

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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CRP/EXTELL PARCEL I, L.P.,

Petitioner,

-against-

ANDREW CUOMO, in his capacity as
THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK, et al.,

Respondents.
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DECISION AND
ORDER

Index No.
113914/2010

HON. ANIL C. SINGH, J.:

Petitioner CRP/Extell Parcel I, L.P. (“CRP/Extell”) challenges the determinations issued by respondent, the Attorney General of the State of New York, ordering petitioner to return \$16 million dollars in down payments to the purchasers of forty condominium units in a new construction on the West Side of Manhattan.

Petitioner is the developer of The Rushmore, a newly constructed luxury condominium located at 80 Riverside Boulevard. The condominium development offering plan was made in 2006 and 2007. The co-respondents are individual condominium purchasers (“purchasers”) who entered into agreements with petitioner to buy condos.

Pursuant to General Business Law (“GBL”) section 352-e, in order to offer condominium units for sale to purchasers in New York, the developer or sponsor must first submit and file the offering plan with the Attorney General’s Office. Pursuant to the Martin Act and the regulations promulgated by the Attorney General’s Office, a sponsor’s

proposed plan and other required documents are submitted for review to the Attorney General to ensure that they comply with applicable law and regulations.

Under section 20.3(o)(12) of the regulations (the “First Closing Regulation”), a condominium offering plan is required to

State when Sponsor expects the first closing of a unit to occur which should correspond to the first year of operation projected in Schedule B. State that if such date is delayed twelve (12) months or more, purchasers will be offered rescission.

13 NYCRR 20.5(a)(5) (the “Rescission Regulation”) states that

If there is a material amendment to the offering plan that adversely affects the purchasers, sponsor must grant purchasers a right of rescission and a reasonable period of time that is not less than fifteen (15) days after the date of presentation to exercise that right.

CRP/Extell submitted its proposed plan to the Attorney General’s Office on November 29, 2005. Thereafter, the Attorney General issued deficiency comments to the sponsor’s outside counsel which is also the escrow agent in this matter, the law firm of Stroock & Stroock & Lavan LLP (hereinafter “Stroock”). The ongoing review process began, sets of revisions were submitted by petitioner’s attorneys and the Attorney General reviewed and commented on such revisions.

On August 11, 2006, petitioner’s plan was accepted for filing by the Attorney General’s Office. CRP/Extell then began offering condominium units for sale.

Between 2006 and 2008, the forty individuals named as co-respondents in this proceeding entered into purchase agreements with petitioner. The purchase agreements incorporated by reference CRP/Extell’s offering plan. The offering plan identified the commencement date for the first year of operations in the building. The projected first

closing date was September 1, 2008.

In their respective agreements, each purchaser agreed to purchase a unit for a stated price. Purchasers agreed to provide an “Initial Deposit” and an “Additional Deposit” as down payments for their payment obligations under the purchase agreements. Each purchaser agreed to pay the balance of the purchase price upon delivery of the deed for the property it had purchased. Each purchaser agreed further that CRP/Extell would retain the purchaser’s down payment if the purchaser failed to close on its unit as required by the purchase agreement.

In accordance with the agreements, purchasers tendered down payments to CRP/Extell. The down payments were all placed in escrow subject to 13 NYCRR section 20.3(o) in accordance with the offering plan.

The aggregate amount of the down payments paid by the purchasers is \$16 million dollars. The properties are valued collectively at over \$110 million dollars.

Section 20.3(o)(12) of the regulations required CRP/Extell to offer purchasers a right to rescind if the first closing in the building was delayed twelve (12) months beyond the anticipated commencement of the first year of operations. CRP/Extell was required, therefore, to offer purchasers a right to rescind if the first closing did not occur by September 1, 2009.

The offering plan contains a provision stating as follows:

It is anticipated that the First Closing will occur by the commencement date for the First Year of Condominium Operation as set forth in Schedule B which is September 1, 2008. If the First Closing does not occur by September 1, 2008, as such date may be extended by duly filed amendment to the Plan, Sponsor will amend the Plan to update the budget and to offer Purchasers the right to rescind their Agreements within fifteen (15) days

after the presentation of the amendment disclosing the updated budget, and any Purchaser electing rescission will have their Deposits and any interest earned thereon returned.

It is undisputed that the offering plan was drafted by CRP/Extell's counsel.

Petitioner contends that the attorney who drafted the offering plan erroneously typed an "8" (September 1, 2008) instead of a "9" (September 1, 2009) in the above provision.

The purchase agreements contain the following integration clause:

This Agreement together with the Plan constitutes the entire agreement between the parties and supersedes any and all understandings and agreements between the parties with respect to the subject matter hereof.

The first closing occurred on February 12, 2009, after the September 1, 2008 rescission date set forth in the plan. Petitioner did not offer purchasers rescission as a result of the non-occurrence of the first closing by September 1, 2008.

On February 23, 2009, respondent/purchaser ARC Chinich RE LLC filed an application with the Attorney General for a determination on the disposition of down payments, seeking to rescind its purchase agreements on the ground that the first closing had not taken place by the projected date of September 1, 2008. CRP/Extell cross-applied for release of the down payments to petitioner. Subsequently, other respondent/purchasers filed applications similar to the one filed by ARC Chinich.

Purchasers argued before the Attorney General that CRP/Extell should be bound by the date of September 1, 2008, typed into the guarantee provision of the offering plan. CRP/Extell argued in opposition (and in support of its own cross-application regarding the down payments) that the date of September 1, 2008, was a scrivener's error that did not reflect the parties' actual intent and, therefore, CRP/Extell was entitled to reformation

of the purchase agreements.

The Attorney General issued a determination dated April 9, 2010, finding in favor of the respondent/purchasers regarding their application for release of the down payments. The determination denied CRP/Extell's cross-application and directed the escrow agent to release the down payments – together with any accumulated interest – within 30 days.

Instead of bringing an immediate Article 78 proceeding in state court, CRP/Extell filed an action in the United States District Court for the Southern District of New York on May 10, 2010, challenging the Attorney General's determination on federal and state constitutional grounds. Petitioner also raised a claim under Article 78 in its federal lawsuit.

By order dated October 12, 2010, the District Court granted the Attorney General's motion to dismiss the action.

Subsequently, CRP/Extell commenced the instant Article 78 proceeding. The verified petition asserts two causes of action. The first cause of action seeks reformation of the offering plan and purchase agreements. The second cause of action seeks declaratory relief in the form of a stay of enforcement of the determinations pending the disposition of the merits of the petition.

Petitioner asked the court to issue an order imposing the following relief: 1) reversing the determinations of the Attorney General and denying the purchasers' applications to rescind their agreements and be refunded the downpayments being held in escrow; 2) reversing the determinations and conducting a trial to determine the relevant

issues of fact, including to consider evidence of the parties' intent under the purchase agreements; 3) pursuant to New York contract law, reforming the offering plan and purchase agreements to reflect the intent of the parties that CRP/Extell was not providing purchasers a money-back guarantee that the first closing of title in the condominium would take place by the projected date for such closing of September 1, 2008; and 4) pursuant to CPLR 3001, 5519 and 7805, declaring that there is a stay of enforcement of the determinations pending the disposition on the merits of the petition.

On November 10, 2010, this Court heard petitioner's application for a stay of enforcement of the Attorney General's determinations and for leave to take discovery. The Court – over opposition of the Attorney General and the respondent/purchasers – granted a stay upon the posting of an undertaking.

In the instant proceeding, petitioner contends that the Attorney General's determinations were arbitrary and capricious in numerous respects. CRP/Extell points out that the determinations cite the alleged failure of CRP/Extell to present extrinsic evidence in support of its arguments and positions, despite the obvious limitations of CRP/Extell's ability to obtain such evidence in the absence of discovery, a hearing, or any other means of soliciting testimony from the purchasers regarding their intent.

According to CRP/Extell, petitioner was limited further because the Attorney General did not share with CRP/Extell the evidence it had received during ex parte meetings with the Stroock firm, in which the drafter of the language admitted that he had typed the 2008 date into the provision by mistake. CRP/Extell contends that the Attorney General's consideration of such random, limited extrinsic evidence aggravated its failure

to have sought to identify and collect all such evidence itself, and to afford the parties any adequate opportunity to obtain and present any such evidence themselves.

CRP/Extell asserts that the determinations reflect the Attorney General's policy-based decision to subvert any consideration of the parties' actual intent by applying a standard of strict liability. Petitioner argues that the Attorney General adopted a policy of holding a sponsor to the rescission date typed into the offering plan regardless of what the parties actually intended.

According to petitioner, the Attorney General's decision to "reduce the question of the parties' actual intent to a secondary consideration" constitutes clear legal error. CRP/Extell asserts further that, in determining what relief to afford the purchasers, the Attorney General far exceeded what the parties could have intended. Petitioner contends that the errors of law included the Attorney General's misapprehension of the law of contracts, pursuant to which a fact-finder must consider the extrinsic evidence of the parties' intent in deciding whether the contract at issue reflects a scrivener's error and, thus, warrants reformation.

In response, the Attorney General and the purchasers assert that petitioner's cause of action for "reformation" should be dismissed because, in enacting General Business Law section 352-e(2-b), the legislature authorized the Attorney General to resolve condominium development escrow disputes like those at issue here. As the Attorney General has jurisdiction over the escrow disputes underlying this proceeding, the Court's role relative to the escrow disputes is limited to review pursuant to Article 78.

Respondents assert that petitioner failed to establish the existence of a scrivener's

error or mistake requiring reformation. Specifically, respondents contend that petitioner offered no extrinsic evidence that the parties mutually intended September 1, 2009, to be the rescission date. Moreover, the Attorney General asserts that there was and is no allegation that there was never any “meeting of the minds” as to the purported September 1, 2009 date. Furthermore, the Attorney General contends that it asked CRP/Extell to present extrinsic evidence of the parties’ intent, but petitioner failed to produce any such evidence.

Discussion

Pursuant to CPLR 7803(3), this Court must determine “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion....”

Where a petitioner alleges that an administrative agency failed to look at extrinsic evidence to ascertain the meaning of a contract term, the standard of review is whether the agency acted arbitrarily and capriciously, thereby abusing its discretion (see, for example, Matter of Big Tree Energy Partners v. Bradford, 219 A.D.2d 27 [3d Dept. 1996]). To warrant annulment of an administrative determination, an erroneous evidentiary ruling must be “so egregious as to infect the entire proceeding with unfairness” (Matter of Goohya v. Walsh-Tozer, 292 A.D.2d 384, 385 [2d Dept. 2002] quoting Matter of Ackerman v. Ambach, 142 A.D.2d 842, 845 [3d Dept. 1988]).

In the instant matter, the Attorney General concluded that extrinsic evidence as to the intent of the parties was irrelevant based on its interpretation and application of common law principles of contract law regarding scrivener’s error, mutual mistake,

unilateral mistake and reformation. Accordingly, in order to determine whether the Attorney General erred because it failed to consider extrinsic evidence of the parties' intent, we must initially determine whether the Attorney General committed an error of law with respect to its analysis under the law of contracts.

“Judicial review of administrative determinations pursuant to Article 78 is limited to questions of law” (6 N.Y.Jur.2d Article 78 section 27). “In reviewing questions of law, the reviewing court is not bound by an administrative agency's determination thereof” (Id.) Questions of law include, for example, whether a contractual obligation exists (Matter of West-Herr Ford, Inc. v. Tax Appeals Tribunal of the State of New York, 16 A.D.3d 727 [3d Dep't 2005]).

Paragraph 2-b of General Business Law section 352-e states in pertinent part:

the attorney general is hereby authorized to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this subdivision, including, but not limited to, determining when escrow funds may be released, the nature of escrowees, and other terms and conditions relating thereto deemed necessary in the public interest.

The Attorney General's regulations governing plans for newly-constructed condominiums are codified at Part 20 of NYCRR Title 13. The Attorney General's interpretation of such rules and regulations is subject to deference (Dunlop Development Corp. v. Spitzer, 26 A.D.3d 180 [1st Dept. 2006]).

Petitioner argues that, where scrivener's error is alleged, the law requires the fact-finder to collect and consider all of the relevant evidence of the parties' intent. Petitioner contends that where, as here, a party is seeking reformation of an agreement, a party may rely on extrinsic evidence even if the agreement is not ambiguous. Such extrinsic

evidence in the instant matter includes: 1) the admission of a scrivener's error by Stroock; 2) provisions in the agreement that are inconsistent with a September 1, 2008 date; 3) advertising materials; and 4) the pre-dispute course of dealings.

“A scrivener's error constitutes a mistake in the reduction of an agreement to writing” (Rosalie Estates, Inc. v. Colonia Insurance Co., 227 A.D.2d 335, 337 [1st Dep't 1996]). “A written agreement may be reformed for mutual mistake where the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement” (Ebasco Constructors, Inc. v. Aetna Insurance Co., 260 A.D.2d 287, 290 [1st Dep't 1999] (internal quotation marks and citation omitted)).

Petitioner's reliance on Howard v. Baxter Street Development Co., LLC, 24 Misc.3d 1225(A) [Sup. Ct., N.Y. County 2009], is misplaced. There – unlike the present case – the date of rescission in the agreement clearly contradicted with the date of rescission set forth in the offering plan, to wit: July 1, 2007 versus July 1, 2006. The case is, therefore, distinguishable.¹

Petitioner also cites Young v. Verizon's Bell Atlantic Cash Balance Plan, 615 F.3d 808 (7th Cir. 2010), in support of its position. However, the case is distinguishable in two significant respects.

First, there was a clear discrepancy between two documents in Young. Second, the scrivener's error in Young would have resulted in a windfall.

¹Petitioner contends that the federal court's opinion in Scion 2040 Managing Member LLC v. Ebreff Holding Company, LLC, 2011 WL 1457147 (E.D. Wis. 2011), is persuasive authority that is consistent with the Howard case. We disagree. In Scion, the court found that the parties “utilized a prior agreement with which all persons negotiating were familiar as the foundation for the parties' present agreement.” By contrast, there were no prior agreements negotiated by the petitioner and respondents in the instant matter. Accordingly, the Scion case is unpersuasive.

Unlike the situation in Young, enforcement of the agreements in the instant matter would not result in any windfall to respondents. Rather, they would simply get their deposits back.

The key fact in the instant matter is that there is no inconsistency whatsoever. The offering plan does not provide for a different rescission date than any other document.

Petitioner asserts that there was a mutual mistake, yet there is no contrary agreement that would demonstrate the existence of such a mistake. The parties did not come to the understanding of a September 1, 2009 date. In short, there is no evidence that the September 1, 2008 date was a mistake.

Likewise, the doctrine of unilateral mistake is not available as an excuse for the Court to re-write the unambiguous agreement. Petitioner has neither alleged nor shown any fraudulent conduct whatsoever by respondents.

Petitioner contends that CRP/Extell is permitted to assert a reformation claim against the purchasers in the instant Article 78 proceeding.

The evidence necessary to warrant reformation of a written instrument has been summarized as follows:

There is a heavy presumption that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties. To overcome this presumption and warrant a trial on a claim for reformation, the plaintiff must come forth with a high level of proof, free of contradiction or equivocation, that the instrument is not written as intended by both parties. The party seeking reformation bears the burden of proving by clear and convincing evidence that the instrument is not correct due to an error in the reduction of the agreement to writing, or that it was executed under mutual mistake or unilateral mistake coupled with fraud. This means that the plaintiff must show, in no uncertain terms, not only that mistake or fraud exists, but also exactly what the parties agreed upon, particularly if

the negotiations were conducted by sophisticated, counseled people.

...

Where the mistake lies in the basis of the agreement itself rather than in its reduction to writing, it is incumbent upon the proponent of reformation to show that the mistake is mutual; that is, that both parties intended the same agreement, which is different than what is reflected in the written instrument. It is not necessary, however, to prove a mutual mistake where the alleged error occurred in the reduction of the agreement to writing. To succeed on a reformation claim on unilateral mistake, the plaintiff bears the burden of proving both its own mistake and fraudulent concealment by the other party.

(16 N.Y. Jur.2d Cancellation of Instruments section 92).

In the determinations, the Attorney General found that CRP/Extell had not met its heavy burden to show that the alleged “scrivener’s error” was contrary to the intention of the parties and had not provided evidence that the parties intended a September 1, 2009 date. In addition, the Attorney General found that the law of mistake did not support CRP/Extell’s position that the September 1, 2008 rescission date stated in the offering plan was an “obvious typographical error” requiring reformation of the contract under the law of mutual and/or unilateral mistake. Furthermore, the Attorney General found that the integration clause in the purchase agreement might preclude consideration of parol evidence even where a claim of scrivener’s error is asserted, and that the offering plan unambiguously identifies September 1, 2008, as the rescission date.

The Court has reviewed the Attorney General’s determinations very carefully to determine whether they contains any errors of law. We find no such errors. The 19-page administrative decision thoroughly analyzes petitioner’s arguments regarding scrivener’s error, mistake and reformation and accurately applies principles of New York contract law. The Attorney General found that the provision in issue was unambiguous. We find

such determinations entirely rational based on the record before us.

Finally, the Court finds that petitioner is not entitled to discovery with respect to this Article 78 proceeding. The Supreme Court does not have the authority in an Article 78 proceeding to consider any evidence that was not considered by the Attorney General's Office in rendering its determinations. “[J]udicial review of an administrative determination is limited to the facts adduced and record made before the administrative agency, and judicial review of additional evidentiary submissions would violate this fundamental tenet” (Dunlop Dev. Corp. v. Spitzer, 26 A.D.3d 180,182 [1st Dept. 2006] (internal citations omitted)).

Pursuant to Article 78, the role of the Court in reviewing an administrative determination is to ascertain the presence of a rationally based determination and once found, the judicial function is satisfied (Pell v. Board of Education, 34 N.Y.2d 222 [1974]). The court “is not to second-guess the wisdom of what an administrative agency has done, nor to reform the procedures and methods used by that agency” (Procaccino v. Stewart, 32 A.D.2d 486, 489 [1969], affd 25 N.Y.2d 301 [1969]). “[A]n administrative agency’s construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight” (Tommy & Tina, Inc. v. Dept. of Consumer Affairs of the City of New York, 95 A.D.2d 724 [1983], citing Matter of Herzog v. Joy, 74 A.D.2d 372, 385 [1980]).

The determinations reflect that the Attorney General’s decision not to consider extrinsic evidence of the intent of the parties was rational under the circumstances.

Finally, petitioner’s hybrid Article 78/reformation claim is barred by collateral

estoppel. The Attorney General has ruled on the dispute over the down payments, and the Attorney General clearly has jurisdiction over such disputes. Accordingly, the determinations of the Attorney General cannot be collaterally attacked.

For the above reasons, the application to vacate the determination of the Attorney General's Office is denied, and the Article 78 proceeding is dismissed, and it is further

ORDERED that petitioner CRP/Extell Parcel I, L.P., and Stroock & Stroock & Lavan LLP, the escrow agent, are directed to release and return the down payments, together with any accumulated interest, to the individual purchasers within 30 days of receipt of this decision and order; and it is further

ORDERED that the respondent individual purchasers are awarded their costs and expenses in defending this proceeding.

The foregoing constitutes the decision and order of the court.

Date: January 19, 2012
New York, New York

Anil C. Singh