

Urban Archaeology Ltd. v Dencorp Investments, Inc.
2004 NY Slip Op 30027(U)
November 22, 2004
Supreme Court, New York County
Docket Number: 2_30060/1353
Judge: Diane A. Lebedeff
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. DIANE A. LEBEDEFF PART 8
Justice

Urban Archaeology Ltd.,
ET AL

- v -

Dancorp Investments, Inc.,
ET AL

INDEX NO. 601353/03
MOTION DATE 11/19/04
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	} 1-7
Answering Affidavits — Exhibits _____	
Replying Affidavits _____	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____ J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8

-----X

URBAN ARCHAEOLOGY LTD., GIL SHAPIRO
and GERALDINE RONAN,

Plaintiffs,

-against-

Index No. 601353/03
Mot. Seq. No. 003

DENCORP INVESTMENTS, INC. and ALLAN
S. REIVER,

Defendants.

-----X

DIANE A. LEBEDEFF, J.:

On the prime motion, defendants seek a determination that they have a right to purchase pursuant to a put-call option further described below. Plaintiffs cross move for specific performance of that put-call option. It is noted, as a procedural matter, the motion papers are substituted instead and in place of an unsigned underlying order to show cause, which substitution was consented to on a conference call held between counsel and the court on November 18, 2004.

FILED

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As has been previously described, this matter concerns a partnership known as Urban Archaeology Co. Dencorp Investments, Inc., and Urban Archaeology Ltd. are the two sole partners; each such corporation is controlled by the first individual named in the caption and, for the purposes of this decision, each such corporation and its controlling individual will be referred to as "plaintiffs" or "defendants." Pursuant to the underlying partnership agreement, either party could issue a "put-call option" (Partnership Agreement,

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para. 11). Plaintiffs issued such a put on May 1, 2003. Defendants requested a stay of such put, which was granted by this court's preliminary injunction; such preliminary injunction was vacated by the Appellate Division, First Department, on October 5, 2004 (*Urban Archaeology Ltd. v. Dencorp Investments, Inc.*, ___ A.D.3d ___, 783 N.Y.S.2d 330 [1st Dept. 2004]).

The debate currently before the court requires a simple resolution on the pleadings, in that both parties request summary judgment relief. The standard for evaluating motions for summary judgment is well-established. "To obtain summary judgment it is necessary that the movant establish [a] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in [movant's] favor (CPLR 3212, subd. [b]), and [movant] must do so by tender of proof in admissible form" (*Friends of Animals v. Assoc. Fur Mfrs.*, 46 N.Y.2d 1065, 1067 [1979]).

The starting point here is that only plaintiffs have pleaded a claim for specific performance. It is the clear import of the appellate decision that plaintiffs have made out an adequate *prima facie* case in support of such relief and this court independently also so concludes.

Equitable defenses have been plead. While weighing such defenses, the applicable standard is that a grant specific performance rests upon the discretion of the trial court, reviewable under an abuse of discretion standard (*Van Wagner Advertising Corp. v. S & M Enterprises*, 67 N.Y.2d 186, 192 [1986]).

Turning to what are or might be considered to be equitable defenses, defendants have pleaded unclean hands (first affirmative defense), laches, waiver and estoppel (second

affirmative defense), bad faith (third affirmative defense), denial of access to books and records (fourth affirmative defense), and miscalculation of capital accounts (fifth affirmative defense). None of these have been supported by defendants with proof submitted in opposition to the plaintiffs' cross motion. It also must be specifically noted that ultimately both this court and the Appellate Division found the defendants' protest about access to the books and records belied by the record and, in relation to calculation of the capital account, such figures have been fully identified and no longer serve as a reason to impede the rights of the parties under the contract (*compare Cho v. 401-403 57th Street Realty Corp.*, 300 A.D.2d 174, 174-175 [1st Dept. 2002], "Supreme Court properly determined that there are triable issues of fact precluding summary judgment as to whether defendants' alleged failure to provide financial disclosure, as required by the parties' prior stipulation, precluded plaintiffs from exercising the option, created by the stipulation, to repurchase shares in two closely held real estate corporations"). Accordingly, the court finds the equitable defenses are not sufficient to bar the grant of summary judgment to plaintiffs.

As a final argument, defendants urge that they should still be permitted to close by reason of stays of the closing, and thus snatch success from the jaws of defeat. However, several fatal flaws to this argument exist. First, the defendants failed to post the \$10,000 bond set in the order of September 23, 2003, from which order sprang all the orders addressed by the Appellate Division. The court has reviewed the County Clerk's file and no such bond was filed. Not having posted the bond, defendants have lost the protection of the now vacated preliminary injunction (Siegel, *N.Y. Practice* § 329 [3d ed.], "Before

getting a preliminary injunction, the plaintiff will have to submit an undertaking [bond] – this is mandatory – in an amount to be fixed by the court, conditioned that ‘if it is finally determined that he was not entitled to an injunction’, the plaintiff will pay the defendant ‘all damages and costs which may be sustained by reason of the injunction’” [citing to CPLR 6315 (b)]; *see*, as to general nature of injunction bond, *J.A. Preston Corp. v. Fabrication Enterprises, Inc.*, 68 N.Y.2d 397 [1986]).

Second, given that there has been a final order by the Appellate Division, First Department, regarding the defendants’ lack of entitlement to a preliminary injunction, this court’s scope of action in this area necessarily is limited (*see, for example, Greenburgh Eleven Union Free School Dist. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2 A.D.3d 109 [1st Dept. 2003], *lv. dismissed*, 1 N.Y.3d 622 [2004] “Upon remittance, the court’s order ‘shall be authority for any further proceedings’ [CPLR 5524 (b)]. * * * * In view of our prior order, Supreme Court was without authority to [reach another issue]”).

Third, the various trial court stays were for identified times certain with dates of expiration or, alternatively, in relation to the stipulation governing the stay pending appeal, as measured by its terms. There was no indefinite tolling and, at this point, plaintiffs are the beneficiary of the stays to the extent that they should not be precluded from closing by reason of any calculation of time.

For these reasons, the court finds that defendants have no further right to demand that they be permitted to proceed with purchase of the plaintiffs’ partnership interest. Given the record as a whole, plaintiffs are entitled to summary judgment in their favor on the cause of action for specific performance and may proceed to purchase defendants’

partnership interest. The motion is denied and the cross motion granted.

Consistent with the foregoing, it is ordered and decreed that plaintiffs are entitled to proceed with such purchase and plaintiffs shall set a date for closing expeditiously.

This decision constitutes the order of the court.

Dated: November 22, 2004



J.S.C.

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