INDEX NO. 604384/2016

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

MOTION DATE: 05/13/2016
ADJ. DATE: 08/31/2016
Mot. Seq. 001-MG

MOTION DATE: 05/13/2016
ADJ. DATE: 08/31/2016
Mot. Seq. 002-MD

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

CASEDISP
e-filed full participation

MATRIX INVESTMENT GROUP, LLC d/b/a THE MATRIX GROUP,

Plaintiffs

DECISION & ORDER

-against-

TWO TREES FARM DEVELOPMENT, LLC,

Defendants

TO:

GERARD MCCREIGHT, ESQ.
1201 ROUTE 112
PT JEFFERSON STA, NY 11776
631-406-4920

ESSEKS, HEFTER & ANGEL ESQS.
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Defendant for Summary Judgment dated April 22, 2016, (2) Notice of Cross Motion by Plaintiff dated July 22, 2016, and all e-filed documents numbered 1-36, it is:

ORDERED that the motion (Seq. #001) by Defendant for summary judgment is granted and the action is dismissed; and it is further

ORDERED that Plaintiff's motion (Seq. #002) by Plaintiff to amend its complaint to include a cause of action for unjust enrichment is denied.

DECISION

Plaintiff commenced this declaratory judgment pursuant to CPLR § 3001.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant moves for summary judgment based upon the following facts:

Defendant, Two Trees LLC Farm Development, LLC (Hereinafter "Two Trees"), and Plaintiff Matrix Investment Group, LLC (Hereinafter "Matrix") entered into a contract for the sale of two unimproved lots, known as 16 Two Trees Lane and 18 Two Trees Lane, Bridgehampton, on or about June 2, 2015. Matrix agreed to pay a total purchase price for the properties of $10 million. Matrix delivered the Defendant-seller a check for $1,000,000.00 representing the down payment required pursuant to the contract. The remaining $9 million purchase price was to be paid as follows: $4 million in cash at the closing, and $5 million pursuant to a purchase money mortgage and bond to be held by Two Trees.

Pursuant to Paragraphs 42(B)(9) and 43(F) of the Contract of Sale, the Note and Bond together were to be personally guaranteed by Matrix Chairman and Chief Executive Officer Glen Nelson up to and including $2.5 million. The closing was to take place on or about August 3, 2015 the law office for Two Trees' legal counsel. Matrix was represented in the negotiation of the contract of sale by its in-house counsel.

On July 24, 2015, counsel for Matrix requested a 30-day extension of the time to close. In exchange for this extension, Matrix agreed to the release to Two Trees from escrow the $1,000,000.00 down payment and agrred the down payment was non-refundable. In negotiating the extension, Two Trees initially asked that Matrix replace the $1,000,000.00 being released to it with additional funds to be held in escrow. Counsel for Matrix rejected this request, but in doing so acknowledged that Matrix was releasing a million dollars from escrow.

Two Trees agreed to extend the on or about date for 30 days in exchange for the release of the $1 million from escrow. On July 31, 2015, Matrix and Two Trees entered into a written First Amendment to Contract of Sale that memorialized this agreement and adjourned the closing date to "on or about September 4, 2015." As the September 4, 2015 closing date approached, Matrix requested another 30-day extension of time to close. Matrix agreed to pay Two Trees $20,000,000 in non-refundable consideration for this second extension. On or about September 4, 2015, Matrix and Two Trees entered into a written Second Amendment to Contract of Sale that further extended the closing date for an additional 30 days, to 10 a.m. on October 9, 2015, with "time being of the essence as to said date and time."

On or about September 16, 2015, Matrix and Two Trees again amended the Contract in a Third Amendment to Contract of Sale that added a view easement over and across other properties owned by Two Trees for the benefit of both lots that Matrix was purchasing and other lots owned by Two Trees. Approximately three days before the October 9, 2015 time of the essence closing, Matrix requested another extension of the time to close and, at 7:28 a.m. on October 9, 2015, with the "time is of the essence" closing scheduled for 10 a.m. that day as required by the Second Amendment, Matrix, by its counsel, emailed a request another 30-day extension of the time to close and offered to pay another $20,000 for the extension.

Two Trees declined to agree to yet another extension of the time to close and informed Matrix that Two Trees was ready, willing and able to proceed to closing that day and that Two Trees expected Matrix to close the transaction as scheduled.

Two Trees was ready, willing and able to close the transaction with Matrix at the agreed time, as set forth in the Second Amendment. Matrix did not appear at the closing on October 9, 2015. At approximately 2 p.m. on October 9, 2015, Two Trees, by counsel sent a letter by fax, with a copy by email and original by Federal Express, to counsel for Matrix declaring Matrix in default under the Contract, terminating the Contract and confirming that, in accordance with the First Amendment and the Second Amendment, the $1,000,000.00 down payment and the additional $20,000.00 payment had already been released to Two Trees, without recourse to Matrix in accordance with the prior written agreements.

The terminated Contract was thereafter revived through a written Reinstatement of Contract of Sale and Fourth Amendment to Contract of Sale" dated October 26, 2016. Pursuant to the Fourth Amendment, the October 9, 2015 termination letter was withdrawn and the Contract, including its First, Second and Third Amendments, was reinstated. A new closing date was set for February 29, 2016 at 10 a.m. at the law office for Two Trees counsel with "time being of the essence as to said date and time." In regard to the $1,000,000.00 down payment and $20,000.00 in additional funds that Matrix had paid Two Trees, the Fourth Amendment expressly stated:

The Seller and Purchaser acknowledge that the down payment of $1,000,000.00 plus the additional payment on account of the purchase price in the sum of $20,000.00 for a total sum of $1,020,000.00 (herein "Total Payment on Account of Purchase Price") had been released from escrow pursuant to the First Amendment to Contract of Sale and the Second Amendment to Contract of Sale. The Purchaser acknowledged that the total payment on account of the purchase price remained non-refundable to purchaser under any circumstances, including termination of the contract or default by the seller. However, in the event that the closing of title were to take place as set forth herein, the seller agreed to give the purchaser a credit against the balance due at closing in the amount of the total payment on account of purchase price.

The Fourth Amendment memorializing the negotiations between Two Trees and Matrix was finalized and Nelson signed the Fourth Amendment for Matrix as the Chairman/Chief Executive Officer of Matrix and Two Trees executed this agreement by its Manager-Member.

Then, on or about December 3, 2015 Matrix and Two Trees amended the reinstated Contract. The written "Fifth Amendment to Contract of Sale" did not amend the closing date, which remained 10 a.m. on February 29, 2016. The Fifth Amendment terminated a right of first refusal otherwise available to Matrix under the Contract in regard to another lot that was for sale by Two Trees. Matrix Chairman and Chief Executive Officer Glen Nelson unfortunately passed away on December 20, 2015.

On February 23, 2016, Two Trees inquired whether Matrix intended to close the following week, as the Fourth Amendment required. Counsel for Two Trees eventually responded by email that he was "meeting with executors" and would get back to Two Trees' counsel before the end of the day. Counsel for Matrix left a voice-mail for Seller's attorney in which he stated that he would be sending a letter expressing the impossibility of performance of the contract due to Nelson's death and demanding return of the down payment.

Matrix argued that impossibility was a defense to proceeding with the closing was based on the provisions of the Contract (Paragraphs 42(B)(9) and 43(F)) pursuant to which Nelson was to personally guarantee to Two Trees the mortgage to be given at closing. Two Trees, by counsel, responded the same day and rejected the purported termination and demand for the return of the down payment and advised Matrix that Two Trees was waiving the requirements in Paragraphs 42 and 43 of the Contract that Nelson provide a personal guarantee on the Mortgage.

Two Trees advised Matrix that it remained ready to provide at closing any further documentation it might require to document Two Trees' waiver of Mr. Nelson's personal liability and confirmed the closing for February 29, 2016 at 10 a.m., the "time is of the essence" closing date required by the Fourth Amendment to the contract, and informed Matrix that Two Trees was ready, willing and able to convey title to the Properties in accordance with the Contract and with the waiver of Nelson's personal liability.

On the scheduled closing date and time of February 29, 2016 at 10 a.m., Two Trees stood ready, willing and able to close the transaction on behalf of Two Trees. Matrix did not appear at the closing. On February 29, 2016, after it was apparent that Matrix would not be attending the closing, Two Trees sent a letter by email, fax and Federal Express declaring Matrix in default under the Contract, terminating the Contract and confirming that, in accordance with the First Amendment and the Second Amendment as confirmed by the Fourth and Fifth Amendments, the $1,000,000.00 down payment and the additional $20,000.00 payment had already been released to Two Trees, without recourse to Matrix.

The foregoing facts support Defendant's motion for summary judgment. Plaintiff does not contest these facts, but cross moves to amend the complaint to include a claim for unjust enrichment.

CROSS MOTION TO AMEND PLEADINGS

Plaintiff contends that the release of the down payment, as had already been effected in accordance with the contract as amended by the parties, constituted an unjust enrichment of the

Defendant. Plaintiff cross moves to amend its complaint to add a cause of action for unjust enrichment. "Applications for leave to amend pleadings should be freely granted except when the delay in seeking leave would directly cause undue prejudice or surprise the opposing party, or when the proposed amendment is palpably insufficient or patently devoid of merit (CPLR 3025[b])." *Joon Mgt. One Corp. v Town of Ramapo, 142 A.D.3d 587 (2nd Dept. 2016).*

It is routine for loss of the down payment to constitute liquidated damages that protects both parties to a contract from the uncertainty and difficult measurement of actual damages that attends a breach of contract for the sale of real property. *See J. D'Addario & Co., Inc. v Embassy Indus., Inc., 20 N.Y.3d 113 (2012) and see Ittleson v. Barnett, 304 A.D.2d 526 (2nd Dept. 2003), denying motion to amend the pleadings to allege unjust enrichment arising out of the loss of a ten percent down payment upon a breach of contract for the sale of real property.)*

There is no merit to the Plaintiff's proposed amendment to the pleadings. The contract between the Plaintiff a Limited Liability Company did not include any contingencies with respect to the death of any of the members of either the Plaintiff or the Defendant. Plaintiff argues that its CEO was a key man to its operations. This may well be true, but the Plaintiff did not bargain for the Defendant to be the insurer of the risks that might attend his death. Accordingly, the cross motion to amend the pleadings is denied, and the Defendant's motion for summary judgment is granted.

The foregoing shall constitute the decision and order of the court.

Dated: September 20, 2016

JOHN H. ROUSE, Acting J.S.C.

FINAL DISPOSITION