

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

PRESENTER C. E. Ramos

PART 53

Index Number : 603683/2006

RM REALTY HOLDINGS

vs

MOORE, PETER

Sequence Number : 002

REARGUMENT/RECONSIDERATION

NO. _____
IN DATE _____
IN SEQ. NO. _____
IN CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

~~is accompanied by a memorandum of decision and order.~~
is decided in accordance with
accompanying memorandum of decision and order.

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

FILED
JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/29/07


CHARLES E. RAMOS c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
RM REALTY HOLDINGS INC.,

Plaintiff,

Index No. 603683/06

-against-

PETER MOORE and 145 AMERICAS LLC,

Defendant.
-----X

Charles Edward Ramos, J.S.C.:

Plaintiff, RM Realty Holdings Corp. ("RM"), moves pursuant to 22 NYCRR § 600.14¹, seeking reargument of this Court's order, entered on March 8, 2007, dismissing plaintiff's Amended Complaint. Reargument is granted, the prior order of this Court is hereby vacated and the following decision and order in substituted in its place and stead.

Plaintiff seeks compensatory damages with respect to defendants' alleged breach of contract by its failure to obtain plaintiff's prior approval of a transfer of certain air rights, purportedly owned by plaintiff, and sold to a third party by defendants.

Background

On or about May 9, 2005, RM entered into a purchase agreement for the purchase of commercial Unit 8 from the sponsor of the Condominium (the "Condo"), defendant 145 Americas, LLC ("145 Americas"). Defendant, Peter Moore, is the managing member

¹Plaintiff mistakes this Court for the "Court of Appeals" citing as authority for this motion a reargument statute (22 NYCRR § 600.14) applicable only to New York's highest court. Here, the applicable statute is CPLR 2221(d)(2).

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of 145 Americas, and the commercial owner of the Unit 4D.

Unit 8 is located on the top floor of the Condo and has appurtenant to it a total of 3,225 square feet of roof space (also referred to as terrace area). In the May 9, 2005 Purchase Agreement, wherein plaintiff purchased the Condo, plaintiff also obtained the right to expand Unit 8 into such roof area. As a part of that transaction, plaintiff also entered into a Development Rights Agreement ("DRA") with 145 Americas, and Moore, wherein plaintiff was granted 2,000 square feet of air rights described only as "immediately adjacent" to the terrace, on the same level of Unit 8. The purpose of this was to allow the interior square footage of Unit 8 to be increased.

DRA ¶5 provides that plaintiff's authorization is required if other owners of air rights want to build in the area "immediately adjacent" to Unit 8. This is the provision plaintiff contends gives him the rights he seeks to vindicate in this action.

On November 8, 2005, defendants entered into a Zoning Lot Merger Purchase Agreement with non-party Bayrock/ZAR Spring LLC ("Bayrock") conferring air rights to build "Trump Soho," a hotel condominium. This action contends that plaintiff's approval was required for such sale (presumably because future construction is contemplated as merely a sale is not prohibited).

On March 8, 2007, plaintiff's Amended Complaint was dismissed as a matter of law because the DRA did not confer air rights over Bayrock's property.

Reargument

CPLR 2221(d) (2) provides that a motion for leave to reargue:

"shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

Plaintiff contends that the March 8, 2007 order was premised on a clear error of law regarding the definition of "limited common element" ("LCE") and the resulting use of the plaintiff's terrace. Although counsel for defendant appears to have misstated the definition of LCE at argument on the motion to dismiss (as opposed to its definition in the Declaration of Condominium), the order of March 8, 2007 was not premised upon this representation, and therefore, any error by counsel is harmless to the outcome of this action.

The Declaration of Condominium indeed defines LCE's as:

"common elements which are available for the use, for certain purposes, solely by owners of units to which such limited common elements are appurtenant and by the occupants of such units and invitees of such owner and occupants."

The Motion to Dismiss

The relevant sections of the DRA are as follows:

...the development air rights for the Building are appurtenant to Unit 4D.

...Sponsor [145 Americas LLC] and Moore hereby grant to RM 2,000 square feet of Development Rights (the "Air Rights") immediately adjacent to the terrace on the same level of Unit 8. ¶ 1.

It is understood that the grant of Air Rights...is for the purpose of allowing RM and its assignees to increase the interior square footage of Unit 8 and, if RM has not built within such Air Rights increasing the surface of Unit 8, the Air Rights will be assignable to third parties both within or without the area immediately adjacent Unit 8.

¶ 2.

RM authorization will be required in case other owners of air rights want to build in the area immediately adjacent to his [RM's] unit. ¶ 5.

At the outset, it should be noted that the complaint does not contend that any third party is building (or intends to build) immediately adjacent to Unit 8. This fact alone requires dismissal. Unit 8, as shown in the site plan, is surrounded by roof area. The only building activity that could violate plaintiff's rights would have to occur on the roof of the condo in order to be "immediately adjacent to his [RM's] unit."

According to the DRA, plaintiff has control of the air rights at the level of Unit 8. Others may encroach upon plaintiff's rights only with permission. However, plaintiff's contention that the language "2000 square feet of Development Rights immediately adjacent to the terrace on the same level of Unit 8" applies to the air rights over Bayrock's property is

absurd and contrary to the agreement as a matter of law.

Although plaintiff is correct that the definition of "adjacent" means "lying close or near to, but not necessarily touching," he fails to address that "immediately adjacent" would mean an area abutting the unit or, at least abutting the terrace. Moreover, as the DRA plainly states in ¶ 2:

"It is understood that the grant of Air Rights...is for the purpose of allowing RM and its assignees to increase the interior square footage of Unit 8..."

It is unfathomable that a fact finder could reasonably conclude that the agreement could allow plaintiff to expand Unit 8 in a manner that would infringe on the Bayrock property, which plans the construction of a building over 50 feet away from plaintiff's nearest portion of the terrace. In order to place Unit 8 "immediately adjacent" to the new construction planned by Trump, the plaintiff would have to extend the interior footage of Unit 8, 96 feet from its present location, over thin air (using air rights he does not claim to own) for 50 feet of that distance.

This action is so baseless in fact or law as to be frivolous.

Accordingly, it is

ORDERED that plaintiff's motion for leave to reargue hereby granted, and it is further

ORDERED that the defendants' motion to dismiss the complaint is granted with prejudice.

Dated: May 29, 2007


CHARLES E. RAMOS

J.S.C.

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JUN 14 2007
NEW YORK
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Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.