2157 ACP LLC v Famous Indus., Inc.
2019 NY Slip Op 33323(U)
October 29, 2019
Supreme Court, New York County
Docket Number: 155888/2017
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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2157 ACP LLC,

Plaintiff,

-against-

FAMOUS INDUSTRIES, INC. and JOSEPH A. ALTMAN, P.C.,

Defendants.

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DECISION AND ORDER

Index No: 155888/2017

Motion Seq. Nos.: 001, 002

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

This action involves a dispute arising from a real estate transaction between plaintiff 2157 ACP LLC ("2157"), as grantor, and defendant Famous Industries, Inc. ("Famous"), as developer, pursuant to a Site Development Agreement, dated April 20, 2016 ("Agreement").[1] Plaintiff's motion (Sequence Number 001) seeks summary judgment pursuant to CPLR 3212 compelling Famous to specifically perform its obligations under the Agreement, and dismissing its counterclaims. Defendants' motion (Sequence Number 002) seeks summary judgment pursuant to CPLR 3212 dismissing the complaint, and awarding judgment on the counterclaims.

BACKGROUND FACTS

The facts alleged in the Complaint (NYSCEF Doc. No. 1) are as follows. Famous is the owner of certain real property consisting of land located known as 166 West 128th Street and 2157-2159 Adam Clayton Powell, Jr. Boulevard in New York, New York (the "Property") (Complaint, ¶ 4). Pursuant to the Agreement, Famous agreed to sell the Property to 2157, which,

[1]Defendant Joseph A. Altman, P.C. ("Altman") is the attorney for Famous and escrowee of a $1.14 million down payment paid by 2157 (Agreement, § 4.1 [NYSCEF Doc. No. 11]).

in turn, agreed to develop the Property into a mixed-use condominium building. 2157 further agreed to pay Famous $5.7 million at the closing of the transaction, and, at a later date, deliver four of the condominium units to Famous ("Units") upon completion of the development (*Id.*, ¶¶ 5-7). The Agreement required, among other things, 2157 to obtain a commitment letter of $10 million in construction financing, and Famous to cooperate with 2157 in its application for governmental approvals (*Id.*, ¶¶ 8-9). 2157 alleges that while 2157 was "ready, willing and able" to close on the purchase of the Property on June 13, 2017, Famous informed 2157 on June 9, 2017 that it would refuse to close (*Id.*, ¶¶ 15-16). On June 12, 2017, 2157 was informed by the New York State Attorney General that the Agreement provision, which required 2157 to convey the Units to Famous, was an "unregistered sale of real estate securities and was unenforceable and illegal" under the Martin Act (*Id.*, ¶ 17). The Complaint alleges that Famous refused to cooperate with 2157 in its application to the Attorney General for a waiver of the requirement to register the sale of the Units to Famous (*Id.*, ¶ 18). Famous also refused to cooperate with 2157's applications to governmental authorities that were "necessary prerequisites for obtaining construction financing" (*Id.*, ¶ 19). 2157 alleges that Altman was instructed by Famous to release the down payment to Famous (*Id.*, ¶ 20). 2157 commenced this action against defendants on June 29, 2017, seeking, *inter alia*, specific performance of the Agreement.

DISCUSSION

Summary Judgment

In setting forth the standards for considering a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hosp.*, the following:

"As we have stated frequently, the 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

(68 NY2d 320, 324 [1986] [internal citations omitted]; *Gammons v City of New York*, 24 NY3d 562, 569 [2014] [movant must tender sufficient evidence to show the absence of any material issues of fact to warrant the court, as a matter of law, in directing summary judgment]).

The courts routinely scrutinize summary judgment motions, as well as the facts and circumstances of each case, to determine whether relief may be granted (*Andre v Pomeroy,* 35 NY2d 361, 364 [1974] [entry of summary judgment "deprives the litigant of his day in court[,] it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"]); *Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997] [in weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion"]). Moreover, the courts have held that bare allegations or conclusory assertions in pleadings are insufficient to create genuine issues of fact necessary to defeat a summary judgment motion (*Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]). On the other hand, "[w]here different conclusions can reasonably be drawn the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]; a*ccord Jaffe v Davis*, 214 AD2d 330, 330 [1st Dept 1995] [conflicting inferences required denial of summary judgment motion]).

Summary Judgment Motion by 2157 for Specific Performance

Section 1.1 of the Agreement (NYSCEF Doc. No. 11) provides that Famous is required to convey fee title in the Property to 2157 "upon delivery by Developer [2157] to Famous of a commitment letter from Developer's lender in an amount of not less than $10,000,000, no later than twelve (12) months from the date of the Agreement." The closing was to take place no later than ten business days thereafter. Thus, the Agreement required 2157 to deliver a commitment letter to Famous by May 20, 2017. In turn, section 4.5 of the Agreement provides that, in the event 2157 fails to timely deliver the commitment letter, it would be in default of the Agreement and would have "a thirty (30) calendar day grace period to cure such default." If 2157 failed to cure the default within such 30 day period, the Agreement would "be considered by the parties to be terminated, null and void, [and] of no further force and effect." Section 4.5 of the Agreement also provided that in the event of a breach by 2157, Famous would be entitled to, as liquidated damages, 3/4 of the initial down payment paid by 2157.

2157 submits a letter, dated May 4, 2017, from Investors Bank expressing an interest to provide construction and permanent financing to 2157 for the subject project (NYSCEF Doc. No. 12). The Investors Bank letter, however, indicates that the document "should not be construed as an offer, contract, or commitment of any kind." Famous advised 2157, in a letter dated May 15, 2017 (NYSCEF Doc. No. 13), that such document was not a commitment letter, and that 2157 would have 30 days to cure its default. It is undisputed that the Investors Bank document was not a commitment letter that would satisfy the requirement of the Agreement.[2]

[2]Counsel for 2157 conceded in oral argument that 2157 is not asserting herein that the Investors Bank letter qualified as a sufficient commitment letter under the Agreement (tr oral argument at 4-5).

Thereafter, 2157 obtained a letter from Corvin Capital, LLC ("Corvin") entitled "Commitment Letter", dated May 25, 2017 ("Corvin Letter" [NYSCEF Doc. No. 14]). The Corvin Letter states in the preamble that "following are the proposed terms" and that it "will consider entering into a loan transaction with [2157]." The Corvin Letter provides that the loan amount of the commitment is "[t]he lesser of (i) Fourteen Million, Five Hundred Thousand and 00/100 Dollars (14,500,000.00) and [sic] (ii) Seventy Percent (70%) of the of the [sic] "as is" value of the Property" (NYSCEF Doc. No. 14). In addition, the Corvin Letter sets forth various commercial terms, such as the requirement that 2157 provide Corvin an "expense deposit" of $50,000 upon execution and return of said commitment letter and includes due diligence, title search, insurance and exclusivity provisions.

By letter, dated May 31, 2017 ("May 31 Letter" [NYSCEF Doc. No. 15]), Famous informed 2157 that the Corvin Letter was "not a commitment letter for numerous reasons," without stating the specific reasons (*Id.* at 1). The May 31 Letter provides that "as per [Famous'] May 15, 2017 letter, [2157] has 30 days to cure its default, and upon a failure to cure, the liquidated damages portion of the [Agreement] will then be exercised. That the time to cure is still running, and **time is of the essence**" (*Id.* at 1[emphasis in original]).

In opposition to 2157's summary judgment motion (Sequence Number 001) and in support of its separate summary judgment motion (Sequence Number 002),[3] Famous contends

[3] Notably, these two papers are virtually identical. Thus, 2157 argues that the separate motion for summary judgment by Famous was filed "in contravention of" the parties' stipulation, because Famous agreed therein to serve an opposition to 2157's motion and/or any cross-motion (Affirmation in Opposition, ¶¶ 2-4 [NYSCEF Doc. No. 56]). 2157 also argues that the separate motion reflects a "sharp practice" by Famous "to have the last word," and is a "blatant violation" of the court's rules against sur-replies. *Id.* In reply, Famous contends that neither the stipulation nor the CPLR prevents it from filing the separate motion (Reply Affirmation, ¶¶ 4-6 [NYSCEF

that the Corvin Letter was not a commitment letter. Famous maintains that because the Corvin Letter stated that the lender "will consider" lending to 2157 based on the "proposed terms," the Corvin Letter did not contain an "unequivocal promise" to lend, and did not constitute a "final approval or commitment" (Affirmation in Support, ¶¶ 22-26 [NYSCEF Doc. No. 29]; Affirmation in Opposition, ¶¶ 21-25 [NYSCEF Doc. No. 45]). Famous argues that a "conditional" commitment letter does not satisfy a contractual requirement to obtain a commitment letter, which must contain "language of commitment," and an "unequivocal promise" of the lender to "ultimately extend credit" (*Id.*; s*ee Delaney v Grunbaum*, 84 AD3d 722 [2d Dept 2011]; *Krainin v McCusker*, 45 AD3d 738 [2d Dept 2007]; *Kressel, Rothlein & Roth v Gallagher*, 155 AD2d 587 [2d Dept 1989]). Famous contends that 2157 breached the Agreement by failing to submit a "proper commitment letter," and thus has failed to establish a prima facie entitlement to summary judgment.

In the instant matter, there is at the very least an issue of fact as to whether or not the Corvin Letter satisfies the provision in the Agreement setting forth the obligation of 2157 to obtain a commitment letter. Section 1.1 of the Agreement provides that 2157 as developer deliver a commitment letter "from [d]eveloper's lender in an amount of not less than $10,000,000, no later than twelve months from the date of this Agreement[4] (NYSCEF Doc. No. 11). The Corvin Letter, however, provides that the loan amount of the commitment is "[t]he

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Doc. No. 60]). This Court will address only the substantive issues being raised herein.

[4]Although the Corvin Letter is dated more than 30 days of the date of the Agreement, by letter, dated May 15, 2017, Famous gave 2157 thirty days to cure upon receipt of a letter, dated May 4, 2017 from Investors Bank which 2157 concedes did not constitute a commitment letter as required by the Agreement.

lesser of (i) $14,500,000.00) and [sic] (ii) 70% of the of the [sic] "as is" value of the Property" (NYSCEF Doc. No. 14). There is nothing in the record defining the "as is" value of the Property and as such, plaintiff has failed to sustain its burden to establish that the Corvin Letter satisfies the requirement in the Agreement that 2157 secure a commitment in the amount of $10,000,000. 2157 has not satisfied its burden in establishing entitlement to summary judgment on its claim for specific performance given the failure of the Corvin Letter to commit to unequivocally lend $10,000,000 together with the language in said letter's preamble that the terms constitute "proposed terms" and Corvin "will consider" entering into a loan transaction with 2157. Furthermore, there is no evidence in the record that 2157 made the "expense deposit of $50,000," as required by the Corvin Letter (Corvin Letter at 2 [NYSCEF Doc. No. 14]).

In addition, to prevail on a claim for specific performance, the plaintiff must show, *inter alia*, that it has "substantially performed its contractual obligations and [is] willing and able to perform its remaining obligations" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]). Given that there is an issue of fact as to whether the Corvin Letter satisfied the Agreement, 2157 has failed to show that it substantially performed its contractual obligations.

Summary Judgment Motion by Famous on its Counterclaim to Retain the Deposit

Famous seeks entry of summary judgment in its favor as to its counterclaim, awarding it the right to retain the $1.14 million deposit made by 2157, as liquidated damages (Agreement, §§ 4.1, 4.5 [NYSCEF Doc. No. 11]).[5] Section 4.5 of the Agreement states, in relevant part, that in the event 2157 fails to timely deliver a commitment letter and fails to cure the default, "3/4th of

[5]There are no arguments in the record with respect to the second counterclaim asserted by Famous seeking reasonable attorneys' fees.

the initial Downpayment made on execution of this Agreement, $855,000, shall be deemed liquidated damages and retained by Famous as such, with the remaining $285,000 to be returned to [2157] and, thereafter, this Agreement shall be terminated, the parties released from the obligations hereunder, and this Agreement shall be of no further force and effect" (*Id.*, § 4.5).[6]

Famous argues that because 2157's letters (May 30, 2017 and June 9, 2017 Letters [NYSCEF Doc. No. 39 and 41]) set a closing date for the transaction on June 13, 2017, the "failure to close by the time of the essence day is a wilful default" on the part of 2157 (Affirmation in Support, ¶ 29 [NYSCEF Doc. No. 29], citing *Grace v Nappa*, 46 NY2d 560 [1979]). Contrary to Famous's assertion, 2157's May 30 and June 9 Letters did not specifically state that the closing scheduled for June 13, 2017 was "time of the essence." Instead, these letters plainly state that the closing "shall take place" no later than June 13, 2017. In fact, the only instance where "time is of the essence" was declared appears in Altman's May 31 Letter, wherein he states that the time to cure the default arising from the Corvin Letter, which according to him was not a commitment letter, "is still running, and ***time is of the essence***" (May 31 Letter [emphasis in original]). Thus, the only "time is of the essence" clause asserted in the instant matter, refers to the time to cure the default, and not the time to close.

2157 contends that the failure of Famous to complete a zoning lot merger prevented Famous from holding 2157 in default and therefore 2157's time to perform has not expired (Reply Memorandum of Law at 5 [NYSCEF Doc. No. 55], citing *Rachmani Corp. v 9 E. 96th*

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[6]At most, Famous would be entitled to 3/4 of the down payment amount of $1.14 million in accordance with Section 4.5 of the Agreement. While Famous seeks to retain the entire $1.14 million down payment amount in its first counterclaim, the motion papers appear to seek liquidated damages as set forth in Section 4.5 of the Agreement, which by its terms limits such damages to 3/4 of the full $1.14 million down payment.

Street Apt. Corp., 211 AD2d 262 , 269 [1st Dept 1995] ["a party may not frustrate the performance of an agreement by bringing about the failure of a condition precedent"] [internal quotation marks and citations omitted]). 2157 further contends that the fact it "was prepared to close and waive this deficiency does not change the equation in any way, because [section 1.3 (b)] is for [2157's] benefit, and [2157] may waive it in order to proceed to closing" (Reply Memorandum of Law at 5 [NYSCEF Doc. No. 55], citing *De Freitas v Holley*, 93 AD2d 852 (2d Dept 1983).

Specifically, section 1.3 of the Agreement, provides that Famous is obligated to execute and deliver instruments requested by 2157 "including, without limitation, instruments pertaining to zoning and zoning lot mergers." In the event Famous delays signing any permit or cooperating with 2157 regarding the project, "the Closing shall be delayed day for day for such [sic] until Famous cooperates" (Agreement, § 1.3 (b) [NYSCEF Doc. No. 11]). 2157 contends that it was "entitled to extend the closing date pursuant to the contract until such time as [d]efendant Famous completes the zoning lot merger," especially where the delay was caused by Famous (Reply Memorandum of Law at 5 [NYSCEF Doc. No. 55]). In response, Famous argues that 2157's letters setting the closing date, never indicated that Famous was required to sign any approvals (Affidavit of President of Famous, ¶ 27 [NYSCEF Doc. No. 30]). As such, even if the subject commitment letter constituted a sufficient commitment pursuant to the terms of the Agreement, there is an issue of fact as to whether Famous has performed under the Agreement by cooperating with 2157 under section 1.3 of the Agreement thereby entitling Famous to retain the down payment.[7]

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[7]Famous asserts that the letter of June 12, 2017 written by counsel for 2157 (June 12 Letter [NYSCEF Doc. No. 40]) constituted a repudiation of the Agreement and entitled Famous

CONCLUSION

On the basis of the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment (sequence number 001) is denied; and it is further

ORDERED that defendants' motion for summary judgment (sequence number 002) is denied.

Dated: October 29, 2019

ENTER

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

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to damages (Affirmation in Support, ¶¶ 31-33 [NYSCEF Doc. No. 29]). In the June 12 Letter, 2157's counsel indicates that he was "notified by the Attorney General's office that the [Agreement] as written is in violation of the Martin Act," and he requested Altman to contact him "to discuss how we can remedy the situation in accordance with the attached e-mail from the Attorney General's office" (June 12 Letter [NYSCEF Doc. No. 40]). Famous argues that "a letter stating that a party will no longer proceed with a purchase of real estate constitutes a repudiation of the [Agreement]" *Id.*, ¶ 31. However, to sustain a claim of anticipatory contract repudiation, the claimant must show that the defendant has expressed an "absolute refusal to perform" (*QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56, 63 [2d Dept 2013] [internal quotation marks and citations omitted]; *accord Rachmani*, 211 AD2d at 266 ["a party has indicated an unequivocal intent to forego performance of his obligations under a contract"]). Here, the June 12 Letter, on its face, does not show that 2157 has expressed an absolute refusal to perform.