

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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ZL ELMHURST, LLC,

Plaintiff,

- v -

SUNSHINE ELMHURST REAL ESTATE LLC,

Defendant.

INDEX NO. 650163/2021

MOTION DATE 02/26/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 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, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents and for the reasons set forth hereinbelow, the instant motion, pursuant to CPLR 3212, by plaintiff, ZL Elmhurst, LLC, for summary judgment on its first cause of action, in its favor against defendant, Sunshine Elmhurst Real Estate LLC, is granted; the instant request, pursuant to CPLR 3212, by defendant, for summary judgment dismissing plaintiff's first cause of action, is denied; and the instant request, pursuant to CPLR 3212, by defendant, for summary judgment dismissing plaintiff's second cause of action, is denied, without prejudice, solely as moot, as plaintiff has withdrawn said cause of action (NYSCEF Doc. 76).

Background

The background facts, briefly stated, are as follows. On March 15, 2019 ("the Effective Date"), plaintiff, ZL Elmhurst, LLC, and defendant, Sunshine Elmhurst Real Estate LLC, entered into an agreement ("the Agreement," NYSCEF Doc. 10), pursuant to which plaintiff would purchase part of the land located at 45-20 83rd Street in Elmhurst, Queens ("the Land To Be Sold"), and defendant would retain the remainder of the land ("the Land To Be Retained") (the Land To Be Sold and the Land To Be Retained, collectively, "the Property"). The Agreement provided that defendant "intended" to rezone the Property with a "commercial overlay," which plaintiff claims is a condition precedent to its obligation to close on the Property. Additionally, the Agreement's Section 5.5.8 entitles plaintiff to terminate the Agreement and to receive reimbursement of its down payment, attorney's fees, and other expenses, essentially in the event that defendant fails to satisfy a condition precedent to closing on the Property. As here relevant, defendant has submitted a rezoning application ("the Rezoning Application") for the Property that does not propose a commercial overlay for either the Land To Be Sold or the Land To Be Retained. (NYSCEF Documents 1, 7, 10, 45, and 76.)

On January 8, 2021, plaintiff commenced the instant action, seeking a judgment (1) on its first cause of action, declaring that [a] plaintiff has the right, at its option, to terminate the Agreement on the ground that defendant breached the Agreement by failing to obtain the commercial overlay; [b] upon said termination, plaintiff has the right to recover \$2,238,279.75 (plaintiff's down payment, plus interest, plus legal fees and other costs); [c] the commercial overlay on the Land To Be Sold remains a condition precedent to closing, and, if defendant does not obtain said commercial overlay, plaintiff is entitled to reimbursement of its down payment, plus accrued interest, attorney's fees, and other costs; and, in the alternative, (2) on its second cause of action, declaring that if the Agreement remains in effect, then the purchase price thereon has reduced from \$24,869,775.00 to \$21,486,325.00, maximum; and (3) awarding plaintiff costs, disbursements, and attorney's fees arising out of the instant action (NYSCEF Doc. 1). On February 8, 2021, defendant answered with various admissions, denials, and three Affirmative Defenses (failure to state a claim; no breach of any contract; and ripeness) (NYSCEF Doc. 3).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on its first cause of action, for a declaration essentially that plaintiff may terminate the Agreement and receive reimbursement of its down payment, plus costs, disbursements, and attorney's fees (NYSCEF Doc. 6).

Defendant now cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's first and second causes of action (NYSCEF Doc. 43). Defendant asserts, inter alia, that the Agreement does not obligate defendant to obtain a rezoning that includes a commercial overlay extending to the Land To Be Sold (NYSCEF Doc. 48).

On April 21, 2021, plaintiff withdrew its second cause of action and consented to this Court's dismissing said cause of action, without prejudice to plaintiff's reasserting said cause of action should the parties proceed toward closing on the Property (NYSCEF Doc. 76, at 25).

Discussion

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993). Once the movant's initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment").

The Agreement's "Recitals D." states the following:

[Defendant] intends to seek a change in the zoning of the [Property] so that the applicable zoning will be residential **with a commercial overlay, such rezoning to affect both the [Land To Be Sold] and [the Land To Be Retained] (the "Rezoning of the Land")** which [defendant] will endeavor to effectuate within

the three and one-half year period running from the Effective Date (the “Rezoning Application Period”).

(Emphasis Added.”) (NYSCEF Doc. 10, at 4.).

Plaintiff has established that it is entitled to summary judgment on its first cause of action, as a condition precedent to plaintiff’s closing on the Property has not been met. Defendant has failed to fulfill its above-quoted obligation to “endeavor” to rezone the property “with a commercial overlay.” Defendant itself has demonstrated that it violated said obligation by acknowledging that on August 3, 2020, defendant filed a (since-modified) Rezoning Application (ULURP No. 210042 ZRQ) that proposed a commercial overlay for only the Land To Be Retained (NYSCEF Doc. 45). Indeed, on December 4, 2020, defendant amended the subject Rezoning Application, removing the proposal for a commercial overlay extending to the Land To Be Retained (NYSCEF Doc. 44, at 11).

This Court will not grant attorney’s fees to either party as neither party is at fault; pursuant to its discussions with the New York City Department of City Planning (“City Planning”), defendant could not rezone the Property so as to provide for a commercial overlay that extended to the Land To Be Sold (NYSCEF Doc. 48). Indeed, defendant intended to do so, and in situations such as the instant one, attorney’s fees should not be awarded against the party who was not at fault.

This Court has considered defendant’s other arguments and finds them to be unavailing and/or non-dispositive.

Therefore, this Court will (1), grant plaintiff’s instant 3212 motion for summary judgment on its first cause of action; (2) deny defendant’s instant CPLR 3212 request for summary judgment dismissing plaintiff’s first cause of action; and (3) deny, without prejudice, solely as moot, as plaintiff has withdrawn its second cause of action (NYSCEF Doc. 76), defendant’s instant CPLR 3212 request for summary judgment dismissing plaintiff’s second cause of action.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion, pursuant to CPLR 3212, by plaintiff, ZL Elmhurst, LLC, for summary judgment on its first cause of action, in its favor against defendant, Sunshine Elmhurst Real Estate LLC, is hereby granted; the instant request, pursuant to CPLR 3212, by defendant for summary judgment dismissing plaintiff’s first cause of action, is hereby denied; and the instant request, pursuant to CPLR 3212, by defendant for summary judgment, dismissing plaintiff’s second cause of action, is hereby denied, without prejudice, solely as moot, as plaintiff has withdrawn its second cause of action (NYSCEF Doc. 76, at 25).

Accordingly, the Clerk is hereby directed to enter judgment declaring that (1) the parties’ March 15, 2019 agreement (“the Agreement”) is hereby terminated because a condition precedent, a commercial zoning overlay, has not been met and cannot be met within the time that the Agreement provides; and (2) upon said termination, plaintiff has the right to recover

\$2,238,279.75 (the total amount of plaintiff's down payments), plus interest thereon from March 14, 2020 (the date of plaintiff's second down payment (CPLR 5001(b))).



7/9/2021
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE