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Docket: 1884CV02916-BLS1

Date: December 30, 2019

Parties: Headquarters Hotel, LLC v. LBV Hotel, LLC

Judge: /s/Brian A. Davis Associate Justice of the Superior Court

Decision and Order Regarding Defendant and Counterclaim Plaintiff LBV Hotel, LLC's Motion for Summary Judgment (Docket Entry No. 25.0):

Plaintiff Headquarters Hotel, LLC ("Headquarters") filed this action against defendant LBV Hotel, LLC ("LBV") in September 2018 seeking a determination as to the parties' respective rights under a "right of first offer" provision (the "ROFO Provision") in their Estate for Years Agreement (the "Agreement"). The Agreement grants LBV an estate in the real estate owned by Headquarters at 154 Berkley Street, Boston, Massachusetts (the "Premises") until 2131.[1] Headquarters claims that LBV triggered Headquarters' right to purchase the Premises in January 2018 by sending Headquarters written notification of LBV's desire to sell the Property in accordance with the terms of the ROFO provision in the Agreement. Headquarters, however, refused to execute a confidentiality agreement that LBV demanded as part of the sale process, with the result that the parties' proposed transaction devolved into acrimony and, ultimately, litigation.

Headquarters' claims against LBV are set out in the five counts of its Verified Complaint and Jury Demand ("Complaint," Docket Entry No. 1.0). Headquarters' claims include breach of contract (Count I); breach of express and implied covenants of good faith and fair dealing (Count II); estoppel/reliance interest (Count III); violation of G.L. c. 93A, § 11 (Count IV); and declaratory judgment pursuant to G.L. c. 231A (Count V). Each of Headquarters' claims is premised on the notion that LBV remains obligated to go forward with a possible sale of the Premises to Headquarters under the ROFO Provision. LBV, in turn, denies any liability to Headquarters and any obligation to go forward with a sale of the Premises to Headquarters or any other purchaser. LBV also has asserted a series of counterclaims that, in most instances, simply mirror Headquarters' claims. See Answer and Counterclaims of LBV Hotel, LLC ("Counterclaims," Docket Entry No. 17.0).

The case came before the Court most recently on LBV's Motion for Summary Judgment (the "Motion," Docket Entry No. 25.0). The gist of LBV's Motion, fairly characterized, is that its offer to sell the Premises to Headquarters in accordance with the ROFO Provision was effectively rejected by Headquarters and thereafter withdrawn by LBV, with the result that all of Headquarters' claims fail, and all of LBV's Counterclaims succeed, as a matter of law. Headquarters opposes the Motion.

[1] While the date 2131 may seem, at first glance, to be a typographical error, it is not. The Agreement expressly grants LBV the right to "have and hold the Premises for a term ... of one hundred and twenty-nine (129) years commencing on the Commencement Date [i.e., June 24, 2002] and ending on June 24, 2131...." See Agreement (a copy of which is included as Exhibit 1 in the Joint Appendix of Exhibits filed in connection with Defendant's Motion for Summary Judgment ("Joint Appendix")), Article III.

The Court conducted a hearing on LBV's Motion on September 24, 2019. All parties appeared and argued. Upon consideration of the written submissions of the parties and the oral arguments of counsel, LBV's Motion is ALLOWED IN PART for the reasons summarized, briefly, below.

Factual Background

The following facts, as revealed by the summary judgment record, are undisputed.[2] Headquarters is the record owner of the Premises, which (appropriately) once housed the headquarters of the Boston Police Department. On or about June 24, 2002, Headquarters entered into the Estate for Years Agreement with LBV's predecessor in interest, Berkeley Hotel Associates, LLC ("Berkeley"), pursuant to which Headquarters granted Berkeley a 129 year estate in the Premises (the "Estate for Years"). Berkeley subsequently operated a luxury hotel on the site for approximately eleven years. In 2013, LBV acquired all of Berkeley's right, title, and interests in the Agreement, as reflected in the Second Amendment to the Agreement, dated as of February 11, 2013.[3] LBV has operated the "Loews Boston Hotel" on the Premises since that time.

The original Agreement contains a ROFO Provision at Section 15.1. See Joint Appendix, Exhibit 1, at 62-64. Under the ROFO Provision, if either party to the Agreement desires to market its interest in the Premises to potential third-party purchasers, the offering party first must offer its interest to the other party "at the same price and upon all of the same terms and conditions" that the offering party shall extend to third-party purchasers. Id. at 62. After the offering party makes its ROFO offer, the "non-offering party [has] ninety (90) days from the date the non-offering party receives all information which it reasonably requests which is necessary to evaluate the value of the offering party's interest and "to notify the offering party that the non-offering party has elected to purchase" the offering party's interest "at the same price and in accordance with the terms and conditions of notice from the offering party." Id. at 6263.

[2] The undisputed facts recited herein are taken from Headquarters' Response to LBV's Statement of Materials Facts filed in conjunction with LBV's motion for summary judgment. In some instances, Headquarters' response to particular facts, while lengthy, does not directly address whether the facts stated are "disputed" or "undisputed." In such instances, the Court has deemed any facts that are not expressly controverted by Headquarters as admitted for purposes of deciding LBV's motion. See Superior Court Rule 9A(b)(5)(iii)(A) ("For purposes of summary judgment, each fact set forth in the moving party's statement of facts is deemed to have been admitted unless properly controverted in the manner forth in this Paragraph....").

[3] A copy of the Second Amendment to Agreement is included in the Joint Appendix as Exhibit 4.

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On January 11, 2018, LBV sent Headquarters a letter (the "January 11 Letter") stating that it was "considering marketing" its Estate for Years for sale, with an asking price in the range of \$80 million to \$93 million (defined, in the January 11 Letter as the "Expected Range").[4] January 11 Letter at 1. LBV further inquired whether Headquarters "has an interest in acquiring [LBV's Estate for Years] for an amount in the Expected Range...." Id. Alternatively, if Headquarters did not have an interest in acquiring LBV's Estate for Years, LBV asked that Headquarters sign an enclosed form of waiver relinquishing its rights under the ROFO Provision of the Agreement. Id. at 1-2.

Headquarters responded to LBV's January 11 Letter by indicating "that it was interested in such a purchase, and ask[ing] LBV to issue a ROFO letter in accordance with Section 15.1" of the Agreement. Plaintiff Headquarters Hotel, LLC's Response to Defendant LBV Hotel, LLC's Statement of Material

Facts ("SOMF"), ¶11. Thereafter, on February 5, 2018, LBV sent Headquarters, per the terms of the ROFO Provision, a letter containing formal notice of LBV's intent to solicit third-party bids for its Estate for Years in the Premises, and a written offer by LBV to sell its Estate for Years to Headquarters, on the "terms and conditions" set forth in the letter (the "ROFO Offer"). [5] LBV's "terms and conditions," fairly summarized, were: (1) a purchase price of \$83 million; (2) a \$4.15 million deposit within three weeks of acceptance of an offer to purchase; (3) affirmation and acceptance of the existing Hotel Management Agreement between Lowes and LBV; and (4) execution of an attached four-page "confidentiality agreement" (the "Confidentiality Agreement") that LBV described as "necessary" for LBV to provide Headquarters with access to the Premises and its business records for due diligence purposes. ROFO Offer at 1-2.

On March 22, 2018, Headquarters, through its legal counsel, responded in writing to LBV's ROFO Offer (the "ROFO Response"). [6] Headquarters' ROFO Response neither accepted, nor rejected the financial terms of LBV's ROFO Offer, but it explicitly rejected the requirement that Headquarters sign LBV's proposed Confidentiality Agreement. As stated by counsel for Headquarters,

[t]he Agreement does not require that Grantor [i.e., Headquarters] execute a confidentiality agreement as a condition of its receiving the information requested therein. Accordingly, our client has not executed and will not execute the confidentiality instrument attached to the ROFO [Offer].

Joint Appendix, Exhibit 8, at 1.

[4] A copy of LBV's January 11 Letter is included in the Joint Appendix as Exhibit 6.

[5] A copy of LBV's ROFO Offer is included in the Joint Appendix as Exhibit 7.

[6] A copy of Headquarters' ROFO Response is included in the Joint Appendix as Exhibit 8.

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Headquarters rejected LBV's requirement that Headquarters sign LBV's proposed Confidentiality Agreement notwithstanding the fact that any third-party with an interest in acquiring the Premises would be required to execute the same Confidentiality Agreement in advance of undertaking any due diligence. SOMF, ¶ 13. Headquarters coupled its rejection with a demand that LBV nonetheless provide Headquarters with "true and accurate copies" of various documents listed on a "Preliminary Due Diligence Schedule" that was appended to its ROFO Response. Joint Appendix, Exhibit 8, at 1, 4.

Headquarters subsequently sent LBV a significantly revised draft of LBV's Confidentiality Agreement that, among other things, contained language that would have permitted Headquarters to share LBV's confidential information with third-parties of Headquarters' choosing. SOMF, ¶ 18. See also April 24, 2018 e-mail from Headquarters' legal counsel with proposed, revised confidentiality agreement (the "Revised Confidentiality Agreement"). [7]

Unwilling to accept Headquarters' proposed new terms, LBV notified Headquarters by mail on May 30, 2018, that it had elected to withdraw its ROFO Offer (the "Withdrawal Letter"). [8] Id., ¶19. As stated by LBV,

[a]s a result of Grantor's [i.e., Headquarters'] refusal to comply with the terms of the ROFO Notice, Grantee [i.e., LBV] no longer desires to solicit a third party to purchase the Grantee's Interest.

Id.

Headquarters commenced this Superior Court action seeking to enforce its purported ROFO rights under the Agreement on September 17, 2018.

Discussion

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cargill, Inc. v. Beaver Coal & Oil Co.*, [424 Mass. 356](#), 358 (1997). A party who does not bear the burden of proof at trial may demonstrate the absence of a genuine issue of material fact either by submitting affirmative evidence negating an essential element of the nonmoving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of his or her case at trial. See *Kourouvacilis v. General Motors Corp.*, [410 Mass. 706](#), 716 (1991).

[7] A copy of Headquarters' Revised Confidentiality Agreement is included in the Joint Appendix as Exhibit 10.

[8] A copy of LBV's Withdrawal Letter is included in the Joint Appendix as Exhibit 11.

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LBV argues that it is entitled to entry of summary judgment in its favor on all of Headquarters' claims because Headquarters rejected the ROFO Offer as a matter of law on March 22, 2018, when Headquarters flatly refused to execute LBV's proposed Confidentiality Agreement. The Court agrees.

It has been and remains "elementary law" in this Commonwealth that "an offer must be accepted in the terms in which it is made in order to become a binding contract, and that a conditional acceptance or one that varies from the offer in any substantial respect is in effect a rejection and is the equivalent of a new proposition." *Moss v. Old Colony Trust Co.*, [246 Mass. 139](#), 148 (1923) ("Moss"). See *Peretz v. Watson*, [3 Mass. App. Ct. 727](#), 728 (1975) ("Peretz") (explaining that a response to a party's offer that "varies from the terms of the offer in any material respect is in effect a rejection ... and ... an offer once rejected cannot thereafter be revived by an attempted acceptance thereof").

In this case, LBV has the explicit right under the ROFO Provision to determine for itself the price and other terms and conditions upon which it wishes to offer its Estate for Years for sale to Headquarters and to others, if at all. Joint Appendix, Exhibit 1, at 62. The only limitation the ROFO Provision places on LBV's right to set the terms and conditions of any offer is that LBV first must make its Estate for Years available for purchase by Headquarters "at the same price and upon all of the same terms and conditions upon which" LBV's interest "shall be offered to the third party...." *Id.* Thus, LBV may make the terms and conditions of its offer as onerous or as attractive as LBV likes, so long as LBV offers the same onerous or attractive terms and conditions to all potential purchasers, including Headquarters. See *id.*

The ROFO Offer that LBV sent to Headquarters on February 5, 2018, described in clear and plain language the specific terms and conditions on which LBV intended to solicit third-party offers for its Estate for Years in the Premises. See Joint Appendix, Exhibit 7, at 1-2. One of those terms and conditions was the requirement that Headquarters (or any other potential purchaser) execute a Confidentiality Agreement in the form provided by LBV. *Id.* at 2. Execution of LBV's proposed Confidentiality Agreement was, according to the ROFO Offer, "necessary" for LBV to grant Headquarters (or any other potential purchaser) access to the Premises and to LBV's books and records for due diligence purposes. *Id.* Because it was LBV's stated intention to impose the same Confidentiality Agreement condition on every

potential purchaser, Headquarters' out-of-hand rejection of that condition in its ROFO Response was, in a very real sense, an explicit rejection of LBV's ROFO Offer.[9] See Moss, 246 Mass. at 148; Peretz, 3 Mass. App. Ct. at 728.

[9] Headquarters argues, unpersuasively, that LBV's requirement that Headquarters sign a Confidentiality Agreement before commencing due diligence with respect to the ROFO Offer is, by itself, a breach of the parties' Agreement because the ROFO Provision expressly gives Headquarters "ninety (90) days from the date [it] receives all information which it reasonably requests which is necessary to evaluate the value of [LBV's] interest" to response to any ROFO offer. See Joint Appendix, Exhibit 1, at 62-63. See also Headquarters' Combined Opposition and Memorandum in Opposition to LBV's Motion for Summary Judgment at 14. Nothing in the ROFO Provision (or any other provision of the Agreement), however, restricts LBV's right to protect the confidentiality of its sensitive business information through the imposition of an appropriate confidentiality agreement, and there is no evidence in the summary judgment record suggesting that LBV would have denied Headquarters any "information which it reasonably request[ed]" had Headquarters simply executed LBV's proposed form. Instead, Headquarters insisted on a dramatically revised form of confidentiality agreement that would have given Headquarters the right to share LBV's confidential information with third-parties chosen by Headquarters, conduct that is not contemplated by, or authorized in, the ROFO Provision as written. See Joint Appendix, Exhibit 10, at 3.

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Moreover, even if Headquarters had not explicitly rejected the ROFO Offer in its ROFO Response, LBV still would be entitled to the entry of summary judgment in its favor because LBV properly withdrew the ROFO Offer in its May 30, 2018 Withdrawal Letter. See Joint Appendix, Exhibit 11. "[A]n offeror is ordinarily free to revoke his offer at any time before it is accepted." Commonwealth v. Johnson, [447 Mass. 1018](#), 1020 (2006). See Gladstone v. Union Warren Savings Bank, [2 Mass. App. Ct. 850](#), 850 (1974) ("Gladstone") (explaining that "defendant was free to revoke the offer at any time prior to acceptance by the plaintiff ... [and] [a]cceptance must be by full performance on the part of the offeree in order that a contract may come into existence"). Nothing in the ROFO Provision (or, again, any other provision of the Agreement) expressly prohibits LBV from exercising its common law right to revoke an ROFO Offer once made, and none can be properly implied by the Court. See Gladstone, 2 Mass. App. Ct. at 850. See also Marcelle, Inc. v. Sol & S. Marcus Co., [274 Mass. 469](#), 474 (1931) ("Whether by accident or design, the parties failed to insert in their agreement any stipulation on this matter. The court cannot supply a deficiency of that nature. It can only interpret the contract as made by the parties."). Cf. Bronstein v. Prudential Ins. Co., [390 Mass. 701](#), 708 (1984) (recognizing that "court cannot insert words into ... [an agreement], where, as here, the language of the ... [agreement], taken as a whole, is clear and unambiguous").

For the foregoing reasons, LBV is entitled to summary judgment in its favor on each of Headquarters' claims in this action, as well as on Count I of its Counterclaims seeking a declaratory judgment that the ROFO Offer "was rejected by Headquarters, had expired and/or was properly revoked by LBV prior to acceptance." Counterclaims, ¶21. LBV is not entitled to the entry of judgment in its favor, however, on any of its remaining Counterclaims as they all raise questions concerning the reasonableness of Headquarters' behavior, which is not a matter that can be resolved on summary judgment in

the circumstances of this case. See *DeSanctis v. Lynn Water and Sewer Commission*, [423 Mass. 112](#), 116 (1996) (noting that "[r]easonableness is a question of fact for the jurors whose decision is based on consideration of all the relevant circumstances").

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Order

IT IS HEREBY ORDERED that LBV's Motion for Summary Judgment (Docket Entry No. 25.0) is ALLOWED as to Counts I through V of Headquarters' Complaint, and Count I of LBV's Counterclaims. In all other respects, LBV's Motion is DENIED.

IT IS FURTHER ORDERED that a declaration shall enter declaring that the ROFO Offer was rejected by Headquarters, had expired, and/or was properly revoked by LBV prior to its acceptance by Headquarters.

/s/Brian A. Davis Associate Justice of the Superior Court

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