Victor RPM First, LLC v Charles Condominiums, LLC
2022 NY Slip Op 33053(U)
September 9, 2022
Supreme Court, New York County
Docket Number: Index No. 653265/2018
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET CHAN** **PART** **49M**

Justice

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VICTOR RPM FIRST, LLC

Plaintiff,

- v -

THE CHARLES CONDOMINIUMS, LLC,

Defendant.

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INDEX NO. 653265/2018

MOTION DATE 05/05/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

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

In this action[1] arising from the construction of a luxury residential condominium building in Manhattan, the Development agent – plaintiff Victor RPM First, LLC (Victor) – seeks to recover from the Owner – defendant The Charles Condominiums, LLC, (Charles) – the "Back-End Fee" totaling $1,811,000.00. In this motion sequence 5, defendant Charles moves for summary judgment on the remaining cause of action for breach of contract[2] or in the alternative, an order entitling Charles to repay certain investors before paying Victor the "Back-End Fee." Plaintiff Victor opposes the motion.

Background

Victor and Charles entered into an Amended and Restated Development Management Agreement (the Development Agreement) on January 17, 2013, for a construction project at 1355 First Avenue in Manhattan (the project). Charles claims that Victor breached the Development Agreement and raises two arguments in this motion. The first argument focuses on Victor's performance of the contract (NYSCEF # 82 – Defts' MOL at 9). The second argument concerns the Back-End Fee provision in the parties' Development Agreement (*id.* at 13). Victor, in opposition, proffers a different version of the Amended and Restated Development

[1] In a related case under Index 657040/2019, The Charles Condominiums, LLC brought an action against Victor RPM First, LLC seeking $20,000,000 in damages for construction defects that allegedly stemmed from Victor RPM First, LLC's mismanagement under the parties Amended and Restated Development Agreement (NYSCEF # 82 – Deft's MOL at 7).

[2] The second through eighth causes of action of the complaint were dismissed, leaving intact only the first cause of action for breach of contract (NYSCEF # 36 – tr at 2 and 25; #'s 37 and 55 – Orders of Hon. O. Peter Sherwood [ret.] dated April 19, 2019, and November 26, 2019, respectively).

Management Agreement [Development Agreement II], also dated January 17, 2013 (NYSCEF # 92 – Development Agreement II), which Victor refers to as the "fully executed Development Agreement"; this Decision and Order will refer to this just-submitted document as the "Development Agreement II." Victor claims that the Development Agreement II is the true Amended and Restated Development Management Agreement. The critical difference between the two documents speaks to Charles' Back-End Fee argument, addressed below.

Victor's Performance of Contract

Charles posits that the third Whereas Clause[3] and §§ 2, 3, and 5 of the Development Agreement mandates Victor to oversee the design, construction, and inspection of the project (*id.* at 8). Charles does not go over the specifics of any of the sections or preamble language that were allegedly breached. As evidence that Victor breached this part of the agreement, Charles submits the following statement from Victor's verified Amended Counterclaims in the related Charles damages action (see fn 1 *supra*): "Victor was not responsible for the quality of the design, construction or inspection of the Project" Charles characterizes this allegation in Victor's pleading as a judicial admission (*id.* at 10-13).

In response, Victor claims that Charles omitted the remainder of the paragraph from which Charles plucked that specific sentence, as well as omitting four related paragraphs. Victor argues that, given the omissions, Charles' argument is misleading and takes that one sentence out of context. Victor underscores the word 'quality' in the plucked sentence to point out that Victor was not responsible for the quality of the construction manager, architect, and engineers, all of whom Charles had retained.

On this point, Victor's argument is persuasive. While section 2 of the Development Agreement mandates Victor to "perform or cause to be performed, all of the work necessary to construct and build-out the Project . . . it also mandates Victor to "employ . . . a reputable licensed professional architecture firm and a reputable licensed professional engineering firm, both selected by Owner . . . ." There is no claim that these firms were not licensed, and there is nothing in Charles' motion that speaks to the quality of the work. Thus, Charles fails to make a prima facie showing on its claim of Victor's breach of the Development Agreement.

The Back-End Fee

Charles' second argument is that the Back-End payments to Victor comes

[3]The third WHEREAS clause states: "WHEREAS, the parties desire that Development Manager undertake and complete all tasks necessary to construct a luxury residential condominium . . . ." This clause continues with the size of the property (NYSCEF # 78 at 1).

after all the payments are made to the project, including to various investors, as outlined in section 10.2 of the Development Agreement (NYSCEF #'s 2, and 82 at 13). At issue are sections 10.1 and 10.2 of the Development Agreement, which provide, respectively, for the payment of two percent of the gross proceeds from the sale of each condominium unit and the Back-End Fee to Victor (NYSCEF # 39 – Amended Complaint – at 8-9; and ¶ 4). The Back-End Fee is based on calculated allocation of the "estimated cash that would be available for distribution as if [Victor] and [various distinct investors known as] the Bluerock Investors" (NYSCEF # 92 – Development Agreement – at 9). Section 10.2[b][i] of the Development Agreement provides that "the Back-End Fee as calculated above is a fee compensating Development Manager for its construction management services and other obligations set forth in this Agreement" (*id.* at 10).

> The Back-End Fee is not payable to Development Manager [Victor] unless and until (A) the Construction Loan has been paid in full, (B) all Unpaid Development Manager Base Fees and Unpaid Development Oversight Manager Base Fees (as defined in the Development Oversight Agreement) have been paid in full, (C) such payments would be in compliance with the terms of the Mazzanine Loan Documents, and (D) all Senior Payments have been made in full.

(*id.* at 11, § 10.2[b][i]). That section concludes with this statement: "Payment of the Back-End Fee is expressly junior and subordinated to payment of the foregoing items." (*id.*) Thus, Charles states that Victor is entitled to the Back-End Fee subject to (i) all the "Senior Payments"; (ii) Net Equity – defined as Victor Pref Equity and Owner Pref Equity; and (iii) all equity "'currently or hereafter invested' through the Preferred Classes A through F under the JV LLC Agreement" (NYSCEF # 82 – Deft's MOL at 4-5; # 92 at 9, §§ 10.2[a][i] to [a][v]).

In opposition, Victor presents, for the first time in this litigation, another Amended and Restated Development Agreement dated January 17, 2013. Victor claims that the initial Development Agreement was mistakenly filed with its complaint (NYSCEF # 2 - Amended and Restated Development Management Agreement; see also NYSCEF # 78 - same). At oral argument, Victor's current counsel asserts that Victor's prior counsel erred in filing the initial Development Agreement rather than the Development Agreement II (Tr. 8/23/22 at 16:6). Victor submits an affirmation of its President and principal owner, Moshe Shuster, and its Vice President and principal owner, Ran Korolik, to clarify that the Development Agreement II was the document that Shuster had negotiated. Shuster also points out the differences in § 10 between the two documents.

Specifically, in Development Agreement II, there are: (a) the omission of BR 1355 (Preferred Class "F") in the fully executed Development Agreement [II]; and (b) the addition of a $200,000 bonus which was to be added to the Back-End Fee."

The Preferred Class F relates to the "Bluerock Investors" (NYSCEF # 91 – Shuster aff – ¶ 7; # 93 – Korolik aff; # 92 at 10-11, § 10.2 (a)(v) and (vi)). Indeed, a comparison of the agreements show that the Development Agreement II contains subsection (vi) to § 10.2 (NYSCEF # 92 at 11) which the Development Agreement does not contain (NYSCEF # 78 at 11). Subsection (vi) states, in pertinent parts, that "in addition to . . . subsections (i) through (v) . . . the Back-End Fee payable to the Development Manager shall be increased by a one-time completion bonus . . . equal to $200,000 . . . ." (NYSCEF 92 at 11, § 10.2 (a)(vi)). This completion bonus is separate from the calculations in the preceding subsections dealing with investor payments or equity-based calculations (*id.*).

Charles' reply to Victor's asserted new "evidence" of the Development Agreement II points to the number of times that Victor had submitted and relied upon the initially filed Development Agreement without a hint of the existence of the Development Agreement II (NYSCEF # 97 at 1). Specifically, Victor filed the initial Development Agreement with (i) the summons and complaint on June 28, 2018, which complaint was verified by Ran Korolik; (ii) a motion by order to show cause for a preliminary injunction on July 9, 2018, which was supported by Korolik's sworn affidavit; (iii) an opposition, with Korolik's affidavit in support, to Charles' motion to dismiss the original complaint on September 21, 2018; (iv) an amended verified complaint on July 22, 2019; and (v) an opposition to Charles' motion to dismiss the amended complaint on September 6, 2019 (respectively, NYSCEF #'s 1, 16; 6-7; 25; 39-40; 49-50).

Charles characterizes Victor's use of this new Development Agreement II as a ploy to raise an issue of fact to defeat summary judgment (NYSCEF # 97 at 4). Citing *Garber v Stevens* (94 AD3d 426 [1st Dept 2012]), Charles argues that Victor's submission and reliance on the initial Development Agreement at all times prior to Victor's opposition in this motion constitutes a judicial admission (*id.* at 5-6). And based on the unambiguous Development Agreement, Charles concludes that its motion for summary judgment should be granted. Charles' argument is persuasive on this second argument.

A review of Victor's proffered Development Agreement II, which is supported by Shuster's affirmation and Karolik's affidavit, does not open the door to Victor's attempt to substitute the Development Agreement II as the "true" agreement (*see* NYSCEF # 78 at 17 to end of document; NYSCEF # 92 at 17 to end of document). Shuster's signature, on behalf of Victor, appears on both documents. Signatures on behalf of Charles appear only on the Development Agreement II (NYSCEF # 92 at the last page). No signature on behalf of Charles appears on the Development Agreement (NYSCEF # 78 at [presumed] 19). However, the blank signature page in the initially filed Development Agreement (NYSCEF # 78) shows tell-tale signs of whited-out signatures on the signature lines for Charles' signatories.

Victor's attempt to use the Development Agreement II to contradict its own document – the Development Agreement – that Victor filed in support of its verified complaint and amended verified complaint fails. At this point in this litigation, not only was the allegedly incorrect Development Agreement relied upon by Victor in prior motions, but it was also the document used in the decisions rendered for Victor's motion for preliminary junction and a temporary restraining order, and Charles' motions to dismiss the complaint and the amended complaint (NYSCEF #'s 32, 37, 55). Given Victor's late "discovery" of the "real" Agreement (both documents in Victor's control), and the dubious nature of the signature page, along with Victor's owners' affidavits, which are self-serving, little to no weight can be accorded to Victor's proffered Development Agreement II. Victor's attempt here is insufficient to raise an issue of fact as to which Agreement is the true document binding the parties (*accord, Santa v Capitol Specialy Ins., Ltd.*, 96 AD3d 638, 639 [1st Dept 2012]). Hence, the Development Agreement that Victor filed with its verified complaint, amended verified complaint, and in all the prior motions, which were supported with affidavits of Victor's principal, remains the one in use in this motion and action.

Finally, as to the payment of the back-end fees issue, Charles' alternate request for a declaration that payment of the back-end fees comes after the various payments are made, as outlined in section 10.2[b][i] of the Development Agreement, and quoted above in this decision on page 3, is granted. This determination does not speak to any substantive issues related to the Development Agreement as this motion is silent as to that.

Accordingly, it is

ORDERED that the branch of defendant The Charles Condominium, LLC's motion for summary judgment on the breach of contract cause of action is denied; and it is further

ORDERED that the branch of defendant The Charles Condominium, LLC's motion for summary judgment on the payment of the Back-end Fees to be subject to section 10.2[b][i] of the Amended and Restated Development Management Agreement that plaintiff filed throughout this litigation excluding the version filed in plaintiff's opposition in Motion Sequence 5.

9/9/2022
DATE

MARGARET A. CHAN, J.S.C.

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

653265/2018 VICTOR RPM FIRST, LLC vs. CHARLES CONDOMINIUMS, LLC
Motion No. 005