

RF W. 132 LLC v Mediolanum LLC

2008 NY Slip Op 30153(U)

January 10, 2008

Supreme Court, New York County

Docket Number: 0601640/2007

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **EMILY JANE GOODMAN**

PART 17

Index Number : 601640/2007

RF WEST 132 LLC.

vs

MEDIOLANUM LLC.

Sequence Number : 001

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied

per attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JAN 22 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/10/08

[Signature]

EMILY JANE GOODMAN
S.S.E.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

RF WEST 132 LLC,

Plaintiff,

Index No. 601640/07

-against-

MEDIOLANUM, LLC,

Defendant.

-----X

EMILY JANE GOODMAN, J.:

Defendant Mediolanum, LLC (Mediolanum) moves, pursuant to CPLR 3211, to dismiss the complaint, to cancel the notice of pendency filed by plaintiff RF West 132 LLC (RF West) on or about May 16, 2007, to award defendant costs and expenses, pursuant to CPLR 6514, and to impose sanctions against plaintiff and plaintiff's counsel, including reasonable attorneys' fees incurred by defendant, pursuant to 22 NYCRR 130-1.1, on the ground that the instant action is wholly frivolous.

FACTS

RF West and Mediolanum entered into negotiations for Mediolanum to sell, and RF West to buy, Mediolanum's rights as vendee under a contract for the sale of certain realty situated in New York. The complaint alleges that the parties entered into a written agreement whereby Mediolanum would assign its rights to RF West. However, Mediolanum did not sign the contract. RF West

did sign the agreement, and wire transferred the \$200,000 deposit called for in the agreement. The deposit was a down payment on the Assignment Fee of \$3,850,000.

The parties disagree about the precise sequence of events regarding the timing of the offer to return the deposit compared with when this action was instituted and the notice of pendency was filed. However, those issues are irrelevant to the question of whether there was an enforceable contract, and whether RF West had a legitimate basis to file the notice of pendency.

On May 16, 2007, RF West commenced this action, seeking specific performance of the contract and a permanent injunction enjoining defendant from conveying its interest in the property to anyone else (first cause of action), and seeking damages for breach of contract stemming from Mediolanum's failure to assign RF West its rights to purchase the property (second cause of action). The notice of pendency was filed the same day.

DISCUSSION

RF West contends that since there was a written contract, which it signed, and Mediolanum received the \$200,000 down payment, as provided in the contract, Mediolanum cannot rely on the statute of frauds to negate the agreement, based on the doctrine of part performance. RF's position is unsupported.

Even if the court were to accept RF West's contention that the statute of frauds does not apply, there is still no

enforceable agreement. The draft agreement provides: "This Agreement shall not be binding or effective until properly executed and delivered by Assignor and Assignee." Notice of Motion, Ex. C, at 6, ¶ 17 (F). Plaintiff does not dispute that this provision was contained in the agreement his client signed. Thus, by its terms, the draft agreement precludes enforcement of the agreement unless it was signed and delivered by both plaintiff and defendant. RF West does not even allege, must less provide evidence, that Mediolanum ever signed the agreement. Therefore, the agreement, by its very terms, is not binding.

RF West further contends that it did not act improperly in filing a notice of pendency under the circumstances presented. However, even if there had been a binding agreement, such action would have been improper. Plaintiff does not dispute that the draft agreement provides:

It is expressly understood by Assignee that Assignee shall have no right to specific performance of this Agreement, and further that Assignee shall have no right to file a Notice of Pendency affecting or encumbering the property, except however, that if Assignee shall deliver to Assignor the Assignment Fee, as set forth hereunder, then Assignor shall cause the Contract of Sale to be assigned to Assignee and Assignee shall be entitled to enforce all of Assignor's rights under the Contract of Sale... .

Id. at 2, ¶ 7. Thus, according to the specific terms of the agreement, even had it been enforceable, RF West would have had no right to file a notice of pendency because it paid only the down payment, not the full assignment fee. Plaintiff does not

offer any basis to justify filing the notice of pendency. It merely argues that there are material issues of fact regarding the intentions of the parties, which requires that it be given an opportunity to obtain discovery. However, there is no discovery that would negate the fact that, even had the agreement been executed, plaintiff would not have had any right to file a notice of pendency according to the terms of the proposed agreement. Nor could the fact that the agreement provides that it is not enforceable until executed and delivered by both parties be altered by any discovery.

In the absence of any basis upon which plaintiff could file a notice of pendency, seek specific performance, or seek to have the contract enforced, plaintiff's complaint is dismissed and the notice of pendency is cancelled.

Sanctions

Mediolanum seeks sanctions, arguing that plaintiff had no good-faith basis to bring this action or to file the notice of pendency. RF West responds by saying that defendant should be sanctioned for moving for sanctions. Plaintiff relies on the disputed chronology of when defendant backed out of the agreement, and when defendant offered to return the down payment.

As discussed above, the question regarding when Mediolanum offered to return the down payment, and when it in fact returned the down payment, is irrelevant to the relief plaintiff seeks in

its complaint. The complaint seeks relief based upon a contract that was never fully executed, and by the terms of which it would not be entitled to the relief sought in any event.

22 NYCRR 130-1.1 (c) provides:

For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Plaintiff has put forth a position that is not defensible in fact or law. Nor has plaintiff offered any basis upon which the law regarding construing the contract should be modified in order to allow it to proceed. Additionally, when defendant pointed out that there was no basis for plaintiff's suit, plaintiff failed to remove the notice of pendency or to withdraw the action seeking specific performance. See 22 NYCRR 130-1.1 (c). Moreover, the

court held a telephone conference with the parties on the motion, and plaintiff nonetheless chose to wait for a decision from the court on the motion. Under these circumstances, plaintiff's actions, and that of its attorneys, are sanctionable. Based upon the court's review of the papers submitted, plaintiff and its attorneys are sanctioned in the total amount of \$3,140.00, to be borne jointly, representing the amount which this court finds to be reasonable legal fees incurred by defendant in the making this motion, and \$140.00 for costs (RJI \$95.00 and motion fee \$45.00).

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion is granted, the complaint is severed and dismissed, the notice of pendency is cancelled, and plaintiff and its attorney are sanctioned in the amount of \$3,140.00 to be borne jointly; and it is further

ORDERED that this amount shall be paid to defendant's attorneys within 20 days after receipt of a copy of this Decision and Order, with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 10, 2008

ENTER:


 J.S.C.
EMILY JANE GOODMAN

FILED

JAN 22 2008

NEW YORK
 COUNTY CLERK'S OFFICE