Herald Sq. Hotel Partners, LP v Life Hotel Partners LLC
2020 NY Slip Op 31921(U)
June 10, 2020
Supreme Court, New York County
Docket Number: 650377/2019
Judge: Arthur F. Engoron
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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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HERALD SQUARE HOTEL PARTNERS, LP

Plaintiff,

- v -

LIFE HOTEL PARTNERS LLC,

Defendant.

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INDEX NO. 650377/2019

MOTION DATE 01/29/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is hereby ordered as follows:

Mea Culpa
I erred.

Summary
In this action, simply put, plaintiff is suing for the balance of payments it is due pursuant to a contract to sell certain air rights to defendant. Defendant claims that it never received the air rights and has counterclaimed for the money that it did pay plaintiff. Plaintiff moved for summary judgment. In a December 18, 2019 Decision and Order this Court denied summary judgment, finding that whether or not plaintiff transferred the air rights was an issue of fact. Plaintiff now moves to reargue. The Court now finds (with apologies to all concerned for the extra time and expense) that the prior Decision and Order was palpably incorrect and that plaintiff is entitled to summary judgment.

Background
Neither side significantly disputes the underlying facts, most or all of which are imbedded in writings. Prior to the events here in issue plaintiff owned the Herald Square Hotel, located at 19 West 31st Street, New York, NY. In a January 2015 Contract of Sale (NYSCEF Doc. 11), plaintiff agreed to sell the building to non-party Cityview Commercial, LLC for $40,969,750. The last sentence of the first paragraph of the contract expressly excluded the property's air rights.

Paragraph 9(a)(x) of the contract obligated plaintiff to deliver "[a]ny other documents required by this Agreement to be delivered by Seller or reasonably requested by Purchaser's Title Company in order to effectuate the provisions of this Agreement … . The provisions of this subsection shall survive the Closing."

Paragraph 24 of the contract, titled "Discharge of Seller's Obligations," provide(d) as follows:

> The delivery of the Deed to Purchaser shall be deemed full performance and discharge of every agreement and obligation of Seller to be performed under this Agreement, except those, if any, which are specifically stated in this Agreement to survive the Closing. Unless otherwise specifically so stated, no obligations, liabilities, representations or warranties of Seller shall survive the Closing.

In Paragraph 4(c) of a "Reinstatement of and Fourth Amendment To Contract of Sale" (NYSCEF Doc. No. 16) the parties agreed as follows:

> All representations and warranties of Seller set forth in the Contract and this Amendment shall be true, correct and complete on the date made and on the date of the Closing, and shall survive the Closing for a period of six (6) months … Any action for breach of the warranties and representations shall be commenced no later than nine (9) months from the date of Closing, time being of the essence with respect to said date, it being agreed and understood that failure to commence such action within said period shall be deemed a waiver of the right thereto.

On or about June 15, 2015 the contracting parties entered into a "Sixth Amendment to Contract" (NYSCEF Doc. 12). In Paragraph 3(a) plaintiff represented and warranted that it "own[ed] approximately 11,566 square feet of air rights allocable to the Premises." In Paragraph 3(b) plaintiff agreed to convey these air rights to the purchaser. In Paragraph 3(c) plaintiff promised to deliver to the purchaser, prior to or at closing, a document called the "First Amendment to Zoning Lot Development Agreement" ("FAZLDA"). In Paragraph 3(d) plaintiff agreed to sell the air rights for an additional $1,850,000. Paragraph 3(d)(i) provided that of that amount, $1,200,000 was to paid at the closing; Paragraph 3(d)(ii) provided that the remaining $650,000 was to be paid by defendant, a principal of the purchaser; Paragraph 3(d)(iii) provided that defendant was to repay said remaining balance, plus 8% interest, in June 2017.

Apparently, the Zoning Lot Development Agreement pooled the air rights of the subject building and three adjoining properties. Apparently, the FAZLDA allowed plaintiff to sell those rights, but would be effective only if signed by the other three owners. Apparently, only one of those other three owners signed it. Thus, this Court will assume, arguendo, that in and of itself, the FAZLDA was ineffective to transfer the air rights, which apparently was the case.

At some point around this time Citiview assigned the contract to, for present purposes, defendant (NYSCEF Doc. 13).

On June 19, 2015, the parties attempted to close, but the purchasers, or their lenders and/or title insurance company, balked because the FAZLDA was missing two signatures. On June 23, Matthew Danow, the purchasers' attorney, attempted to overcome this hurdle by emailing plaintiff (NYSCEF Doc. 17) as follows:

> … Attached is a Clarification Agreement, to be executed by Tower 31 [apparently the only one of the three adjoining property owners to have signed the FAZLDA] and the Seller, which contains the same clarifications and terms as the ZLDA Amendment [i.e., the FAZLDA], but does not purport to amend the ZLDA (which would require the signatures of the other two parties). Since I don't have the Amendment in WORD, I can't run a compare, but if you read it, you'll see that I tried to stay as true as possible to the language of the original Amendment only deleting conforming the provision [sic ?] which purport the [sic] amend the ZLDA.

As indicated, Danow attached the draft of the Clarification Agreement (NYSCEF Doc. 17) to the email. The parties then revised, finalized and executed the Clarification Agreement (NYSCEF Doc 18).

The parties closed on June 26, 2015. Plaintiff delivered the deed, which purported to include the air rights, and the Clarification Agreement; the purchasers paid the contract price, less the $650,000 indicated above. On September 10 the purchasers' title insurer duly recorded the Clarification Agreement (NYSCEF Doc. 19).

Some two years later, in or around September 2017, defendant sought an extension of time to pay the unpaid principal balance of $650,000.00, plus over two years of 8% interest. In or about October 2017 the parties entered into an "Extension Agreement" (NYSCEF Doc. 15). The first "Whereas" clause states that plaintiff "sold certain air rights … associated with the real property known as the Herald Square Hotel … ." In the third "Whereas" clause defendant acknowledged that as of September 30, 2017 the balance of the purchase price, plus interest, for the air rights was "Seven Hundred Sixty-Seven Thousand Eight Hundred Sixty-Six and 24/100 ($767,866.24) Dollars." In the fourth "Whereas" clause defendant acknowledged that it was unable to pay the $650,000 and that it was requesting, in consideration of $50,000, that plaintiff extend the due date through December 31, 2018.

Section 1.01.A of the Extension Agreement states as follows:

> [Defendant] hereby acknowledges and confirms that it is currently indebted to [plaintiff] for the Air Rights Balance plus interest at Eight (8%) percent per annum. Simultaneously with the execution and delivery of this Agreement, defendant shall pay plaintiff the Extension Fee and upon [plaintiff's] receipt of the funds [plaintiff] hereby acknowledges and confirms that the due date of the Air Rights Balance plus accrued and deferred interest is and shall be extended until June 26, 2018 [sic ?].

In fact, defendant paid only $20,000 of the Extension Fee. Section 3.01 of the Extension Agreement provides that the prevailing party in any litigation to enforce the Extension Agreement (exactly what we have here) is entitled to reasonable attorney's fees and costs.

To date, defendant has failed to pay the air rights balance (due no later than December 31, 2018); the 8% interest thereon; the $30,000 remainder of the extension fee: and the interest on that.

Procedural History

On or about January 20, 2019 plaintiff commenced the instant action. On or about February 19 defendant interposed its answer and counterclaims, the latter of which essentially seek return of the $1,200,000 paid for the air rights and the $20,000 paid for the Extension Agreement. On or about March 26 plaintiff interposed its amended reply. On or about July 19 plaintiff moved for summary judgment. On or about December 18 this Court denied that motion, as indicated above.

The Instant Motion and Cross-Motion

Plaintiff now moves, pursuant to CPLR 2221, for leave to reargue plaintiff's previous summary judgment motion and, upon reargument, for summary judgment on its damages causes of action and dismissal of defendant's counterclaims. Defendant now cross-moves for summary judgment, seeking return of the monies paid for the air rights and the Extension Agreement, and for related relief.

Discussion

This Court erred egregiously in at least three respects in drafting and issuing the prior Decision and Order. First, whether or not plaintiff conveyed the air rights is, under the circumstances, a question of law, not, as this Court stated, a question of fact. Nobody is disputing who signed what, or with what indicia of authority a person purported to act on behalf of another, which would be issues of fact. Rather, pursuant to the undisputed facts, plaintiff either did or did not convey the air rights.

Second, the question at the heart of this case is not, although it might appear to be, whether plaintiff did or did not convey the air rights, and it well may not have. The question is whether, in light of all the circumstances indicated above, plaintiff fulfilled its contractual obligations.

Finally, this Court failed to consider at least four valid, compelling, convincing, persuasive arguments plaintiff propounded in its moving and reply papers (addressed here in, arguably, chronological order).

Merger

First, the Court failed to consider whether "merger" extinguished plaintiff's contractual obligation to transfer air rights or a completely signed FAZLDA. The doctrine of merger provides that a contract to convey real property merges into the deed, which extinguishes any obligations or guarantees that it does not expressly state. In laypersons' terms, if you think the person selling you real estate is failing to fulfill his or her obligations under the contract of sale, then do not go ahead with the deal, because, if you do, you will not be heard to complain. This salutary principal furthers faith and finality in real estate transactions.

Paragraphs 9(a)(x) and 24 of the contract, both quoted from above, are somewhat in a state of disequilibrium. The former provides that plaintiff's obligation to deliver any documents to which defendant is entitled survives the closing; the latter provides that closing extinguishes any "obligations, liabilities, representations or warranties" except those "specifically stated in this agreement to survive." There was no language, express or otherwise, anywhere in the Sixth Amendment that the plaintiff's obligation to deliver the FAZLDA would survive the closing.

Considered in tandem, the latter provision trumps the former here. The former provision is a generic "give me any documents that I will need to carry out the purposes of the contract," which normally and naturally is a continuing obligation; it is somewhat of an anti-"Ha Ha, Gotcha" provision. Viewed in its entirety, Paragraph 9(a) is simply a laundry list of the documents, such as permits, licenses, and tax forms, that a purchaser of real estate in Midtown Manhattan would need, or at least want; 9(a)(x) is the 10th such item. The latter provision insulated plaintiff against any claim of non-performance unless the deed specifically provided that such a claim survived closing. Defendant's true gripe here is not that plaintiff failed to deliver a document; rather, it is that plaintiff's "representations or warranties" about its ability to transfer the air rights was overstated or non-existent.

Plaintiff's reliance on the rule of contract construction that specific provisions control general ones, see generally, Muzak Corp. v Hotel Taft Corp., 1 NY 2d 42 (1958) (leading case), is also sound. Paragraph 9(a)(x) is a statement of general principal; Paragraph 24 specifically states what obligations, including representations and warranties, which lie at the heart of the instant dispute, do not survive closing. Finally, as plaintiff cleverly notes, Paragraph 9(a)(x) does not use any form of the word "specific"; Paragraph 24 does, twice.

In sum, plaintiff's obligation to deliver the FAZLDA, and thus the air rights, did not survive the closing because no express language stated that it would.

Estoppel

Second, the Court failed to consider plaintiff's argument that plaintiff's execution and delivery of the Clarification Agreement (NYSCEF Doc. No. 17), which defendant proposed, negotiated, executed, accepted and recorded, replaced plaintiff's obligation to deliver the air rights pursuant to the FAZLDA. This is plaintiff's most intriguing, and possibly its strongest, argument. After the initial attempt to close was aborted, the purchasers agreed to accept the Clarification Agreement in lieu of the FAZLDA. As plaintiff argues in its reply memo (NYSCEF Doc. 54, at 9), "the Clarification Agreement supplanted the [FAZLDA]." Defendant is thus estopped from arguing that it is aggrieved by plaintiff's failure to provide a FAZLDA signed by plaintiff and all three adjoining property owners; that argument will not fly.

Untimeliness

Third, the Court failed to consider whether the nine-months-post-closing limitation period in Paragraph 4(c) of the Reinstatement of and Fourth Amendment To Contract of Sale (NYSCEF Doc. 16) bars defendant's claim that plaintiff did not own or did not transfer the air rights. It does! Although said provision speaks in terms of "[a]ny action for breach," this Court interprets it to cover any defense to an action for non-payment. In this context, a claim is a claim, whether offensive or defensive, as the clear idea was to provide that after a defined, limited period of time, defendant would not rely on any such claim in litigation.

Defendant understandably cites CPLR 203(d), which provides, as here relevant, that a "defense … [that] arose from the transactions, occurrences, or series of transactions or occurrences, upon

which a claim asserted in the complaint depends, … is not barred … notwithstanding that it was barred at the time the claims asserted in the complaint were interposed." This provision is designed, as one hopes they all are, to prevent unfairness. If one side to a transaction can sue, the other side should be able to defend and/or sue, notwithstanding the technical requirements of Statutes of Limitations. Here, plaintiff is not relying on a Statute of Limitations; it is relying on a contractual period of limitation. Furthermore, defendant's right to claim a breach of plaintiff's warranties and representations seems, in context, not just to have been "limited," but to have been extinguished, or, as the contract says, "waived"; thus, defendant is purporting to rely on a defense that is not just time-barred, time being of the essence, but waived. Finally, this Court sees nothing unfair in refusing to allow a party to dredge up an untimely (time being of the essence), waived defense to a claim that years later, in the Extension Agreement, the party ratified.

The correct resolution of this issue is close and problematic; but the Court believes that as a matter of contract interpretation and fairness, plaintiff should be allowed to rely on the contractual limitations period to which defendant agreed.

Ratification and Waiver

Fourth, the Court did not consider that when defendant sought the Extension Agreement to delay its obligation to pay the remainder of the air rights balance, rather than complain about plaintiff's failure to deliver the FAZLDA or the air rights, defendant acknowledged that plaintiff had "sold certain air rights," and that defendant had failed to pay the remaining balance for them. The Extension Agreement was a valid contract: plaintiff provided the dual consideration of extending the time for defendant to pay and agreeing not to sue thereon immediately; defendant provided the dual consideration of promising to pay $50,000 ($20,000 of which it paid on the spot) and acknowledging the air rights sale and the remaining debt. Plaintiff is entitled to the benefits of this bargain, which came into being, and thus supersedes, all other rights and obligations.

Miscellaneous Matters

As this Court today finds that plaintiff is not obligated to return the subject $1,200,000, it need not and does not reach the issue of whether defendant has standing to pursue this claim (although, as a matter of fairness and common sense, the Court is inclined to agree with defendant). Similarly, as defendant is not entitled to summary judgment, the Court need not and does not reach the issue, which plaintiff raises, of whether defendant is precluded from asking for this relief because it did not cross-move to reargue (but the Court thinks defendant is not precluded). As the prevailing party, plaintiff is entitled to its reasonable attorney's fees and to costs.

Conclusion

For the reasons set forth herein, plaintiff's motion to reargue is granted; upon reargument, plaintiff's motion for summary judgment is granted; and defendant's cross-motion for summary judgment is denied. The Clerk is hereby directed to enter judgment in favor of Herald Square Hotel Partners, LP and against defendant Life Hotel Partners LLC in the amount of $650,000 ($1,850,000 minus $1,200,000) and interest thereon at 8% per annum from June 26, 2015 (the date of closing); plus $30,000 and interest thereon at 8% per annum from September 30, 2017 (the last day of the month of execution of the Extension Agreement); plus statutory interest

thereon from the date of entry of judgment; plus costs and disbursements. The judgment shall also deny and dismiss defendant's defenses and counterclaims. Plaintiff may obtain an inquest into the amount of the reasonable attorney's fees to which it is entitled by filing a copy of this Decision and Order and a Note of Issue with a Notice of Inquest, and by paying any required fees.

6/10/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE