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

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TISOPED CORP

Plaintiff,

Index No.: **0655731/2016**

-against-

THOR 138 N 6TH ST LLC

Defendant.

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MELISSA A. CRANE, J.S.C.:

This action involves competing claims to a sum certain that is currently in escrow under an agreement to assign the rights to purchase real property located at 138 North 6th Street, Brooklyn, NY (the "Property"). Plaintiff Tisoped Corp. ("Tisoped") moves for summary judgment, pursuant to CPLR § 3212 (motion no. 1), against defendant Thor 138 N 6th Street, LLC ("Thor"). Thor opposes and moves separately for summary judgment in its favor (motion no. 2). For the following reasons, the court denies plaintiff's motion, but grants defendant's.

Background

Tisoped is a New York corporation. Octavio Molina ("Molina") is the owner of the Property. On January 7, 2015, Tisoped (as "Purchaser") and non-party Molina (as "Seller"), entered into a Sale-Purchase Agreement ("Underlying Contract" or "SPA") for the sale of the Property. The Underlying Contract had a sales price of $6.1 million. Tisoped paid $305,000 to Molina for the down payment and other expenses.

The SPA provided the purchasers with 21 days to conduct due diligence ("Due Diligence Period"). The SPA called for a closing "on or about the day which is 90 days following the end of the Due Diligence Period" ("Closing Date") (SPA § 4.1) The SPA did not set forth a time-of-the-essence closing date, but had an estimated closing date of April 28, 2015 (90 days from 21 days past January 7, 2015).

The SPA called for the seller to provide certain documents. For example, subsection 5.7 of section 5 provides that as part of due diligence the seller must:

> "Following the expiration of the Due Diligence Period, and provided that (i) this Agreement has not been terminated pursuant to Paragraph 5.6 and (ii) that Purchaser was unsuccessful in obtaining, or has chosen not to seek, a Surrender Agreement from the commercial tenant, Seller shall provide to Purchaser (x) [an] [sic] estoppel certificate from commercial tenant..." (emphasis added).

Section 7 of the SPA is titled "Closing Documents" and lists other documents the seller is responsible for delivering to Purchaser: "such other documents, instruments and/or deliveries as are required to be delivered by Seller pursuant to the terms of this Agreement" (Assignment Agreement section 7.1[k]).

Thor is a Delaware limited liability company. On January 20, 2015, Tisoped (as "Assignor"), and Thor (as "Assignee") entered into an Agreement of Assignment ("Assignment Agreement"), by which Tisoped effectively sold its right to purchase under the SPA to Thor, subject to the conditions of the Assignment Agreement and SPA. The consideration for the assignment totaled $1.5 million (subsequently modified to $1,455,000).

The Assignment Agreement bifurcated the consideration. The "Released Deposit Portion" of $305,000, was to reimburse Tisoped for what it had already paid to Molina. Tisoped received the Released Deposit Portion shortly after the parties signed the Assignment Agreement. The balance ("Remaining Deposit Balance") of $1,150,000 is in escrow.

The Assignment Agreement addressed how to disburse the Remaining Deposit Balance for several anticipated scenarios. Section 2 of the Assignment Agreement, entitled "Consideration; Deposit; Escrow," provides that "if, as and when the closing of the sale of the Property to Assignee under the Underlying Contract (the "Closing") occurs, the Remaining Deposit Balance (as such term is defined in Section 4.2 herein) shall be paid to the Assignor."

Section 6 of the Assignment Agreement is entitled "Conditions to Closing." Subsection 6.1 of that section, entitled "No Ownership Interest," enables Thor to terminate the Assignment Agreement provided it is not in default under the SPA:

> "Subject to the provisions of Section 8.2 hereof, if the Closing does not occur under the Underlying Contract (unless due to the Assignee's default thereunder) this Agreement shall terminate upon notice from Assignee, whereupon Escrow Agent shall promptly return the Remaining Deposit Balance to Assignee (unless Assignee is in default) and the Escrowed Documents to their respective parties depositing same with Escrow Agent, whereupon this Agreement shall be of no further force and effect, except as to any provision which by its express terms shall survive termination."

Section 8 of the Assignment Agreement is titled "Provisions with Respect to Default" Subsection 8.2, entitled "Default by Assignee" provides that in the event Thor was in default under the SPA, Tisoped could retain the Deposit[1] as liquidated damages:

> "If the Closing does not occur under the Underlying Contract due to the Assignee's default under the Underlying Contract, (i) Assignor shall be entitled to retain the Deposit as liquidated damages, such amount being agreed upon as liquidated damages for failure of Assignee to perform the duties, liabilities and obligations imposed upon it by the terms and provisions of this Agreement and (ii) Assignor shall have the right to receive, at the Assignor's election, an assignment of the Underlying Contract (together with the Down Payment and Rent Escrow thereunder) from Assignee, whereby Assignor shall again become the "purchaser" under the Underlying Contract and have the right to close on the Property pursuant to the Underlying Contract."

If the closing failed to occur, other than because of Thor's default, Tisoped would have the opportunity to take back its rights under the SPA:

> "Assignor shall also have the right to the aforementioned assignment of the Underlying Contract (together with the Down Payment and Rent Escrow thereunder) in the event of a failure of a condition to close pursuant to the Underlying Contract (unless such failure of condition has been waived by Assignee) or if the Closing does not occur for any other reason (other than the Assignee's default) and provided that Assignee is not then actively seeking to enforce the provisions of the Underlying Contract and to cause the Current Owner

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[1] Per the Assignment Agreement "Deposit" references the total consideration of $1,455,000.

> to convey the Property to Assignee, in which event Assignor and/or Escrow Agent, as applicable, shall return the Deposit (inclusive of the Released Deposit Portion), to Assignee upon execution of the aforementioned agreement."

Soon after Tisoped and Thor executed the Assignment Agreement, on February 24, 2015, the commercial tenant of the Property commenced an action against the landlord Molina, *Les Caprice Des Sophie LLC v Octavio Molina*, Index No. 502164/2015 (Supreme Ct. Kings Co.) ("L&T Litigation"). Thor contends that, because of the L&T Litigation, the closing could not occur on the April 28, 2015 projected closing date. Thor contends the L & T Litigation rendered Molina unable to provide the necessary estoppel certificate from the commercial tenant.

Because, the closing could not occur by the projected Closing Date, "on or about" April 28, 2015, Thor and Molina extended the estimated closing date five times ("Extensions") hoping to resolve the L&T Litigation. The first closing extension agreement was dated April 22, 2015, and the fifth closing extension agreement was dated May 17, 2016. Ultimately, Molina and Thor extended the closing date to August 31, 2016. Tisoped alleges that, during this time, it objected to the Extensions and made several demands via counsel for the release of the Remaining Deposit Balance. However, Thor would not release the Remaining Deposit Balance.

On October 28, 2016, Tisoped filed the complaint in this action. On June 2, 2017, Thor terminated the Assignment Agreement and demanded the return of the Remaining Deposit Balance under section 6.1 of the Assignment Agreement.

Tisoped argues that Thor is in default because the Extensions under the SPA effectively amended the Assignment Agreement, while Thor could not amend the Assignment Agreement without Tisoped's consent. Tisoped bases its reasoning on section 10 of the Assignment Agreement. Subsection 10.5, entitled, "Underlying Contract" provides that

> "Assignee acknowledges that this Agreement is subject to the terms of the Underlying Contract which is incorporated herein by reference. Notwithstanding

> the foregoing, in the event of any inconsistencies between the terms of the Underlying Contract and this Agreement, this Agreement shall prevail."

Subsection 10.7 is a standard merger clause. It provides that only a co-signed writing could amend the Assignment Agreement:

> "this Agreement and the other documents executed and delivered contemporaneously herewith contain the entire agreement and understanding among and between the parties with respect to the subject matter hereof and supersedes and replaces all prior understandings and agreements both written and oral. This Agreement shall not be amended, altered, modified or supplement except in a writing duly executed by, or on behalf of, all the parties hereto. The Exhibits annexed hereto are hereby incorporated and made part of this Agreement."

Tisoped reads sections 10.5 and 10.7 together as prohibiting Thor's ability to amend the SPA without Tisoped's consent. Tisoped further argues the Extensions were without that consent and therefore constitute: (1) a breach of the Assignment Agreement and (2) Thor's default under the SPA. However, neither the SPA, nor the Assignment Agreement incorporate "time of the essence" language. It is also undisputed that, during contract negotiations with Tisoped about the Assignment Agreement, Thor consistently rejected "time of the essence" language.

Thor contends its obligations under the SPA are intact. It argues SPA sections 7.1(k) and 5.7 establish that Molina's remission of the estoppel certificate was a precondition to close and that the L&T Litigation prevented Molina from providing the estoppel certificate. Thor argues it properly terminated the Assignment Agreement when it served Tisoped with the June 2, 2017 termination letter because no closing under the SPA had yet occurred and it was not otherwise in default. Thor asserts, that Section 6.1 entitles it to the return of the Remaining Deposit Balance because closing under the SPA did not occur.

DISCUSSION

I. Plaintiff's Motion for Summary Judgment

The court denies plaintiff's motion for summary judgment seeking the Remaining Deposit Balance and damages. Under Section 8.2 of the Assignment Agreement, Tisoped can only retain the Deposit from the Assignment Agreement if "Closing does not occur under the Underlying Contract [SPA] *due to [Thor's] default under the [SPA]*." Thor, however, is not in default under the *SPA*. Faced with this reality, Tisoped argues that, by repeatedly putting off the closing without Tisoped's permission, Thor breached the *Assignment* Agreement (see Reply Aff. of Eli Raider, dated August 8, 2017 at ¶ 6).

However, this argument does not militate in favor of awarding judgment to plaintiff as a matter of law. First, the Assignment Agreement provided that: "If, as and when the closing of the sale of the Property to Assignee under the Underlying Contract [SPA] (the 'Closing') occurs, the Remaining Deposit Balance. . . shall be paid to Assignor." (Missry Aff. Ex. A [Assignment Agreement] § 2, emphasis added.) As there has been no closing, Tisoped is not entitled to the Remaining Deposit Balance at this time. Plaintiff fails to articulate the right to recovery under a different theory.

Plaintiff has also moved for summary judgment under a theory of breach of the covenant of good faith and fair dealing. This cause of action can arise when a party to a contract does not technically breach that contract, but nevertheless effectively deprives the other party of its bargained for benefits under the contract (*see Richbell Info Servs. Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 [1st Dep't 2003]; *see also Sterling 5th Assoc. v Carpentile Corp.*, 9 AD3d 261, 262 [1st Dep't 2007]). However, the composition of the covenant of good faith and fair dealing cannot contravene the terms of the contract or add obligations to it (*see, e.g., Cohen*

PDC, LLC v Cheslock Baker Opportunity Fund, LP, 94 AD3d 539, 540 [1st Dep't 2012]). Here, whether Thor breached the covenant of good faith and fair dealing by putting off the closing, at best, would be an issue of fact. Consequently, there is no basis to award summary judgment as a matter of law to plaintiff. Accordingly, the court denies plaintiff's motion in its entirety.

II. Defendant's Motion for Summary Judgment

Summary judgment dismissing this case presents a more difficult question. Thor claims it properly exercised its termination right under the Assignment Agreement and therefore the Remaining Deposit Balance must be returned to it. Again, Tisoped contends that by repeatedly putting off the closing under the SPA, Thor serially breached either the text or the spirit of the Assignment Agreement. Clearly, Thor had a right to terminate the Assignment Agreement under section 6.1. That it did so after the commencement of this litigation is of no moment, as Tisoped does not claim Thor should have terminated earlier. Moreover, there is no "time of the essence" clause in either the SPA or the Assignment Agreement and Tisoped does not dispute that Thor rejected any time of the essence requirement to which Tisoped acquiesced. Nothing in the SPA prohibits the purchaser from adjourning the closing. Given what the agreements specifically state, the parties provided for what happened here—Thor's inability or lack of desire to close, because of the commercial tenant.

Tisoped claims that Thor's excuse about Molina not being able to obtain an estoppel certificate is meritless, because no closing was ever scheduled. However, Tisoped does nothing to dispute Thor's assertion that the closing was put off because of the L & T litigation.

Plaintiff claims the estoppel certificate is a pretense and that Thor just wanted the premises sold vacant. First, there is nothing in the record to suggest that a vacant property was Thor's motivation. But, even if it were, it is irrelevant. Tisoped does not even suggest that the

closing could have occurred without the estoppel certificate or that it would have been reasonable for Thor to close without it. Moreover, Thor was within its rights in putting off the closing as time was never made of the essence. Finally, the parties contemplated in their agreement exactly what occurred by providing Thor with the right to terminate and have the purchase opportunity revert back to Tisoped. Thus, Tisoped was never deprived of the benefit of its bargain. Rather, it received exactly what it bargained for—the reversion of the right to purchase. Accordingly, Thor acted in accordance with the terms of the contract and it is appropriate to grant summary judgment to Thor.

Accordingly, it is

ORDERED THAT the court denies plaintiff's motion for summary judgment (motion seq. 1); and it is further

ADJUDGED, DECREED AND DECLARED that plaintiff Tisoped Corp., is not entitled to receive the Remaining Deposit Balance; and it is further

ADJUDGED, DECREED AND DECLARED that defendant Thor 138 N 6th St LLC is entitled to receive from escrow the Remaining Deposit Balance, and it is further

ORDERED THAT the court grants defendant's motion for summary judgment (motion seq. 2) and dismisses this case.

The clerk is directed to enter judgment dismissing this case accordingly.

DATED: March 14, 2018
New York, NY

J.S.C

HON. MELISSA CRANE