

Verdeber v Commander Enters. Centereach, LLC

2011 NY Slip Op 32799(U)

October 18, 2011

Supreme Court, Nassau County

Docket Number: 007691/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

**JOSEPH E. VERDEBER, JUDITH VERDERBER
and VERBENCO LLC,**

Plaintiffs,

INDEX NO.: 007691/2009
MOTION DATE: 8/22/2011
SEQUENCE NO.: 10

- against -

**COMMANDER ENTERPRISES CENTEREACH,
LLC, COMMANDER ENTERPRISES, LLC,
BENCO, LLC, PEMBROKE PROPERTIES, LLC,
LEONARD SHAPIRO and JOSEPH SHAPIRO,**

Defendants.

The following documents were read on this Motion:

- Motion to Amend Complaint and Stay Proceedings 1.
- Plaintiffs' Memorandum of Law in Support of Motion 2.
- Affirmation of Matthew F. Didora in Opposition 3.
- Plaintiffs' Reply Memorandum of Law in Further Support 4.

PRELIMINARY STATEMENT

Plaintiffs move by Order to Show Cause for leave to amend their complaint to assert claims of breach of contract and waiver with respect to defendant Benco's failure to consummate a closing on its acceptance of its offer to purchase plaintiffs' membership interest. They also seek a stay of further proceedings, including the submission of the proposed Judgment submitted by defendants' counsel, or any similarly proposed judgment, to the County Clerk for entry.

Defendants oppose the motion requests on the grounds that the proposed new

claims are without merit, and are based upon the same transactions as were previously resolved by this Court and affirmed by the Appellate Division.

BACKGROUND

The underlying action is by holders of a 20% interest in Commander Enterprises Centereach, LLC (CEC), the successor in interest to Pembroke Properties. Defendants contend that the CEC Operating Agreement was executed in 2000; but plaintiffs deny having signed that agreement, contending that a July 1999 agreement controls. That agreement provides that if a member desires to sell his interest, they are required to give the other members an option to purchase on the same terms. The 2000 agreement limits the sale of any interest to Benco, the owner of the 80% interest in CEC, pursuant to a formula in which the “purchase price/buy out rate” is determined by multiplying the net operating income by 8.80, and deducting the outstanding mortgage balance. At some point the individual plaintiffs allegedly transferred their interest to Verbenco, LLC, which defendants contend triggered the provision requiring sale to Benco in accordance with the stated formula in the 2000 agreement.

This Court previously determined that the 2000 agreement applied, and that plaintiffs were obligated to convey their membership interest in accordance with the formula set forth in that agreement. Plaintiffs appealed, and by Order dated June 7, 2011, the Second Department affirmed, and determined that the January 2009 transfer by the individual plaintiffs of their interests to Verbenco terminated their membership in the company, and was properly interpreted by Benco as an offer by the Verdebers to sell their interest in the company, which Benco accepted. The Court further affirmed that the 2000 agreement governed the terms of the buyout, and that the buyout provision was not an unreasonable restraint on alienation of property, nor was it unconscionable.¹

¹ Affirmation in Opposition to Motion, Exh. “E”.

DISCUSSION

Amendment of Pleadings

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules. Plaintiff seeks relief under subdivision (b), which provides as follows:

Rule 3025. Amended and supplemental pleadings

* * *

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

* * *

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is “palpably insufficient” to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed.²

The proposed Amended Verified Complaint is annexed to the moving papers.³ The allegations of the document include a claim that plaintiffs and defendant Benco entered into an Operating Agreement on or about July 2, 1999. That agreement granted plaintiffs a 20% interest in Pembroke, with the remaining 80% held by Benco. On or about June 28, 1999 defendant Benco formed Commander, the successor-in-interest of Pembroke. On July 7, 1999 Commander purchased real property located at 2100 Middle Country Road, Centereach, New York. Plaintiffs thereby had a 20% interest in Commander.

² *Lucido v. Mancuso*, 49 A.D.3d 220, 230 (2d Dept. 2008).

³ Exh. “C”.

On or about January 8, 2008, in response to a demand of plaintiffs, Joseph G. Shapiro, on behalf of Commander Enterprises, provided a cover letter and a copy of what was described as a 2000 Operating Agreement. Prior to receiving the 2000 Operating Agreement, the plaintiffs claim to have never seen, nor executed it.

On or about December 23, 2008, plaintiffs formed Verbenco and on January 14, 2009, they transferred their interest in Commander to Verbenco. On the following day, January 15, 2009, they served notice upon defendants that they had transferred their interests. On February 2, 2009, defendants rejected the request that they recognize the transfer, relying upon the 2000 Operating Agreement.

The First Cause of Action alleges breach of contract against Benco. They claim that the January 14, 2009 transfer of the membership interests of the Verderbers was a triggering event under Article VII of the 2000 Operating Agreement, and Benco had thirty(30) days to close on the purchase of plaintiffs' interests. The failure of Benco was a breach of contract, causing damage to plaintiffs. Plaintiffs seek damages and an Order precluding Benco from now closing on the plaintiffs' membership interests.

The Second Cause of Action claims that Benco has waived its right to close on the purchase of the Verderbers' membership interests as a result of their failure to do so within the time prescribed in the 2000 Operating Agreement. Benco acknowledged receipt of the notice of transfer on January 22, 2009, and the failure of Benco to close within thirty (30) days constituted a waiver. Plaintiffs seek an Order declaring that Benco has waived its rights to purchase the interest of Verbenco and that Verbenco is a member of Defendant Commander

DISCUSSION

While plaintiffs have previously argued, in the alternative, that if the 2000 Operating Agreement were binding on them, Article VII was either invalid or was applicable only in the event of death of the holder of a membership interest. This Court rejected those arguments, and concluded that the transfer of the Verderbers' membership interests in 2009 terminated their membership in Commander Enterprises. This position was unanimously affirmed by the Appellate Division in its decision of June 7, 2011.

In the face of multiple motions and appeals by plaintiffs, it is disingenuous on their part to state that defendants have waived their right to acquire their interests in Commander because they did not do so within thirty (30) days of January 22, 2009. The matter was only finally determined by the decision of the Appellate Division, which remanded the matter to this Court for the ministerial act of entering judgment in conformity with their decision.

Plaintiffs' proposed amended complaint does not raise any "additional or subsequent transactions or occurrences" as mandated by § 3025 (b). There is nothing new, other than the passage of time, upon which plaintiffs claim entitlement to a full retreat from the determinations of this Court and the Appellate Division. All of the allegations of the proposed amended complaint occurred prior to the initiation of the action, and were fully known to all parties. Plaintiffs have raised no additional or subsequent transactions or occurrences so as to enable them to seek an amendment of their complaint.

Since plaintiffs have steadfastly refused to recognize the applicability of the 2000 Operating Agreement, it would have been little more than a fool's errand for defendants to actively pursue a closing of the transfer. It is inconceivable that plaintiffs would willingly have appeared to sign over their interest in Commander while, at the same time, seeking to undue the applicability of Article VII of that Agreement in the Courts.

Where the conduct of a party prevents the other party to a contract from completing its obligations, the latter is not responsible for non-performance. An implied covenant of good faith and fair dealing is implied in all contracts; and one who prevents the performance in accordance with the contract cannot avail themselves of the nonperformance which they have occasioned.⁴ The defendant in *1 — 10 Industry Associates, LLC*, a tenant who had received a significant rent abatement in return for their promise to relocate from one of landlord's buildings to another, and arbitrarily rejected alternative locations as unsatisfactory, thereby depriving plaintiff of an intended benefit of the agreement, was subject to an obligation to act reasonably, even though the agreement did not explicitly require them to act in a reasonable fashion.

Similarly, plaintiffs' refusal to acknowledge the efficacy of Article VII of the 2000

⁴ *1—10 Industry Associates, LLC v. Trim Corp. of America*, 297 A.D.2d 630 (2d Dept. 2002).

Operating Agreement, and their pursuit of legal condonation of their position, precluded defendants from effectuating a formal closing of the transaction. Were it not for the actions of plaintiffs in seeking appellate redress, the matter would have been fully resolved. In fact, soon after the October 2009 Order of this Court, defendants commenced installment payments in accordance with Article VII of the 2000 Agreement. These checks were rejected and returned to them by plaintiffs.

This Court, as are the parties, is constrained to follow the dictate of the Second Department, which has directed the entry of a Judgment “declaring that the Verderbers’ interest in Commander Enterprises Centereach, LLC, terminated in January 2009, and that Benco, LLC, is entitled to purchase their interest, to be valued in accordance with the formula set forth in Article VII of the subject operating agreement * * *”. This language implicitly directs the future transfer of the Verderbers’ interests, irrespective of the thirty (30) day period within which the Agreement called for the closing.

Plaintiffs’ motion to amend the complaint to include claims for breach of contract and declaring that defendants have waived their right to purchase plaintiffs’ interest in Commander Enterprises Centereach, LLC is denied.

Defendant is directed to Submit Judgment.

This constitutes the Decision and Order of the Court.

Dated: October 18, 2011


J.S.C.

ENTERED
OCT 25 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE