

Fifteenth & Fifth LLC v LG Park Slope LLC
2021 NY Slip Op 30391(U)
February 9, 2021
Supreme Court, New York County
Docket Number: 652211/2020
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK **PART** **IAS MOTION 53EFM**

Justice

-----X

FIFTEENTH AND FIFTH LLC

Plaintiff,

- v -

LG PARK SLOPE LLC

Defendant.

-----X

INDEX NO. 652211/2020

MOTION DATE 08/04/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 were read on this motion to/for DISMISS.

The Complaint in this case must be dismissed because Fifteenth and Fifth LLC (the **Seller**) can not force LG Park Slope LLC (the **Purchaser**) to close based on (i) an outdated tenant estoppel certificate (i.e., a certificate which does not provide that the rent is current through the month of the closing) or (ii) by substituting its own Seller’s Certificate (hereinafter defined) (after having received a non-conforming tenant estoppel certificate) and disclosing that Crunch, LLC (the **Tenant**) is as of the closing requesting a rent deferment in respect of the COVID-19 pandemic. Putting aside that Section 46 the Agreement of Lease, dated June 9, 2015, by and between Seller and Tenant, as amended (the **Lease**; NYSCEF Doc. No. 25, § 46) addresses whether the Tenant is entitled to any such rent deferment, the Seller’s argument fails. Section 10(l) of the Contract (hereinafter defined) makes clear that the Seller’s obligation was to deliver an estoppel certificate in a form reasonably requested by Purchaser’s lender or in the form attached to the Tenant’s Lease or in the form customarily delivered by such Tenant at closing. The Tenant’s April Estoppel Certificate (hereinafter defined) is outdated for an April 13 time is of the essence

closing because, among other things, it does not make any representation as to whether rent has been paid through April or whether any defaults exist under the lease as of April. Finally, having received a Tenant Estoppel Certificate (hereinafter defined) from the Tenant, Section 20 of the Contract did not afford Seller with the right to provide a Seller's Certificate at closing. Thus, the Purchaser's cross motion for summary judgment and return of the Downpayment (hereinafter defined) must be granted, the Complaint must be dismissed and the Seller's motion for summary judgment must be denied.

The Relevant Facts and Circumstances

Reference is made to a Contract of Sale (the **Contract**; NYSCEF Doc. No. 3), dated March 16, 2020, by and between the Seller and the Purchaser, pursuant to which the Seller agreed to sell, and the Purchaser agreed to purchase, 551-555 5th Avenue a/k/a 213-221 15th Street, Brooklyn, NY (the **Premises**) for \$19,750,000 subject to the terms set forth in the Contract. Pursuant to the terms and conditions of the Contract, the Purchaser paid a down payment (the **Downpayment**) of \$1,000,000 to be held in escrow pending the closing which was scheduled for April 13, 2020 with time being of the essence (*id.*, §§ 2.03[a], 3.01).

At the closing, pursuant to Section 10.01 of the Contract, the Seller was obligated to deliver to the Purchaser a tenant estoppel "in a form reasonably requested by Purchaser's lender or in the form attached to the Tenant's Lease or in the form customarily delivered by such Tenant." (*id.*, § 10.01[I]).

Section 20.01 of the Contract also addressed the Seller's closing obligation to deliver tenant estoppel certificates. Section 20.01 provides that the Seller would use "commercially reasonable efforts" to deliver estoppel certificates from all tenants in the "form attached to or provided for in the respective Lease or on the applicable Tenant's standard form" (*id.*, § 20.01). If the Seller was unable to obtain an estoppel certificate from the tenant (each, a **Tenant Estoppel Certificate**), the Seller was permitted to substitute any unsigned estoppel certificate for an estoppel certificate in the required form as executed by the Seller (*id.*; each, a **Seller's Certificate**). The Contract did not, however, provide that the Seller could deliver either (i) a Tenant Estoppel Certificate which was already received from a tenant or (ii) a Seller's Certificate. The Contract provides that the Seller could provide a Seller's Certificate only if the Seller did not obtain a Tenant Estoppel Certificate.

If the Purchaser defaulted in its obligations under the Contract, the Seller was entitled to retain the Downpayment and any interest thereon as liquidated damages (*id.*, § 13.06). If the Seller defaulted on any of its obligations under the Contract, the Purchaser was entitled to its sole and exclusive remedy of either the Downpayment or specific performance of the Seller's obligations (*id.*, § 13.07). The Contract provided that in no event would the Seller be obligated to pay Purchaser damages of any kind or nature (*id.*). If for any reason the closing did not occur, the parties could make a written demand upon the escrowee for payment and the escrowee could in good faith elect not to make such payment until otherwise directed by a final judgment of the court (*id.*, § 2.03[a]).

Pursuant to the Contract, the Seller did not represent or warrant that any particular lease would be in force or effect as of the closing or that the tenants would not be in default unless the Seller provided a Seller's Certificate pursuant to Section 20 of the Contract (*id.*, §§ 4.10, 20). In fact, Sections 10 and 20 of the Contract reflect that the bargain between the parties was such that the Purchaser was required to do its own due diligence and could rely on, among other things, the Tenant Estoppel Certificates or Seller's Certificates that the Seller was obligated to deliver. Stated differently, the delivery of the Tenant Estoppel Certificates as a closing delivery was a material obligation of the Seller because the Seller itself was not making any representations except if it chose to deliver a Seller's Certificate in accordance with the terms and conditions of the Contract.

In 2017, the Tenant had provided a Tenant's Estoppel Certificate (the **2017 Estoppel Certificate**; NYSCEF Doc. No. 32), dated November 20, 2017, where it represented that “[a]ll rents or other charges due *as of the date hereof* under the Lease have been paid” (*id.*, § 3 [emphasis added]). The Tenant also certified that it was not in default, had no knowledge of any event that with notice and/or the passage of time would constitute a default, and that there was “no charge, defense, lien, claim or offset against the Landlord” or against any rent due or to become due under the lease (*id.*, §§ 5, 8).

Before the Contract was executed, Teresa Lam, co-manager of the Purchaser, emailed Guy Morris, the manager of the Seller, a copy of the lender's model lessee estoppel certificate on March 6, 2020 (the **Lender's Estoppel Certificate**; NYSCEF Doc. No. 31). In Section 2 of the

Lender's Estoppel Certificate, the tenant was required to certify whether there was any default or existing claims, defenses or offsets against rent due (*id.*, § 2).

After receiving a Tenant Estoppel Certificate from the Tenant as of March, 2020 (the **March Estoppel Certificate**; NYSCEF Doc. Nos. 33, 34), on April 6, 2020, the Purchaser's attorney, Leon Luk, requested that the Seller revise the March Estoppel Certificate because the closing was scheduled to occur in April 2020 and address, among other things, April rent (NYSCEF Doc. No. 36). One day before the closing on April 12, 2020, the Seller's attorney, William Goldman, emailed Mr. Luk a Tenant Estoppel Certificate, dated April 7, 2020 (the **April Estoppel Certificate**; NYSCEF Doc. No. 37). The April Estoppel Certificate was however deficient because the Tenant only represented that all rent due under the Contract was paid through March 31, 2020 (*id.*, §§ 2, 6). Upon receipt, Mr. Luk emailed Mr. Goldman on April 12, 2020 to ask for an update on the Tenant's April 2020 rent (NYSCEF Doc. No. 38 at 3). Mr. Goldman responded the same day advising that the Tenant had not paid April rent and that it was the Purchaser who rejected the Tenant's request for a deferral of April rent (*id.*). On April 13, 2020, the Purchaser refused to accept the April Estoppel Certificate (NYSCEF Doc. No. 30, ¶ 23).

On April 13, 2020, the Seller emailed the Purchaser a Seller's Certificate, dated April 13, 2020 (the **April Seller's Certificate**; NYSCEF Doc. No. 26). In the April Seller's Certificate, the Seller represented that:

2. No Default. As of the date hereof and to the best of Lessor's knowledge, (a) there exists no breach of or default under the Lease, nor any condition, act or event which with the giving of notice or the passage of time, or both, would constitute such a

breach or default *other than Lessee's failure to pay rent due April 1, 2020*, and (b) there are no existing claims, defenses or offsets against rental due or to become due under the Lease *other than Lessee's requests for rent deferment due to COVID-19*.

(*id.*, § 2 [emphasis added]).

The Purchaser rejected the April Seller's Certificate and refused to close (NYSCEF Doc. No. 18, ¶ 17). On June 3, 2020, the Seller commenced this action alleging claims for: (i) breach of the Contract and (ii) a declaratory judgment that the Seller is entitled to the Downpayment (NYSCEF Doc. No. 2). In its Answer, the Purchaser asserted counterclaims for: (i) a declaratory judgment that the Purchaser is entitled to return of the Downpayment, (ii) breach of the covenant of good faith and fair dealing, (iii) a vendee's lien in the amount of the Downpayment, (iv) unjust enrichment, and (v) breach of the Contract (NYSCEF Doc. No. 13).

On August, 3, 2020, the Seller moved for summary judgment on its Complaint and to dismiss the Purchaser's counterclaims pursuant to CPLR §§ 3211 (a)(1) and (a)(7). In response, the Purchaser cross moved for partial summary judgment on its first, third, and fifth counterclaims.

Discussion

A. Seller's Motion for Summary Judgment and the Purchaser's Cross Motion for Summary Judgment

On a motion for summary judgment, the movant "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]),

citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

The Seller argues that it is entitled to summary judgment for breach of the Contract and return of the Downpayment because: (i) the Purchaser improperly refused the April Seller’s Certificate and its refusal to close was a default under the Contract, (ii) the April Seller’s Certificate was compatible with the Contract and there was no requirement that specific terms be included in the Tenant Estoppel Certificate, and (iii) the Purchaser’s proposed requirements for the Tenant Estoppel Certificate was inconsistent with the allocation of risk in the Contract. The Purchaser’s arguments fail.

A claim for breach of contract requires (1) the existence of a contract, (2) the plaintiff’s performance, (3) the defendant’s breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). When time is of the essence in a lease Contract, each party must tender performance on such date unless the time for performance is extended by mutual Contract (*Grace v Nappa*, 46 NY2d 560, 565 [1979]).

Pursuant to the Contract, the Seller’s delivery of a Tenant Estoppel Certificate was a material term of the closing (NYSCEF Doc. No. 3, § 10.01[1]; see *ReliaStar Life Ins. Co. v Home Depot U.S.A., Inc.*, 570 F3d 513, 519 [2d Cir 2009] [“general purpose of an estoppel certificate... is to assure one or both parties to an agreement that there are no facts known to one and not the other that might affect the desirability of entering into the agreement, and to prevent the assertion of

different facts at a later date”]). The Contract required the Seller to produce an estoppel certificate in one of three acceptable forms, including a “form reasonably requested by Purchaser’s lender or in the form attached to the Tenant’s Lease” (NYSCEF Doc. No. 3, § 10.01[I]). Both the Lender’s Estoppel Certificate and the 2017 Estoppel Certificate required that the tenant identify any default or any claims, defenses or offsets against rent due as of the date that the estoppel certificate was executed (*see* NYSCEF Doc. Nos. 31-32). The 2017 Estoppel Certificate also required that the tenant identify whether all rent had been paid as of the date of the estoppel certificate (NYSCEF Doc. No. 32). This was material because the Seller made no representations in the Contract as to whether the leases were in full force and effect. Stated differently, the bargain between the parties was that the Purchaser and its lender was to rely on the Tenant Estoppel Certificates to ensure that the rent under the leases was available. Without the lease in full force and effect and the rent being paid per the leases at closing and as previously indicated on the delivered rent roll, the Purchaser or its lender may not have been prepared to move forward with the transaction. *This* was not the bargained for Purchaser’s risk.

However, the April Estoppel Certificate merely stated that there was “no breach of or default by Lessee as Tenant under the Lease beyond the expiration of all applicable notice and cure periods,” and that rent was paid through **March 31, 2020** (NYSCEF Doc. No. 24). The April Estoppel Certificate was not produced in acceptable form because it omitted critical information that was required under the Contract; namely the status of rent paid, and any potential default and defenses as of the date that the estoppel certificate was executed. Under these circumstances, the Purchaser was not required to close as the Seller breached Section 10(I) and 20 of the Contract by failing to deliver a proper tenant estoppel certificate at closing. The

Purchaser is therefore entitled to the Downpayment upon the Seller's default and in accordance with Section 13.07 of the Contract (NYSCEF Doc. No. 3, § 13.07). As discussed above, delivery of the April Seller's Certificate did not comply with the Contract because the Contract only permitted delivery of a Seller's Certificate when the Seller was unable to obtain a Tenant Estoppel Certificate, not after it received one that it knew would not be acceptable (NYSCEF Doc. No. 3, § 20.01).

Accordingly, the Seller's motion for summary judgment is denied and the Purchaser's cross motion for partial summary judgment is granted regarding its first counterclaim for a declaratory judgment, third counterclaim for a vendee's lien, and fifth counterclaim for breach of contract.

B. Seller's Motion to Dismiss the Purchaser's Counterclaims

For the reasons set forth above, the branch of the Seller's motion to dismiss the Purchaser's first, third, and fifth counterclaim for recovery of the Downpayment is denied. However, the Purchaser's second counterclaim for breach of the covenant of good faith and fair dealing and the fourth counterclaim for unjust enrichment must be dismissed because, among other reasons, the Contract expressly prohibits the Purchaser's claim for "damages of any kind or nature" (NYSCEF Doc. No. 3, § 13.07).

Accordingly, it is

ORDERED that the branch of the plaintiff's motion for summary judgment is denied and its Complaint is dismissed; and it is further

ORDERED that the branch of the plaintiff's motion to dismiss is granted to the extent of the defendant's second counterclaim for breach of the covenant of good faith and fair dealing and the fourth counterclaim for unjust enrichment; and it is

ORDERED that the defendant's cross motion for partial summary judgment is granted; and it is further

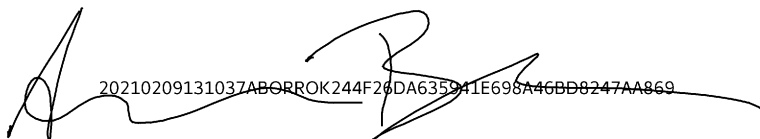
ADJUDGED and DECLARED that defendant LG Park Slope LLC is entitled to an immediate return of the Downpayment with all accrued interest thereon and the escrowee, Royal Abstract of New York LLC, shall release the Downpayment with all accrued interest from escrow and to LG Park Slope LLC; and it is further

ADJUDGED and DECLARED that LG Park Slope LLC has a valid and subsisting vendee's lien in the amount of the Downpayment with all accrued interest; and it is further

ORDERED that the portion of the defendant's counterclaim that seeks the recovery of reasonable attorney's fees and costs is severed and the issue of the amount of reasonable attorney's fees and costs that the defendant may recover against the plaintiff is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for the defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/suptctmanh).



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2/9/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

¹ Available on the Court’s website at www.nycourts.gov/suptctmanh under the “References” link on the navigation bar.