows:

> 1. Covenant: For a term commencing on [April 6, 2015] and expiring on ... October 5, 2016 (the "Expiration Date") ..., if [Defendant], its members and partners, and the members, partners, shareholders, officers, directors, employees, representatives and agents or each of the foregoing (collectively, "Flatbush-Related Entities") or any affiliate of [Defendant], or any successor or assigns of [Defendant] enters into an agreement to acquire additional floor area development rights associated with the Fulton Property (the "Development Rights"), Vance, or its designees, shall be entitled to additional compensation (the "Additional Compensation") in an amount as calculated in Section 2.2(d) of the PSA, which shall be payable in accordance with the terms set forth in Section 2.2(d) of the PSA.

Section 2.2(d) of the PSA provides, in relevant part, as follows:

> If, prior to the Closing Date, or within eighteen (18) months after the Closing Date, Buyer or any Buyer Related Entities or affiliate of Buyer, or successor or assigns of Buyer enters into an agreement to acquire additional floor area development rights associated with the land commonly known as 570 Fulton Street, Brooklyn, New York (the "Development Rights"), the Seller, or its designee, shall be entitled to additional compensation (the "Additional Compensation") in an amount equal to the total number of zoning square feet ("ZFA") of Development Rights so acquired multiplied by Thirty-five and 00/100 Dollars ($35.00). The Additional Compensation shall be payable to Seller on the date that Buyer or any Buyer Related Entities or affiliate of Buyer, or successor or assigns of Buyer acquires the Development Rights.

According to Plaintiff, on or before September 18, 2015, an affiliate of Defendant, 570 Fulton Street Property LLC ("570 Fulton") acquired the Fulton Property, including 189,000 zoning square feet of development rights associated with the building lot. Based upon the provisions in the

Security Agreement and the PSA, Plaintiff contends, in its motion papers, that it is entitled to $6,615,000.00 in additional compensation (189,000 multiplied by $35.00).

With the instant motion, Defendant moves to dismiss Plaintiff's breach of contract claim for failure to state a cause of action on the basis that the PSA's conditional payment clause, and the clause in the Security Agreement that cross-references it, is triggered only if Defendant or its affiliate purchases transferrable air rights at the Fulton Property for the purpose of transferring those air rights to the Flatbush Property (also known as the "Development Site"). According to Defendant, Plaintiff is entitled to additional compensation only if Defendant acquires "additional floor area development rights" to build a larger building on the Development Site but that Plaintiff is not entitled to such payment if Defendant acquires the Fulton Property as a free-standing development without transferring the development rights to the Development Site. Defendant argues that Plaintiff's interpretation of the conditional payment clause renders the term "additional" superfluous and devoid of meaning. Further, that if "additional" is accorded its distinct and separate meaning, that the conditional payment clause cannot possibly apply to *any* acquisition of rights at the Fulton Property but must be restricted to circumstances where the acquisition of air rights is additive to those that the Development Site enjoyed already. In support of its interpretation, Defendant points to the example provided in the conditional payment clause which provides: "By way of example, if Buyer acquires 20,000 ZFA of Development rights, the Seller, or its designee, would be entitled to additional compensation in an amount equal to $700,000.00." Defendant argues that, because the Fulton Property had 86,300 total square feet of development rights,[1] the example of purchasing only 20,000 square feet illustrates what the words of the contract mean: that if Defendant "added" 20,000 square feet to the Development Site from rights acquired in the Fulton Property, Plaintiff was entitled to additional compensation.

[1] Plaintiff's complaint alleges that the Fulton Property has 86,300 square feet of development rights. In its motion papers, however, Plaintiff asserts that the Fulton Property has 189,000 square feet of development rights.

Defendant additionally argues that had the parties intended for the Security Agreement to be triggered upon the purchase of any rights at the Fulton Property, then the contract would have been drafted to state so explicitly. Defendant submits that the subject transaction involves a sophisticated Plaintiff whose principal, Aaron Stauber, possesses over 25 years of commercial real estate experience, and that Plaintiff was represented in the subject transaction by Jonathan Kamin, a lawyer with 17 years of experience. That, as such, if Plaintiff and its attorney intended for the additional compensation to be triggered upon the purchase of any rights relating to the Fulton Property, without qualification, they knew how to express that in a document and would have done so.

In opposition to Defendant's motion, Plaintiff argues that a natural reading of the conditional payment clause establishes that "additional" refers to floor area development rights beyond those already associated with the Flatbush Property at the time of the PSA, that is, "supplementary to what is already present or available." Plaintiff further argues that Defendant's interpretation is not supported by the contractual language as the conditional payment clause does not contain terms such as "unused," "excess," or "transferred."

Secondly, Plaintiff contends that Defendant's interpretation yields an absurd result in view of the Security Agreement's "trigger date" and "payable date" requirements. Plaintiff states that its right to additional compensation is triggered when an affiliate of Defendant "enters an agreement to acquire" the Fulton Property's development rights. That this additional compensation is then payable when the affiliate actually acquires those rights. According to Plaintiff, because the affiliate cannot transfer rights before acquiring them, it is illogical to interpret the conditional payment clause as requiring Defendant's affiliate to do exactly that to trigger the additional compensation. Plaintiff contends that Defendant's interpretation also nullifies the Expiration Date contained in the Security Agreement because it allows Defendant to sidestep the conditional payment clause by having an affiliate purchase the Fulton Property's development rights before the Expiration Date and then simply hold off on transferring those rights until after the Expiration Date passes.

On the other hand, Plaintiff contends that its interpretation aligns perfectly with the circumstances surrounding the agreements. Specifically, that at around the time of the PSA, the Fulton Property was also for sale. According to Plaintiff, it is "real estate 101" that the Flatbush Property would be worth more to a developer who also owned or controlled the Fulton Property's development rights, especially if the developer already owned the Corner Property. Plaintiff states that the additional value stemming from owning an adjoining property's development rights derives from the opportunity to control buildable space regardless of what the buyer ultimately decides to do with the property, and thus, negotiating a sale that takes into account the amount of adjoining space that the buyer controls is perfectly reasonable.

Based on the foregoing, Plaintiff asserts that it is entitled to summary judgment because it has established that "an affiliate" of Defendant acquired the Fulton Property's floor area development rights before the Expiration Date and Defendant has failed to pay Plaintiff additional compensation in accordance with the parties' agreements. With regards to whether 570 Fulton is "an affiliate" of Defendant, Plaintiff states that the PSA defines "affiliate" to mean "any Person (as defined below) that directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with another Person." "Person" shall mean a natural person, partnership, limited partnership, limited liability company, corporation, trust, estate, association, unincorporated association or other entity." Plaintiff asserts that, according to the relevant LLC agreements, 570 Fulton is owned, through 570 Fulton Mezz, by the same entity that controls Defendant, One Venture.

As to the amount of additional compensation, although Plaintiff's complaint alleges that 570 Fulton acquired only 86,300 zoning square feet of development rights, Plaintiff does not dispute Defendant's estimation of 189,000 zoning square feet based on One Venture's LLC agreement reflecting same.

In reply, Defendant disputes that adding the Fulton Property to the contiguous property configuration added any value because the Corner Property and Flatbush Property together created

a sufficient development site. Defendant also contends that it had no interest in acquiring the Fulton Property at the time of the PSA or at closing. Had Defendant been interested, Defendant states that it would not have agreed to pay Plaintiff any premium for the acquisition of the Fulton Property since it would not have made the Flatbush Property inherently more valuable.

With regards to Plaintiff's motion for summary judgment, Defendant argues same must be denied as premature because Defendant is entitled to deposition discovery. Further, that the motion should be denied because 570 Fulton was not an "affiliate" because the entity was created after the parties entered into the PSA and Security Agreement. Finally, that Plaintiff's increased demand of $6.6 million is impermissible because Plaintiff's complaint demands damages of only $3,020,500 and Plaintiff must therefore seek leave to amend its complaint to seek increased damages. Further, that Plaintiff's reliance on One Venture's LLC agreement as establishing the acquired square footage is erroneous since the 189,000 figure represents the potential square footage if a developer sought to re-zone the property upon application to the City Planning Commission. It is Defendant's position that, by purchasing the Fulton Property, 570 Fulton acquired 71,920 square feet of development rights and that this is based upon documents produced by Plaintiff's principal, Mr. Stauber.

Discussion

On a motion to dismiss a plaintiff's claim pursuant to CPLR §3211[a][7] for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]). Rather, the court is required to afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference (*Kamchi v Weissman*, 125 AD3d 142, 150 [2d Dept 2014]).

Here, Defendant's motion to dismiss for failure to state a cause of action must be denied as Plaintiff has stated a valid cause of action. Defendant's motion is essentially one for summary judgment as it argues that the subject agreements are unambiguous and precludes Plaintiff's claims. Plaintiff also submits that the agreements are clear on their face but argues that summary judgment

is warranted in its favor. Thus, the issue before the Court is whether either party is entitled to summary judgment.

It is a well established principle that "[t]he construction and interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous in the first instance" (*Law Offs. of J. Stewart Moore, P.C. v Trent*, 124 AD3d 603, 603 [2d Dept 2015]). "If the language is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence" (*Id.*). Where a court determines that the terms of the agreement are ambiguous and the intent of the parties becomes a matter of inquiry, parol evidence is permitted to determine that intent (*Weiner v Anesthesia Assocs., P. C.*, 203 AD2d 454, 454-55 [2d Dept 1994]).

Here, the Court finds that the subject conditional payment clauses are not unambiguous as it relates to whether the parties intended the purchase of the Fulton Property to trigger the additional compensation and, therefore, extrinsic evidence is needed to determine the true intent of the parties. Although the existence of an ambiguity does not necessarily preclude summary judgment (*see Hudson-Port Ewen Assoc., L.P. v Chien Kuo*, 165 AD2d 301, 303 [3d Dept 1991]), where, as here, there has been little to no discovery and the facts and circumstances surrounding the subject transaction have yet to be thoroughly ferreted out, the Court finds that any grant of summary judgment would be premature. The Court therefore denies summary judgment with leave to renew upon completion of party depositions.

This constitutes the Decision and Order of the Court.

E N T E R,

SYLVIA G. ASH, J.S.C.