

M & A Motors, Inc. v Disco Realty, Inc.

2004 NY Slip Op 30071(U)

May 14, 2004

Supreme Court, Suffolk County

Docket Number: 0020672/0672

Judge: James M. Catterson

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVIII - SUFFOLK COUNTY**

PRESENT:

Honorable JAMES M. CATTERSON

Motion IUD: 3-21-03
Motion No.: 003 - MD

M & A MOTORS, INC.,

Plaintiff,

- against -

DISCO REALTY, INC., and AMES D. RESSA,

Defendants.

PLAINTIFF'S ATTORNEY

Schapiro & Reich, Esqs.
325 East Sunrise Highway
Lindenhurst, New York 11757

DEFENDANTS' ATTORNEY

Joseph J. Sciacca, Esq.
33 Main Street
Port Washington, New York 11050

Upon reading and filing the following papers (1) Notice of Motion for Summary Judgment dated February 20, 2003 and supporting papers (including Memorandum of Law) by defendants; (2) Affidavit in Opposition dated March 20, 2003 and supporting papers (including Plaintiffs Memorandum of Law) by plaintiff; (3) Reply Affirmation dated March 19, 2003 by defendants; and now,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing, the motion is decided as follows:

ORDERED that this motion by defendants for an order pursuant to C.P.L.R. Rule 3212 granting summary judgment in their favor dismissing the complaint and awarding defendants costs, sanctions and attorney's fees pursuant to 22 N.Y.C.R.R. § 130-1.1 is denied. It is further

ORDERED that the defendants are directed to service a copy of this decision and order upon all parties.

Plaintiff commenced the instant action to enforce a right of first refusal to purchase real property located at 999 and 1017 East Jericho Turnpike in Huntington Station, New York, pursuant to a lease extension from the owner, defendant Disco Realty, Inc., for the period of

October 1, 1997 to September 30, 2002. The lease extension specifically provided that “. . . the Tenant shall have the right of first refusal to purchase the premises in the event that the same are offered for sale.”

By letter dated April 9, 2002, an attorney at the firm of Rivkin Radler L.L.P. informed defendant Ames D. Ressa (hereinafter referred to as “Ressa”), principal of the defendant Disco Realty, Inc., that a client was willing to purchase the property for two million dollars with the conditions that 1) a mutually acceptable contract of sale based on commercially reasonable terms be executed between the parties; 2) the closing date occur on or about 90 days from the date of execution of the contract of sale; and 3) the contract of sale be subject to the completion of a satisfactory Phase I environmental inspection. By letter dated April 30, 2002, the plaintiffs principal shareholder, Mehdi Afati (hereinafter referred to as “Afati”) advised Ressa that the plaintiff desired to exercise its right of first refusal to purchase the property subject to the receipt and acceptance of a contract of sale containing commercially reasonable terms and conditions. In response, the defendants’ attorney sent a letter dated May 7, 2002 requesting that the plaintiff execute the attached three duplicates of the proposed contract of sale if plaintiff found them acceptable. The letter contained the qualification that the defendant had not reviewed the proposed contract and that the transmittal of the contract to the plaintiffs attorney was not to be construed as an offer to sell the premises. The defendant’s attorney subsequently sent a letter dated June 17, 2002 to the plaintiffs attorney indicating that Ressa was “not interested in pursuing a sale of the referenced premises at this time.” Ressa later sent the plaintiff a letter dated July 29, 2002 stating “As you know your Lease ends as of September 30, 2002. Commencing October 1, 2002 your rent will be \$5,250.00 per month plus taxes on a Month-to-Month basis. Please advise the undersigned at your earliest convenience if you intend to continue as a Tenant on a Month-to-Month basis.”

By its complaint, the plaintiff alleges that it advised the defendants on or about April 30, 2002 that it sought to exercise its right of first refusal and that it was ready, willing and able to purchase the property. The plaintiff contends that defendants declined to offer the property in bad faith and devised a scheme to convey the property to another in derogation of the plaintiffs right of first refusal. The plaintiff further alleges that it has been wrongfully deprived of its rights under the amended lease, has been forced to commence this action and incur attorney’s fees, and has been damaged in a manner for which there is no adequate remedy at law. Plaintiff seeks judgment against defendants directing them to offer the property to plaintiff in accordance with the right of first refusal at a price equal to the April 9, 2002 offer together with costs, disbursements and legal fees.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff failed to execute a contract of sale pursuant to the terms of the lease extension, and for an award of costs, sanctions and attorney’s fees pursuant to 22 NYCRR § 130-1. In support of the motion, defendants submit, *inter alia*, the affidavit of Ressa, the affidavit of Stephen A. Ressa (the defendant’s real estate attorney); the pleadings; the lease agreements; the letter dated May 7, 2002 with a proposed contract of sale; and the letter dated June 17, 2002 indicating that Ressa was no longer interested in selling the property.

In his affidavit, Ressa asserts that the plaintiffs principal, Afati, wished to purchase the property after learning from Ressa that on or about April 9,2002 Ressa had received an offer to purchase from a client of Rivkin Radler L.L.P. In addition, Ressa asserts that after preparing a contract of sale and sending it to the plaintiff on May 7,2002, the plaintiffs attorney requested five main changes to the contract. Of these changes, two concerned financing and environmental inspection and the defendants' attorney refused these requests. Finally, Ressa asserts that he subsequently changed his mind and that his attorney sent the plaintiffs attorney a letter dated June 17,2002 informing that Ressa was not going to sell the property and his attorney requested the return of the contract.

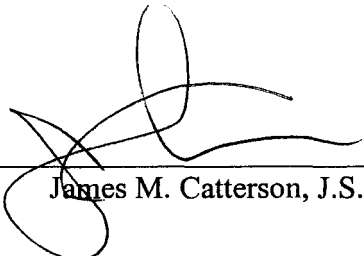
In opposition, the plaintiff contends that its right to exercise the right of first refusal became a legally binding obligation when Afati spoke directly with the defendant Ressa and agreed to pay the two million dollar price. In support of the opposition, the plaintiff submits the affidavit of Afati, and its letter dated April 30,2002.

Here, inasmuch as plaintiff exercised its right of first refusal by letter dated April 30, 2002 before any contract with the third-party (the Rivkin Radler client) expired or was abandoned, a binding offer and acceptance was created between the plaintiff and the defendants. See Cipriano v. Glen Cove Lodge # 1458,B.P.O.E., 1 N.Y.3d 53,769 N.Y.S.2d 168 (2003). The defendants did not revoke the offer prior to acceptance. A binding contract was therefore created that was unaffected by any subsequent expiration of the triggering event (the expiration or abandonment of a contract between defendants and the Rivkin Radler client). See Yudell Trust I v. API Westchester Assocs., 227 A.D.2d 471,643 N.Y.S.2d 161 (2d Dept. 1996). That the defendants have not sold the property to anyone is irrelevant under the circumstances. However, there is an issue of fact as to whether the plaintiff failed to match the third-party offer by requesting changes to the contract terms, which would allow the defendants to revoke the offer. Accordingly, the instant motion is denied.

The above constitutes the decision and order of the Court.

ENTER

Date: May 14,2004


James M. Catterson, J.S.C.

 FINAL DISPOSITION

 X NON-FINAL DISPOSITION