

**Clark Constr. Corp. v BLF Realty Holding Corp.**

2004 NY Slip Op 30314(U)

November 24, 2004

Supreme Court, New York County

Docket Number: 122662/00

Judge: Shirley Werner Kornreich

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

PRESENT: KORNREICH  
Justice

PART 54

CLARK CONSUMPTION CODE,

INDEX NO. 122662/00

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 13

MOTION CAL. NO. \_\_\_\_\_

BLF READY HOLDING CODE,

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Renewal

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1,2

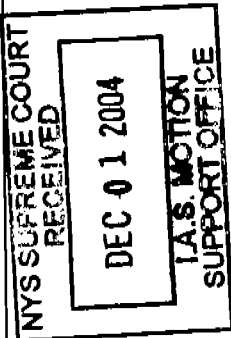
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

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



FILED

DEC - 1 2004

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/24/04

SHIRLEY WERNER KORNREICH  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
CLARK CONSTRUCTION CORPORATION,  
MARC E. ELLIOTT and SAVAS TSITIRIDIS

Index No.: 122662/00

Plaintiffs,

-against-

BLF REALTY HOLDING CORP.,  
AIM HOLDING, LLC and WILLIAM FLEISCHER,

**DECISION  
and ORDER**

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

Following partial summary judgment for defendants in an action to enforce alleged oral contracts for purchase of condominiums, plaintiff tenants move for renewal. The motion is granted.

I. Facts

Plaintiffs are tenants of a building located at 117-119 Hudson Street, New York, NY (“the building”). Plaintiff Clark Construction Corp. (“Clark Construction”) has been in the building as a commercial tenant since 1988, while plaintiffs Savas Tsitiridis (“Tsitiridis”) and Marc E. Elliott (“Elliott”) have occupied their residential units since February 1998 and December 1998, respectively.

Each tenant entered into a lease agreement with defendant BLF Realty Holding Corp. (“BLF”), which owned the building in 1993. That corporation is alleged to be the alter ego of defendant William Fleischer (“Fleischer”). In November 2000, shortly after plaintiffs commenced this lawsuit, BLF sold the building to defendant AIM Holding, LLC (“AIM”),

which plaintiffs claim is yet another corporate alias of Fleischer's. Fleischer is president of BLF and a member of AIM; he is also a resident of the building.

Each plaintiff has a similar story. Each alleges that Fleischer discussed his intention to convert the building into condominiums. Fleischer allegedly said he had an offering plan he would submit to the State Attorney General and that the building would be converted in about a year, once the necessary renovations brought the building up to Code and the Attorney General's approval was received. The offering plan was never exhibited to plaintiffs.

Nonetheless, plaintiffs allegedly negotiated prices on their units and paid down payments that were to be credited to their eventual purchases. Christopher Clark ("Clark"), president and majority owner of Clark Construction, claims to have worked out a sale price of \$1,344,000 and a down payment of \$200,000 for his firm's space on the building's second floor. Elliott says he paid \$100,000 toward the \$610,000 price on his third-floor apartment, Unit 3F, and Tsitiridis says he paid \$115,000 toward a price of \$1,180,000 on the entire fourth floor, which included his apartment. Plaintiffs allege they invested money in renovations to improve their units in reliance upon the alleged oral purchase agreements. Clark Construction claims to have spent between \$150,000 and \$250,000; Elliott claims to have spent approximately \$30,000; and Tsitiridis claims to have spent approximately \$75,000.

No writing regarding the agreements was consummated, even though plaintiffs are no strangers to business dealings. In addition to running Clark Construction, Clark owns, through 155-157 Franklin Street LLC, residential and commercial space in the neighborhood. Elliott is an attorney who has represented condominium buyers. Tsitiridis owns residential and commercial buildings in Queens, and he owns and operates taxicab fleets through his various business entities.

Elliott and Tsitiridis each allege that they paid the down payments via their leases with BLF, couching the payments in terms of rent. The leases, however, mentioned nothing about Fleischer's plans to take the building condominium, nor did they speak to agreements to sell the apartment to the lessees. The money paid was described as rent, and each lease contained an integration clause.

Elliott's lease ran from December 1998 to November 1999, at which time it was renewed for an additional year. Tsitiridis' lease ran from February 1998 to January 1999. Clark Construction had no written lease as of April 1, 1998. Since the expiration of their leases, plaintiffs have been month-to-month tenants, paying rent that defendant complains is far below market value. Defendants served a notice of termination on Clark Construction that purported to terminate its tenancy effective November 1, 2000, and also served notices on Elliott and Tsitiridis effective October 1, 2002.

Plaintiffs assert numerous causes of action. Their first cause of action seeks an injunction preventing defendants from transferring an interest in the premises to any third party; the second seeks specific performance of the alleged oral agreements; the third seeks damages for breach of contract on the oral agreements; the fifth seeks damages for fraud; and the seventh seeks a judgment declaring that plaintiffs Elliott and Tsitiridis are protected tenants under MDL Article 7-C. The fourth and sixth causes of action, which relate to harassment, as well as plaintiff's requests for punitive damages, were previously stricken by the Court (Shoenfeld, J.). In their answer, defendants assert a variety of affirmative defenses, and make several counterclaims: counterclaims one through six seek orders directing plaintiffs to surrender their premises and judgments ejecting them from the building; counterclaims seven through nine seek damages for

plaintiffs' use of the premises at below-market rent since they received notices of termination; and the tenth counterclaim seeks legal fees from Clark Construction pursuant to its 1993 lease.

Before plaintiffs Elliott and Tsitiridis joined the action, the Court (Schoenfeld, J.) issued a decision on July 12, 2001 that: 1) consolidated various actions in the Supreme Court and the New York Civil Court into the present action; 2) denied defendants' motion to dismiss plaintiff's contract claims; 3) dismissed Clark Construction's harassment claims and requests for punitive damages; and 4) allowed plaintiff to attempt to pierce the corporate veil and show Fleischer's liability. The Appellate Division upheld Justice Schoenfeld's decision on December 5, 2002, and ruled, *inter alia*, that absent rebuttal evidence, on a dismissal motion, Clark Construction's complaint was sufficient to make out a fraud claim and remove the alleged contract from the Statute of Frauds via the part performance exception. Clark Construction Corp. v. BLF Realty Holding Corp., 300 A.D.2d 49 (1st Dept. 2002). The Court granted leave on September 9, 2002 to add Elliott and Tsitiridis to the complaint.

The Court has issued several subsequent rulings, the most recent being a decision on plaintiffs' motion for an extension of notice of pendency and defendants' cross-motion for summary judgment. In that August 16, 2004 decision, the Court dismissed all of plaintiffs' causes of action except for fraud, granted defendants' counterclaims for ejectment, ordered the notice of pendency not be extended, and ordered defendants to post an additional \$500,000 bond to secure any eventual judgment against them.

Plaintiffs bring the present motion for renewal on the basis of evidence recently acquired. This evidence includes various checks and business records from defendants tending to show that BLF hired people to work on an offering plan, and to do other work pursuant to converting the building to condominiums. Additionally, they include an unsigned writing allegedly created

by Clark in 1998 that details the price agreed upon by Clark and Fleischer. Plaintiffs also request sanctions against defendants' counsel for lack of cooperation in the discovery process, as well as for spoliation of evidence, on the basis of one check that had its memo section redacted with a black marker.

Plaintiffs have filed an appeal of the summary judgment decision with the Appellate Division, which will hear argument in its January 2005 term. In an order entered October 5, 2004, the Appellate Division granted a stay of the ejectment orders until the appeal is heard. However, on November 15, 2004, that stay was vacated as to Elliott and Tsitiridis upon a showing that they failed to pay use and occupancy for November 2004 as required by the court.

## II. Discussion

According to CPLR 2221(e)(2), a motion to renew "shall be based upon new facts not offered in the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." Plaintiffs offer new evidence showing that Fleischer investigated converting the building to condominiums and commissioned work to that end. The Court will revisit its summary judgment decision in light of this evidence.

In that decision, the Court held that the alleged oral agreements between Fleischer and the plaintiffs constituted a private sale under the criteria laid out in People v. Michael Glenn Realty Co., 106 Misc. 2d 46 (N.Y. Sup. Ct. 1980) – namely, that the small number of offerees and the relationship between Fleischer and the plaintiffs counseled against considering the sales a public offering. Were they part of a public sale, the contracts would have violated the Martin

Act, which, inter alia, prohibits the sale of condominiums before the owner has filed a prospectus with the state's Attorney General. GBL § 352-e.<sup>1</sup>

The alleged oral contracts provided that Fleischer was to sell the condominiums to plaintiffs after getting approval from the Attorney General on the offering plan. The new evidence confirms that defendants contemplated converting the entire building. Consequently, the new evidence makes clear that the alleged sale of the three condos was intended by all parties to be a part of a public sale. Indeed, the complaint contains a judicial admission that the agreements were for Fleischer to sell the condos after converting the building to condominiums. Affirmation of Jeffrey S. Ween, Ex. A, ¶ 12, 16. Accordingly, any sale was required to conform to the requirements of the Martin Act. Since the contracts would have obligated Fleischer to sell the condominiums to the plaintiffs and since the contracts were allegedly formed before any offering plan was filed, they would have been illegal under the Martin Act.

Illegal contracts are generally unenforceable; however, in cases where a contract is illegal because it violates a statute and "the denial of relief is wholly out of proportion to the requirements of public policy," recovery may be allowed. Benjamin v. Koeppe, 85 N.Y.2d 549, 553 (1995). Here, the Court will not enforce the alleged contracts. One plaintiff is a lawyer, one owns his own business, and the other is an entrepreneur. That they would pay such large sums of money without putting anything in writing strongly suggests that they were consciously avoiding written contracts. It does not further public policy to reward such under-the-table

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<sup>1</sup> The statute provides: "It shall be illegal and prohibited for any person, partnership, corporation ... to make or take part in a public offering or sale in or from the state of New York of securities constituted of participation interests or investments in real estate ... when such securities consist primarily of participation interests or investments in one or more real estate ventures, including cooperative interests in realty, unless and until there shall have been filed with the department of law, prior to such offering, a written statement or statements, to be known as an 'offering statement' or 'prospectus' concerning the contemplated offering which shall contain the information and representations required by paragraph (b) of this subdivision. ... No offer, advertisement or sale of such securities shall be made in or from the state of New York until the attorney general has issued to the issuer or other offerer a letter stating that the offering has been filed." GBL § 352-e(1)(a), (2). The phrase "cooperative interests in realty" has acquired a meaning that includes condominiums. All Seasons Resorts, Inc. v. Abrams, 68 N.Y.2d 81, 90 (1986).

dealings, and ordering specific performance or giving expectation damages would do just that. Moreover, the fraud cause of action is alive. Plaintiffs can recover damages under that claim.

The Court's reasoning with regard to the Statute of Frauds and parol evidence remains valid. Elliott and Tsitiridis allegedly made their down payments through their written leases, each of which contained an integration clause. The parol evidence rule prevents a party from using external evidence to create an ambiguity in an unambiguous agreement. W.W.W. Assoc., Inc. v. Giancontieri, 77 N.Y.2d 157, 163 (1990). Thus, plaintiffs are prevented from showing that the rent paid pursuant to an unambiguous lease was in actuality a down payment for a future condominium purchase. Without that, Elliott and Tsitiridis do not have activity unequivocally referable to the alleged oral agreements, which is required to trigger the part performance exception of the Statute of Frauds. See GOL § 5-703(4); Anostario v. Vicinanza, 59 N.Y.2d 662, 664 (1983).

Clark Construction did not pay its \$200,000 as part of a lease. However, even if that payment were enough to invoke the part performance exception, specific performance would be the only remedy available to the Court. GOL § 5-703; Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Group PLC, 974 F. Supp. 270, 275 (S.D.N.Y. 1997), aff'd Messner Vetere Berger McNamee Schmetterer Euro RSCG, Inc. v. Aegis Group, PLC, 186 F.3d 135 (2nd Cir. 1999); Mulford v. Borg-Warner Acceptance Corp., 115 A.D.2d 163, 164 (3rd Dept. 1985). The Court can decline to order specific performance where it would be impractical because it would require constant supervision. Grossman v. Wegman's Food Markets, Inc., 43 A.D.2d 813 (4th Dept. 1973); Southex Trading Co. v. Piankay Realities, Inc., 59 N.Y.S.2d 362, 365 (N.Y. Sup. Ct. 1946). Such is the case here. The Court would decline to order specific performance because it would require the Court to determine what is an acceptable offering plan

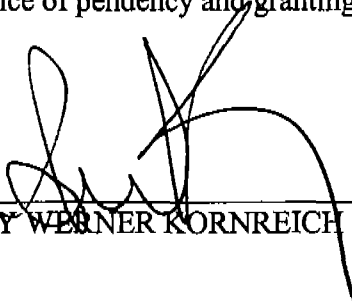
and what is not; further, it would impermissibly affect the rights and interests of the building's other tenants. Together with the determination that the contracts were illegal and unenforceable, this means plaintiffs' contract causes of action were properly dismissed. Plaintiffs still have recourse through their fraud claims.

Finally, Clark's unsigned, self-serving memo is of no value. The evidence of a writing between Tsitiridis and Fleischer was available on the summary judgment motion, as was Elliott's Tabak Realty worksheet; both were previously considered by the Court. Furthermore, the Court declines to sanction defendants for any alleged misconduct. Accordingly, it is

ORDERED that plaintiffs' motion for renewal is granted; and it is further

ORDERED that upon reconsideration of the summary judgment motion, the Court adheres to its August 16, 2004 order canceling the notice of pendency and granting partial summary judgment to defendants.

Date: November 24, 2004  
New York, New York

  
\_\_\_\_\_  
SHIRLEY WERNER KORNREICH

**FILED**  
DEC - 1 2004  
NEW YORK  
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