SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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MALACHITE SERVICES LLC

Plaintiff,

- v -

148-150 EAST 28TH ST LLC,

Defendant.

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INDEX NO. 656060/2019

MOTION DATE 09/10/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant's motion for summary judgment is granted and the cross-motion by plaintiff to amend pursuant to CPLR 3025(c) and for summary judgment is denied.

Background

On April 19, 2019, plaintiff and defendant entered into an agreement for the purchase of a property located at 148-50 East 28th Street in Manhattan. The agreement required plaintiff to forward a down payment of $668,000 and there was no mortgage contingency clause. Plaintiff contends that in June 2019, the State of New York enacted the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") and that this caused the appraisal value of the premise to decline to $5.7 million (the purchase price was $6.68 million).

Plaintiff claims that it would not have entered into the agreement if it had known about the HSTPA and that the concept of "force majeure" applies. It seeks a declaratory judgment that it is entitled to rescind the contract and get its down payment back. Plaintiff also brings a cause

of action for a permanent injunction staying performance of the contract until the rights of the parties are determined under the first cause of action.

Defendant moves for summary judgment dismissing the action on the ground that the concept of force majeure does not apply here. It points out that there is no force majeure clause in the contract and that the passage of a new law is not a basis to terminate a contract. Defendant argues that if the Court were to accept plaintiff's argument, then any time a new law is passed a plaintiff could get out of a contract affected by a new law. It concludes that plaintiff had 60 days to complete the transaction from the date of the agreement and plaintiff has failed to do so. Defendant also requests that it be permitted to keep the down payment.

Plaintiff cross-moves to amend to conform to the evidence pursuant to CPLR 3025(c) and for summary judgment. In the alternative, plaintiff seeks leave to amend pursuant to CPLR 3025(b). Plaintiff contends that defendants' motion for summary judgment must be denied because plaintiff's sole purpose of purchasing the premises was "the ultimate ability to vacate the rent stabilized extremely under market unit and change the use and occupancy of the Premises" (NYSCEF Doc. No. 14, ¶ 17). Plaintiff claims it made this known to all parties.

In its new pleading, not submitted until its reply, plaintiff offers a frustration of purpose claim and contends that the unexpected event (the passing of the HSTPA) renders a party's performance in the contract as valueless. Plaintiff concludes that defendant is not entitled to the down payment because it has not pled that relief as a counterclaim nor has it complied with the allegations in the contract of sale.

In opposition to the cross-motion, defendant emphasizes that it was plaintiff who informed defendant it was no longer going to close and instead wanted rescission of the contract. Defendant maintains that it is ready and willing to close under the terms of the contract. It points

out that plaintiff has abandoned its force majeure arguments in its cross-motion and instead raises the frustration of purpose claim. Defendant notes that plaintiff moves to amend but does not actually attach an amended pleading.

In reply to its cross-motion, plaintiff claims that the affidavit of its managing member is enough evidence for the Court to amend the pleadings to conform to the evidence under CPLR 3025(c). It also argues that counsel for plaintiff spoke personally with a real estate broker involved and he apparently says he was aware of the goal of eventually destabilizing a unit at the premises (although plaintiff's counsel admits it was unable to get an affidavit from this broker).

Discussion

"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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The doctrine of frustration of purpose "is a narrow one which does not apply unless the frustration is substantial. In order to invoke this defense, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense"(*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004] [internal quotations and citation omitted).

The Court grants defendant's motion and denies the cross-motion. The fact is that plaintiff failed to state a cause of action for either frustration of purpose or under a force majeure theory. In this case, plaintiff wants to back out of a valid contract to buy a building because the law changed and the building may not be as lucrative as plaintiff expected. Simply put, there is no basis to find that the agreement should be terminated based on the passage of the HSPTA.

And a closer examination of the contract at issue reveals that plaintiff's concerns about possibly destabilizing one of the units is irrelevant. The contract states that "This Agreement embodies and constitutes the entire understanding between the parties with respect to the transaction contemplated herein" (NYSCEF Doc. No. 15 at 36). Nowhere in the contract is there any mention that plaintiff entered into the contract with the express purpose to destabilize a unit Plaintiff cannot now rely on oral representations it may have made in connection with buying a building because the value of building later dropped.

In fact, it appears from the contract that there are many units in the building, both commercial and residential, and only one of the units is rent stabilized (*id*. at exh B, Rent Roll]). The Court does not see how the fact that one of the nine units in the building will remain stabilized under the terms of the HSTPA frustrates the purpose of buying the building such that the contract can be terminated. And even if the HSTPA had not been passed, the rent for the unit in question ($725.08) is significantly far away from the former high rent deregulation threshold. In other words, it would have been quite a while before this unit could possibly have been taken out of rent stabilization, something plaintiff surely knew if this was its goal in buying the building.

To the extent plaintiff asserted a force majeure claim (it appears that plaintiff abandoned this claim in its cross-motion), that is also without merit. Passing legislation is not an act so

unforeseeable that it could justify terminating the contract at issue here. Plaintiff agreed to buy a building and that building still exists. A change in how much rent can be collected from a single unit is not a basis to rip up this agreement.

With respect to the cross-motion, plaintiff failed to sufficiently argue a basis to amend under CPLR 3025(c) or (b). The affidavit submitted as the "evidence" to be conformed to the pleadings (NYSCEF Doc. No. 13) does not state a ground upon which relief could be granted. Mr. Malekan (managing member of plaintiff) explains that he tried to get a reduction in price in June 2019 (after the HSTPA was passed) and that defendant later tried to send a "time of the essence" closing letter. But this does not support a basis to rescind the contract and order a return of the down payment under the theory of force majeure or frustration of purpose (plaintiff's first cause of action).

And defendant is correct that plaintiff failed to attach an amended pleading in support of its cross-motion. Therefore, the relief sought in the alternative to amend pursuant to CPLR 3025(b) is denied. Even if the Court were to consider the amended complaint submitted for the first time in reply to the cross-motion, that pleading does not state a cognizable cause of action as it alleges a frustration of purpose cause of action. That claim, as explained above, is without merit.

The Court also finds that plaintiff's second cause of action for a permanent injunction staying performing of the contract until the rights of the parties are determined under the first cause of action is now moot given that the Court has rejected both of plaintiff's theories to terminate the contract.

To be clear, the Court also declines to make an affirmative ruling that defendant is entitled to keep the down payment as liquidated damages. The procedural posture of this case is

that plaintiff sought a return of the down payment (along with termination of the contract) based on theories of force majeure and frustration of purpose. As plaintiff pointed out, defendant did not assert any counterclaims seeking a ruling that it could keep the down payment as liquidated damages and the Court will not make such an affirmative ruling on these papers. The Court also declines to award legal fees as defendant did not cite to a provision of the contract permitting it to recover such fees in these circumstances.

Summary

The Court recognizes that plaintiff is unhappy that the passage of the HSTPA, which apparently caused the value of the building it was buying to decrease.[1] But that is not a basis to terminate a contract or order the return of a down payment under a force majeure or frustration of purpose theory. Those doctrines are reserved for situations in which the entire point of a contract is eliminated. The fact that, under current law, plaintiff won't be able to destabilize one unit in a nine-unit building does not come close to the situation those legal theories envision. Values of buildings change all the time; sometimes neighborhoods become more or less popular or pandemics can force lucrative long-term tenants to permanently close.

And here, plaintiff's alleged purpose is not found anywhere in the contract, which also contains a clause stating it constitutes the entire agreement between the parties. Moreover, as defendant argues, the passage of legislation cannot form the basis for ripping up the contract here. Otherwise, every time legislation is passed, it would permit an unhappy party to get out of a contract affected by it. The Court declines to embrace such an expansive view of the doctrines of force majeure or frustration of purpose.

[1] There is no doubt defendant is not happy about HSTPA either.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant is granted to the extent it sought dismissal and denied to the extent it sought an order regarding the down payment and attorneys' fees, and the Clerk is directed to enter judgment in favor of defendant when practicable along with costs and disbursements after presentation of proper papers therefor, and the Clerk is directed to cancel the Notice of Pendency (NYSCEF Doc. No. 2); and it is further

ORDERED that the cross-motion to amend and for summary judgment by plaintiff is denied.

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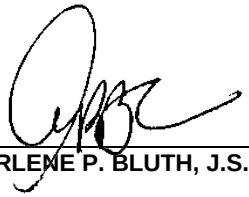

9/15/2020
DATE

ARLENE P. BLUTH, J.S.C.

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