

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32458
W/kmb

_____AD3d_____

Argued - September 19, 2011

REINALDO E. RIVERA, J.P.
RUTH C. BALKIN
L. PRISCILLA HALL
JEFFREY A. COHEN, JJ.

2010-04402

DECISION & ORDER

Ari Yemini (also known as Arieh Yemini), individually, plaintiff/counterclaim defendant-respondent, Ari Yemini (also known as Arieh Yemini), in his capacity as a member of Peninsula Holdings, LLC, et al., plaintiffs-respondents, v Oded Goldberg, et al., defendants/counterclaim plaintiffs-appellants, et al., defendant; et al., additional counterclaim defendants (and a third party action).

(Index No. 12402/05)

Ruskin Moscou Faltischek, P.C., Uniondale, N.Y. (Douglas J. Good and Adam L. Brower of counsel), for defendants/counterclaim plaintiffs-appellants.

Steven Cohn, Esq., P.C., Carle Place, N.Y. (Susan E. Dantzig of counsel), for plaintiff/counterclaim defendant-respondent and plaintiffs-respondents.

In an action, inter alia, to recover damages for breach of contract, the defendants/counterclaim plaintiffs Oded Goldberg and Goldberg Commodities, Inc., appeal from an order of the Supreme Court, Nassau County (Bucaria, J.), entered March 11, 2010, which granted the motion of the plaintiff/counterclaim defendant and the plaintiffs for court approval of the sale by the plaintiff Peninsula Holdings, LLC, of certain parcels of real property located in Hempstead, and for a judgment declaring that the plaintiff Ari Yemini (also known as Arieh Yemini), in his capacity as a member of Peninsula Holdings, LLC, is authorized to close said transaction on behalf of the plaintiff Peninsula Holdings, LLC.

Motion by the plaintiff/counterclaim defendant and the plaintiffs, inter alia, to dismiss the appeal on the ground that the appeal has been rendered academic or, in the alternative, to hear and determine the appeal as an exception to the mootness doctrine. By decision and order on motion

October 4, 2011

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of this Court dated October 25, 2010, that branch of the motion which was to dismiss the appeal on the ground that the appeal has been rendered academic or, in the alternative, to hear the appeal as an exception to the mootness doctrine was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the branch of the motion which is to dismiss the appeal on the ground that it has been rendered academic is granted; and it is further,

ORDERED that the appeal is dismissed as academic; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff/counterclaim defendant and the plaintiffs.

The plaintiff/counterclaim defendant and the plaintiffs commenced this action alleging, inter alia, that the defendants/counterclaim plaintiffs Oded Goldberg and Goldberg Commodities, Inc. (hereinafter together the defendants) failed to make certain required capital contributions to the plaintiff Peninsula Holdings, LLC (hereinafter Peninsula). The order appealed from relates to the proposed sale of real property owned by Peninsula. On appeal, the defendants contend, inter alia, that the Supreme Court erred in concluding that the plaintiff Ari Yemini (also known as Arie Yemini), in his capacity as a member of Peninsula, had the authority to close on the subject sale of real property on behalf of Peninsula. However, during the pendency of this action, and as a result of the filing of the notice of appeal, the prospective purchaser of the real property was unable to obtain title insurance in order to proceed with the subject transaction. As a result, the down payment was returned to the prospective purchaser and the subject contract of sale was rendered void. Where performance of a contract has been voided and/or rendered impossible, a disputed issue that arises from the contract is rendered academic (*see Alter v Levine*, 57 AD3d 923, 924; *Asher v Gigante*, 21 AD3d 916, 917; *Voyticky v Duffy*, 19 AD3d 685, 685; *Church of God of Prospect Plaza v Fourth Church of Christ, Scientist of Brooklyn*, 76 AD2d 712, 718, *affd* 54 NY2d 742). Accordingly, under the instant circumstances, the issue of Yemini's authority to close on the transaction on behalf of Peninsula is academic. Despite the parties' contentions to the contrary, this case does not warrant the invocation of the exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715; *Naber Elec. Corp. v Hawthorne Cedar Knolls Union Free School Dist.*, 49 AD3d 698, 698; *Asher v Gigante*, 21 AD3d at 917; *Romaro Corp. v Sea & Sky Garden*, 304 AD2d 742, 742; *compare Matter of Brown v Appelman*, 241 AD2d 279).

RIVERA, J.P., BALKIN, HALL and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court