SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

----------x

LG 18TH STREET LLC and LYHOU GINDI,

Plaintiffs, Decision and order

- against - Index No. 514459/18

mot # 1 & 2

33518 RESIDENCE LLC, GARBO BROTHERS GROUP, YANIV GHARBO, AVRAHAM GARBO, SHIA WALDMAN, & MOZES WEINSTOCK,

Defendants, February 21, 2019

----------x

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking partial summary judgement. The defendant has cross-moved seeking summary judgement. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On November 16, 2017 the plaintiff LG 18th Street LLC purchased an apartment building located at 335 18th Street in King County from defendant 33518 Residence LLC. The contract provided that the closing would take place a few days later on November 29, 2019 with time being of the essence. Indeed, the closing occurred on that date. Pursuant to a rider to the contract the seller was obligated to deliver a fully rented building at market rents of at least a $265,000 annual rent roll. If the seller could not deliver such fully rented building then the seller would have sixty days from the date of closing in which to comply. The rider as well as an escrow agreement signed

the same date as the closing provided for a complicated contractual scheme to determine the precise amount owed in case there was a failure to secure the requisite rent roll of the apartment building. The plaintiff asserts it is owed $1,810,686 and seeks summary judgement for that amount. The defendant opposes the motion and has cross-moved to dismiss the causes of action based upon Debtor Creditor Law §271, §272 and §273.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

Paragraph 18 of the rider states that in the event the seller does not deliver a fully rented building of $265,000 in annual rent then the seller would be given sixty days in which to comply. Furthermore, $150,000 was placed in escrow pending the defendant's cure period. Thus, the rider provided a number of conditions necessary for the seller to meet his obligations under the rider. First, as noted, the seller had sixty days in which to rent any unoccupied units to increase the rent roll to the agreed upon amount of $265,000. If the seller failed to do so,

the plaintiff buyer was permitted another sixty days in which to rent the apartments. Thus, if at the end of 120 days the rent roll was still below $265,000 the purchaser would be entitled to a "credit equal to the difference between the 15 times the actual rent roll and a [sic] $265,000, which sum shall be paid to the Purchaser from said escrow" (see, Rider to Contract §18(a)). Further, the rider provided that the purchaser would be entitled to a loss of rents based upon an annual rent roll of $265,000 from the sixty first day through the one hundred and twentieth day "which sum shall be paid to Purchaser from said escrow" (id at §18(b)). The rider moreover provided the purchaser would be entitled to a loss of rents for any tenant that is in arrears at the date of closing through the one hundred and twentieth day "which sum shall be paid to Purchaser from said escrow" §18(c)).

Although the rider purports to limit any damages to the amount placed in escrow, namely $150,000, the escrow agreement itself states that "in the event liability exceeds amount in escrow, the Seller shall remain liable for same" (see, Escrow Agreement dated November 29, 20170). The defendant argues that clause contained in the escrow agreement "could only refer to the obligations for the repairs and pay any outstanding water charges" (see, Defendant's Memorandum of Law in Opposition, pages 4,5) which were additional obligations contained in a survival agreement signed the same day as the closing and the escrow

agreement. Thus, the defendant argues that notwithstanding the clause which seems to state liability cannot be limited, such liability does not refer to any issues concerning the rent roll. However, the Escrow Agreement specifically states that "in consideration of your agreeing to close this day on the above captioned premises, it is agreed that the seller's obligations in Exhibit 'A' attached hereto will be completed" (see, Escrow Agreement). It is true that a handwritten notation that states "and seller repair list attached" is added to the sentence above, however, that obligation is entirely ambiguous. Exhibit A attached contains the same conditions and requirements contained in Paragraph 18 of the Rider to the Contract. Thus, the opening statement of the Escrow Agreement states that in consideration of the closing the obligations contained in Exhibit A "will be completed" (id). Clearly, Exhibit A limits liability to the amount of the escrow of $150,000. The further clause contained in the Escrow Agreement that the seller shall be liable even if the liability exceeds the escrow agreement contradicts the above noted sentence rendering the Escrow Agreement ambiguous. It is well settled where the language of a contract is ambiguous then its construction presents a question of fact which cannot be resolved on a motion seeking summary judgement (Pepco Construction of New York, Inc., v. CNA Insurance Company, 15 AD3d 464, 790 NYS2d 49 [2d Dept., 2005]).

Further ambiguities exist and to fully appreciate the ambiguities the contentions of the parties must be presented. According to the plaintiff the rider required the seller to deliver premises with an annual rent roll of $265,000 or $22,083.33 per month or the penalties contained in Paragraph 18 would be implemented. Further, the seller was obligated to pay plaintiff for any lost rents from day sixty one through day one hundred and twenty following the closing date, essentially the months of February and March 2018. The plaintiff asserts the total rent collected for February 2018 was $1,000 and for March 2018 was $9,300. Further, argues the plaintiff, the seller was required to pay the plaintiff "15 times the difference between $265,000 and the actual rent, annualized on that date being April 2018, which is 120 days after closing" (see, Affirmation in Support of Motion, ¶ 26). The plaintiff asserts the total monthly rent roll for April 2018 was $12,300 for an annualized rent roll of $147,600. That annual rent roll, less the bargained for rent roll of $265,000 yields $117,400 which multiplied by 15 yields $1,761,000 which including the shortfalls for February of $21,083.33 and March of $12,783.33 and additional rental arrears of $14,100 equals the sum of $1,808,966.66. The court's calculations are $1,719.34 lower than the amount sought by plaintiff.

The defendant disputes the monthly rent roll and argues it

was only $7,200 for an annual rent roll of $86,400. Further, the defendant asserts the monthly rent roll is multiplied by 15 to yield an amount of $108,000 which when subtracted by $265,000 yields a damages amount of $157,000.

Thus, there are two ambiguities present, the actual rent roll at the relevant time period and the method of calculating the multiple of 15 to arrive at a penalty amount. Concerning the first question of fact, a rider to the contract only contains two tenancies with a monthly rent roll of $7,200. The plaintiff provided leases with a monthly rent roll of $12,300, both far short of the projected $22,083.33 per month. These questions of fact must be explored through discovery. In either event entering into an agreement to provide rent rolls more than double the most generous interpretation of the evidence presented is curious indeed and requires further discovery.

Concerning the second ambiguity, namely the method of calculating the multiplier of 15, the contract itself provides little guidance. The relevant clause, as noted, states that the purchaser shall be entitled to a credit "equal to the difference between 15 times the actual rent roll and a [sic] $265,000, which sum shall be paid to the purchaser from said escrow" (supra). The contract does not explicate whether the multiplier of 15 is applied to the monthly rent roll and then that number is deducted from $265,000 as argued by the seller or whether it should be

applied to the difference between $265,000 and the annual rent roll as argued by the buyer. The difference between the two methods is $1,604,000. It should be noted that even assuming the plaintiff's rent roll is correct, then utilizing the defendant's method would yield an amount of $80,500, less than the $157,000 it concedes. Thus, the lower rent roll results in a higher amount admittedly amount owed, another curious anomaly. In any event, the poorly drafted contract provides no guidance in resolving this ambiguity presented by the parties. Therefore, the parties must engage in discovery to discern their intent when they entered into the contract and if possible, shed light upon their intent regarding the application of the multiplier of 15. Therefore, based on the foregoing the motion and cross motion seeking summary judgement is denied at this time without prejudice to either party.

So ordered.

ENTER:

DATED: February 21, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC