85 A.D.3d 456
Supreme Court, Appellate Division,
First Department, New York.

2626 BWAY LLC, Plaintiff–Appellant,
v.
BROADWAY METRO ASSOCIATES,
LP, et al., Defendants–Respondents.

June 7, 2011.

Synopsis

Background: Purchaser of real property filed suit against seller alleging breach of contract. The Supreme Court, New York County, Eileen Bransten, J., dismissed. Purchaser appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] contract and recorded zoning lot development agreement (ZLDA) were unambiguous, so would be enforced as written;

[2] contract did not require seller to grant purchaser right to develop roof up to point of air and light easement; and

[3] three weeks' notice was reasonable time to set time is of the essence closing date.

Affirmed.

West Headnotes (4)

[1] Vendor and Purchaser
Estate or title to be conveyed

In breach of contract action brought by purchaser of real property, both the contract of sale for the property and a recorded zoning lot development agreement (ZLDA) made between property seller and adjoining property owner regarding light and air easement were unambiguous with regard to whether purchaser had development rights between current roofline and beginning of air and light easement 15 feet above the building, so agreements would be enforced as written without regard to alleged oral agreement between purchaser and seller.

Cases that cite this headnote

[2] Easements
By express grant or reservation

Easements
Alteration

Under the rule of construction inclusiounius est exclusio alterius, the expression of a specific guarantee of use by easement implies the exclusion of any other guarantee of use.

Cases that cite this headnote

[3] Vendor and Purchaser
Estate or title to be conveyed

Contract of sale for real property, which was made subject to a recorded zoning lot development agreement (ZLDA) between property seller and adjoining property owner granting a light and air easement beginning 15 feet above the parapet wall of the roof, and which included ZLDA as a permitted exception to the conveyance of title, did not require seller to convey title to purchaser with right to develop upward on roof to point where air and light easement began, since ZLDA provided that seller retained right to use that area only "for mechanical equipment or any other devices," not for development.

Cases that cite this headnote

[4] Vendor and Purchaser
Time as of the essence of the contract

Seller's unilateral three-week notification to purchaser of real property to set "time of the essence" closing date for the sale was reasonable, as contract itself had not provided for specific closing date.

2 Cases that cite this headnote

Attorneys and Law Firms

****438** Claude Castro & Associates, PLLC, New York (Claude Castro of counsel), for appellant.

Reavis Parent Lehrer LLP, New York (Lawrence **Brocchini** of counsel), for respondents.

MAZZARELLI, J.P., SWEENY, MOSKOWITZ, RENWICK, ROMÁN, JJ.

Opinion

***456** Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about January 22, 2010, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

[1] Plaintiff purchaser alleges that defendant seller Broadway Metro Associates, LP anticipatorily breached the contract for the purchase of real property by, inter alia, its inability to convey title with certain development rights purportedly provided to the seller in a recorded Zoning Lot Development Agreement (ZLDA) made between the seller and an adjoining property owner. However, neither the contract of sale nor the ZLDA provide for the development rights claimed by plaintiff to exist. These agreements are unambiguous and must be enforced as written (*see W.W.W. Assoc. v. Giancontieri,* 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]).

[2] The ZLDA and an agreement entered into between the seller and the adjoining property owner specifically conveyed to the adjoining property owner a light and air easement beginning ***457** 15# above the parapet wall of the roof of the subject premises. However, the fact that the area covered by the easement does not begin until 15# above the parapet wall does not provide the seller with the right to add to the premises up to that point or create any obligation on the part of the adjoining property owner to protect such right. The ZLDA's only protection of a right to build on the roof is the retention of Broadway Metro's right to use that area "for mechanical equipment ... or any other devices." Under the rule of construction inclusiounius est exclusio alterius, the expression of a specific guarantee of use implies the exclusion of any other guarantee of use (*see Two Guys from Harrison–N.Y. v. S.F.R. Realty Assoc.,* 63 N.Y.2d 396, 404, 482 N.Y.S.2d 465, 472 N.E.2d 315 [1984]; *Matter of New York City Asbestos Litig.,* 41 A.D.3d 299, 302, 838 N.Y.S.2d 76 [2007]).

[3] Since the contract of sale was specifically made "SUBJECT TO" the ZLDA and included the ZLDA as a "Permitted Exception" to the conveyance of title, the seller was under no obligation to convey title in the manner claimed by plaintiff and thus, plaintiff's attempt to hold the seller in breach for this purported defect is unavailing.

[4] Defendant seller's unilateral scheduling of a clear and unequivocal "time of the essence" closing date on three-weeks' written notice was reasonable under the circumstances (*cf. ADC Orange, Inc. v. Coyote Acres, Inc.,* 7 N.Y.3d 484, 490, 824 N.Y.S.2d 192, 857 N.E.2d 513 [2006]).

****439** We have considered plaintiff's remaining arguments and find them unavailing.

All Citations

85 A.D.3d 456, 925 N.Y.S.2d 437, 2011 N.Y. Slip Op. 04759