2014 NY Slip Op 51349(U)

**HARMIT REALTIES LLC, Plaintiff,**

**v.**

**835 AVENUE OF THE AMERICAS, L.P.; CARLISLE 839 LLC; 835 6TH AVE MASTER LP; 835 6TH AVE PARKING L.P.; EQR-BEATRICE A, LLC; BEATRICE B, LLC; BEATRICE C, LLC; BEATRICE D, LLC; BEATRICE E, LLC; BEATRICE F, LLC; BEATRICE G, LLC; BEATRICE H, LLC; BEATRICE I, LLC; and "XYZ CORPS 1-5," THE LAST FIVE NAMES BEING FICTITIOUS and UNKNOWN TO THE PLAINTIFF, THE PARTIES INTENDED BEING ENTITIES, IF ANY, TO WHICH, DEFENDANTS HAVE ASSIGNED, GRANTED, OR IN ANY OTHER WAY TRANSFERRED THEIR INTERESTS AT ISSUE, Defendants.**

651931/2013.

**Supreme Court, New York County.**

Decided September 3, 2014.

Todd E. Soloway, Esq., Pryor Cashman, LLP, for plaintiff.

Jed I. Bergman, Esq., Kasowitz, Benson, Torres & Friedman LLP, for defendants.

CHARLES E. RAMOS, J.

In motion sequence 003, defendants, a group of real estate developers and owners, move to dismiss the amended complaint pursuant to CPLR 3211 [a] [1] and [7] on the grounds that plaintiffs claims are time barred, not supported by factual allegations, do not seek redress for any cognizable harm, and do not warrant equitable relief.

## Backgroun d

This is an action brought by **Harmit** Realties LLC **(Harmit)** against 835 Avenue of the Americas, L.P., Carlisle 839 LLC, 835 6th Ave Master LP, 835 6th Ave Parking L.P., EQR-Beatrice A, LLC, Beatrice B, LLC, Beatrice C, LLC, Beatrice D, LLC, Beatrice E, LLC, Beatrice F, LLC, Beatrice G, LLC, Beatrice H, LLC, and Beatrice I, LLC (collectively, the defendants),Il

**Harmit** and defendants own adjacent properties on West 30th Street and Sixth Avenue in Manhattan, New York. **Harmit** owns 114-120 West 30th Street, New York, New York (Owner Parcel) and defendants own 835-861 Avenue of Americas, New York, New York (Developer Parcel).

In seeking to build a mixed-use hotel and residential building, the defendants purchased from **Harmit** certain air rights (Excess Development Rights) for $9 million dollars. The transaction was finalized on June 4, 2007 and made pursuant to a purchase and sale agreement (Purchase Agreement) and a zoning lot development agreement (ZLDA).

Defendants, as part of the transaction, submitted to the New York City Department of Buildings (DOB) a survey of the amount of square footage that was transferred from the Owner Parcel to the Developer Parcel (the survey). In 2012, **Harmit** learned that said survey allegedly incorrectly stated the amount of square footage transferred by **Harmit** under the agreement because the survey failed to include the existence of a mezzanine level on the Owner Parcel.

The agreements provided that the defendants were only purchasing Excess Development Rights and excluded **Hermit's** improvements on the Owner Parcel, which allegedly included the mezzanine level and all other parts of the Owner Building (Utilized Development Rights). However, in none of the agreements do these sophisticated parties specifically state how much square footage or any measurement of what was purchased. The parties also did not include any language in the contract regarding the mezzanine level.

**Harmit** accuses the defendants of wrongfully transferring to themselves development rights, resulting in defendants overbuilding their building and encroaching on **Hermit's** development rights.

In this action **Harmit** is (a) seeking a declaration that it did not in fact transfer Utilized Development Rights in excess of the amount of square footage permissible under the agreements between the parties; (b) claiming breach of contract arising out of defendants' violation of the agreements; (c) seeking specific performance of defendants' contractual obligation to purchase and develop only **Hermit's** Excess Development Rights and to submit any and all applications to the relevant government agencies to correct their wrongful conduct; (d) claiming trespass for defendants' current and continuing encroachment and improper entry onto the Owner Building; (e) seeking a mandatory injunction requiring that defendants cure the overbuilt Developer Building; and, (f) claiming breach of the implied covenant of good faith and fair dealing for depriving **Harmit** of the benefit of the agreements.

## Discussion

## Statute of Limitations

Defendants move to dismiss the action on the ground that the causes of action sound in conversion and are time barred, because the statute of limitations for a conversion claim is three years which allegedly began to run from 2007.

The allegations are that the defendants misappropriated and used **Hermit's** air rights in connection with the Owner Parcel. It is undisputed between the parties that air rights fall within the definition of real property. Air rights have been recognized as an inherent attribute of ownership of land (See *Macmillan, Inc. v CF Lex* Assocs, 56 NY2d 386, 393 [1982]; Also see *Real property, definition of (air rights)—Real Property Tax Law, §§ 102(12), 564,* WL 142022, Op Counsel SBEA No 110 [NYBD Equal & Ass 1986] [Concluding that air rights may not be separately assessed from real property for purposes of taxation]).

**Harmit** contends that under New York law there exists no cause of action for the conversion of real property. This Court agrees since "an action sounding in conversion does not lie where the property involved is real property (See *Benn v Benn,* 82 AD3d 548, 550 [1st Dept 2011]).

Defendants cite to *Spom v MCA Records, Inc.* (58 NY2d 482, 488 [19831), for the proposition that "if the plaintiff seeks to recover for amounts to the destruction or taking of the property, then the action is properly deemed one for conversion." That case concerned the unauthorized commercial exploitation of a master phonograph record which is not real property, and is inapplicable to this matter.

Defendants also rely on the case of *Goulian v Gramercy 29 Apartments, Inc.* (199 AD2d 98 [1st Dept 19931), which cites *Spom* (58 NY2d at 488). The court in *Goulian* found that plaintiffs complaint alleging appropriation of the right to build on their roof space does not state a cause of action for trespass. The conversion claim was barred by the statute of limitations but the court did not conduct an analysis as to why the claim for trespass fails and the claim for conversion upheld. In the instant matter the complaint does not specifically state a cause of action for conversion and as such *Goulian* does not apply.

The claims are timely because the three-year statute of limitations is inapplicable since the claims do not sound in conversion. Further, the claims do not fail on other statute of limitations grounds.

## 3211 (a)(7)

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action" (CPLR 3211[a][7]). On a motion to dismiss for failure to state a claim, "the court is concerned with whether the pleading states a cause of action rather than the ultimate determination of the facts" *(Stukuls v State,* 42 NY2d 272, 275 [19771). Such motion will not be granted, unless the moving papers conclusively establish that no cause of action exists *(Ming v Hoi,* 163 AD2d 268 [1st Dept 1990]).

The court should construe the pleadings in a liberal fashion by accepting the facts alleged in the complaint and interpreting them in a light most favorable to the plaintiff *(Leon v Martinez,* 84 NY2d 83, 87 [19941). Statements in a pleading shall be sufficiently particular to give the court and parties notice of transactions, occurrences or series of transactions or occurrences, intended to be proved and the material elements of each cause of action (CPLR 3013).

Defendants contend that **Harmit's** breach of contract claims fail as a matter of law based on three reasons: 1) **Harmit's** assertions of breach are conclusory and not supported by allegations of fact; 2) the amended complaint fails to allege the existence of any damages suffered by **Harmit** as a result of Defendants alleged breach; and, 3) damages would be barred by the explicit contractual waiver of consequential damages.

**Harmit** states two causes of action for breach of contract, the first claiming damages and the second seeking specific performance (See Am. Compl. Second Cause of Action **TT** 69-81 and Third Cause of Action **TT** 82-88). For a breach of contract claim, a plaintiff must allege: 1) the existence of a contract, 2) plaintiffs performance of the contract, 3) defendants breach of the contract, and 4) resulting damages *(Harris v Seward Park Housing Corp.,* 79 AD3d 425 [1st Dept 2010]).

**Harmit** alleges the existence of a contract between the parties through the relevant contractual provisions of the Purchase Agreement and ZLDA, which allegedly establish that the parties agreed that there would not be a transfer of **Harmit's** Utilized Development Rights as part of the transaction (See Am. Compl. **VI** 43-50).

It is alleged that the defendants transferred to themselves **Harmit's** Utilized Development Rights by filing a survey with the DOB which allegedly incorrectly indicated the amount of developable square footage, and then constructing the overbuilt Developer Building *(id.* **TT** 74-79). What is not alleged or explained is how the grantee defendants transferred to themselves rights or property they did not own. In the plaintiffs memo of law, counsel states:

> "By the express terms of the contracts, at closing **Harmit** did not transfer and defendants did not acquire any development rights that **Harmit** was already using, including all of the space located in the Owner Building ..."

It is alleged in conclusory fashion that **Harmit** has been damaged in an amount not less than $500,000 and that defendants should specifically perform on their contractual obligation to purchase and develop only the Excess Development Rights, and to submit applications to the DOB which do not incorporate the Utilized Development Rights, and do any and all things necessary to cure the breach *(id.* **TT** 81, 88).

Relying on *Gordon v Dino De Laurentiis Corp,* 141 AD2d 435 (1st Dept 1988)(breach of contract claim was dismissed due to boilerplate allegations of damage and failure to articulate causation in the complaint), defendants argue that **Harmit** states conclusory damages without any specific allegations as to how **Harmit** was harmed.

Defendants also contend that **Harmit's** alleged damages are barred by the explicit contractual waiver of consequential damages under ZLDA since any indirect damages such as damages from an inability to sell, refinance, or further develop its property are barred by §16 of ZLDA.

Consequential damages are not ordinarily recoverable in cases arising from the breach of a real estate purchase contract *(Alikes v Griffith,* 956 NYS2d 354 [4th Dept 2012]). Courts have found it improper for a vendor seeking compensation paid to a third person for negotiating the sale where an executory contract for the sale of real property has been terminated by the vendor due to a breach by the purchaser *(Le v 315 West Sevent -Ninth Street Cor oration* 225 NYS 218 [1st Dept 1927]. Other examples of unrecoverable consequential damages are property taxes, interest on contract price and broker's commissions *(Tator v Salem,* 439 NYS2d 497 [3d Dept 1981]). Further, interest on a mortgage, sums paid attorneys for abstracts and services, and the vendor's traveling expenses in connection with the transaction are improper elements of damages for breach of contract claims to sell realty on which the purchaser was to give a mortgage with interest as part of the purchase price *(Ackley v Parsons* 181 NYS 116 [3d Dept 1920]).

**Harmit** has failed to specifically plead whether the alleged $500,000 in damages are direct damages for defendants' failure to compensate **Harmit** for the alleged taking of additional development rights or for any other alleged consequence. Further, there are no allegations to the effect that defendants actions caused injury to **Harmit.**

Based on the documentary evidence, the breach of contract and declaratory judgment causes of action should be dismissed. The parties agreed that **Harmit** would only sell and defendants would only acquire **Harmit's** Excess Development Rights and did not acquire **Harmit's** Utilized Development Rights (Am. Compl. at ¶72). It is alleged that defendants transferred to themselves **Harmit's** Utilized Development Rights by filing a Survey with the DOB which failed to include a mezzanine level in the Owner Building *(id.* at ¶74-75), notwithstanding that **Harmit** fails to point to anywhere in the parties' agreements where said mezzanine level was specifically stated to be excluded from the transfer. Moreover, in none of the agreements do the parties define said mezzanine level and do not assign the Utilized Development Rights or any rights for that matter a set numerical measurement.

In addition, the Survey may account for the mezzanine level since there is a "penthouse" level in addition to the six floors of the Owner Building (See Aff. Drucker, Exhibit 7, The Survey). The Survey also does apparently coincide with Certificate of Occupancy (COP), in that the COP also indicates 6 levels attached to the Owner Building (See Aff, Drucker, Exhibit 3, COP). However, the Court needs the benefit of discovery and possibly expert testimony to reach factual findings regarding these stated issues. As such, only the claim for breach of contract to compel the filing of an accurate survey should not be dismissed.

Defendants further argue that **Harmit's** trespass claim fails as a matter of law since it is duplicative to the claims for breach of contract in that the essence of the trespass claim is based on the same asserted taking of Utilized Development Rights, overbuilding of the Developer Building, and claimed damages as those alleged in the breach of contract claim (citing *Wildenstein v 5H* & Co, *Inc.,* 97 AD3d 488, 492 [1st Dept 2012]).

**Harmit** argues in opposition that the trespass claim is not duplicative of the breach of contract causes of action since "a tort claim is not duplicative of a contract claim if it arises out of the violation of a legal duty that springs from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the

contract" (*Community Counseling Mediation & Servs. v Chera,* 78 AD3d 554 [1st Dept 2010] [Court found that plaintiffs allegations that it consented to defendant installing wastewater pipes through areas of the space plaintiff leases, and that defendant agreed to be responsible for damage and/or liability that arose from work performed in the rear of the plaintiffs leasehold, are sufficient to show a contract that, if upheld, would create a duty beyond that owed to a property owner]).

**Harmit** has not specifically alleged facts to satisfy a prima facie showing for a trespass cause of action but has merely only listed the elements in a conclusory fashion (Am. Comp. ¶89-93). Further it has not alleged a duty outside of the parties' agreements that is owed to it by defendants to satisfy *Community Counseling Mediation & Servs* (See *id.).* **Harmit** merely alleges that there is a duty between the parties as generated from and imposed by New York City's zoning regulations but fails to cite to any authority and the stated regulation for such proposition.

Defendants also argue that the equitable remedies **Harmit** seeks are not available as a matter of law despite the parties agreeing in ZLDA that "in the event of any breach or threatened breach of this Agreement by any party hereto, the non-defaulting party shall have the right to any remedy available at law or in equity, including but not limited to injunctive relief and specific performance, excluding, however, consequential damages" (ZLDA, § 16, annexed as Exh. C in defendants' Notice of Motion).

In the complaint, **Harmit** seeks two equitable remedies: specific performance and a permanent mandatory injunction in its fifth cause of action.

"Specific performance has been imposed as the remedy for breach of contracts for the sale of real property" and is granted when there is a lack of an adequate remedy at law and where the imposition of the remedy must not itself work an inequity and be an undue hardship (*Van Wagner Advertising Corp. v S & M Enterprises,* 67 NY2d 186, 192-195 [19861). **Harmit** alleges that in accordance with ZLDA, defendants should, among other things, specifically perform on their contractual obligation to submit any and all applications to the DOB which do not incorporate **Harmit's** Utilized Development Rights (Amend. Comp. ¶ 88). This claim shall stand. **Harmit** may be able to establish that its rights to further development of the site of the Owner Building has been negatively impacted by the alleged error in the survey.

However, to be entitled to a permanent injunction, plaintiff is required to establish irreparable harm and an absence of an adequate legal remedy (*McDermott v City of Albany,* 309 AD2d 1004, 1005 [3d Dept 2003]). "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient" (*L & M Franklyn Avenue, LLC v S. Land Development, LLC,* 98 AD3d 721, 722 [2d Dept 2012][internal quotation marks omitted]). An injunction is a drastic remedy granted only in a clear case, reasonably free from doubt (*Standard Realty Associates, Inc. v Chelsea Gardens Corp.,* 105 AD3d 510 [1st Dept 2013][internal quotation marks omitted]).

In its fifth cause of action for a permanent mandatory injunction, **Harmit** alleges the defendants built upon its Utilized Development Rights and wrongfully transferred to themselves rights for use in the development of the Owner Building that belong to **Harmit** causing the Developer Building to be overbuilt, and that defendants failed to reflect in the survey that the Owner Building contained a mezzanine level (Amend. Comp. TT 9,97). **Harmit** states it will suffer permanent irreparable injury to the Owner Parcel and Building with no adequate remedy at law if the defendants do not cure their overbuilt building *(id. at* TT 96,97).

There are insufficient allegations in the complaint to sustain such a drastic claim for injunctive relief. If the acts of the defendants can be shown to have caused a loss of use of **Harmit's** Utilized Development Rights and if in such a case monetary damages are insufficient (See *L & M Franklyn Avenue, LLC,* at 722), the remedy is to require a new survey. **Harmit** cannot compel the defendants to modify its building. That power vests with the DOB.

Finally, in its sixth cause of action, **Harmit** alleges that by filing the survey and overbuilding the developer building, defendants breached the implied covenant of good faith and fair dealing and undermined the Purchase Agreement and ZLDA. Since this cause of action is based on the same allegations and claims as the breach of contract causes of action for alleged breaches of the Purchase Agreement and ZLDA, the sixth cause of action is duplicative and as such should be dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted at to all causes of action except to compel the filing of corrective documents.

III The facts set forth herein are taken from the pleadings, unless otherwise noted.

LK Refer to Amended Complaint, 111113.37 for a full description of the parties.