NEW YORK COURT OF APPEALS ROUNDUP

COURT DECIDES CASE CLOSELY WATCHED BY REAL ESTATE INDUSTRY

WILLIAM T. RUSSELL, JR. AND LYNN K. NEUNER*
SIMPSON THACHER & BARTLETT LLP

November 14, 2017

We note that Judge Paul Feinman was sworn in as an Associate Judge of the Court of Appeals on Oct. 18, 2017, bringing the court back up to full strength—although we also note that he took no part in the case we discuss in this month's column. On October 19, the court issued its opinion in *Princes Point v. Muss Development* and ruled that the filing of a suit to rescind or reform a contract did not under the circumstances constitute an anticipatory breach of that contract. This was a case closely watched by the real estate industry in New York as the lower court decisions found that a real estate purchaser's rescission action did constitute an anticipatory breach and, accordingly, created potential issues for prospective buyers who had a good faith basis for seeking to rescind a sale agreement but were concerned about preserving their rights.

In 2004, the plaintiff agreed to purchase a 23-acre piece of waterfront property in Staten Island known as Princes Point. In the 1980s, the New York State Department of Environmental Conservation (DEC) had declared the property an inactive hazardous waste site. The owners undertook remediation work, including the construction of a seawall along the entire shoreline of the property to prevent erosion. After completion of the remediation work, the property was delisted as a hazardous waste site in 2001, and the owners began to seek the necessary government approvals to develop the property. In 2004, the owners agreed to sell the property to plaintiff for $35,910,000 with a $1,878,500 initial down payment. The contract provided that the owners were required to deliver the government approvals required for development and that the parties would close after the approvals had been obtained. The contract also provided for an "Outside Closing Date" 18 months after contract execution. If the government approvals had not been obtained by the Outside Closing Date, either party could terminate the agreement on 30 days' notice, plaintiff would receive a refund of its down payment and the parties would be released from their contractual obligations. In the alternative, plaintiff could waive the government approval requirement and proceed to closing at a reduced sale price.

Before the Outside Closing Date occurred and after Hurricane Katrina devastated large portions of Louisiana, the DEC inspected the seawall at Princes Point and noted certain flaws that it required the owners to remedy. Accordingly, the owners were not able to deliver the required government approvals by the Outside Closing Date and they informed plaintiff that they intended to terminate the agreement unless plaintiff agreed to amend it.

In March 2006, the owners and plaintiff amended the agreement to extend the Outside Closing Date to July 22, 2007, increase the purchase price (to $37,910,000) and down payment (to $3,995,000), and require plaintiff to pay half of the cost of certain remediation expenses. The parties subsequently extended the

* **William T. Russell, Jr.** *and* **Lynn K. Neuner** *are partners at Simpson Thacher & Bartlett LLP.*

Outside Closing Date 11 times to July 22, 2008, because of the continued work required to remedy the defects in the seawall. The contract amendments also provided that plaintiff would "not commence any legal action against [owners] in the event that any of the Development Approvals had not been issued or the [remedial work] had not been completed by the New Outside Closing Date."

Approximately one month before the final extended Outside Closing Date, plaintiff commenced an action in Supreme Court, New York County against the owners alleging, inter alia, that it had been defrauded into entering into the contract and the amendments by the owners' alleged misrepresentation regarding the condition of the seawall and their ability to complete the remedial work. Plaintiff essentially sought rescission of the 2006 amendment and reinstatement of the terms of the original 2004 agreement (with a reduction in the purchase price to account for the owners' failure to obtain the government approvals necessary for development of Princes Point).

The owners asserted several counterclaims including (1) a claim for a declaration that, since the final Outside Closing Date had passed, either the agreement had terminated or plaintiff was required to close immediately without any purchase price adjustment, and (2) a claim that by failing to close, plaintiff had defaulted under the contract thereby entitling the owners to retain the down payment and the payments plaintiff had made for its share of the remedial work.

The trial court dismissed all of plaintiff's claims and granted the owners summary judgment on the two claims described above. Plaintiff appealed from that part of the decision that found plaintiff had breached the contract and that the owners were accordingly entitled to retain the payments plaintiff had made.

The Appellate Division, First Department, affirmed the judgment and found that, because a rescission action evinces a party's intent to disavow its contractual obligations, filing such an action constitutes an anticipatory breach of the contract. The First Department further held that the owners did not have to show that they were ready, willing and able to complete the sale (including by obtaining the development approvals) because the buyer's repudiation discharged their future obligations. As a result, the owners would have been entitled to keep the down payment and remediation payments even though they may not have been able to deliver the land with the required government approvals. The First Department granted plaintiff leave to appeal and, in a decision written by Judge Eugene Fahey and joined by the rest of the court other than Judge Feinman, the Court of Appeals reversed.

The court explained that an anticipatory breach requires a "positive and unequivocal" expression of intent not to perform one's contractual obligations. The court noted that the First Department had correctly observed that the commencement of a declaratory judgment action to define the rights of the parties does not constitute an anticipatory breach, but disagreed with the First Department that the rescission action at issue here was markedly different. Particularly where the plaintiff was seeking to reform the contract amendments and compel performance under the terms of the original deal, the court held that "the mere act of asking for judicial approval to avoid a performance obligation is not the same as establishing that one will not perform that obligation absent such approval." The court did not reach the secondary point of whether a seller would be excused from having to show it could perform its contractual obligations in order to be able to keep the down payment and other sums transferred by the prospective buyer.

While the court rejected arguments that plaintiff's rescission action constituted an anticipatory breach, the wording of the decision does not foreclose the possibility that a rescission action under different facts would obtain a different result. Because Judge Fahey's opinion specifically focused on the fact that plaintiff was

seeking to compel performance of the original terms, it is not clear whether a plaintiff who was seeking to rescind a contract in its entirety and terminate any contractual obligations would fare equally well.