Vance Assoc., LLC v One Flatbush Ave. Property, LLC
2020 NY Slip Op 32194(U)
July 6, 2020
Supreme Court, Kings County
Docket Number: 508278/2016
Judge: Larry D. Martin
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At an IAS Term, Comm-12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of July, 2020.

P R E S E N T:

HON. LARRY D. MARTIN,
Justice.

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VANCE ASSOCIATES, LLC,

Plaintiff,

Index no. 508278/2016

DECISION/ORDER
Motion Seq. 4 & 5

-against-

ONE FLATBUSH AVENUE PROPERTY, LLC,

Defendant.

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Recitation, as required by CPLR 2219(a), of the e-filed papers considered on the review of motions for summary judgment

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	106-154, 155-179, 208
Answering Affidavits	180-207, 211-286, 287-325
Replying Affidavits	330-331, 332-339
Sur-Reply Affidavits	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff Vance Associates, LLC ("Vance") commenced this action against defendant One Flatbush Avenue Property, LLC ("One Flatbush") for breach of an agreement. Plaintiff now moves (in motion sequence four), for an order, pursuant to CPLR 3212, granting summary judgment in plaintiff's First Amended Complaint in the amount of $8,459,955, or, alternatively, partial summary judgment in the amount of $2,527,200 on plaintiff's breach of contract claim.

Defendant also moves (in motion sequence five), for an order pursuant to CPLR 3212, granting summary judgment to defendant and dismissing the complaint, or, alternatively, limiting damages.

Brief Factual Background

Plaintiff acquired 11-17 Flatbush Avenue (the "Flatbush Property") in downtown Brooklyn around 1999 and 2000. Adjacent to the Flatbush Property is 570 Fulton Street (the "Fulton Property"). Fulton Property lot occupied approximately 7,192 square feet. At the time that plaintiff acquired the Flatbush Property, the Fulton Property was owned by Saint Christopher-Ottilie ("SCO"), a non-profit organization. In January of 2006, plaintiff agreed to purchase the air rights to the Fulton Property. This transaction did not close, however.

Adjacent to the Flatbush Property was also 1 Flatbush Avenue (the "Corner Property") on the corner of Flatbush Avenue and Fulton Street. Capstone Equities ("Capstone") and its business partner Steve Shokouhi, purchased the Corner Property around 2012 and 2013. Capstone partnered with the Carlyle Group ('Carlyle"), another developer, in a joint venture where Andrew Chung acted on Carlyle's behalf with respect to Carlyle's interests. The joint venture planned to develop both the Flatbush Property and the Corner Property.

Plaintiff alleges that on or around January 27, 2014, Aaron Stauber, Vance's president, met with Chung and Shokouhi to discuss a tentative purchase price for the Flatbush Property (*see* Stauber Aff. ¶ 12; Stauber Aff. Ex. 8 [October 2013 email string]). During this meeting, Stauber discussed that the Flatbush Property was worth more to the owner of the Corner Property because the Corner Property was landlocked, and the Flatbush Property had access to the balance of the block. Chung stated that the Capstone-Carlyle venture had no desire to acquire any rights beyond the Flatbush Property and the Corner Property, including no desire to acquire rights to the Fulton Property. Stauber asked to include language in the agreement that will provide Vance additional compensation if the Capstone-Carlyle venture did in fact acquire rights to the Fulton Property.

The meeting resulted in an agreement to sell the Flatbush Property by Vance for $18 million, plus additional compensation if due (*see* Stauber Aff. ¶ 16-17).

In May 2014, OldCo, a joint venture of Capstone, Carlyle, and Slate Property Group, and Vance negotiated the Purchase and Sale Agreement ("PSA") for OldCo to purchase the Flatbush property. Both sides were represented by counsel during these negotiations (*see* Stauber Aff. ¶ 17). Plaintiff alleges that on May 2, 2014, Shokouhi sent Stauber a preliminary draft of the PSA. The terms of this draft only provided for additional compensation:

> "[i]f, prior to the Closing Date, [sic] Buyer acquires additional development rights associated with the land commonly known as 570 Fulton, Brooklyn New York for development (the "Air Rights"), the Purchase Price shall by increased by an amount equal to (A) 0.25 multiplied by (B) and amount to (x) 200 minus (y) the purchase

price per zoning square foot (ZFA) paid by Buyer or an Affiliate of Buyer for the Air Rights multiplied by (C) the total number of zoning square feet (ZFA) of the Air Rights; provided, however, that such amount shall in no event be less than zero" (see Plaintiff Ex.12 [May 2 draft] at § 2.2 (c)).

On May 14, 2014, plaintiff emailed changes to § 2.2(c) as follow:

> ~~(c)~~ (d) If, prior to the Closing Date, or within three (3) years after the Closing Date, Buyer or any Buyer Related Entities or affiliate or Buyer acquires additional floor area development rights associated with the land commonly known as 570 Fulton Street, Brooklyn, New York ~~for development~~ (the "Development ~~Air~~ Rights"), the Seller, or its designee, ~~Purchase Price~~ shall by entitled to additional compensation in an amount equal to the total number of zoning square feet ("ZFA") of Development Rights so acquired multiplied by Thirty-five and 00/100 Dollars (435.00). By way of example, if Buyer acquires 20,000 ZFA of Development rights, the Seller, or its designee, would be entitled to additional compensation in an amount equal to $700,000.00. This covenant shall survive the Closing Date for a period of three-years, and shall be deemed to be a covenant running with the land. Seller and Buyer shall execute such necessary documents at the Closing to preserve and perfect these rights,. ~~increased by an amount equal to (A) 0.25 multiplied by (B) an amount equal to (x) 200 minus (y) the purchase price per zoning square foot (ZFA) paid by Buyer or an Affiliate of Buyer for the Air Rights multiplied by (C) the total number of zoning square feet (ZFA) of the Air Rights; provided, however, that such amount shall in no event be less than zero.~~

Plaintiff alleges that the purpose of striking the term *Air Rights*, inserting the words floor area, and adding the term *Development Rights*, was to ensure that the additional compensation could be triggered not only by the acquisition of the Fulton Property's air rights, but also by the acquisition of the entire property itself. Plaintiff also alleges that the purpose of striking the words *for development* was to ensure that Vance would be entitled to additional compensation if, within the applicable time, OldCo expressed an interest in buying some or all of the Fulton Property's development rights, for any reason whatsoever. Further, the purpose of expanding the sphere of persons and/or entities that could trigger the additional compensation was ensuring that OldCo would pay the additional sum, whether it acquired the additional development rights directly or indirectly.

On May 19, 2014, in an email from OldCo's counsel, a draft of the now § 2.2(d) provision provided the following changes:

(d) If, prior to the Closing Date, or within [one (1)] year after the Closing Date, Buyer or any Buyer Related Entities or affiliate or Buyer acquires additional floor area development rights associated with the land commonly known as 570 Fulton Street, Brooklyn, New York (the "Development Rights"), the Seller, or its designee, shall by entitled to additional compensation in an amount equal to the total number of zoning square feet ("ZFA") of Development Rights so acquired multiplied by Thirty-five and 00/100 Dollars ($35.00). By way of example, if Buyer acquires 20,000 ZFA of Development rights, the Seller, or its designee, would be entitled to additional compensation in an amount equal to $700,000.00. This covenant shall survive the Closing Date for a period of one year, [and shall be deemed to be a covenant running with the land. Seller and Buyer shall execute such necessary documents at the Closing to preserve and perfect these rights.]

Another draft was sent by OldCo's counsel later on May 19, 2014 providing the following changes:

(d) If, prior to the Closing Date, or within ~~[one~~eighteen (~~1~~18)~~]~~ ~~year~~ months after the Closing Date, Buyer or any Buyer Related Entities or affiliate or Buyer enters into an agreement to acquires additional floor area development rights associated with the land commonly known as 570 Fulton Street, Brooklyn, New York (the "Development Rights"), the Seller, or its designee, shall by entitled to additional compensation (the "Additional Compensation") in an amount equal to the total number of zoning square feet ("ZFA") of Development Rights so acquired multiplied by Thirty-five and 00/100 Dollars ($35.00). The Additional Compensation shall be payable to Seller on the date that Buyer or any Buyer Related Entities or affiliate or Buyer acquires the Development Rights. By way of example, if Buyer acquires 20,000 ZFA of Development rights, the Seller, or its designee, would be entitled to additional compensation in an amount equal to $700,000.00. This covenant shall survive the Closing Date for a period of ~~one year, [and~~eighteen (18) months. The obligation of Buyer or any Buyer Related Entities or affiliate of Buyer to pay the Additional Compensation shall be deemed to be a covenant running with the land for such eighteen (18) month period and Seller and Buyer shall execute such necessary documents at the Closing to preserve and perfect these rights~~.]~~, provided that at any time Buyer may elect to terminate such covenant running with the land by depositing with Escrow Agent in escrow an amount equal to $_____ (the "Additional Compensation Escrow") to secure Buyer's obligation to pay the Additional Compensation if due under the terms herein. The Additional Compensation Escrow shall be held and disbursed pursuant to an escrow agreement reasonably satisfactory to Seller and Buyer and which escrow agreement shall provide that the funds remaining in the Additional Compensation Escrow shall be returned by Buyer eighteen (18) months after the Closing Date.

Defendant alleges that § 2.2(d) provided for additional compensation to Plaintiff of $35 per square feet, in the event that OldCo or an affiliate entered into an agreement to obtain "additional floor area development rights" associated with the Fulton Property within 18 months of closing.

Plaintiff alleges that at some point on or before May 19, OldCo accepted the majority of Vance's changes to § 2.2(d), including the expanded definition of the term *Development Rights*, the elimination of any requirement to obtain the development rights *for development*, and the expanded scope of persons and entities who could trigger § 2.2(d).

Defendant alleges that on May 20, 2014, after replacing the words "air rights" with "development rights" in the draft PSA, Stauber created a Microsoft Outlook calendar entry stating "[o]n 11-17 Flatbush, prior to Closing, prepare documents to allow their *Air Rights Covenant* to Run with the Land. Or they have to Escrow $2.5MM (See Section 2.2(d) of the PSA)" (*see* Defendant's Ex. 25). On May 29, 2014, OldCo and Vance executed the PSA.

Section § 2.2(d) of the executed PSA provided that:

> (d) If, prior to the Closing Date, or within eighteen (18) months after the Closing Date, Buyer or any Buyer Related Entities or affiliate of Buyer, or successor or assigns of Buyer enters into an agreement to acquire additional floor area development rights associated with the land commonly known as 570 Fulton Street, Brooklyn, New York (the "Development Rights"), the Seller, or its designee, shall be entitled to additional compensation (the "Additional Compensation") in an amount equal to the total number of zoning square feet ("ZFA") of Development Rights so acquired multiplied by Thirty-five and 00/100 Dollars ($35.00). The Additional Compensation shall be payable to Seller on the date that Buyer or any Buyer Related Entities or affiliate of Buyer, or successor or assigns of Buyer acquires the Development Rights. By way of example, if Buyer acquires 20,000 ZFA of Development rights, the Seller, or its designee, would be entitled to additional compensation in an amount equal to $700,000.00. This covenant shall survive the Closing Date for a period of eighteen (18) months. The obligation of Buyer or any Buyer Related Entities or affiliate of Buyer to pay the Additional Compensation shall be deemed to be a covenant running with the land for such eighteen (18) month period and Seller and Buyer shall execute such necessary documents at the Closing to preserve and perfect these rights, provided that at any time Buyer may elect to terminate such covenant running with the land by depositing with Escrow Agent in escrow an amount equal to $2,500,000.00 (the "Additional Compensation Escrow") to secure Buyer's obligation to pay the Additional Compensation if due under the terms herein. The Additional Compensation Escrow shall be held and disbursed according to the terms hereof pursuant to an escrow agreement reasonably satisfactory to Seller and Buyer and which escrow agreement shall provide that the funds remaining in the Additional Compensation Escrow which have not be earned by the Seller according to the terms hereof shall be returned to Buyer eighteen (18) months after the Closing Date.

On March 15, 2015, OldCo assigned its interest in the PSA to the defendant One Flatbush (*see* Defendant's Ex. 29). On April 6, 2015, Defendant and plaintiff entered into a Security Agreement which provides, in relevant part, as follows:

> For a term commencing on the Effective Date [April 6, 2015] and expiring on the earlier to occur of October 5, 2016 [the "Expiration Date"] if One Flatbush, its members and partners, or any successor or assigns of One Flatbush enters into an agreement to acquire additional floor area development rights associated with the Fulton property [the "Development Rights"] Vance, or its designees, shall be entitled to additional compensation [the "Additional Compensation"] in an amount as calculated in Section 2.2(d) of the PSA, which shall be payable in accordance with the terms set forth in Section 2.2(d) of the PSA.

Plaintiff states that other than removing the covenant to run with the land, the Security Agreement did not change anything in § 2.2(d) [Ex. 18 (Schwartz Tr.) at 183:14-185:2; Ex. 19 (Schwartz Dep. Ex. 2) at ¶ 22.

On August 5, 2015, 570 Fulton Street Property LLC ("570 Fulton") was formed and is owned and controlled by One Flatbush Avenue Venture, LLC ("OFAV"), which also owns and controls defendant One Flatbush. On August 7, 2015, 570 Fulton entered into an agreement to buy the Fulton Property, including "all development rights and air rights relation to" the Fulton Property.

October 2017 Decision

Defendant moved to dismiss plaintiff's breach of contract claim for failure to state a cause of action on the basis that the PSA's § 2.2(d) provision and the Security Agreement provision that cross-references it, is triggered only if defendant or its affiliate purchases transferable air rights at the Fulton Property for the purpose of transferring those air rights to the Flatbush Property. Justice Sylvia Ash held that defendant's motion to dismiss must be denied and that the motion was essentially one for summary judgment as it argued that the subject agreements are unambiguous and precluded plaintiff's claims. The court further held that the PSA's § 2.2(d) provision and the Security Agreement provision that cross-references it were not unambiguous as it relates to whether the parties intended the purchase of the Fulton Property to trigger the additional compensation and, therefore, extrinsic evidence was needed to determine the true intent of the parties. The court also denied plaintiff's motion for summary judgment as premature.

Plaintiff's Contentions

Plaintiff contends that since the Court concluded that § 2.2(d) is facially ambiguous, the parties' prior dealings are admissible to determine their intent in interpreting the additional compensation provision. Plaintiff argues that the extrinsic evidence shows that at the time of the PSA, the parties understood the additional compensation would be owed where an affiliate of defendant purchased the Fulton Property, as is alleged here. Plaintiff argues that the parties chose broad contractual language to require this additional compensation.

According to plaintiff, the only fair reading of § 2.2(d) is that it entitles plaintiff to "additional compensation" if, within 18 months of closing on the Flatbush Property, defendant or an affiliate enters into an agreement to acquire additional floor area development rights associated with the Fulton Property, which shall be payable to plaintiff on the date that these rights are acquired. Further, the changes to the contract language by removing the term *Air Rights*, adding the broader term *Development Rights*, and lifting any requirement that these rights be acquired *for development* or even at all show that the parties intended to trigger the additional compensation if defendant or an affiliate expressed a desire to buy some, or all, of the Fulton Property's development rights for any reason.

As to the extrinsic evidence, plaintiff provides that Stauber's testimony is uncontroverted and that the original discussion regarding § 2.2(d) showed an agreement for plaintiff to be compensated if OldCo, and by assignment, defendant showed any interest in acquiring some or all of the Fulton Property's development rights. According to Stauber's testimony, during the meeting to sell the Flatbush Property, plaintiff stated that the property was worth "a tremendous amount of money, specifically to the owner of One Flatbush, because" One Flatbush was landlocked on the corner and only touched the plaintiff's property. The Flatbush Property provided access to the Fulton Property and plaintiff felt that if defendant bought the Flatbush Property, defendant will be given "the key to the kingdom" by allowing One Flatbush to no longer to be landlocked. Plaintiff contends that both parties understood that the Flatbush Property could be the key to a particularly attractive "major assembly" involving the three contiguous lots.

Stauber testified that Andrew Chung responded to this comment by agreeing that plaintiff's property provides the benefit of being adjacent to other properties and should be sold at a premium but insisted there was had no interest in any other properties except plaintiff's property and One Flatbush and should not pay a premium for plaintiff's Flatbush Property. Stauber then states that

he suggested to include an agreement that if OldCo did in fact move forward with an interest in the Fulton Property, plaintiff should be compensated.

In his deposition testimony, Chung testified that there was no interest at the time of the meeting to purchase the Fulton Property. When asked about discussions with Stauber regarding the additional compensation if the Fulton Property was acquired, Chung testified the following:

> Q So Mr. Chung is it fair to say that the substance of the discussion that you had with Mr. Stauber was that 570 Fulton Street had additional air rights, in excess of the building on the property, that could be transferred to 11-17 Flatbush?
>
> A It's fair to say that there was a conversation that any air rights from 570 Fulton that got transferred was a topic of discussion in which Aaron Stauber would get paid.
>
> Q Mr. Chung did you ever reach an agreement to that effect?
>
> A To the best of my recollection there is an agreement out there. I don't want to testify as to the exact contents of that agreement, but the agreement can stand on its own.
>
> Q Did you understand that agreement to be, in effect, a toll for transferring the air rights from 570 Fulton to the One Flatbush development?
>
> A I don't know want to testify as to what it is, I have used the word toll, but basically the agreement can stand on its own that my recollection is if the air rights, if any rights were transferred from 570 Fulton it would have to be transferred through his site and he wanted to basically get a percentage, paid a percentage, of the value of the air rights of the development rights that were transferred from 570 Fulton through his site to get to One Flatbush.
> …
>
> Q Is it your understanding that the agreement with Mr. Stauber, regarding the 570 Fulton air rights transfer, was inserted into the ultimate purchase and sale agreement?
>
> A Well, we all have the agreement, so the agreement can stand on its own. To my recollection there is a provision in there that deals with the transfer of any development rights from 570 Fulton to 11-17 and then ultimately to One Flatbush. So whatever that agreement, whatever that provision says, that's what it says.

On May 14, Stauber received a preliminary draft of the PSA which contained an additional compensation clause that eventually became § 2.2(d) of the PSA. Stauber sent comments in the form of redline on this clause. Plaintiff contends that the May 14 redline changed deleting the term

Air Rights and replaced it with the term *Development Rights* were accepted by OldCo. Plaintiff asserts that they affirmatively explained to OldCo the significance behind changing Air Rights to Development Rights by discussing these changes with OldCo's counsel. Plaintiff also contends that adding the broader terms *floor area development rights* and *Development Rights* contemplated that either the purchase of the entire Fulton Property, or the purchase of just its air rights, would also trigger the additional compensation. Thus, whether defendant only bought part, or the entire Fulton Property lot will trigger compensation under § 2.2(d) and the amount to be compensated would be determined by the amount of rights defendant or its affiliate acquired, regardless of what use or intent defendant or its affiliate had for those rights.

Plaintiff also explains that the definition of development rights according to the Department of City Planning is the following:

> Development rights generally refer to the maximum amount of floor area permissible on a zoning lot. When the actual built floor area is less than the maximum permitted floor area, the difference is referred to as "unused development rights." Unused development rights are often described as air rights.

Thus, *development rights* is a broader term used in the New York City real estate industry that defines the maximum amount of floor area on a zoning lot that can be used for development of the lot, while air rights is a narrower term used to describe only unused development rights. Plaintiff argues that both Stauber and Chung shared the same understanding of the terms *development rights* and *air rights* as described above.

Along with the changes discussed above on the May 14 redlines, plaintiff also points out that the term *for development* was rejected by plaintiff and the parties ultimately eliminated any possible requirement that defendant acquire rights to Fulton Property with the intent to use them in any particular way. Thus, the language of § 2.2(d) only requires defendant or its affiliate to enter into an agreement to acquire these rights in order to trigger plaintiff's entitlement to additional compensation and is payable when the rights are acquired.

Plaintiff also points out that OldCo's conduct after the PSA shows this understanding by providing a June 3, 2014 email to Chung by David Schwartz, representative for defendant One Flatbush, stating: "We should buy just the air rights from the neighbor on Flatbush [sic]. What do you think? What do we owe the other guy on that?" In his deposition, Schwartz testified the following regarding this email:

> Q Did you have an understanding that if the air rights are purchased from 570, that One Flatbush would owe the other guy meaning Vance, compensation?
> A So my understanding was that if the air rights were purchased from 570, then One Flatbush would owe Vance compensation, that is my understanding.

Plaintiff also argues that further testimony by Schwartz that the terms *development rights* and *air rights* were "synonymous" does not raise triable issues of fact since the Court of Appeals has held that uncommunicated subjective intent alone cannot create an issue of fact where otherwise there is none" (*Wells v. Shearson Lehman/Am. Exp., Inc.*, 72 N.Y.2d 11, 24 [1988]; *see also Hudson-Port Ewen Assocs., L.P. v. Kuo*, 165 A.D.2d 301, 305 [3d Dept 1991] *aff'd sub nom. Hudson-Port Ewen Assocs., L.P. v. Chien Kuo*, 78 N.Y.2d 944 [1991]).

Finally, plaintiff contends that there is evidence of the parties' shared intentions surrounding the additional-compensation escrow provision and such further contemplates the purchase of the Fulton Property. Plaintiff provides emails during the negotiation showing that § 2.2(d) requires a $2.5 million escrow because this sum roughly estimates the amount of additional compensation that would be due under § 2.2(d)'s formula if the buyer of the Fulton Property purchased the entire lot based on a floor area ratio of 10.

In the alternative, plaintiff asks that the court to grant partial summary judgment in its favor for a sum of $2,517,200. Plaintiff asserts that defendant has already conceded that the Fulton Property has at least 71,920 development rights and, using § 2.2(d)'s formula, 71,290 multiplied by $35 equals $2,517,200, and plaintiff's right to the balance to be determined at trial.

As to defendant's motion for summary judgment, plaintiff asserts that defendant is not entitled to summary judgment dismissing plaintiff's claim. Plaintiff asserts that the May 14 redline, and subsequent drafts preclude summary judgment in favor of defendant. Plaintiff claims that defendant seeks to interpret § 2.2(d) in a manner that both parties expressly rejected during their negotiations. Plaintiff views the May 14 redline as showing that the parties rejected the notion that § 2.2(d) only pertains to air rights, and that § 2.2(d) was drafted in the broadest possible terms. This is evident by the fact that the parties changed *Air Rights* to *Development Rights* and also lifted any requirement that the aforementioned development rights by acquired *for development*. Plaintiff also believes that defendant does not offer material facts or undisputed materials to support the notion that plaintiff's proper conduct in changing *Air Rights* to *Development Rights* was meaningless. Defendant's interchangeable-use argument fails, argues plaintiff, because it relies on documents from 2006 that predate plaintiff and OldCo's first interaction by seven years and as a

result, shed no light on plaintiff's nor defendant's understanding of § 2.2(d). Furthermore, plaintiff contends that defendant's interpretation of these documents is unwarranted and plainly disputed, as each document refers to a specific set of development rights and provides no support for defendant's belief that plaintiff at the time of negotiation understood the terms "air rights" and "development rights" to be synonymous.

Defendant's Contentions

On its motion, defendant contends that § 2.2(d) is triggered only by the acquisition of transferable air rights from the Fulton Property for use on the Flatbush Development Parcel, which would be "additional" to those development rights associated with the acquisition of the Flatbush Property.

Defendant contends that the contract language establishes defendant's interpretation because § 2.2(d) provides additional compensation if defendant or an affiliate acquires "additional floor area development rights" and the only way defendant could acquire additional development rights, relative to those acquired in buying the Flatbush Property, would be to add to the development parcel air rights from the Fulton Property. In § 2.2(d), according the defendant, the example of how the formula would work further shows that the provision contemplated defendant's acquisition of development rights for the site in addition to those conferred by the PSA. The example states: "By way of example, if Buyer acquires 20,000 ZFA of Development rights, the Seller, or its designee, would be entitled to additional compensation in an amount equal to $700,000." This, says defendant shows that the parties contemplated that the buyer of the Flatbush Property would acquire some quantity of air rights associated with the Fulton Property since both parties knew at the time that Fulton Property had roughly 50,000 square feet of unused development rights—i.e., air rights—its neighbor could obtain, and the example expressed how the provision would work for one such hypothetical transaction.

Further, plaintiff's alternative construction would render the word "additional" superfluous because plaintiff attempts to say that the phrase "If…Buyer or…affiliate…enters into an agreement to acquire *additional* floor area development rights associated with [the Fulton Property]" means the exact same as "If…Buyer or…affiliate…enters into an agreement to acquire floor area development rights associated with [the Fulton Property]." Defendant states that plaintiff's meaning would violate the canon of construction that "meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is

practicable to give each a distinct and separate meaning" (NY Statues § 231; *see Vallev Rosen*, 138 AD3d 117 [2d Dept 2016]; *Technicon v Elects. Corp. v American Home Assurance Co.*, 141 AD2d 124 [2d Dept 1988]).

Defendant also provides that its interpretation prevails under a second canon of construction, "*expression unius est exclusion alterious*"—i.e., the inclusion of one thing implies the exclusion of the other. Thus, by stating that defendant's acquisition of "additional floor area development rights" triggered a payment obligation, the PSA was also stating that any other type of transaction triggered no payment obligation. Defendant argues that if the parties intended § 2.2(d) to apply to a simple purchase of the Fulton Property, or to all transactions involving development rights to the Fulton Property—whether or not they yielded additional development rights to the Flatbush Property—the PSA and the Security Agreement could have said so. Under the canon of *expression unius*, the language excludes additional compensation for a transaction involving the Fulton Property that did not constitute purchase of additional development rights for the development parcel's benefit.

Defendant contends that the extrinsic evidence establish that defendant is entitled to summary judgment and at bare minimum also establishes that plaintiff cannot obtain summary judgment because there are disputed issues of fact that require a trial. Defendant asserts that Stauber's statement to Chung that "if you get any air rights from [the Fulton Property], and you transfer them over to the [the Corner Property], then I should get paid." Chung testified that Stauber also added that, "if any rights were transferred from [the Fulton Property] it would have to be transferred through his site and he wanted to basically get a percentage, paid percentage, of the value of the air rights of the development that were transferred from [the Fulton Property] through his site to get to [the Corner Property].

Defendant also argues that, in looking at the drafting history of § 2.2(d), plaintiff offered no reason when it changed the term *air rights* to *additional floor area development rights,* nor did plaintiff communicate that the linguistic change was intended to accomplish any change in the meaning. To this point, defendant points to the deposition of Scott Kobak, an attorney directly involved in the transaction at issue who testified that (a) the Additional Compensation Clause refers to acquisition of air rights by the combined One Flatbush/11-17 Flatbush development, (b) to the extent Plaintiff intended any other meaning when it changed the draft language, it did not so communicate to OldCo, and (c) had the parties intended for the clause to cover acquisition of a fee

simple interest that involved no transfer of air rights to the Flatbush Development Parcel, the parties would have said so in clear and express language.

Additionally, defendant provides two separate and contemporaneous calendar entries by Stauber during the negotiation period stating the following: "On 11-17 Flatbush, prior to Closing, prepare documents to allow their Air Rights Covenant to Run with the Land. Or they have to Escrow $2.5MM (See Section 2.2(d) of the PSA)" and "[I]f Buyer's *buy air rights to 570 Fulton*, they must pay us $35/sf. This expires on 10/5/16. Check on status." Defendant argues that these two entries are written admissions by plaintiff that confirm defendant's position and refute plaintiff's.

Finally, defendant introduces evidence of prior contracts prepared by plaintiff showing that plaintiff attempted to get air rights from the Fulton Property for use on the Flatbush Development Parcel, even before the PSA was executed. In the contracts, the terms air rights and development rights were used interchangeably, a fact Stauber admitted to according the defendant, and that the purpose of the contracts was to acquire the rights for the benefit of the Flatbush Property. Thus, defendant argues, these efforts are consistent with Chung's testimony concerning the parole evidence for the PSA and that it shows why Stauber said he wanted to be compensated under § 2.2(d): i.e. if OldCo obtained air rights and used them for the development.

Defendant also contends even if plaintiff could establish a basis for liability, the court should limit any damages to the Fulton Property's development rights to those that existed as of the cut-off date, October 5, 2016 and must be capped at $2,517,200 because the zoning district for the Fulton Property at that time had maximum development rights of "10x Far" or 71,920 square feet.

Discussion

Summary judgment is appropriate if the moving party is entitled to judgment as a matter of law and no genuine issue of material fact exists (*see* CPLR § 3212; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Where triable issues of fact exist, the summary judgment standard is not met (*see Utica Mut. Ins. Co. v. Style Mgmt. Assocs. Corp.*, 28 N.Y.3d 1018, 1019, [2016]). The burden is on the moving party on a motion for summary judgment to make prima facie showing of entitlement to judgment as a matter of law (*see Zuckerman*, 49 N.Y.2d at 562). The evidence is viewed in the light most favorable to the party opposing summary judgment and all reasonable inferences are drawn in that party's favor (*see Avon Elec. Supplies, Inc. v. Baywood*

Elec. Corp., 200 A.D.2d 697, 698 [2d Dept 1994]; *see also Giraldo v. Twins Ambulette Serv. Inc.*, 96 A.D.3d 903, 903 [2d Dept 2012]).

Summary judgment may be further applicable when the contract language renders the parties' intentions ambiguous but one party's extrinsic evidence demonstrates "not only its interpretation is reasonable but that it is the only fair interpretation" (*see Demetrio v. Stewart Title Ins. Co.*, 124 AD3d 824, 826 [2d Dept 2015], quoting *City of New York v. Evanston Ins. Co.*, 39 AD3d 153, 156 [2d Dept 2007] (granting summary judgment)).

As to plaintiff's motion for summary judgment, or alternatively, for partial summary judgment, plaintiff failed to show its prima facie entitlement to judgment as a matter of law. The court finds that the "additional floor area development rights" has two possible meanings. The phrase can either mean that defendant had to acquire any rights at all from the Fulton Property or whether this phrase mean that any rights from the Fulton Property acquired by defendant need to be additional to the development rights being acquired from the parties' PSA. Plaintiff's submission failed to show that there were no genuine issues of triable fact as to what the parties intended the phrase "additional floor area development rights." As argued by defendant, the word "additional" would be rendered superfluous if we adopt plaintiff's interpretation but, on the same hand, plaintiff makes an argument that the parties agreed to delete the phrase *for development*, which would seem to indicate that the parties did not seek a require for the rights to be acquired for the use in the development parcel. These issues cannot be resolved on a motion for summary judgment. Defendant also failed to show its prima facie entitlement to judgment as a matter of law for reasons stated above reasons. In essence, both parties' papers show that there are genuine issues of fact as to what the parties intended when drafting the provision at issue. Each party's interpretation is reasonable when looked through the evidence provided but the same evidence contradicts the other. Thus, the meaning to be given to § 2.2(d)'s additional compensation clause is best left for the fact finder to decide.

"When the language of a contract is ambiguous, its construction presents a question of fact [that] may not be resolved by the court on a motion for summary judgment" (*DiLorenzo v. Estate Motors, Inc.,* 22 A.D.3d 630, 631,802 N.Y.S.2d 516 [2d Dept 2005]). Plaintiff's motion for summary judgment, or alternatively, for partial summary judgment and defendant's motion for summary judgment are denied as issues of fact exist which can only be resolved at trial.

ORDERED Plaintiff Vance's motion for summary judgment, or alternatively, for partial summary judgment is denied; and it is further

ORDERED Defendant One Flatbush's motion for summary judgment is denied.

The court, having considered the parties' remaining contentions, finds them unavailing. All relief not expressly granted herein is denied.

This constitutes the decision and order of this court.

ENTER

LDM

Hon. Larry D. Martin, J.S.C.