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Ruling Trims Claims Against Developer for Condo Delay

Christine Simmons, New York Law Journal

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A suit brought by an attorney against a real estate developer claiming construction delays on his condominium caused financial harm has resulted in a finding by a Manhattan judge that the developer was not liable for the lawyer's increased mortgage costs.

Mitchell Hurley signed a purchase agreement for a condo unit in December 2012 at 52 Laight Street, but the building was not approved for occupancy until September 2013, well after his locked in mortgage rate expired.

Supreme Court Justice Anil Singh ([See Profile](#)) said in [Hurley v. Watanabe](#), 653098/2013, "[Hurley's] decisions to enter into a mortgage lock, and the timing of his decision, as well as the mortgage market fluctuations, were not items over which defendant had control or connection."

Bruce H. Lederman, partner at D'Agostino, Levine, Landesman & Lederman and the developer's attorney, said the decision is unique because courts have rarely addressed whether a condo developer was liable for mortgage rates rising during construction delays.

According to city public records, Hurley, a partner at Akin, Gump, Strauss, Hauer & Feld, bought the unit for \$3.3 million.

Hurley said the developer's agents claimed the units would be ready to close in December 2012 or January 2013.

But there were delays, he said, and paperwork that was necessary for a temporary certificate of occupancy was not filed until after his mortgage interest rate lock expired on Aug. 15, 2013. To mitigate his damages, Hurley said he made a new agreement with the bank at a rate higher than he would have enjoyed had the developer delivered the unit on time.

Ultimately, the certificate of occupancy was issued on Sept. 6, 2013. Later that month Hurley sued the developer, Laight St. Condo Development Inc.; its officers Kengo Watanabe and

Yuko Watanabe, the construction manager for the project, Vanguard Construction and Development Co., among others.

Hurley claimed breach of contract, breach of the duty of good faith and fair dealing, intentional misrepresentation, fraudulent inducement, among other claims.

He claimed the construction delays led to extra rental and mortgage costs.

Specifically, Hurley said he was forced to expend many months of additional rent, \$80,000 or more, while waiting for the unit to close, and to "pay massively increased interest costs" on his mortgage—more than \$800 per month extra, every month, for the next 30 years, for a total of about \$300,000— compared to the earlier rate.

The developer, its officers and the construction manager moved to dismiss the claims against them.

The developer said if Hurley wanted to close by a certain date, that this should have been negotiated and written into the contract.

Hurley acknowledged there is no closing date in the agreement but argued the breach occurred because a party is required to close within a reasonable period of time.

Singh noted that the offering plan provided that the closing on the first unit could be delayed from July 1, 2012, to beyond June 30, 2013, with subsequent closings possibly further delayed.

A plain reading of the agreement, Singh said, would preclude a finding of breach of contract for an October 2013 closing, so long as the developer was complying with its obligations to perform diligently.

Addressing Hurley's claim for damages due to a higher mortgage interest rate, Singh said that given the language in the offering plan and the purchase agreement contemplated a possible substantial delay in completion, the conclusion that the parties contemplated the developer assuming liability for interest rate fluctuations is "unwarranted."

The parties' contemplations must be viewed from the time they entered into the contract, not based on later correspondence from Hurley that he was at risk of losing his interest rate, the judge said.

Singh dismissed Hurley's breach of contract claim to the extent that it seeks these damages.

But the judge sustained the claim against the developer for other possible damages, such as his rental costs during the delays.

The judge said the plan contained an express obligation that the developer diligently and expeditiously complete construction. Hurley alleges that the developer intentionally halted or delayed work, sitting idle for weeks or even months.

Assuming that the developer simply halted construction for reasons other than general vagaries inherent in construction, this would constitute a breach of the developer's contractual obligations, Singh said.

Singh dismissed all other causes of action against the developer and dismissed the claims against the individual officers and the claim against Vanguard.

John Simoni, a member at Goetz Fitzpatrick who represented Vanguard, said he is pleased with the decision for the guidance it gives to developers for purchase agreements and plan documents.

Hurley's suit against two design consultants and a company hired by the developer to obtain a certificate of occupancy are still standing.

Meanwhile, Lederman said the developer "intends to vigorously pursue the claims for legal fees incurred in this victory," he said.

Lederman said the building was delayed partly because of Superstorm Sandy, obtaining approvals from the city and by contractors and subcontractors.

David Zensky, an Akin Gump partner who represents Hurley, declined to comment.

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