SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

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RICHARD SACK AND PETEZI SACK,

Plaintiff,

Index No. 601472/01

- against -

DECISION, ORDER and JUDGMENT

CHARLOTTE DEUTSCH, et al.,

#002, 004, 005

Defendants.

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MARTIN SCHOENFELD. J.:

Motions 002, 004, and 005 are consolidated for disposition and disposed of as follows:

In this action plaintiffs Richard and Petezi Sack assert various claims all based upon an alleged right of first refusal to purchase the building in which plaintiffs have long resided, located at 138 West 73rd Street, New York, NY ("the building"). Defendants Gordon Jacques Kahn; Edgar Galloway; Fernando Polletta; Eileen Polletta (collectively, "the Kahn Group"); Jeffrey D. Taub; Meyers, Greenawalt, Taub & Wild (collectively, "the Taub Defendants"); and S. Stanley Deutsch, now move, and Charlotte Deutsch now cross-moves, for summary judgment. For the reasons set forth herein, the motions and cross-motion are granted, the complaint is dismissed with prejudice, and the Kahn Group defendants are awarded summary judgment on their counterclaim seeking a declaration that plaintiffs' alleged right

of first refusal is void as against the Kahn Group and the property.

Background

In or about 1973 plaintiffs leased the basement apartment in the building from the Deutsches.[1] In or about April 1985 plaintiffs filed a rent overcharge complaint with the New York State Division of Housing and Community Renewal ("DHCR"). In or about August 1987 the DHCR proceeding was purportedly resolved pursuant to an undated, handwritten stipulation (Taub Moving Exhibit A) ("the 1987 Stipulation") that includes, as ¶ 12 thereof, the alleged right of first refusal:

> 12) Landlord gives the tenant's [sic] the right of first refusal in the event Landlord seeks to sell Subject Premises while tenants continue to be the tenants of record of the apartment . . . .

The stipulation was signed by plaintiffs; their attorney, John Tilley; Charlotte Deutsch (as "Landlord"); and Jason Deutschmeister (as "Atty for Charlotte Deutsch"). The 1987 Stipulation purportedly resolved pending landlord-tenant

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[1] The Deutsches' marital status, or lack thereof, then and now is unclear to this Court. It appears that they were husband and wife in 1973 but later divorced. Today's decision is independent of their status at any point in time.

litigation in Civil Court (Index No. 83802/87) and was filed there, as well as with DHCR and in Criminal Court (where some form of harassment complaint had been pending).

S. Stanley Deutsch did not sign the 1987 Stipulation. He states (Moving Affidavit ¶ 5) that Charlotte was not his agent or otherwise authorized to act on his behalf. On the other hand, Tilley states (Opposition Exhibit G, ¶¶ 3-4) "that representations were made . . . at the time of the execution of the [1987 Stipulation], that Charlotte Deutsch was fully empowered to bind the 'Landlord' in all its promises" and that "[s]pecifically, both Charlotte Deutsch and her attorney represented that she had full legal authority from Stanley Deutsch to enter into the covenants in [the **1987** Stipulation]." Richard Sack states (Opposition Affidavit ¶ 5) that Charlotte Deutsch "expressly stated that she had a written power of attorney from her former husband" and that she "stated she was fully empowered in writing by Mr. Deutsch to bind him.'' This Court will assume, solely for purposes of the instant motion, that representations were made that Charlotte Deutsch had authority to act for S. Stanley Deutsch. However, the legal effect, if any, of these representations need not be and is not decided.

In or about July 1999 Charlotte Deutsch retained the Taub Defendants to commence what became a series of landlord-tenant summary proceedings against plaintiffs. Taub filed a Petition dated June 28, 1999 in Deutsch v Sack, Index No. 82374/99 (also written as "872374/99") (Opposition Exhibit I) that refers to the 1987 Stipulation. Taub also submitted a September 28, 1999 Affidavit (Opposition Exhibit J) of Charlotte Deutsch that had annexed as an exhibit thereto a copy of the 1987 Stipulation. Although aware of the existence of extensive prior litigation, including the existence of the 1987 Stipulation, Taub states that he was not aware of the alleged right of first refusal until on or about March 27, 2001, when plaintiffs served Taub with a cross-motion in the then-current landlord-tenant litigation. Again, this Court will assume, solely for purposes of the instant motion, that Taub had actual or constructive notice of the alleged right of first refusal prior to the contract and sale here in issue.

In an Affidavit dated June 23, 2000 (Unnumbered Exhibit to Kahn Group motion), Petezi Sack claimed that she was entitled to "poor person" status, pursuant to CPLR Article 11, in the then-pending landlord-tenant summary proceeding. The Affidavit includes the following statement: "I own no property of any kind

except necessary wearing apparel and home furnishings + housewares." Later, in an Affidavit dated March 27, 2001 (Unnumbered Exhibit to Kahn Group motion, ¶ 52), Petezi Sack stated that: plaintiffs had "been forced to spend [their] savings [and] have had to borrow money to survive."

Meanwhile, in *or* about September 2000, the Deutsches, represented by defendants Ronald S. Herbst and Gazianis & Herbst (collectively, "the Herbst Defendants") contracted to sell the building to the Kahn group, represented by the Taub Defendants, for $2,000,000. The sale closed on January 10, 2001. Richard Sack apparently does not question the contract price, as he states (Opposition Affidavit ¶ 10) that "[t]he product of Taub's efforts was a contract dated September 28, 2000, whereby the Deutsches agreed to sell the Building to [the Kahn Group] for a price of $2 million." The Taub defendants informed plaintiffs of the sale several weeks later, on or about January 29, 2001. Soon after purchasing the building, the Kahn Group settled the landlord-tenant litigation with plaintiffs.

It is undisputed that the Deutsches did not offer plaintiffs an opportunity to purchase the building on the same terms and conditions as the Kahn Group bought it. The complaint (¶ 45) states that plaintiffs "were ready and willing to purchase the

Premises under the terms and conditions of the" sale to the Kahn Group. The complaint (¶ 48) alleges that the building is worth in excess of $3,500,000.

The Alleged Causes of Action

The first cause of action in the complaint seeks rescission of the sale to the Kahn Group and specific performance of plaintiffs' alleged right of first refusal.

The second cause of action seeks to enjoin the Kahn Group from conveying, encumbering, or renting the property.

The third cause of action seeks damages from the Deutsches for breach of contract.

The fourth, fifth, and sixth causes of action seeks damages against the non-Deutsch defendants for tortious interference with contractual relations.

The seventh cause of action seeks treble damages against Taub for violating Judiciary Law § 487.

The Kahn Group's Answer - Excerpts

The second affirmative defense in the Kahn Group's answer is that "plaintiffs were not financially capable of meeting all the financial requirements of the contract of sale."

The third affirmative defense asserts that the alleged right of first refusal is void for indefiniteness.

The fourth and fifth affirmative defenses assert that plaintiffs forfeited any alleged right of first refusal by continually failing to pay rent.

The sixth affirmative defense asserts that the alleged right of first refusal is "void on its face" because Charlotte and Stanley Deutsch owned the building as tenants-in-common, whereas only Charlotte signed the 1987 Stipulation.

The eighth affirmative defense asserts that the Kahn Group members were bona fide purchasers and, thus, entitled to the protection of Real Property Law §§ 291, 294.

The Kahn Group's Answer includes a counterclaim for a declaration that plaintiffs' claims to a right of first refusal are void as against them "and the premises.''

Discussion

The parties' submissions raise a plethora of potentially interesting issues, including the effect, if any, of the granting by only one tenant in common of a purported right of first

refusal; the requisite specificity of such a right'; the extent to which (alleged) breaches of an agreement containing a right of first refusal would vitiate the right; and the extent to which the (alleged) constructive notice of counsel of an encumbrance on property is to be imputed to a client claiming *bona* fide purchaser status. Some of these issue might have required disclosure, pursuant to CPLR 3212(f), prior to the making of a dispositive motion based thereon. However, these issues need not be and are not reached, as this Court finds dispositive of the entire case the fact that plaintiffs have failed to rebut the claim that they were not "able" to exercise their alleged right of first refusal.

A plaintiff relying on a right to purchase property must "demonstrate that [plaintiff] was ready, willing and able to purchase the property." Handy v Manganelli, 181 AD2d 658, 658 (2d Dept 1992) (action for specific performance of option contained in lease to purchase demised premises); accord, Huntington Min. Holdings v Cottontail Plaza, Inc., 60 NY2d 997, 998 (1983). Furthermore, "a party opposing [a summary judgment] motion . . must produce evidentiary proof in admissible form

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[2] At first blush, the instant right appears definite enough to be enforced and, therefore, not void for indefiniteness.

sufficient to require a trial of material questions of fact on which the opposing claim rests. '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 (1988) (citations omitted). Plaintiffs have failed to provide anything but conclusions and unsubstantiated allegations about their ability to purchase the building. A plaintiff may not avoid summary dismissal "by raising a feigned factual issue." Miller v City of New York, 214 AD2d 657 (2d Dept 1995).

As noted above, at around the time here in issue, plaintiffs were claiming that they themselves were destitute. They are now estopped from claiming otherwise.

Their sole opposition to defendants' claim that they were not "ready, willing and able" to exercise their alleged right of first refusal is the statement that their "plan is [*sic*] to obtain financing through a long-term acquaintance, **Mark** Luria," and the November 28, 2001 Affidavit of Mr. Luria himself (Opposition Exhibit L). Therein, Mr. Luria states, in essence, that he resides in England; that he has known Richard Sack for almost 50 years; that he is good friends with plaintiffs, is familiar with the building and the neighborhood, and often

discussed plaintiffs' "ongoing problems with their landlord"; that he was aware of the (alleged) right of first refusal and told Richard that he would be interested in being a "financial partner" in exercising that right; that he would like to purchase the building in partnership using plaintiffs' alleged right of first refusal and Luria's financing; that he has long been involved in, *inter alia*, "the ownership, investment and management" of real estate; and that he still owns properties in Hawaii (6), Bellevue Washington (1), Oregon (2). He concludes thusly,

> In brief my financial condition is as follows:
>
> 1. Value of listed securities and cash on hand: in excess of $2,500,000.00
> 2. Equity in real property above indebtedness: in excess of $10,000,000.00
> 3. Significant other assets including home which is debt free. Stock in private companies, notes and accounts receivable, and personal property.
> 4. No other indebtedness of any kind.

This Court will assume, solely for purposes of the instant motion, that Luria would have been willing to be plaintiffs' partner if he had had the means. However, there is no way of knowing whether Luria had or has any means at all. Everything he states is pure ipse dixit. There is not a single statement of objective, verifiable fact. What securities, Enron? What accounts receivable, Global Crossing? What cash, Argentinian

pesos? There are no deeds, no maps, no addresses, no contracts, no photographs, no appraisals, no certificate numbers, no bankbooks, no banker's affidavit. There is pure conclusion and unsubstantiated allegation, from a person outside of the court's jurisdiction and outside of the country. Furthermore, he was writing on behalf of people who, according to Justice Lottie E. Wilkins, in Sack v Deutsch, Index No. 101603/95, in a Decision and Order dated "December 2000" (Taub Defendants Moving Affirmation.,Exhibit C, at 9) said "attempted to perpetuate a fraud on the court by submitting false documents."

A very practical problem with plaintiffs' reliance on Luria's affidavit is that defendants have been deprived of any meaningful means to rebut it in reply. Had Luria indicated what property and securities he owns, defendants' reply papers could have contested the ownership or value thereof.

An affidavit that could have been drawn up in 10 minutes, that claims in excess of $12 million, all of which could be a complete fiction, is a thin reed indeed upon which to have this court restrain alienation of property (which is disfavored in the law) while numerous parties engage in disclosure that could drag on for months or years in a dispute which has been litigated in one form or another for over a decade. Furthermore, had

plaintiffs taken the simple, expedient step of recording their alleged right of first refusal, there would be no question that the current owners would not be bona fide purchasers ~~without~~ notice. In a sense plaintiffs have slept on their rights all these years, and now want to litigate to the hilt.[3]

The cases indicate that a claim of ability to exercise a right to buy must have a specific, factual grounding. In Globerman v Lederer, 281 AD 39 (1st Dept 1952), the issue was whether the plaintiff-real estate broker, suing for a commission, had procured a person ready, willing and able to purchase the property from the defendant. The court wrote as follows:

> In the annotation appearing at 1 A.L.R. 528, the holdings of the cases upon this subject are summarized as follows: 'It may be said, in general, that a proposed purchaser is not able, when he is depending upon third parties who are in no way bound to furnish the funds, to make the purchase. It is not necessary to follow a particular formula in order to establish financial ability of a prospective purchaser to meet the price, but there must be some tansible evidence from which a jury could conclude that he would have had the ability. Some facts must be adduced, beyond the mere conclusion of the prospective purchaser, that he could have performed his obligations in the transaction.

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[3] This Court has already denied, in an opinion dated August 30, 2001, plaintiffs request for a preliminary injunction against alienation of the property. The conclusions and result of that decision are not the basis for the instant decision.

Id. at 42-43 (emphasis added).

Later, in Siegel v Liese, 23 AD2d 425, 425 (3rd Dept 1965), aff'd, 18 NY2d 930 (1966), relied upon by plaintiffs" (Opposition Brief at 18), "the prospective purchasers . . . testified in detail as to financial ability ample to consummate the transaction." Thus, there was "evidence . . . of specific assets and firm commitments by specified lenders.'' Indeed, Siegel was in accord with Globerman:

> It seems to us clear that adequate 'tangible evidence' for a jury's evaluation, as required by Globerman . . is to be found here in the specific and detailed testimony of the prospective purchasers, with unequivocal references to identified sources and, in some instances, documents.

Nothing of the sort is present here. Thus, plaintiffs have failed to raise an issue of fact as to whether, despite their penury, they were "able" to exercise their alleged right of first refusal.

Conclusion

As noted above and by counsel for Charlotte Deutsch (Reply Affidavit ¶ 3), plaintiffs' complaint alleges that plaintiffs

[4] The other cases upon which plaintiffs rely are. also. distinguishable from the instant case.

"were ready and willing to purchase the Premises under the terms and conditions of the Sales Contract." Conspicuously absent is a statement that plaintiffs were "able" to purchase the building. This may have been due to an oversight or typographical error; then again, it may have been in recognition of the fact that the complaint was filed only nine months after Petezi Sack applied for *in forma pauperis* status in the then-pending landlord-tenant litigation. Plaintiffs' friend's intangible, unspecific, unsubstantiated claim to be a multi-millionaire is insufficient to prolong this lawsuit.

As plaintiffs have failed to raise an issue of fact as to whether they were "able" to exercise their alleged right of first refusal, they are not entitled to pursue their claims for recission and specific performance, injunctive relief, damages for breach of contract (there being no damages) or tortious interference with contract (there being no proximate cause or damages). Furthermore, it is obvious that plaintiffs will not be able to make out the "deceit or collusion" (or damages) necessary to establish a cause of action against Traub for violating Judiciary Law § 487. In particular, when Traub stated in open court in the fall of 2000 that he had no reason to believe that the Deutsches did not still own the property, they still did.

Finally, although the Herbst defendants did not move or cross-move for summary judgment, "summary judgment searches the record," CPLR 3212(b), and it is clear that plaintiffs cannot make out a cause of action against them simply because they represented the Deutsches in the sale of the building.

Thus, for the reasons set forth herein, the motions and cross-motion are granted, the complaint is dismissed with prejudice, and this Court hereby declares, pursuant to CPLR 3001 and 3212, that plaintiffs' claim to a right of first refusal is void.

This opinion constitutes the decision, order and judgment of the Court.

Dated: April 2, 2001

J.S.C.