

**Herald Sq. Hotel Partners, LP v Life Hotel Partners
LLC**

2019 NY Slip Op 33720(U)

December 18, 2019

Supreme Court, New York County

Docket Number: 650377/2019

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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INDEX NO. 650377/2019

HERALD SQUARE HOTEL PARTNERS, LP,

MOTION DATE 07/22/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

LIFE HOTEL PARTNERS LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 32, 33, 34, 35, 36, 37, 38

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is hereby ordered that plaintiff's CPLR 3212 motion for summary judgment against defendant is denied.

Summary

On January 17, 2019, plaintiff, Herald Square Hotel Partners, LP, commenced this action against defendant, Life Hotel Partners LLC, to recover a balance due (\$835,204.30, plus daily interest on that amount at the rate of \$142.46, plus another \$30,000.00, plus interest on that amount, attorney's fees, costs, and disbursements) pursuant to a commercial real estate transaction and extension fee. The Verified Complaint alleges two causes of action, both arising out of a breach of contract for air rights.

Background

On or about January 6, 2015, plaintiff entered a contract (the "Contract") to sell the Herald Square Hotel, located at 19 West 31st Street, New York, NY, to Cityview Commercial, LLC ("Cityview"). On or about June 15, 2015, the Contract was amended for a sixth time (the "Sixth Amendment") with plaintiff agreeing to sell the air rights to Cityview for \$1,850,000.00. The Sixth Amendment required that Cityview pay \$1,200,000.00 to plaintiff upon closing and that defendant, a principal of Cityview, pay the remaining \$650,000.00, plus 8% annual interest (the "Remaining Payment") to plaintiff by June 2017. During the subject time period, defendant was the managing member of Life Hotel TIC LLC, LILHA Herald TIC LLC, and FLABLA LLC (the "Purchasers").

Defendant failed to pay the \$650,000.00, plus interest by the June 2017 due date. In approximately September 2017, defendant sought an extension of time to pay the \$650,000.00, plus more than two years of accrued interest. In plaintiff and defendant's Extension Agreement,

entered into in or about October 2017, defendant acknowledged that it owed plaintiff a total of \$767,866.24 (the "Air Rights Balance"). The Extension Agreement required that defendant pay \$50,000.00 immediately (the "Extension Fee") and the Air Rights Balance on or before December 31, 2018 (for a total of \$817,866.24) with interest continuing at 8% per annum. However, defendant has paid only \$20,000.00 of the Extension Fee, and a balance of \$30,000.00 on the Extension Fee remains. Defendant has also failed to pay the Air Rights Balance with interest at 8% per annum by the December 31, 2018 due date.

Plaintiff alleges in its first cause of action that defendant is liable to plaintiff in the amount of \$835,204.30, plus \$142.46 interest per day (the principal sum of \$650,000.00, plus interest between June 26, 2015 and January 17, 2019 at the rate of 8% per year in the amount of \$185,204.30); pursuant to Extension Agreement Section 3.01, plaintiff also seeks attorney's fees, costs, and disbursements. Plaintiff alleges in its second cause of action that defendant is liable to plaintiff in the amount of \$30,000.000, plus interest from October 1, 2017, as defendant paid only \$20,000.00 of the \$50,000.00 Extension Fee.

On February 19, 2019, defendant answered the Verified Complaint. In its "First Defense," defendant asserts various admissions and denials. In its "Second Defense," defendant claims that plaintiff is not entitled to the payments sought in the Verified Complaint's two causes of action. Defendant asserts that at the time of their purported sale by plaintiff, the air rights were subject to a July 2003 Zoning Lot Development Agreement (the "ZLDA") between plaintiff and three other parties (the "ZLDA Parties"). Although plaintiff provided an amendment to the ZLDA signed by one ZLDA party, plaintiff allegedly failed to obtain the consent of the remaining two ZLDA Parties for the subject allocation of the air rights as of the June 2015 closing date. Thus, defendant asserts that plaintiff failed to sufficiently demonstrate its authority to sell the air rights.

Pursuant to its Counterclaims, defendant's Answer requests that this Court (1) dismiss plaintiff's Verified Complaint in its entirety; (2) declare the Air Rights Balance (\$650,000.00, plus interest) null and void unless and until plaintiff provides sufficient evidence of its authorization to sell the air rights as of the closing date; (3) provide guidance as to what would constitute sufficient evidence of said authorization; (4) require that plaintiff immediately return the \$1,200,000.00 air rights payment, plus interest from the June 2015 closing date to Cityview; and (5) declare the Extension Agreement null and void, relieving defendant of any obligation to pay the Extension Fee's remaining balance and requiring plaintiff to return defendant's \$20,000.00 Extension Fee payment, plus interest from the payment date. And in its "Third Defense," defendant asserts that plaintiff's claims "are barred in whole or in part by the doctrine of unclean hands."

On March 26, 2019, plaintiff submitted an Amended Verified Reply to defendant's Answer (it submitted the original Verified Reply on March 8, 2019) with various admissions, denials, and seven Affirmative Defenses, which assert that (1) defendant's Counterclaims fail to state a cause of action; (2) the equitable doctrine of estoppel bars defendant's Counterclaims; (3) laches bar defendant's Counterclaims; (4) the equitable doctrine of waiver bars defendant's Counterclaims; (5) defendant lacks standing to assert its First Counterclaim in that defendant did not pay for air rights while other non-parties did; (6) defendant has failed to mitigate its damages in that the Air

Rights Purchasers purchased the title insurance but no title claim has been made; and (7) defendant's unclean hands bar its Counterclaims. The Reply requests that this Court dismiss defendant's Counterclaims and award attorney's fees, costs, and disbursements to plaintiff.

Plaintiff now moves for summary judgment against defendant on its first and second causes of action and for dismissal of defendant's first and second Counterclaims.

In opposition, defendant requests that the Court (1) deny plaintiff's motion for summary judgment against defendant and (2) grant defendant's Counterclaims for a judgment declaring, simply put, all balances null and void until plaintiff provides sufficient evidence of plaintiff's right to sell the subject air rights; requiring plaintiff to return paid sums; and awarding defendant's attorneys' fees and costs.

Discussion

On July 17, 2019, Abraham Puchall ("Mr. Puchall"), "the trustee of the two trusts which are the sole members of two separate limited liability companies which in turn are the two sole members of plaintiff," submitted an Affidavit supporting plaintiff's motion. Pursuant to CPLR 3212(b), Mr. Puchall asserts that he is "personally and fully familiar with the relevant facts and circumstances of this action" and recited all material facts. He contends:

Since plaintiff's obligation to deliver the document did not specifically survive the closing, such an allegation is nullified by the fact that the Purchasers were given a Deed at the closing, and therefore the contract obligation concerning the First Amendment merged into the Deed.

(NYSCEF Doc. No. 7.) Mr. Puchall also asserts that "any claim based on a breach of a representation or warranty in the Contract had to be brought within nine (9) months of the June 26, 2015 closing," which defendant failed to do. (NYSCEF Doc. No. 7.)

Additionally, Mr. Puchall asserts that defendant's claim that plaintiff breached its representation and warranty for the air rights is also time-barred. Mr. Puchall alleges that defendant does not have standing to recover the \$1,200,000.00, as the Purchasers rather than defendant paid that amount.

Plaintiff argues that its "delivery of the Deed at the closing satisfied all of plaintiff's obligations under the contract including the delivery of the First Amendment to ZLDA." (NYSCEF Doc. No. 36.)

However, defendant argues that plaintiff "has not only failed to meet its initial burden of establishing the absence of an issue of fact but has actually established [defendant's] entitlement to summary judgment." Defendant cites the Sixth Amendment's Section 3(c):

Seller shall, at or prior to Closing, cause to be recorded, if, as and in the manner reasonably required by Purchaser or Purchaser's title insurance company, (i) a fully executed and acknowledged original counterpart of the First Amendment to Zoning Lot Development Agreement attached hereto

as Exhibit A, and (ii) all such documents and instruments as shall be necessary to evidence Seller's ownership of an ability to convey to Purchasers as contemplated hereby the Air Rights.

(NYSCEF Doc. No. 32.) Defendant has thus demonstrated that there remains a disputed issue of fact—namely, whether plaintiff had the right to sell the subject air rights without providing the consent of the remaining two ZLDA Parties “at or prior to” the June 2015 closing date—sufficient to warrant denial of plaintiff’s motion for summary judgment.

In its reply papers, plaintiff convincingly argues that defendant is not entitled to summary judgment against plaintiff. The record demonstrates that defendant has not paid the remaining balances (\$835,204.30, plus daily interest on that amount at the rate of \$142.46, plus another \$30,000.00, plus interest on that amount, attorney’s fees, costs, and disbursements). Further, defendant lacks standing to request that plaintiff return \$1,200,000.00 to Cityview, as defendant did not make the subject payment.

Conclusion

Defendant has demonstrated that there remains a disputed issue of fact, namely whether plaintiff had the right to sell the subject air rights without obtaining the consent of the remaining two ZLDA Parties “at or prior to” the June 2015 closing date.

The record demonstrates that defendant has not paid the remaining balances (\$835,204.30, plus daily interest on that amount at the rate of \$142.46, plus another \$30,000.00, plus interest on that amount, attorney’s fees, costs, and disbursements). Further, defendant lacks standing to request that plaintiff return \$1,200,000.00 to Cityview, as defendant did not make the subject payment.

Thus, for the reasons stated herein, defendant’s requests are denied in their entirety.

As this case appears ripe for a quick, amicable resolution, the Court invites counsel to contact it to schedule a settlement conference. A call to (646) 386-4374 with both sides on the line can get the ball rolling.

Thus, pursuant to CPLR 3212, the motion of plaintiff, Herald Square Hotel Partners, LP, for summary judgment against defendant, Life Hotel Partners LLC, is denied. The Clerk is hereby directed to enter judgment accordingly

12/18/2019

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE