Board of Mgrs. of Atelier v 627 W. 42nd LLC
2017 NY Slip Op 32877(U)
December 29, 2017
Supreme Court, New York County
Docket Number: 151939/2016
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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THE BOARD OF MANAGERS OF ATELIER,
on behalf of all residential unit owners,

Plaintiff,

-against-

Index No. 151939/2016

DECISION AND ORDER

627 WEST 42ND LLC, JOSEPH MOINIAN, and
605 WEST 42ND OWNER LLC,

Defendants.

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M. Crane, J.:

Plaintiff, on behalf of the residential condominium owners of the building known as the "Atelier" in Manhattan, claims that the owners have the right to interior access to the health club/pool on the cellar level of their building, as the condominium Offering Plan, the Declaration, and the By-Laws provide. Nevertheless, defendants have permanently closed those cellar doors, and required all residents to use an exterior door instead. Defendants counter that amendments to the offering plan removed the health club as a common element, instead making it a commercial unit that defendant sponsor retained. According to defendants, the sponsor had the right to change the ingress and egress, and nothing in the parties' agreements mandated that the access doors be in a particular place.

Plaintiff moves for an order granting it partial summary judgment on its claims for a declaratory judgment (first cause of action), breach of contract (second and third causes of action), and for an implied easement (ninth cause of action). Defendants 627 West 42nd LLC,

Joseph Moinian, and 605 West 42nd Owner LLC cross-move for an order granting them summary judgment, dismissing the complaint.

BACKGROUND

Defendant 627 West 42nd LLC (defendant Sponsor) was the sponsor of a high rise condominium building located at 635 West 42nd Street in Manhattan, known as the Atelier (aff of David Scott Neiditch, dated January 23, 2017 [Neiditch aff], exhibit A, complaint, ¶¶ 1, 3). Defendant 605 West 42nd Owner LLC (defendant Sky) is the owner of a residential rental apartment building, known as the Sky, adjacent to the Atelier (*id.*, ¶ 6). Defendant Joseph Moinian is the chief executive officer of the Moinian Group, which is an affiliate of defendant Sponsor and defendant Sky (*id.*, ¶ 5). Plaintiff is the board of managers of the Atelier, that brings this action on behalf of its residential condominium members.

The condominium apartments were sold through an offering plan (Offering Plan), dated December 8, 2005 (Neiditch aff, exhibit C), and a declaration and by-laws (Declaration and By-Laws) (defendants' cross motion, exhibit 8). The Sponsor initially marketed the building as a luxury condominium with top tier amenities, including a swimming pool and health club, located in the cellar and available to all residents (Neiditch aff, ¶ 10). The pool and health club were originally listed as a residential common element. The cellar floor plan showed that there was interior access to them (Neiditch aff, exhibit C, Offering Plan at 239).

In the first amendment to the Offering Plan, dated March 3, 2006 (First Amendment) (defendants' cross motion, exhibit 9), the pool and health club space became part of the defendant Sponsor's "commercial unit," in order to save the condominium over $371,000 per year in operating costs. The residents of the Atelier could still use the pool and health club, but with a fee. That amendment also permitted defendant Sponsor, in the event it built a residential

apartment building on the land adjacent to the Atelier, to enlarge the pool and health club, at its sole cost and expense, onto that adjacent land, and to permit the rental tenants of that future building to use these facilities (*id.* at 1). At the time of this First Amendment, the defendant Sponsor deeded that portion of the commercial unit that included the pool and health club to defendant Sky (defendants' cross motion, exhibit 10).

The Declaration to the Offering Plan, dated November 7, 2006, provided, in Article 11, that "[e]xcept to the extent inconsistent with Article 15 or the By-Laws or prohibited by law" the non-residential unit holders had the right to "(6) change, alter or modify the facade and exterior portion of the Non-residential Unit up to the height of the ceiling of the first floor of the Condominium" (Neiditch aff, exhibit D, Declaration at 11-12). It also provided that the non-residential unit holders could "(7) enlarge the Non-residential Units and provide additional points of ingress and egress to such areas to enable residents of adjacent buildings to utilize them" (*id.* at 12). Article 16 of the Declaration addressed easements. It provided, in section 16.15 (a), that defendant Sponsor had an easement to enable residents of adjacent buildings developed by defendant Sponsor "to use the Garage, and Athletic Facilities on the Third Floor Roof at no cost or expense, providing residents of the [Atelier] can use the amenities of the adjacent buildings at no cost or expense;" to enlarge the Garage and Athletic Facilities at defendant Sponsor's sole cost; and to "(c) alter the methods of ingress and egress to the Garage, and Athletic Facilities to facilitate such use" (*id.* at 16). The term Athletic Facilities referred to outdoor athletic space on the third-floor roof only.

On September 25, 2007, plaintiff, defendant Sonsor and defendant Sky entered into a Zoning Lot Development and Easement Agreement (ZLDEA) (defendants' cross motion, exhibit 11). Paragraph 25 (b) permitted defendant Sky to combine the pool and health club in the

commercial unit in the Atelier with any health club and other recreational facilities Sky was to build, and to operate the two health clubs together (*id.* at 29). It further provided that the plaintiff "agrees to cooperate in all respects as may be reasonably required to allow or facilitate such combination or common operation and maintenance of the Owner Health Club (Atelier Building) and the Developer Health Club (605 Building)" (*id.*).

In December 2010, defendants Sponsor and Moinian closed down the Atelier pool for repairs.

In the spring of 2013, defendant Sky began to develop a 60-story rental building on the adjacent property. In July 2013, plaintiff discovered that the glass access doors to the pool and health club, in the cellar of the Atelier, were locked. These doors closed permanently when defendants' constructed a larger health club for use by both Atelier and Sky residents (*id.*, ¶¶ 26-28).

Defendant Sky has completed construction of the Sky building, and its residents have access, through the cellar of the Sky building, to the pool and health club located in the cellar of the Atelier (Neiditch aff, ¶ 25). Life Time Fitness manages the combined health club which consists of the cellar levels of both the Atelier and the Sky, and the ground and third floor levels of Sky (*see* defendants' cross motion, exhibit 15, aff. of Kimberly Cafaro). All Atelier residents who are members of Life Time Fitness now must enter from the Life Time Fitness entrance on 42nd Street. Access through the Atelier cellar has permanently closed. In fact, locker rooms now occupy the other side of those access doors. Accordingly, there no longer is any usable door to the commercial unit from the cellar hallway of the Atelier (*see* defendants' cross motion, exhibit 14, aff of William Wallerstein).

On March 7, 2016, plaintiff commenced this action asserting eleven claims for breach of

contract, fraud, negligent misrepresentation, false advertising, deceptive business practices, and implied easement. It seeks declaratory, injunctive, and monetary relief. Simultaneously with filing the complaint, plaintiff filed an order to show cause, seeking a temporary retraining order and a preliminary injunction. On March 8, 2016, the court denied the TRO, and held hearings on the preliminary injunction request on April 26 and May 3, 2016. At the conclusion of the April 26, 2016 hearing, the court found that the language in Article 11 (6) of the Declaration gave defendant Sponsor the right to change the glass walls to which the Atelier cellar door access attaches, as that was part of the exterior portion of the commercial unit. It also found that the easement in Article 16.15 of the Declaration sets forth a quid pro quo regarding access to the Garage and the third floor roof athletic facilities, but that the court did not believe that it prohibited defendant Sponsor from changing the access to the health club and pool that existed (defendants' cross motion, exhibit 4, Aril 26, 2016 tr at 48-49). The court found that Article 10 of the Declaration also did not preclude defendants from changing the prior access doors. At the conclusion of the hearing on May 3, 2016, the court denied the motion, stating:

> "I conclude, and I continue to conclude, that there is nothing that requires the owner of the commercial space to provide ingress and egress in a particular place, and certainly, nothing that mandates that such access be through the Atelier building, and based on that, I do not see a likelihood of success on the merits and the preliminary injunction is denied"

(defendants' cross motion, exhibit 5, May 3, 2016 tr at 37-38; defendants' cross motion, exhibit 6). On May 19, 2016, defendants answered the complaint denying the material allegations, and asserting various affirmative defenses.

In moving for partial summary judgment, plaintiff urges that the Offering Plan unequivocally granted residential unit owners interior access to the health club and pool, based

on the cellar floor plans that included those doors. It asserts that defendants cannot identify any provision allowing them to restrict or alter this access. Plaintiff points to Article 16.15 (c) of the Declaration as proof that defendants could not alter ingress or egress to areas other than the Garage and Athletic Facilities. It submits an earlier draft of the Declaration in which the words "Fitness Center" had been included in Article 16.15 (c), before defendant Sponsor deleted them in the final version. Plaintiff uses this earlier language regarding the "Fitness Center" to argue that the deliberate removal of the reference to the "Fitness Center" evidenced defendant Sponsor's clear intent to extinguish its ability to alter the interior access through the Atelier cellar. Further, plaintiff contends that Article 11 (7) of the Declaration, providing non-residential unit owners the right to enlarge and "provide additional points of ingress and egress to such areas to enable residents of adjacent buildings to utilize them" (Neiditch aff, exhibit D, Declaration at 11-12), demonstrates the owner did not have the right to alter existing ingress and egress. Thus, plaintiff seeks declaratory relief (first cause of action), specific performance (second cause of action), a permanent injunction (third cause of action), and, alternatively, an implied easement (ninth cause of action).

In opposition and in support of their cross motion, defendants urge that there is nothing in the Offering Plan, the Declaration, or the By-Laws that grants Atelier residents the absolute right to enter the commercial unit through the Atelier cellar hallway, or that prohibits the commercial unit owner from moving its doorway. Defendants assert that Article 16.15 of the Declaration addresses easements, and does not expressly or impliedly limit the defendant Sponsor from closing the access that existed from within the Atelier. Defendants also urge that Article 11 (7) of the Declaration permits additional points of access, and does not prohibit closing a different access. They contend that plaintiff ignores subsection 6 of that Article, that permits the changing

of the exterior wall and door (Neiditch aff, exhibit D, Declaration at 11-12). Defendants further urge that section 2.2.6 (b) of the By-Laws provides a broad grant of power to the non-residential unit owner to take any action, and that action will not be deemed to affect the Atelier residents negatively. They also point to page 58 of the Offering Plan, that grants broad power to the non-residential unit owner to approve changes relating solely to its unit. This power includes changes to the rules of its operation (Neiditch aff, exhibit C, Offering Plan at 58). Based on these provisions, defendants contend that plaintiff cannot establish a right to access the commercial unit through the cellar of the Atelier, and therefore, its claims fail as a matter of law. Finally, defendants urge dismissal of plaintiff's implied easement claim because plaintiff cannot establish that the Atelier residents' use of the access doors in the cellar is necessary to the beneficial enjoyment of their property.

DISCUSSION

The Court denies Plaintiff's motion for partial summary judgment and grants defendants' cross motion for summary judgment dismissing the complaint is to the extent that the claims based on breach of contract (first through sixth and tenth causes of action) and an implied easement (ninth cause of action) are dismissed. Although defendants purport to move against the complaint in its entirety, they make no argument that the operative documents preclude the causes of action for fraudulent inducement, negligent misrepresentation or violation of the General Business Law §§ 349-350. Accordingly, these claims remain.

Plaintiff's contract claims depend upon the interpretation of the parties' agreements. Where a dispute concerns the interpretation of a condominium's offering plan, declaration, and by-laws, the "usual rules of contract interpretation [apply] to those documents" (*Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 59 [2005]). To interpret a contract, the court must look at its

language, for "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 559-560 [2014] [internal quotation marks and citations omitted]; *accord Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The court must construe the contract to give meaning and effect to the material provisions, and should not render any provision meaningless (*id.*). The agreement "should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*id.* at 324-325 [internal quotation marks and citation omitted]). A condominium offering plan, declaration, and by-laws must be read together where they "were designed to effectuate the same purpose and were part of the same transaction" (*Residential Comm. of Bd. of Mgrs. of the Sycamore v 250 E. 30th St. Owners, LLC*, 17 Misc 3d 1139 [A], * 6, 2007 NY Slip Op 52344 [U] [Sup Ct, NY County 2007]; *see Borress & Borress LLC v CSJ LLC*, 27 AD3d 287, 288 [1st Dept 2006]).

Here, plaintiff's claims depend on its assertion that the Atelier residents have a guaranteed right to enter the commercial unit, that is, the health club and pool, from the access doors in the Atelier cellar. Plaintiff, however, fails to establish any basis in the agreements for this guaranteed access. A close reading of the Offering Plan, the Declaration and the By-Laws, reveals no provision prohibiting the defendant Sponsor from changing the access doors, or the manner of ingress and egress from its commercial unit. Indeed, plaintiff's counsel admitted at the hearing on the TRO, in response to the court's request that he point to any writing supporting his position, that "[t]here isn't a provision in the offering plans that detail where access comes

from" (defendants' cross motion, exhibit 3, TRO tr at 7).

Plaintiff's reliance on the floor plans to support its claim is unavailing. It makes sense for the floor plans to indicate that there were access doors in the cellar, because, at the time of the original Offering Plan and the amendments, those doors were physically located there and were the only access to the space. The floor plans, however, do not prohibit change to the access doors. Moreover, when the First Amendment amended the Offering Plan it changed the space from a common element to a commercial unit the defendant Sponsor owned. Accordingly, the residential unit owners were aware that this space was privately owned, and that owner could change it.

Plaintiff's assertion that the Offering Plan, upon which they relied in purchasing, has many references to the residential owner's right to enjoy the pool and health club, does not advance its case. The pool and health club are available to the residents, but through the front door, not the former cellar access doors.

The Declaration and By-Laws, like the Offering Plan, do not provide any basis for a guarantee of the Atelier resident's right to cellar access. Article 16.15 (c) of the Declaration, addressing easements, grants defendant Sponsor an easement to "alter the methods of ingress and egress to the Garage and Athletic Facilities." The Declaration and By-Laws define the Athletic Facilities as those on the third floor roof. However, simply because the Declaration and By-Laws do not state that defendant Sponsor has an easement to change the ingress and egress to its own commercial unit, does not warrant the conclusion that it can not make such alterations. Contrary to plaintiff's apparent argument, there is no ambiguity in this provision warranting an examination of a prior draft of the Declaration (*Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 [1st Dept 1995] [the "mere assertion by a party that contract language is

ambiguous is not, in and of itself, enough to raise a triable issue of fact precluding summary judgment"]). Article 16.15 (c) grants an easement, and does not impose a restriction on the location of the access doors to the commercial unit. Moreover, the garage and athletic facilities are common areas, and the health club and pool are defendant Sponsor's own property. The court notes that the reference to the "Fitness Center," in the earlier draft, may have changed with the amendment to the Offering Plan making it private commercial space. Nothing in this provision expressly or impliedly limits the commercial unit owner from closing the access doors to that unit from the Atelier cellar, or guarantees the Atelier residents the right to enter through those doors.

In addition, Article 11 of the Declaration fails to guarantee access. Article 11 (6) provides that defendant Sponsor, as the "Non-residential Unit Owner," had the right, without the consent of the residential board or other unit owners, to "change, alter or modify the facade and exterior portion of the Non-residential Unit up to the height of the ceiling of the first floor of the Condominium" (Neiditch aff, exhibit C, Declaration at 11-12). The former glass access door and walls in the Atelier cellar clearly were part of the exterior of the Non-residential Unit. Thus, this provision grants defendant Sponsor the right to make changes to them without interference from the residential owners or board. By moving the access door to the health club from the exterior wall in the Atelier cellar, to an access door on the 42nd Street side of the Sky building, defendant Sponsor changed the exterior portion of its space from the cellar up to the height of the first floor, within the language of this provision.

Plaintiff's reliance on subsection 7 of this article is similarly unpersuasive. That provision permits the Non-residential Unit Owner to "enlarge the Non-residential Units and provide additional points of ingress and egress to such areas to enable residents of adjacent

buildings to utilize them" (*id.* at 12). This does not prohibit the Non-residential Unit Owner from changing the previous access door and walls to its unit, which right the previous subsection granted. Therefore, this court holds that the parties' agreements unambiguously give defendants the right to change the access door to their space, and do not guarantee the Atelier residents access to that space through the former Atelier cellar access door. Accordingly, the Court dismisses plaintiff's contract claims (the first through sixth, and the tenth causes of action).

Similarly, the court grants summary judgment to defendants, dismissing plaintiff's claim based on an implied easement (ninth cause of action). In this claim, plaintiff seeks an implied easement for the use of the Atelier cellar access doors into the Life Time Fitness Club. The law disfavors these easements. The plaintiff must prove entitlement to it by clear and convincing evidence (*Abbott v Herring*, 97 AD2d 870, 870 [3d Dept 1983], *affd* 62 NY2d 1028 [1984]; *see Mau v Schusler*, 124 AD3d 1292, 1294 [4th Dept 2015]). To establish a claim for an easement implied by existing use, the plaintiff must show:

> "(1) unity and subsequent separation of title, (2) the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and (3) the use must be necessary to the beneficial enjoyment of the land retained" (*Abbott v Herring*, 97 AD2d at 870).

The necessity need only be reasonable, not absolute, while lack of alternative access to the property may demonstrate the easement (*see West End Props. Assn. of Camp Mineola, Inc. v Anderson*, 32 AD3d 928, 929 [2d Dept 2006]). However, a "mere convenience is not sufficient to establish reasonable necessity" (*Mau v Schusler*, 124 AD3d at 1294 [internal quotation marks and citation omitted] [where turnaround was used primarily to facilitate the plaintiff's access to off-street parking, it was a mere convenience, not a necessity]).

In this case, plaintiff claims that it has an easement to use the former cellar doors, that notably open into plaintiff's property and not into the commercial unit. Even if this could constitute an easement, and one that was meant to be permanent, plaintiff fails to make a *prima facie* showing that this easement is ncessary. Plaintiff fails to show that the Atelier residents cannot enter the commercial unit from another way, while defendants have presented undisputed proof that the residents can and have entered the commercial unit, now known as Life Time Fitness, through the 42nd Street entrance of the Sky building. This alternative access demonstrates that to enter through the Atelier cellar doors was a "mere convenience," and not a necessity. (*see Mau v Schusler*, 124 AD3d at 1294; *Four S Realty Co. v Dynko*, 210 AD2d 622, 624 [3d Dept 1994] [use of property as a means of ingress and egress to own parcel is a mere convenience where plaintiff could use public thoroughfare instead]; *Pastore v Zlatniski*, 122 AD2d 840, 841 [2d Dept 1986] [same]). Therefore, the court dismisses this claim as a matter of law. The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that the defendants' cross motion for summary judgment is granted to the extent that the first through sixth, ninth, and tenth causes of action are dismissed; and it is further

ADJUDGED, DECREED AND DECLARED that defendants are NOT required to make the swimming pool and fitness center accessible to plaintiff Unit Owners via existing glass doors located in the basement of the Atelier; and it is further

ORDERED that the action shall continue as to the Fraud in the Inducement, Negligent Misrepresentation and General Business Law § 349 causes of action; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 304, 71 Thomas Street, on March 6, 2018 at 11 AM.

Dated: December 29, 2017

ENTER:

J.S.C.