

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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MLVM WASHINGTON LLC,

DECISION AND ORDER

Plaintiff,

Index No. 103037/08

-against-

TERM-WASHINGTON STREET GARAGE CORP., GB
DEVELOPMENT GROUP LLC, and GERALD BRAUSER,

Defendants.

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JANE SOLOMON, J.:

On this motion for summary judgment by plaintiff, the court is required to determine whether plaintiff purchaser is correct that, as a matter of law, defendant sellers breached a complicated contract for the sale of real estate ("Contract", Exhibit A to the motion) .

BACKGROUND

The Contract is dated September 13, 2007 and involves the sale and conveyance of all title, rights, and interests in development property known as 111-121 Washington Street, New York, New York, along with the air and development rights appurtenant to 105-107 Washington Street, and other nearby lots called the Air Rights Parcels (collectively, the Property) by defendants Term-Washington Street Garage Corp. and GB Development Group LLC (Sellers) to plaintiff MLVM Washington LLC (MLVM).

(There are numerous capitalized defined terms in the Contract; the same are used herein as appropriate; e.g. September 13, 2007

is the "Effective Date").

MLVM deposited \$2 million in escrow upon execution, as required by paragraph 2(b)(i); it then made the Additional Down Payment of \$3 million required under paragraph 2(b)(ii) 30 days after the Effective Date.

The closing is provided for in paragraph 5, set forth in one paragraph of text covering more than one single-spaced page. It provides for a time of the essence Scheduled Closing Date 60 days after the Effective Date, subject to adjournment by MLVM to a First Adjourned Closing Date 60 days later, in which event the \$5 million deposit was to be released from escrow to Seller while MLVM was to deposit another \$2 million in escrow. Pursuant to this provision, when MLVM adjourned the Closing from November 13, 2007 to a First Adjourned Closing Date in January 2008, and the initial \$5 million deposit was released to Sellers, they and their principal, defendant Gerald Brauser, executed and delivered to MLVM their Guaranty. In the Guaranty, the guarantors became jointly and severally liable not only for the amount of the released funds with interest but also for all collection costs. Interestingly, and relevant to one of their contentions in defense of this lawsuit, paragraph 3 provides that they agreed that the Guaranty "shall inure to the benefit of, and may be enforced by, the Purchaser and any permitted assignee of Purchaser under the Contract."

MLVM was entitled to yet a Second Adjourned Closing Date upon the giving of notice and depositing an additional \$8 million. Notably, the provision covering Sellers' right to adjourn the closing is more limited; succinctly stated towards the end of paragraph 5, it may do so

. . .(i) in order to eliminate a title objection, (ii) in order to jointly seek to secure with Purchaser the Urban Plaza Approval or (iii) as otherwise specifically set forth herein, *but Seller shall not have the right to adjourn the Closing past March 31, 2008* (emphasis added).

As the date for the First Adjourned Closing approached, although no notice for a Second Adjourned Closing Date had been received from MLVM, on January 8, 2008, Sellers wrote to MLVM demanding an additional down payment of \$8 million, and notifying MLVM that if such down payment were not received, MLVM would be deemed in default of the Contract, and Sellers would retain the down payment already paid on the Contract in its entirety. In response, by letter of January 14, 2008, MLVM declared Sellers in default of the Contract due to their failure to demolish 102-104 Greenwich Street (one of the Air Rights Parcels), and for other reasons. Sellers replied on January 16 that it "would be futile for Seller to demolish the building . . . when [MLVM] cannot close . . ."

These exchanges concluded with the service by Sellers of a letter dated February 6, 2008 setting a time of the essence closing for February 28, 2008. The dispute then came to court on

February 27, 2008. The closing first was stayed and then, after a hearing and lengthy discussion about the then status of a variety of aspects of the transaction, enjoined on March 14, 2008, on the ground of Sellers then inability, as a matter of law, to close under the Contract by demonstrating that they had performed their obligations concerning 102-104 Greenwich Street, discussed more fully below.

March 31, 2008 passed without demolition of 102-104 Greenwich Street. By letter dated May 27, 2008, MLVM sent a Notice of Termination, and demanded the return of its down payment. Sellers responded the next day with their own Notice of Termination asserting that MLVM is responsible for any breach of the Contract.

In August 2008, MLVM amended its complaint to conform to the events which transpired after the preliminary injunction was granted. Its claims, and that of the defendants in their counterclaim, exceed those permitted by the "Default" provisions of paragraph 29 of the parties' Contract: Subsection (a) provides that, as damages to Sellers upon MLVM's default would be "difficult to ascertain," Sellers' "sole remedy" is to retain the Down Payment and additions thereto. Similarly, subsection (b) permits MLVM to be repaid the down payment or seek specific performance (on onerous terms not relevant here). To be sure, in each event, under paragraph 37(1), the successful, non-defaulting

party may recover all litigation and related expenses.

THE PLEADINGS AND THIS MOTION

The claims in the Verified Amended Complaint which are the subject of MLVM's motion for summary judgment are within the Contract: The first cause of action is for breach of contract against the Sellers for \$7 million and interest, based on the May 27 termination letter; the fifth, against the Sellers and Mr. Brauser, is based on the Guaranty, and is for \$5 million and interest; and the sixth cause of action against the Sellers and Mr. Brauser is for litigation expenses, etc. under both the Contract and the Guaranty. MLVM also seeks dismissal of the Sellers' counterclaim in which damages for MLVM's alleged breaches of the Contract are sought in an amount no less than "the price set forth in the Contract."

The counterclaim is rooted in Sellers' defenses and contentions that MLVM never actually intended to close, did not have the funds to do so and failed to succeed in its efforts to "flip" its interest in the Property, which Sellers assert violated the Contract. Sellers also maintain both that demolition of 102-104 Greenwich Street (1) would not have made the Additional Development Rights available for transfer to MLVM, but, rather, would have defeated that opportunity, and (2) was not a condition precedent to closing.

Particularly relevant to this motion is paragraph 33(a)

of the Contract. MLVM maintains that the plain language of this clause obligated the Sellers to demolish 102-104 Greenwich Street before a closing could be scheduled and, moreover, in light of the portion of paragraph 5 of the Contract emphasized above, the same had to be accomplished by March 31, 2008. Paragraph 33 (a) begins as follows:

Seller shall, at Seller's sole cost and expense, prior to Closing cause the building located at 102-104 Greenwich Street to be demolished in order to make the Additional Development Rights available for transfer to [MLVM]. The parties agree that the Additional Development Rights consist of (i) transferable development rights ("TDR's") which will be made available as the result of the demolition and reconstruction of the building at 102-104 Greenwich Street to a reduced height of two (2) stories and (ii) a strip of land . . .

BREACH OF CONTRACT - RETURN OF THE DOWN PAYMENT (FIRST CAUSE OF ACTION)

As indicated paragraph 33(a) provides that "Seller[s] shall ... cause the building located at 102-104 Greenwich Street to be demolished in order to make the Additional Development Rights available for transfer to [MLVM]" , and those rights "will be made available as a result of the demolition and reconstruction of the building ... to a reduced height of two (2) stories. Sellers admittedly failed do the demolition, and so, MLVM asserts that it thus has demonstrated, prima facie, that it is entitled to judgment. CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557

(1980); see also *Hartzell v Burdick*, 91 Misc 2d 758, 760 (City Ct., Albany, 1977) (“[a] breach of contract by one party relieves the other from obligations under it and renders the covenants unenforceable by the one who has breached it”); *DeCapua v Dine-a-Mate*, 292 AD2d 489 (4th Dept 2001) (“[t]he plaintiff was not entitled to enforce the restrictive covenant in the contract since he breached the contract first by failing to make royalty payments”).

Sellers make a number of unavailing arguments in order to avoid this result (see page 5, *supra*). Sellers point to a DOB pre-determination of April 8, 2008 that the plan to demolish 102-104 Greenwich Street and replace it with a two-story building would be in contravention of Zoning Resolution § 91-31, and would preclude use of the contemplated transfer of the Additional Development Rights. As a result, Sellers demolished only the interior of the property intending, they say, to preserve the purpose of the Contract.¹

However, while there is an indication that the parties’ agreed plan would not lead to the desired result, there is no indication in the DOB determination that the interior demolition would, as Sellers assert, actually result in transferable rights. As such, their claim that they accomplished the aim of the

¹Sellers admit that MLVM was informed of the demolition of the interior only after the work was completed. See Graziadei Affidavit, ¶ 16; Brauser Affidavit, ¶ 12.

Contract, even if they did not follow its letter, is not proof in evidentiary form establishing the existence of triable issues of fact. *Zuckerman*, 49 NY2d, at 562 (mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion). Moreover, given the extensively negotiated provisions of the Contract, even crediting the accuracy of this after-acquired information, the Sellers could not unilaterally apply their own interpretation without consent from MLVM. Accordingly, Sellers repeated assurances of readiness to transfer the Additional Development Rights and close are unpersuasive.

Sellers also argue that the demolition of 102-104 Greenwich Street as provided in the Contract is not a condition precedent to closing. As noted above, this argument failed once and is belied by the text of the parties' agreement. That their non-compliance allegedly is rooted in a good faith belief that the provision will not accomplish its stated purpose, is not relevant. If Sellers did not comply with the Contract, MLVM is entitled to cancel it, and have its deposit returned.

Finally, Sellers maintain that MLVM breached a confidentiality provision in paragraph 30 of the Contract by disclosing the terms and conditions without their permission. That paragraph provides;

... [MLVM] shall treat all information disclosed to or otherwise obtained by [MLVM] in connection with its

review of the Premises and the transaction in a confidential manner, and shall not disclose any such information to any third party except [that] ... such disclosure shall be permissible ... by either party to its ... lenders, financial advisors or any other advisor or consultant, provided that such parties are apprized of the foregoing restrictions and agree in writing to abide by them.

This provision permits MLVM to contact its potential lenders (see Nassi Affidavit) about financing, and such contacts cannot be considered a breach. Sellers' describe, without legal support, MLVM's alleged intention to "flip" the deal to another party as a breach of the covenant of good faith and fair dealing. "For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant *sought to prevent performance of the contract* or to withhold its benefits from the plaintiff." *Aventine Inv. Management, Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 (2nd Dept 1999) (emphasis added). Here, there is no evidence that MLVM did anything to impede Sellers' performance under the contract. Nor have the Sellers indicated, as in *Sorenson v Bridge Capital Corp.* (52 AD3d 265 [1st Dept 2008]), upon which they rely, that there was any right for MLVM to exercise discretion, and that such discretion was abused. In any event, this argument is entirely belied by the text of the Guaranty, which explicitly refers to a possible assignment of the Contract.

Sellers's allegations that MLVM was not financially

capable of closing is without gravitas. First, paragraph 9(b) itself states that "[t]his Contract has been entered into after full investigation, [and] neither party relying upon any statement or representation by the other unless embodied in this Contract" If MLVM did not have the funds to enter into the Contract, Sellers should have so ascertained prior to entering into the deal. Moreover, Sellers' currently articulated belief that MLVM misrepresented its financial position, was waived by the foregoing disclaimer. See *Simone v Homecheck Real Estate Servs.*, 42 AD3d 518, 521 (2nd Dept 2007) ("[w]here the contract specifically disclaims the existence of warranties or representations, a cause of action alleging breach of contract based on such a warranty or representation cannot be maintained"). Third, even if MLVM stated that it would have financial problems closing, the "[m]ere expression of difficulty in tendering the required performance ... is not tantamount to a renunciation of the contract." *Rachmani Corp. v 9 East 96th St. Apt. Corp.*, 211 AD2d 262, 267 (1st Dept 1995).

Finally, while there are numerous representations from the Sellers in the Contract, the only representation from MLVM is in paragraph 18, stating that it "has all the requisite power and legal authority to execute and deliver this Contract and to carry out its obligations hereunder and the transactions contemplated herein." There are no representations concerning financial

ability or any covenants regarding a transfer of the right to close the transaction.

In short, none of Sellers protestations defeat MLVM's claim that it properly terminated the Contract and is entitled to a return of the funds it deposited thereunder.

ENFORCEMENT OF THE GUARANTY (FIFTH CAUSE OF ACTION)

The Guaranty states that "[e]ach Guarantor hereby irrevocably, unconditionally and absolutely guarantees to [MLVM] the full and timely payment of the entire Contract Deposit, in each instance in which [MLVM] is entitled to the return of the Down Payment pursuant to the Contract, including, without limitation, as provided in Paragraph [29 (b)]."

As MLVM has been granted summary judgment on the first cause of action, which pertains to paragraph 29 (b) of the Contract, and as there has been no opposition with regard to the enforceability of the plain language of the Guaranty, summary judgment is granted on this claim.

ATTORNEYS' FEES, COSTS, AND EXPENSES (SIXTH CAUSE OF ACTION)

Paragraph 37 (1) of the Contract provides that in the event of any litigation, "the prevailing party shall be entitled to all costs and expenses of the litigation," and the Guaranty similarly provides that if MLVM is the "prevailing party in [the] litigation, Guarantor shall reimburse [MLVM] for all reasonable costs and expenses incurred in connection with the litigation,

including, without limitation, reasonable attorneys' fees and disbursements"

Given the plain language of the Contract and the Guaranty, summary judgment on the sixth cause of action for attorneys' fees, costs, and expenses is granted.

REMAINING CLAIMS

It is not clear what other recovery MLVM could realize on the remaining claims, and so, upon searching the record, they are dismissed. Accordingly, it hereby is

ORDERED that the motion of plaintiff, MLVM Washington LLC, for summary judgment in its favor is

a. granted with regard to the first, fifth, and sixth causes of action, for return of the down payment due to breach of contract, enforcement of the Guaranty made by the defendants, and attorneys' fees, costs, and expenses, respectively, and, as to the latter, a reference shall be held; and

b. Defendants' counterclaim is dismissed; and it further is

ORDERED that the second, third, fourth, seventh, and eighth causes of action are dismissed.

SETTLE ORDER AND JUDGMENT INCLUDING PROVISION FOR A REFERENCE ON THE SIXTH CAUSE OF ACTION.

DATED: December ,2009

ENTER,

/S/

J.S.C.