Condominium Bd. of Mgrs. of Tribeca Summit v 451 PR LLC
2019 NY Slip Op 32052(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 154751/16
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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CONDOMINIUM BOARD OF MANAGERS OF TRIBECA SUMMIT,

Index No. 154751/16

Plaintiff,

-against-

451 PR LLC and PARK RIGHT CORPORATION,

DECISION/ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff Condominium Board of Managers of Tribeca Summit administers the affairs of Tribeca Summit (the "Condominium"), which comprises residential and commercial units, as well as common elements, in the building known as, and located at, 415 Greenwich Street, New York, NY (the "Building"). Defendant 415 PR LLC (the "Garage Unit Owner") owns the Garage Unit, one of the commercial units in the building, and defendant Park Right Corporation ("Park Right") operates a public parking facility therein. Plaintiff contends that the operation of a public parking facility in the Garage Unit violates a special permit issued by the New York City Planning Commission (the "CPC"), temporary certificates of occupancy issued by the New York City Department of Buildings (the "DOB"), the Condominium's governing documents (the "Declaration" and "By-laws") and Section 339-j of the Condominium Act (New York Real Property Law, Article 9-B).

Plaintiff now moves for summary judgment: (1) pursuant to CPLR 3001, declaring the operation of a public parking facility in the Garage Unit is in violation of the Condominium's governing documents; (2) pursuant to the Condominium's By-laws and RPL § 339-j, permanently enjoining defendants from operating a public parking facility in the Garage Unit;

(3) pursuant to the Condominium's By-laws and RPL § 339-j, directing defendants to implement reasonable procedures to assure the Condominium Board that the Garage Unit will be used only for accessory parking; and (4) pursuant to RPL § 339-j, requiring the Garage Unit owner "to give sufficient surety or sureties for [its] future compliance with the [Condominium's] by-laws, rules, regulations, resolutions and decisions."

Defendants 415 PR LLC and Park Right separately cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

For the reasons set forth below, plaintiff's motion for summary judgment is denied, and defendants' cross motions for summary judgment dismissing the complaint are granted.

Background

On January 22, 2004, 415 Greenwich Fee Owner LLC (the "Declarant") acquired ownership of the Building and the land on which the Building is erected (the "Property"). The Declarant acquired the Property to convert the Building to a residential loft condominium with retail space on the ground floor and attended accessory parking in the cellar (the "Project") (*see* affidavit of Thomas V. Juneau, Jr., ¶ 14).

On June 4, 2004, the Declarant filed with the New York City Department of Planning (the "DCP") a Land Use Review Application (the "Application") (*see id.* ¶ 15). The Declarant sought, among other things, a special permit for 90 accessory parking spaces in the Building (*id.*). By resolution dated February 15, 2005, Community Board No. 1 approved the CPC granting the Declarant a special permit for an attended accessory parking garage in the Building (*see id.* ¶ 15). On April 27, 2005, the CPC granted the Application, and issued a special permit "to allow the construction of a 90-space attended accessory parking garage" in the Building (the

"Special Permit"), subject to the following terms and conditions: (1) the Project "shall conform to all applicable provisions of the Zoning Resolution"; (2) "[a]ll leases, subleases, or other agreements for use or occupancy of the space at the property shall give actual notice of this special permit to the lessee, sublessee or occupant," and (3) "[u]pon the failure of any party having any right, title or interest in the property that is the subject of this application . . . to observe any of the covenants, restrictions, agreements, terms or conditions of this resolution and the attached restrictive declaration whose provisions shall constitute conditions of the special permit hereby granted, the [CPC] may, without the consent of any other party, revoke any portion of or all of said special permit" (*see id.* ¶ 18).

On September 2, 2005, the State of New York, Office of the Attorney General, accepted for filing the Declarant's Offering Plan to sell both residential and commercial units in the Building (the "Offering Plan") (*see id.* ¶ 19). Paragraph 35 of the Special Risks section of the Offering Plan states that "[t]he Garage Unit will be located in the cellar and utilized as an accessory garage" (*see id.* exhibit 3).

On March 25, 2008, the Declarant recorded the Declaration in the Office of the City Register, County of New York, thereby establishing the Condominium (*see id.* ¶ 20). After the Condominium was established, successive temporary certificates of occupancy have limited the Garage Unit to "parking spaces accessory to residential use" (*see id.* ¶ 21; exhibit 10).

Prior to 2013, the Garage Unit was not commercially operated. It was used by condominium residents as an "accessory" parking facility. The general public was not permitted to use the garage. The use of the garage at that time was reflective of New York City's then-prevailing regulations that sought to relieve congestion and pollution by denying non-residents

access to off-street parking. The City believed that non-residents would avoid driving in the "Manhattan Core" if parking was scarce and difficult. The Manhattan Core is defined as below 96th Street on the East Side, and below 110th Street on the West Side. The Condominium is in the Manhattan Core.

Beginning in 2009, the City undertook a large-scale study to determine whether its parking regulations were proving successful. The study resulted in the release of the "Manhattan Core Public Parking Study" (the "Study") in December 2011 (*see* affidavit of Matthew Hearle, exhibit E). The Study revealed that the City's belief that restricted off-street parking would be beneficial was wrong. The Study concluded that accessory parking lots remained underutilized by residents, and that the absence of off-street parking did not discourage non-residents from driving in the Manhattan Core. As a result, congestion and traffic flow was worsened, not relieved.

On May 8, 2013, as a result of the Study, and in an effort to alleviate the increasing problematic shortage of on-street parking available to the public, the New York City Council adopted the Manhattan Core Text Amendment to the Zoning Resolution (the "Amendment"), which eliminated the distinction between accessory and public parking, and garages that formerly were restricted to accessory parking were free to provide parking to the general public.

Specifically, section 13-21 of the Amendment, entitled "Public Use and Off-site Parking" provides:

> "All accessory off-street parking spaces may be made available for public use. However, any such space shall be made available to the occupant of a residence to which it is accessory within 30 days after written request therefor is made to the landlord. No accessory off-street parking spaces shall be located on a zoning lot other than the same zoning lot as the use to which they are accessory"

(Amendment, § 13-21). Section 13-20 of the Amendment provides that section 13-21 is applicable to "[a]ll accessory off-street parking facilities, automobile rental establishments, and public parking lots developed, enlarged or extended in the Manhattan Core after May 8, 2013."

The Garage Unit Owner purchased the Garage Unit on November 8, 2013, shortly after the Amendment became effective. In late 2013, the Garage Unit Owner leased the Garage Unit to Park Right, and the parties entered into an Agreement of Lease, which was subsequently modified and amended (the "Lease") (*see* Juneau affidavit, exhibit 9).

Based on the legislative change, Park Right applied to the DOB for a Letter of No Objection, confirming its legal right to utilize the amended zoning law allowing public as well as residential parking in the Garage Unit. By letter dated January 14, 2014, the DOB confirmed that the Garage Unit may be used for public parking:

> "This is in response to your request dated November 22, 2013 for a Letter of No Objection for 415 Greenwich Street. There is no Certificate of Occupancy on file for this address.
>
> This Department has No Objection to a Parking Garage with maximum capacity of seventy-two (72) cars for Cellar Level, UG #2. Public Parking use only in compliance with ZR 13-21"

(*see* Hearle, affidavit, exhibit G).

Park Right now operates a 24-hour manned and licensed parking facility in the Garage Unit. Parking is available to residents of the condominium as well as the general public.

In Article 27 of the Lease, Park Right made the following representation:

> "[Park Right] represents that it has received and reviewed with its counsel the Declaration and By-Laws and all amendments thereto prior to entering into this Lease. Park Right . . . shall observe and comply with the Rules and Regulations of the Condominium"

(Lease, ¶ 27).

Section 6.16 of the Condominium's By-laws provides:

> "All valid Laws of governmental bodies having jurisdiction thereof, relating to any portion of the Property shall be complied with at the full expense of the respective Unit Owners or the Boards, whoever shall have the obligation to maintain or repair such part of the Property"

(By-Laws, § 6.16).

As set forth in section 2.1 of the By-laws, there exists a Condominium Board with control over the general common elements of the Condominium, and both a Residential Board and a Commercial Board, with the affairs of the Commercial Section, including the Garage Unit, being governed solely by the Commercial Board.

Section 2.2 of the By-laws expressly states that all determinations with respect to the affairs of the Commercial Section shall only be made by the Commercial Board. Section 6.14.4 of the By-laws provides:

> "The Commercial Unit may be used for any purpose permitted by Law. In no event may any Board adopt or enforce any rule or regulation or any amendment to the Declaration or these By-Laws which would have the effect of restricting or limiting the operation of the Commercial Units"

(By-laws, § 6.14.4).

Plaintiff commenced this action on June 6, 2016. Plaintiff alleges that the Garage Unit Owner's and Park Right's use of the Garage Unit violates the Amendment, City regulations, and Condominium rules and By-laws. Through this action, plaintiff seeks to end the use of the Garage Unit by the general public.

The complaint asserts three causes of action: (1) breach of contract based on the failure to comport with the Condominium's governing documents; (2) declaratory relief that the use of the

Garage Unit for public parking is not permitted; and (3) a permanent injunction against use of the Garage Unit for public parking.

Following the denial of pre-answer motions to dismiss, defendants answered the complaint, and the parties engaged in extensive discovery.

Discussion

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). If it is determined that the opposing party has failed to establish a genuine issue of fact, summary judgment must be granted (*see Cawein v Flintkote* Co., 203 AD2d 105, 106 [1st Dept 1994]).

In support of its motion for summary judgment, plaintiff argues that, contrary to the unambiguous requirement in the Condominium's By-laws that defendants comply with "[a]ll valid laws," like the Special Permit and temporary certificates of occupancy allowing only

accessory (not public) parking in the Garage Unit, Park Right is impermissibly using the Garage Unit for public parking, and the Garage Unit Owner is acquiescing to such improper use. Thus, plaintiff asserts that the Condominium Board is entitled to a judgment declaring: (1) the operation of a public parking facility in the Garage Unit violates the Special Permit and the Building's temporary certificate of occupancy; and (2) Park Right's admitted use of the Garage Unit for public parking and the Garage Unit Owner's knowledge of, and acquiescence in, such unlawful use breaches the Condominium's By-laws.

In support of the cross motions for summary judgment, defendants argue that New York City laws and regulations permit unfettered use of the garage by the public as well as condominium residents. Thus, defendants contend, section 13-21 of the Amendment overrides the Special Permit and the Building's temporary certificate of occupancy and permits public parking in the Garage Unit.

In response, plaintiff contends that section 13-21 of the Amendment is applicable only to accessory parking facilities that were "developed, enlarged or extended in the Manhattan Core after May 8, 2013," and that, since Park Right began operating the parking facility in the Garage Unit in December 2013, section 13-21 does not apply. Rather, for existing required or permitted accessory off-street parking spaces established in the Manhattan Core prior to May 8, 2013, like the Garage Unit, the applicable Zoning Resolution provision is section 13-07 (a) (4) which provides:

> "Existing required or permitted accessory off-street parking spaces, public parking lots and public parking garages, established prior to May 8, 2013, shall continue to be subject to the applicable zoning district regulations in effect prior to May 8, 2013, except that:
>
> * * *

> (4) an accessory off-street parking facility in possession of a license issued by the Department of Consumer Affairs, pursuant to section 20-321 of the New York City Administrative Code, to maintain, operate or conduct a garage or parking lot (as defined therein) prior to January 1, 2012, may make accessory parking spaces available for public use in accordance with the provisions of Section 13-21"

(Amendment, § 13-07 [a] [4]).

Plaintiff argues that, as the accessory parking spaces in the Garage Unit were established and in use long before May 8, 2013, and neither the Garage Unit Owner, nor Park Right, had a license from the New York City Department of Consumer Affairs (the "DCA") to operate a public parking facility in the Garage Unit prior to January 12, 2012, the accessory parking spaces in the Parking Garage are "subject to the applicable zoning district regulations in effect prior to May 8, 2013." Thus, plaintiff contends, section 13-21 is inapplicable, and the use of the Garage Unit is governed by the Special Permit and the temporary certificates of occupancy for the Building, which allow only accessory parking therein.

A condominium's by-laws "are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements" (*Murphy v State*, 14 AD3d 127, 133 [2d Dept 2004]; *see also Weiss v Bretton Woods Condominium II*, 151 AD3d 905, 906 [2d Dept 2017] ["[t]he by[-]laws of the defendant condominium and its declaration of covenants, restrictions, easements and liens govern the relationship between the plaintiff, as a unit owner, and the condominium"]).

Section 6.16 of the By-laws provides that "[a]ll valid Laws of governmental bodies having jurisdiction thereof, relating to any portion of the Property shall be complied with at the full expense of the respective Unit Owners or the Boards." Plaintiff contends that defendants are in violation of this section of the By-laws since section 13-07 (a) (4) of the Amendment applies

here, which does not permit public parking in the Garage Unit. Conversely, defendants contend that section 13-07 of the Amendment is clearly applicable, which permits public parking in the Garage Unit.

Accordingly, the parties' motion and cross motions for summary judgment hinge on which Zoning Resolution is applicable.

Generally, when interpreting a statute, courts "look first to the statutory text, which is the clearest indicator of statutory intent," since "[it] is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018] [quotation marks and citation omitted]; *accord Matter of New York State Land Tit. Assn., Inc. v New York State Dept. of Fin. Servs.*, 169 AD3d 18, 28 [1st Dept 2019]). "[W]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning," as the "literal language of a statute is generally controlling unless the plain intent and purpose of a statute would otherwise be defeated" (*Matter of Anonymous*, 32 NY3d at 37 [quotation marks and citation omitted]). Statutory construction requires that "all parts of a statute . . . be given effect, since "a statutory construction which renders one part meaningless should be avoided" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515 [1991]). The statute's sections "must be considered together and with reference to each other" (*People v Mobil Oil Corp.*, 48 NY2d 192, 199 [1979]). A court should only substitute its own interpretation of a statute where "the language is ambiguous or where literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the statute's enactment" (*Matter of Anonymous*, 32 NY3d at 37 [quotation marks and citation omitted]).

Applying the above principles of statutory construction, it is clear that section 13-07 (a) (4) of the Amendment does not apply here. The plain text of section 13-20 of the Amendment

unambiguously provides that section 13-21 applies to all "accessory off-street parking facilities . . . and public parking lots developed, enlarged or extended in the Manhattan Core after May 8, 2013." The Garage Unit Owner purchased the Garage Unit on November 8, 2013 and leased the Garage Unit to Park Right shortly thereafter, for the express purpose of a public parking lot. Park Right began operating the Garage Unit as a public parking garage in December 2013. Thus, under the plain language of the statute, the Garage Unit is a "public parking lot[] developed . . . in the Manhattan Core after May 8, 2013." Hence, section 13-21 applies, which permits former accessory parking facilities to allow parking by the general public. Accordingly, defendants are permitted under the Amendment to utilize the Garage Unit as a public parking facility. Indeed, it is undisputed that, under section 6.14.4 of the By-laws, "[the] Commercial Unit may be used for any purpose permitted by Law."

Moreover, the DOB itself acknowledged the legality of public parking in the Garage Unit in its January 14, 2014 letter, in which it stated that it had "No Objection" to the operation of a public parking garage in the Garage Unit "in compliance with ZR 13-21." In addition to the DOB approval, Park Right possesses a valid and subsisting license from the DCA to operate a public parking garage (*see* affidavit of Simon H. Rothkrug, exhibit C).

Although plaintiff asks this Court to ignore the "No Objection" letter because it incorrectly states that "[t]here is no Certificate of Occupancy on file for the address," this Court rejects this argument. Plaintiff fails to explain why such an error would be relevant, and indeed, such ministerial error has no bearing on the substance of the letter: that the DOB evaluated the Garage Unit and its proposed use as a public parking garage and had "No Objection" to its operation.

This Court also rejects plaintiff's argument that the DOB letter was obtained under false pretenses, because Moshe Izadi, the president of Park Right, signed the DOB application forms as Peter Izadi, instead of as Moshe Izadi. Moshe Izadi submits an affidavit in which he avers that he is known as both Peter Izadi and Moshe Izadi, and that he often uses Peter Izadi as an Americanized first name (*see* Izadi affidavit, ¶ 10).

Finally, although plaintiff asserts that the approval of the Garage Unit for public parking was in error, or was improperly obtained, plaintiff has not filed any complaints or reports, or pursued any proceedings, with the CPC, DOB, DCA or the New York City Department of Environmental Conservation. Accordingly, plaintiff has failed to exhaust its administrative remedies prior to filing this action. Under New York law, this constitutes an independent basis for dismissing plaintiff's claims (*see e.g. Wong v Gouverneur Gardens Hous. Corp.*, 308 AD2d 301, 303 [1st Dept 2003] [citation omitted] [reversing lower court, vacating injunctive relief and granting defendant's cross motion to dismiss the action on ground that "'where there is an administrative agency that has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding'"]; *Katz 737 Corp. v Cohen*, 104 AD3d 144, 151 [1st Dept 2012] ["[h]aving failed to pursue an administrative appeal before DHCR, Katz has failed to exhaust its administrative remedies and is precluded from seeking judicial review"]; *Rattner v Planning Commission of Village of Pleasantville*, 156 AD2d 521, 527 [2d Dept 1989] [where appellants sought "review of the propriety of the former Building Inspector's determination that the parking of commercial limousines on the subject property was a permitted use . . . . Judicial intervention is barred by the Village parties' failure to pursue their administrative remedies"]).

Thus, this Court holds that Park Right's use of the Garage Unit for public parking does not violate section 6.16 of the By-laws, as it is permissible pursuant to the 2013 law change to the Manhattan Core parking regulations, which expanded the definition and permission of accessory parking uses to include public parking. In addition, public parking in the Garage Unit has been duly authorized and permitted by both the DOB and DCA. Accordingly, defendants' cross motions for summary judgment dismissing the complaint must be granted.

This Court has considered the remaining arguments and finds them to be without merit.

Conclusion

Accordingly, it is

ORDERED, ADJUDGED AND DECLARED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED, ADJUDGED AND DECLARED that the cross motion of defendant 451 PR LLC for summary judgment is granted, and the complaint is dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, ADJUDGED AND DECLARED that the cross motion of defendant Park Right Corporation for summary judgment is granted, and the complaint is dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

Dated: July 3, 2019

ENTER:

Hon. SHLOMO S. HAGLER, J.S.C.

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