SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

JOSEPH NAUGHTON,

Plaintiff,

-against-

IRENE YEVTUSHENKO A/K/A IRENE NICKOLAI INDIVIDUALLY, AND AS PRINCIPLE OF CALLICCON HOSPITALITY LLC,

Defendant(s),

Index Number: 1625-2016
RJI Number: 52-38728-2016

Decision & Order

Appearances:

JOSEPH RUYACK, III, ESQ
Attorney for Plaintiff
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Chester, New York 10918

JOHN CLARK, ESQ
Attorney for Defendant
144 East 44th Street, Suite 504
New York, New York 10017

McGUIRE, J. AJSC

This contract action arises from the sale of property commonly known as the Western Hotel, located at 22 and 22 ½ Upper Main Street, Callicoon, New York 12723, the property was sold by Joseph Naughton (Plaintiff herein) to Callicoon Hospitality LLC, with Irene Yevtushenko a/k/a Irene Nickolai (Defendant herein) being the managing member thereof, for a total purchase price of $700,000. Included in the contract of sale was the real property, the business name "Western Hotel", all the contents, inventory and fixtures therein, and the liquor store Western Liquors subject to terms and exclusions set forth in the contract of sale. The parties entered into a contract of sale on or about February 29, 2016, and closed pursuant to the contract on or about July 1, 2016.

Plaintiff commenced this action by serving a summons with notice on September 29,

2016. Thereafter Defendant filed a notice of appearance and demand for complaint on or about November 16, 2017, a complaint was thereafter served. Defendant served an answer and asserted counterclaims against Plaintiff; Plaintiff thereafter served an answer to the counterclaims.

Plaintiff Naughton alleged three causes of action pursuant to his verified complaint, for which he is seeking damages, namely: 1.) Defendant owes Plaintiff for the payment of $1,600 to the State of New York for sales tax; 2.) Defendant owes Plaintiff $771.25 for inventory she received and did not pay for which was transferred from Western Liquors; and 3.) Defendant has failed to pay $5,700 which had been due and owing at the time of the closing of title but which was unrelated to the real property transaction. The first cause of action related to the payment of New York State sales tax was resolved pursuant to this court's Decision and Order following the parties' cross motions seeking summary judgment.

Plaintiff, Mr. Naughton specifically alleges that at the time of the closing, although title of the Western Hotel passed to Ms. Nickolai, Western Liquors could not be transferred as Ms. Nickolai had not yet received her Liquor License from the New York State Liquor Authority. As a result of this Plaintiff alleges that the parties agreed that Plaintiff would continue to operate the liquor store until Defendant had obtained a license to sell liquor in New York State at which time the parties would reconcile the value of the remaining inventory with defendant paying plaintiff those sums at a later date. Ultimately, according to Naughton, Defendant obtained her liquor license and thereafter prior to this transfer of inventory, the parties conducted a count of the inventory. Plaintiff alleges that the amount contained in the inventory was incorrect and that Ms. Nickolai received $771.25 worth of liquor inventory she was not entitled to. Mr. Naughton further alleges that the defendant owes him $5,700 for services rendered on an adjacent parcel of

real property also owned by Ms. Nickolai. While this transaction was separate and distinct from that involving transfer of title to the Western Hotel, the two are joined herein by commonality of parties and the fact that the parties, according, to Mr. Naughton, had agreed that he would be paid for the work completed on her other property, simultaneous with the transaction involving transfer of title to the Western Hotel.

Defendant Ms. Nickolai denies Plaintiff's allegations in her answer and asserts counterclaims for 1.) breach of contract and 2.) breach of express warranty. The basis of Defendant's counterclaim is that Plaintiff breached a provision of the contract of sale which provides that Plaintiff agrees to have the "HVAC, kitchen, and fire suppression equipment within the premises inspected prior to closing [...]" that it will be in working order at the time of closing, and "[...] warrants operation for the period of one (1) year from date of closing."

Defendant argues that Plaintiff failed to furnish, inspect and warrant the operation of the fire suppression equipment at the time of closing, and failed to honor the one (1) year warranty of the equipment detailed in the contract of sale for one (1) year after closing. Defendant alleges that as a result of Plaintiff's breaches she has sustained damages in the form of service and repairs, heightened insurance premiums, loss of business, out of pocket expenses for contractor services to repair, install and perform services.

In response Plaintiff Naughton alleges six affirmative defenses based upon: 1.) failure to state a cause of action; 2.) the action is barred, in whole or in part, pursuant to the statue of frauds; 3.) the doctrine of laches and unclean hands; 4.) the doctrine of waiver; 5.) doctrine of merger; 6.) defendants failed to mitigate their damages.

On April 18, 2018, the Court conducted a non-jury trial of these matters, each of the parties were represented by counsel and each were provided a full and fair opportunity to present

witnesses and offer evidence in support of their claims.

NOW, after reviewing the proofs offered by the Plaintiff, JOSEPH NAUGHTON, and the Defendant, IRENE NICKOLAI; I do hereby make the following Findings of Fact and Conclusions of Law:

FINDINGS OF ESSENTIAL FACTS

The Plaintiff, Joseph Naughton, testified that he was the owner of the Western Hotel from 1969 until 2016 when he entered into a contract of sale to transfer the property to an entity formed and controlled by Irene Nickolai, the Defendant herein. After a period of negotiating the terms of a prospective transaction, the parties entered into a contract of sale on or about February 29, 2016, thereafter following a period of due diligence the parties scheduled the matter for closing and title was transferred in July of 2016. The parties stipulated the contract of sale into evidence which is essentially a standard form containing mostly "boiler plate" language with some additional provisions included to address some of the unique circumstances of this transaction. Specifically, the contract provided for a sale price of $700,000, with $30,000 due upon execution of the contract, receipt of which has been acknowledged, with the balance due at closing. It is noted that the contract includes a provision whereby the seller (Plaintiff herein) would hold a $400,000 mortgage to secure that portion of the purchase price, however that never materialized as the purchaser (Defendant herein), obtained the full amount of the purchase price from other sources. The contract further provides, in paragraph 6, that the premises would be transferred with a valid Certificate of Occupancy and free of any and all notes or notices of violations or requirements issued by any state department or agency. The contract could not be modified or terminated orally. Notices provided for under the contract were to be provided, in writing, tendered to the other party, by first class mail, fax, email. The contract required the

purchaser to purchase the inventory from the liquor store at the time operation of that store was transferred. Paragraph 30 provides that only as expressly provided in this agreement shall any provision or covenant contained in the contract survive delivery of title. Paragraph 36 provides that the purchaser has executed its due diligence in conjunction with this agreement and is familiar with the Western Hotel, the nature of the business and the business climate and further that they have not relied upon any representation or oral statement of the seller and further that the:

> "Seller warrants that all mechanical systems are in operating condition and that the purchaser is aware of the condition and operating capacity of said systems."

Paragraph 40 provides:

> "The seller agrees to have all HVAC, Kitchen and fire suppression equipment within the premises inspected prior to closing. Seller warrants that all such equipment shall be in working order on the date of closing and further warrants its operation for a period of one year from the date of closing. Should any piece of equipment fail, within the specified period, buyer shall immediately notify the seller of the condition and seller shall make every reasonable effort to repair as soon as reasonably practicable. Should an emergency repair be necessary, buyer shall have the right to repair same and receive an offset from the next due mortgage payment, however buyer shall try wherever practicable to allow seller to repair any failure under this paragraph."

Throughout the spring and early summer of 2016, purchaser availed herself of the opportunity to make several inspections of the subject premises, including the physical structure, equipment and systems, indeed Plaintiff offered the she was afforded unencumbered access to the property and she had several people inspect the premises, including those who represented that they were either architects or worked in the construction trades.

At no time, prior to closing or at closing, according to Plaintiff Mr. Naughton, did

Defendant provide any report or raise any concern related to the condition of the property. Defendant arranged to have the Heath Department inspect the premises and it is conceded, by all parties that no violations were noted. At the closing Defendant Ms. Nickolai tendered the purchase price but did not have sufficient funds to satisfy a separate and distinct debt related to construction work which was performed by Mr. Naughton for Ms. Nickolai at an unrelated property. The parties concede that the work was performed, by Plaintiff on Defendant's separate property, that there was an agreement to pay and that the amount due and owing Plaintiff herein is $5,452.81. There is nothing in the record to suggest that Plaintiff is not entitled to that amount.

While the title to the liquor store did pass with the closing, due to Defendant not having a liquor license, the parties agreed to invoke the provisions set forth in the contract of sale at paragraph 38 under which Plaintiff would become a tenant, operating the liquor store, at the rate of $100.00 per month. This tenancy would continue until such time at the necessary licenses were obtained by Defendant, whereupon the parties would reconcile the store inventory which, pursuant to the express terms of the contract the Defendant would purchase from the Plaintiff.

In August of 2016 Defendant secured the necessary permits and the parties worked together to determine the remaining inventory of the liquor store. The parties conceded that the inventory presented in evidence represented the agreed upon stock inventory. The dispute between the parties centered not on the quantity of items but rather, Plaintiff asserted that he had made a computational error in adding up the inventory which resulted in a net shortfall to him of $775.00. There is nothing in the record to establish the amount of money, if any, paid for any liquor store inventory and while defendant conceded that the submitted inventory (Plaintiff's Exhibit 3 in evidence), represented the correct compilation of items, she believed that Plaintiff

was claiming that he had found additional items on a subsequent visit to the store, no such claim was advanced by Plaintiff.

Whereas the parties have agreed that the exhibit admitted by stipulation represented the proper quantum of items and that the unit price was correct, the court has undertaken a review of that exhibit and determined that the value of the inventory turned over to Defendant at the time she assumed operation of the Western Liquor store was $16,132.76, accordingly, Defendant shall be obligated to pay that amount less any credits for sums paid to date for liquor store inventory.

Prior to the transfer of title, but after the parties entered into the contract of sale, pursuant to the contract, Plaintiff completed work and had equipment and systems tested and found to be fully operational. It is significant that the premises, but for a limited number of private catered parties did not operate as a commercial restaurant and bar between fall of 2012 and July of 2016, indeed it is undisputed that the restaurant and bar were not operational at any time during the pendency of this transaction. In anticipation of transferring title to the Defendant the Plaintiff completed some work on the fourth-floor bathroom and prior to closing, pursuant to the contract, he had a refrigeration mechanic inspect each piece of the equipment and confirmed that it was all fully operational. As stated earlier, the New York State Health Department completed an inspection of the premises and did not cite any violations. Furthermore, pursuant to contract the Plaintiff offered that he tested the hood system and fan and found that to be operational as well as the HVAC system, which, as a full-time resident in the building, Plaintiff could testify was fully operational up to and including the day of the closing making enough heat and hot water to support the operation of the building.

Defendant, offered that she made no such formal inspections of the premises prior to closing to determine the functionality of any of the systems or equipment, despite having ample

opportunity to do so, as a result there is nothing in the record from which this Court could conclude or even infer that there were specific issues raised at or prior to the closing which would have given rise to any additional obligation to remedy on the part of Plaintiff Mr. Naughton. Likewise, there is nothing in the record to suggest that Mr. Naughton was out of compliance with the relevant provisions of the contract which required all systems and equipment to be operational on the day of the closing.

Each of the parties testified that after closing there was an issue with a pilot light on the oven, Plaintiff Mr. Naughton became aware of the problem when he was at the Western Hotel one day and he testified that he changed a thermos-coupler, after which the oven was fully operational. Testimony established that the restaurant opened for business on July 30, 2016. On August 8, 2016, a letter was sent from attorney, Steven Vegliante to attorney Joseph Ruyack to advise that there were some residual issues, at the Western Hotel, which required attention. The letter was admitted into evidence, on consent, and provides that there was no fire suppression system in the kitchen ($4,500); the hood fan, which they had originally believed was operational was not and raised an issue regarding the duct work attached to the hood ($7,450.00); the roof was allegedly leaking in four places ($3,000). The letter referenced several leaks in the radiators, the roof, sinks, bar sinks and a broken pilot assembly for the stove which were estimated at a cost of $200.00 for repair. The letter references that these were issues that had been addressed at the closing and were residual matters which the Plaintiff was still obligated to remedy, there is nothing in this letter which suggests that these items were in the nature of those which would fall under the provisions of paragraph 40 of the contact (the warranty) rather Mr. Vegliante represents these issues as falling under obligations contained under paragraph 36 which provides that these systems will be in operating condition as of the date of closing.

Whereas the contract expressly provides, in paragraph 30, that no provision, covenant or representation contained in the contract shall survive delivery of the deed, except as expressly provided for, the issues raised in Mr. Vegliante's letter as referencing residual obligations would need to be supported by some writing, as the contract, according to its express terms cannot be modified except in writing. Since there is no such writing in this record the parties are bound by the express terms of the contract which each executed upon consultation with counsel. Here too, the court notes, that it is incumbent upon the purchaser of any parcel of real property, but perhaps more critical when purchasing a building that is more than 100 years old, which has been only partly operational for several years, to avail themselves of the opportunity to have systems checked prior to closing to confirm their operational capacity as of the time title transfers. Defendant's failure to undertake those opportunities, does not give rise to an obligation afterward for Plaintiff to remedy conditions which could and should have been discovered prior to closing and addressed at closing pursuant to the express terms of the contract.

Paragraph 40 provides additional safeguards but, by its express terms, only for equipment for a period of one year from the date of closing. Furthermore, the contract expressly provides the means by which notice is to be provided, a writing supplied to Mr. Naughton, here the writing was forwarded to the attorney who represented Mr. Naughton at closing, rather than directly to Mr. Naughton as provided for by the terms of the contract.

The parties concede that there was no fire suppression system installed in the Western Hotel at any time relevant to this transaction and as such there is no claim related to the functionality or inclusion of such a system. Rather, the evidence at trial provided that the fire suppression equipment referenced in the contract included various fire extinguishers which were present within the building.

Defendant called plumbing contractor, Mark Peters, during her case in chief who testified credibly that he has been in the business about thirty (30) years. He has completed some work for her in the Western Hotel and that after Ms. Nickolai took title she called about a hot water problem and some leaks in the building. On his first trip to the Western Hotel he made some repairs to the steam boiler mixing valve, which according to Peters had been improperly installed. He also observed that the main plate, on the fire chamber was cracked and he observed water running down the wall in the basement. There were other issues with water leaks between the first and second floor, and there were numerous issues with the heating system. In his rebuttal testimony, Naughton offered that the crack on the main plate of the fire chamber occurred in the mid 1970's and had not effected the operation of the system during the past 40 years.

Mike Misner, the owner of Kaiser Equipment testified that his company specializes in kitchen hood systems, he sells and installs them, repairs and upgrades them. He offered that he is familiar with the Western Hotel, having been asked to perform work at that location in the fall of 2016. When he inspected the hood in the kitchen, he found that it was not functional because as a result of incorrect duct work; there were holes in the hood, and the fan was not operational. Mr. Misner estimated, based upon his inspection of the hood system, that the cost to repair would run between $8,000 and $10,000. He also had the opportunity to inspect the Refrigerator and found that the compressor needed to be repaired, it is a water-cooled system, he did complete about $2,000 worth of repairs and estimated that to completely repair the refrigerator it would cost between $10,000 - $12,000. He offered that the cost to repair the fan, which according to Mr. Naughton was likely installed about thirty (30) years prior, was between $3,000 - $4,000 for parts and labor.

CONCLUSIONS OF LAW

This case is governed by the rules of contract construction. The rules of contract interpretation are well established: when two (or more) parties reduce their agreement to a clear and complete document in the form of a written contract, this writing should be enforced according to its terms (see *Greenfield v. Philles Records, Inc.*, 98 NY2d 562 [2002]). The Court noting "[...] this rule is applied with special force in the context of real property transactions, where commercial certainty is a paramount concern, and where the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length [citations and quotations omitted]" *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 NY3d 398 [2009].

These parties, Plaintiff who owned and operated the hotel for decades and Defendant a real estate broker, who were both represented by counsel entered into a binding agreement, contemplating the sale of a hotel, within which a liquor store was located, which created certain rights and responsibilities. Among those, the Plaintiff was obligated to convey the premises with certain systems and equipment being operational for the purpose they were intended for, specifically operation of a commercial food and beverage establishment. Plaintiff was further obligated to make repairs to equipment which malfunctioned for a period of one (1) year following closing. Defendant was obligated to make certain inspections of the premises to ensure that the systems and equipment intended to be operational on the date of closing, indeed were operational and her acceptance of title in the absence of such confirmation would place upon her the burden of establishing, by a preponderance of the credible evidence, the condition on the date of closing. Defendant made no such inspections and provided nothing to establish

the functionality of any such systems on the date of closing. Plaintiff provided uncontroverted testimony that he had a mechanic test the refrigeration units and determined that they were fully operational on the date of closing. Plaintiff's obligation to warranty the functionality of equipment beyond the date of closing arises out of paragraph 40 in the contract of sale and provides, as a condition precedent to Plaintiff's obligation to make any such repairs, that he be provided with written notice and an opportunity to make repairs.

According to Defendant the only such notice that was provided, was in the form of a letter from Defendant's attorney to Plaintiff's attorney, which is inconsistent with the express terms of the contract which provide for service of such notice on Mr. Naughton directly. That letter raises concerns about a fire suppression system, hood fan, duct work, roof leaks, radiator, sinks, and pilot assembly.

It was conceded that there was no fire suppression system included in the sale of this building and as such Plaintiff cannot be held responsible for installing that which was never contemplated as part of this sale as such Defendant cannot collect anything related to the missing fire suppression system.

The hood fan was last replaced, according to Plaintiff Naughton, some 30 years ago, it is clear that is in ineffective in keeping the kitchen reasonably clear of smoke and no longer functions in accordance with industry standards. While Naughton offered that the hood fan was operational at the time of the closing, he also offered that when asked to inspect the unit thereafter he found it to be operating consistent with the manner in which it had previously functioned and attributed the smoke in the kitchen to Defendant having overtaxed the system, yet, it was uncontroverted that no additional equipment had been added to the kitchen between the time of closing and July 30, 2016, when the kitchen opened for business. Mike Misner

testified that the fan was quite old and that he was not able to find parts for it any longer, noting that the bearings were likely worn out in the fan. Since the kitchen had not operated since closing the condition observed by Mr. Misner was likely not significantly different from the condition of the system at the time of the closing and moreover, since Plaintiff was given notice and an opportunity to make repairs and offered only that the system was overburdened Plaintiff bears some obligation to make repairs to the hood fan.

The duct work however, present a very different analysis because that duct work was likely unchanged since the date of closing and was open and available for inspection. There is nothing to suggest that duct work will wear over time and therefore Defendant bears the burden of having inspected this old system to determine its functionality in 2016. Naughton offered that the hood system worked fine for many years of successful operation, with the Court noting that the fan had clearly worn out after thirty (30) years. The court is not prepared to impose upon Plaintiff the obligation to upgrade a system, installed forty (40) or more years earlier to today's standards and since Defendant had the opportunity to make such inspections and raise such issues prior to contract and prior to closing and failed to do so, this Court cannot find any obligation upon Plaintiff to address the duct work.

Leaks in the roof were addressed, according to the testimony of the Plaintiff and no such issues were raised prior to closing. The parties entered into a contract on or about February 29, 2016, and transfer of title occurred in July of 2016, clearly Defendant had ample opportunity to inspect and raise issues regarding a leak in the roof and failed to do so and this court is without authority thereafter to read any such continuing obligation on the part of the Plaintiff following transfer of title.

Defendant now seeks $200.00 collectively to address leaks in the radiator, sinks and pilot

assembly. There was testimony that the pilot assembly was repaired and there is nothing in the record to establish the itemized cost of repairs to leaking sinks and radiator, however, again the obligation, in the first instance, rests with the Defendant to make reasonable inspections of the building prior to closing and no such inspections were undertaken. This is particularly pertinent in light of the fact that Defendant is a real estate broker and indeed was paid a broker's commission on this transaction of $25,000 and yet allowed title to be conveyed without making these inspections. Since there is nothing in the record to establish the condition of these systems on the date of closing other than Plaintiff's testimony that he had lived and worked in the building and that the HVAC was operating perfectly free from leaks this court must again place upon the defendant the obligation for having made reasonable inspections to determine the existence of any such leaks prior to closing. Even turning to paragraph 40 warranty provisions, they do not expressly include the roof or the sinks and therefore this court cannot infer any continuing obligation on the part of Plaintiff beyond the transfer of title. The radiator is part of the HVAC system but the plumber who testified, Mr. Peters spoke of leaking pipes but never spoke about leaking radiators so there is nothing in the record to confirm the condition of the radiators and the letter from Steve Vegliante, Esq., which constituted the only notice in evidence, does not speak of leaking pipes, accordingly the court, on this record, is unable to establish the obligation to remedy any defect on the part of the Plaintiff, nor is the court able to accurately compute the remedy as there is nothing in the record to establish the cost to repair the leaks in the radiator.

LIQUOR INVENTORY:

The court has reviewed the liquor inventory admitted on consent and stipulated by the parties to be a fair and accurate representation of the quantity and description of the items

transferred with the sale of the Western Liquor store. The court has computed the figures provided by the parties and determined that the value of the liquor transferred was $16,132.76. There is nothing in the record to establish the amounts, if any, paid to date for the liquor to the Defendant will be obligated to pay the sum of $16,132.76, less any amounts paid, to date, on account.

WORK COMPLETED BY PLAINTIFF FOR DEFENDANT:

The parties stipulated to the invoices provided and entered into evidence as representing a fair and accurate representation of the work completed by Plaintiff for Defendant on her other property on Upper Main Street in Callicoon. The Defendant has raised no issues regarding the quality of Plaintiff's work or the scope of that work, indeed she has raised no defense to Plaintiff's demand for payment. The credits to date have been agreed upon and therefore the court finds that the Defendant must pay Plaintiff, for work completed on her separate property the sum of $5,452.81.

Accordingly, it is therefore,

ORDERED, that Plaintiff shall pay Defendant the sum of $3,500 for repair of the hood fan pursuant to obligations created by paragraphs 36 and 40 of the contract of sale; and it is further

ORDERED, that Defendant shall pay Plaintiff the sum of $16,132.76, with appropriate credit being made for any amounts paid to date, and if there is a credit balance due and owing Defendant, Plaintiff shall pay that credit balance to Defendant; and it is further

ORDERED, that Defendant shall pay or cause to be paid to Plaintiff the sum of $5,452.81 for work completed on her separate parcels of real property located on Upper Main Street in Callicoon, New York; and it is further

ORDERED, that the $3,500 owed by Plaintiff to Defendant as and for repair of the hood fan shall be deemed a credit against the $5,452.81 owed by Defendant to Plaintiff for work completed pursuant to separate agreement, therefore the net total due and owing to Plaintiff is $1,952.81 plus or minus any amounts due pursuant to this order related to the transfer of the liquor inventory.

This constitutes the decision and order of the Court. All papers, including the original copy of this Decision and Order, are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR §2220 regarding service with notice of entry.

Dated: Monticello, New York
June 12, 2018

ENTER:

HON. MICHAEL F. McGUIRE, A.J.S.C.