

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEMENT.

RICHARD J. LOWE III

PART 56

Justice

Index Number : 600110/2009

FISHER EAST RIVER ASSOCIATES LLC

VS.

SOLOW EAST RIVER DEVELOPMENT CO.

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO.

600110-09

MOTION DATE

MOTION SEQ. NO.

#001

MOTION CAL. NO.

ere read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED
Jul 21 2009
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

NYS SUPREME COURT RECEIVED
JUL 16 2009
IAS MOTION SUPPORT OFFICE

Dated:

7/14/09

RICHARD J. LOWE III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MDAT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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FISHER EAST RIVER ASSOCIATES LLC,

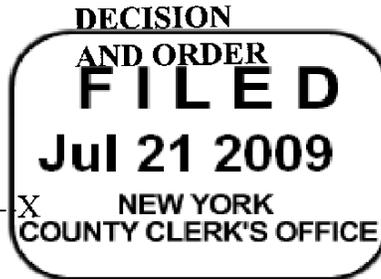
Plaintiff,

Index No. 600110/2009

- against -

SOLOW EAST RIVER DEVELOPMENT
COMPANY, LLC,

Defendant.



-----X
RICHARD B. LOWE III, J.:

Plaintiff Fisher East River Associates LLC (“Fisher”) moves, pursuant to CPLR § 3212(b), for summary judgment on its claims and for specific performance in the form of a court-ordered closing on a sale of membership interests in a limited liability company, or alternatively for money-damages, against Solow East River Development Company, LLC (“Solow”).

BACKGROUND

In November 2000, Fisher and Solow were among a group of bidders who purchased a 9-acre site along First Avenue (the “East River Site”), previously owned by Consolidated Edison Company of New York, Inc. (“Con Edison”). Fisher and Solow each possess membership interests in the East River Realty Company LLC (“East River”), which was formed to manage and redevelop the East River Site as a mixed-use community of residential and office towers with parks, shops and other recreational spaces.¹

¹ Solow alleges, citing to the East River LLC Agreement, that East River holds title to four parcels in Manhattan, known as 616 First Avenue, 685 First Avenue, 700 First Avenue, and 708 First Avenue.

The papers are unclear as to the parties original percentage ownership in East River, but over time Fisher decreased its interest to 15% and Solow increased its interest to 85%. Eventually, the parties negotiated a buy-out of Fisher's remaining interest. The parties executed a Purchase and Sale Agreement on January 4, 2007, pursuant to which Solow agreed to purchase Fisher's remaining 15% interest in East River for approximately \$230 million (Feb 24, 2009 Affirmation of Vasilias Tsismenakis ["Tsismenakis Aff"] Ex 1, "Purchase Agreement"). Pursuant to the Purchase Agreement, Solow made an initial deposit of \$35 million and the parties agreed to a closing date of June 29, 2007.

On June 29, 2007, Fisher and Solow entered into the Amendment to the Purchase and Sale Agreement (Tsismenakis Aff Ex 2, "First Amendment"). Pursuant to the First Amendment, the parties agreed to move the closing date to October 1, 2007, and Solow increased its deposit by \$50 million and agreed to pay 5% interest on the outstanding balance.

On October 2, 2007, Fisher and Solow entered into a letter agreement to further amend the Purchase Agreement (Tsismenakis Aff Ex 3, "Second Amendment"). Pursuant to the Second Amendment, the parties agreed to move the closing date to January 31, 2008, and Solow increased its deposit by \$10 million and agreed to pay 6.5% interest on the outstanding balance.

On January 31, 2008, Fisher and Solow entered into the Third Amendment to the Purchase and Sale Agreement (Tsismenakis Aff Ex 4, "Third Amendment"). Pursuant to the Third Amendment, the parties agreed to move the closing date to December 30, 2008, and Solow agreed to pay Fisher certain principal amounts under a specified payment schedule and interest of 9% interest on the outstanding balance between February 2008 through July 2008 and 12% interest on the outstanding balance between August 2008 through December 2008.

The Third Amendment expressly provides that the Purchase Agreement “may only be changed, amended, modified, or waived by an instrument in writing signed by Seller and Purchaser.”

In October 2008, the parties began negotiating a fourth amendment, in which Solow requested further delaying the closing. Solow alleges that as early as October 2008, Fisher communicated its willingness to postpone the December 30 closing (Affirmation of Chris Smith [“Smith Aff”] ¶ 3). According to Solow, in an email dated November 26, 2008, Fisher stated it was willing to postpone the closing “to 11/15/09” (Smith Aff Ex 1).

On the limited record before the Court, the next communication between the parties takes place almost a month later. On December 22, 2008, Solow emailed Fisher a proposed fourth amendment moving the closing date to November 15, 2009, increasing the deposit by \$2 million (causing over half of the approximately \$230 million to be paid), and agreeing to pay 12% interest on the outstanding balance during the 11 month period (Tsismenakis Aff Ex 5).

By email on December 23, 2008, Fisher rejected Solow’s proposed fourth amendment (Tsismenakis Aff Ex 6). As of this date, Sheldon Solow, managing member of the defendant, states that the parties had agreed on all of the terms of the extension, except that Solow had proposed an interest rate of 12% on the remaining balance, while Fisher proposed a 13% interest rate (Mar 13, 2009 Affidavit of Sheldon Solow [“Solow Aff”] ¶ 4).

On December 24, 2008 at 11:54 a.m., Fisher emailed Solow a counter-proposal for a fourth amendment moving the closing date to November 16, 2009, increasing the deposit by \$2 million, and increasing the interest of the outstanding balance to 15% (Tsismenakis Aff Ex 7). Additionally, Fisher requested that Sheldon Solow provide an additional guarantee of Solow’s

obligations under the Purchase Agreement (*id.*).

Also on December 24, 2008, Fisher delivered a Notice of Closing setting forth the time and location for the December 30 closing pursuant to the Third Amendment (Tsismenakis Aff Ex 8, the "Notice"). The Notice states that it was sent by hand and facsimile. The copy of the Notice sent by hand was delivered to Solow's counsel, who alleges that it was received at 4:30 p.m., after the 4:00 p.m. effective time for notices as provided in the Purchase Agreement (Ctrlm ¶ 9). Fisher admits that at 4:30 p.m. on December 24, 2008, it issued the Notice (Ctrlm Ans ¶ 9).²

According to Solow, the fax copy of the Notice was apparently sent at 2:35 p.m. on December 24, 2008, but was not received until Monday, December 29, 2008 (Solow Aff ¶ 6). Solow alleges that its offices closed at 2:00 p.m. on Christmas Eve for the long holiday weekend, and did not reopen until the following Monday (*id.*). For those reasons, Solow argues that the Notice was effective, at the earliest, as of December 26, just two business days before the December 30 closing date.

By letter dated December 29, 2008, Solow claimed that the parties "negotiated and reached agreement on all of the key terms of an amendment . . . to the agreement to postpone the Closing date to November 2009" and requested that Fisher "execute the Amendment as soon as possible" (Tsismenakis Aff Ex 9). Until such time, Solow stated that it "exercises its right to adjourn the Closing Date until March 31, 2009" (*id.*).

² The Purchase Agreement does not require that the Notice be delivered within a certain time period before the closing is held; rather section 20 of the Purchase Agreement provides for a time for receipt of notices in order to set the date by which the document becomes effective.

On December 30, 2008, Fisher informed Solow that there was no agreement to modify the closing date and rejected Solow's unilateral "adjournment" of the closing (Tsismenakis Aff Ex 10).

Fisher alleges that it was ready, willing, and able to close and appeared at the scheduled closing. Solow did not appear at the closing. By letter dated December 31, 2008, Fisher notified Solow of its failure to close as required by the Purchase Agreement and the Third Amendment (Tsismenakis Aff Ex 12). This letter also stated that Fisher remained ready, willing, and able to close, but gave notice to Solow that if the failure to close was not cured within the ten-day period provided for in the Purchase Agreement, Fisher may elect to exercise its rights and remedies, as set forth in the Purchase Agreement (*id.*). Section 12 of the Purchase Agreement states that in the event of default by Solow, Fisher may elect to terminate the agreement and retain the deposit and all interest accrued.

Solow failed to close by January 9, 2009, the last day of the ten-day cure period under the Purchase Agreement. On January 12, 2009, Fisher initiated the instant action. On February 4, 2009, Solow served Fisher its answer and counterclaims. Solow set forth seven affirmative defenses, including: failure to state a claim, equitable estoppel, unclean hands, frustration of performance by plaintiff, waiver, unconscionability, and intervening and superseding acts; and three counterclaims, including: breach of contract for rescission and restitution, breach of the implied covenant good faith and fair dealing, and breach of contract for damages.

On February 26, 2009, Fisher filed this motion seeking summary judgment on its breach of contract claims and an award of specific performance of the terms of the Purchase Agreement, or money damages in the alternative to specific performance.

DISCUSSION

In support of its motion, Fisher argues that Solow breached the terms of the Purchase Agreement and the Third Amendment by failing to close on December 30, 2008. Fisher concedes that the Purchase Agreement does not state that time is of the essence, but argues that a presumption of such applies to personal property transactions in which the parties agree on a closing date.

Solow argues that it maintained the right to adjourn the closing for a reasonable period of time because the agreement does not state that time is of the essence and the parties' conduct demonstrated that neither had an urgent need to close on the contract date. According to Solow, equitable principles apply to this matter because Fisher seeks specific performance and the transaction essentially deals with real property. Solow also argues that its affirmative defenses and counterclaims dictate denying Fisher's motion for summary judgment at this juncture.

The first argument, whether Solow maintained a right to unilaterally adjourn the closing for a reasonable period of time, turns on whether this matter is treated as an action at law or at equity. As the First Department stated in *GDJS Corp. v 917 Properties, Inc.* (99 AD2d 998, 998-999 [1st Dept 1984]):

In equity actions for specific performance, time is not of the essence unless it affirmatively appears that the parties required the time of performances as a material consideration. However, in an action at law to recover the down payment or for damages upon breach of an agreement, it is generally held that the time for performance stipulated in the contract is of the essence unless a contrary intent appears, either from the agreement or the conduct of the parties.

(Id.; see also Burgess Steel Prods. Corp. v Modern Telecommunications (205 AD2d 344, 346 [1st Dept 1994]; *Lusker v Tannen*, 90 AD2d 118, 124 [1st Dept 1982]).

In actions at equity, in which time is not of the essence, either party is entitled to a

reasonable adjournment of the closing date (*see ADC Orange v Coyote Acres*, 7 NY3d 484, 489 [2006]; *see also Lusker*, 90 AD2d at 125; *3M Holding Corp. v Wagner*, 166 AD2d 580 [2d Dept 1990]; *Grace v Nappa*, 46 NY2d 560, 564 [1979] [“Ordinarily, the law will allow the vendor and vendee a reasonable time to perform their respective obligations, regardless of whether they specify a particular date for the closing of title.”] [citations omitted]).

Claims for breach of commercial contracts, and purchase agreements for membership interests in limited liability companies, are generally treated as actions at law (*see Limited Liability Law* § 601; *Lusker*, 90 AD2d at 124). However, the first and main cause of action in this case is in equity seeking specific performance. Additionally, there is First Department precedent applying equitable principles in an action where plaintiff seeks specific performance on a breach of a commercial contract (*Lusker*, 90 AD2d at 124).

In *Lusker*, the plaintiff brought an action for specific performance following defendant’s breach of a purchase and sale agreement for all the issued and outstanding shares of a corporation whose sole asset was a single piece of real property. The agreement designated a date for performance but not that time is of the essence. Noting that the stock “had no value other than to reflect ownership of the premises,” the court found that “the sole purpose of the contract, which speaks of the sale in terms of a real estate transaction, even to the point of describing the property by metes and bounds, was to convey the corporation’s only asset -- the real property” (*id.* at 125). Accordingly, the court applied the “equitable rule that . . . time is not of the essence” (*id.* at 124).

Upon examining the “nature of the property, the situation of the parties and the circumstances surrounding the making of the agreement” (*Mercantile Nat’l Bank v Heinze*, 135

NYS 962, 969 [NY Sup Ct 1912]), it is clear that the transaction at issue is essentially a step in a real property transaction among the parties and the non-party Con Edison. Fisher and Solow created East River for the purpose of purchasing and developing the East River Site. Making all reasonable inferences in favor of the nonmovant (*Sosnoff v Carter*, 165 AD2d 486, 492 [1st Dept 1991]), apparently the parties maintained equal 50% membership interests in East River, whose sole asset is a single tract of real property (*see* Reply Memo at 12, n 3). The language in the Purchase Agreement stating that the transaction concerns “all of [Fisher’s] rights, title and interest, if any, in and to any asset or *property, either real or personal*, now or hereafter owned, leased, or otherwise held by the Company,” implicates the possible transfer of real property (Tsismenakis Aff Ex 1, Purchase Agreement § 1 [*emphasis added*]). Furthermore, while arguing that it never maintained any interest in the real property, Fisher acknowledges that it created a conditional security interest in favor of Con Edison with respect to the East River Site (*see* Fisher Memo at 19; Fisher’s Aff Ex 15).

On the limited record before the Court, the only distinguishing factor from *Lusker* is that the instant matter involves a minority interest-holder selling its interest to the majority interest-holder, while *Lusker* involved a transfer of all outstanding shares from one party to the other. The result of both transactions is for a single owner to emerge with 100% ownership of a closed corporation whose sole asset is a single tract of real property. Significantly, as in *Lusker*, the value of the membership interests “conveyed [has] no value other than to reflect ownership of the premises” (90 AD2d at 125). Therefore, the “equitable rule that . . . time is not of the essence” applies (*id.* at 124).

As an action at equity, Solow was entitled to adjourn the closing for a reasonable period

of time (*id.*). Determining whether or not Solow breached the agreement by requesting a 90-day adjournment, or by failing to close within the 10-day cure period, is a question of fact not properly resolved on this motion (*Sternlicht v Ferrara*, 35 AD3d 440 [2d Dept 2006]). “What constitutes a reasonable time depends on the facts and circumstances of the particular case” (*Sohayegh v Oberlander*, 155 AD2d 436 [2d Dept 1989], *citing Ballen v Potter*, 251 NY 224 [1929]; *Mazzafarro v Kings Park Butcher Shot*, 121 AD2d 434 [2d Dept 1986]), and such examination is left to a trier of fact. If treated as an action at equity, Solow raised an issue of fact compelling denial of this motion.

If this action were treated as one at law for damages, Solow has raised both an issue of fact and a *bona fide* defense (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Among the various affirmative defenses and counterclaims set forth in its answer, Solow alleges that Fisher waived its right to enforce strict compliance with the December 30, 2008 closing date. According to Solow, Fisher waived this right by failing to give notice of closing until two business days before December 30, 2008.

Fisher argues that the December 30 closing date was set by agreement in January 2008 and that it never waived its right to close on that date because the parties never reached an agreement on a fourth amendment. According to Fisher, the Third Amendment provided a clear and unambiguous closing date that could only be changed, amended, modified or waived by a written agreement.

“Waiver is the voluntary abandonment of a known right which, but for the waiver, would have been enforceable” (*Laguardia Assocs. v Holiday Hospitality Franchising, Inc.*, 92 F Supp 2d 119, 129-130 [ED NY 2000], *citing Nassau Trust Co. v Montrose Concrete Products Co.*, 56

NY2d 175, 184 [1982]). As the Court of Appeals recently stated:

Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. Such abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage. However, waiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection. Generally, the existence of an intent to forgo such a right is a question of fact.

(*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 104 [2006]

[internal citations and quotations omitted]).

In its answer, Solow sufficiently pleads that, by its conduct, Fisher waived its right to enforce strict compliance with the December 30 closing date (*see* Answer ¶¶ 68-70). Fisher consented to three adjournments, executing the amendments on or after the previously scheduled closing dates (*id.*). Fisher communicated in October and November 2008 its willingness to adjourn the closing to November 2009. In reliance on Fisher's willingness to postpone the closing, Solow alleges that it did not attempt to arrange financing in preparation for a December 30 closing (*id.*). Solow further alleges that Fisher knew that, with only two business days' advance notice, Solow would be unable to line up the financing necessary to make the substantial payment required at the closing (*id.*). It is reasonable to infer, on this CPLR § 3212 motion, that as the December 30 closing date approached Fisher was aware that Solow contemplated the parties executing a fourth amendment on or after the closing date, as had happened previously (*id.*). This inference is further justified by Fisher's failure to communicate an intent to go forward with the December 30 closing date until late in the afternoon on Christmas Eve, providing Solow with just two business days notice before the scheduled closing (*id.*). As such, Solow sufficiently alleges both an issue of fact as to whether Fisher's conduct implied that time was not of the essence (*GDJS Corp.* 99 AD2d at 998-999 [explaining that in an

action at law, time is of the essence “unless a contrary intent appears [from] . . . the conduct of the parties”), and a *bona fide* defense that Fisher’s conduct waived any presumption that time was of the essence.

Instead of rebutting Solow’s argument concerning waiver of the presumption, Fisher argues that it never entered into a signed writing waiving the December 30 closing date. Fisher’s argument tacitly concedes that without the right to enforce strict compliance, Solow would be entitled to a reasonable adjournment of the closing. Therefore, even if treated as an action at law in which a presumption of time is of the essence applies, Solow sufficiently pleads a possible waiver of the presumption.

The Court is bound to give Solow’s pleadings every reasonable inference (*Sosnoff*, 165 AD2d at 492), and the question of waiver relies heavily on a question of fact (*Fundamental Portfolio Advisors*, 7 NY3d at 104, citing *Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]). Determining whether there was a waiver is left for a trier of fact and not appropriately resolved on this motion for summary judgment (*compare Hidden Brook Air, Inc. v Thabet Aviation Int’l, Inc.*, 241 F Supp 2d 246, 270 [SD NY 2002], and *U S West Financial Services, Inc. v Marine Midland Realty Credit Corp.*, 810 F Supp 1393, 1406 [SD NY 1993] [finding issues of fact as to whether the party waived time of the essence clause], with *Sikander v Prana-BF Partners*, 22 AD3d 242, 243 [1st Dept 2005] [finding no question of fact as to whether party waived time of the essence clause when providing “extensions of the closing, while clearly reaffirming that time was of the essence”]).

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: July 14, 2009



ENTER:

[Handwritten Signature]
RICHARD B. LOWE III

J.S.C.