

397 West 12th Street Corp. v Zupa

2005 NY Slip Op 30226(U)

January 18, 2005

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

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

PRESENT:

HON. RICHARD B. LOWE, III

PART 56

Justice

397 West 12th Street Corp

INDEX NO.

107542/04

MOTION DATE

- v -

MOTION SEQ. NO.

007

Victor Zupa et al

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED:

J.S.C.

Dated: 1/18/05

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

-----X
397 WEST 12TH STREET CORP.,

Plaintiff,

-against-

Index No. 107542/04

VICTOR ZUPA, MADISON CAPITAL ACQUISITIONS,
LLC, BLUE STAR LLC, DOE CORPORATIONS 1-3,
AND JANE DOES 1-10,

Defendants.

-----X

RICHARD LOWE, III, J:

Defendant Victor Zupa moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, dismissing defendant Madison Capital Acquisitions, LLC (Madison) third cause of action, which asserts a cross claim as against Zupa, and, pursuant to CPLR 315, to cancel the Notice of Pendency filed against Zupa's property, located at 144 10th Avenue, New York, New York. Defendants Madison and Blue Star LLC (Blue Star) cross-move for summary judgment dismissing all causes against them by plaintiff 397 West 12th Street Corp. (12th Street Corp.), and for summary judgment in favor of Madison and Blue Star on their counterclaim for a declaratory judgment and cross claim for specific performance.

Plaintiff 12th Street Corp. is the lessee of the premises at 397 West 12th Street, New York, New York (the West 12th Street property), which is owned and managed by defendant Zupa. 12th Street Corp. brings this action to enforce its rights under its lease with defendant Zupa, which grants 12th Street Corp. the option to purchase West 12th Street in the event that a prospective purchaser provides Zupa with an offer of purchase.

12th Street Corp. alleges that, in January 2004, it learned that Madison was planning on

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offering to purchase the West 12th Street property for \$11.4 million. At that time, 12th Street Corp. informed Madison that it intended to exercise its option under its lease, and to purchase the property.

12th Street Corp. alleges that, in February 2004, Zupa provided notice to 12th Street Corp. that Madison had made an offer to purchase West 12th Street. Pursuant to the option provision of the parties' lease, Zupa provided 12th Street Corp with a copy of a signed contract of sale between Madison and Zupa, which purportedly set forth the complete terms with respect to that proposed transaction (the Madison Contract). The Madison Contract set forth \$14 million as the purchase price for the West 12th Street property.

Prior to exercising its option, 12th Street Corp. learned that Madison also intended to purchase another property owned by Zupa, at 140-144 10th Avenue at West 19th Street in Manhattan (the 10th Avenue property), and that the purchase of West 12th Street and the 10th Avenue property were to be part of a combined transaction.

12th Street Corp. alleges that, prior to exercising its option, it specifically inquired of Zupa's counsel whether Madison had indeed offered to purchase the 10th Avenue property as part of a single transaction, which contemplated the simultaneous sale of both properties, with the purchase price being calculated on that basis. Zupa's counsel represented that the properties were not bound together for the purposes of a sale, and that Zupa did not have a single purchaser who had made an offer to purchase the two properties together.

12th Street Corp. alleges that this was a misrepresentation, and that the terms and conditions of Madison's offer contemplated a single transaction, where both the West 12th Street property and the 10th Avenue property were to be sold together.

On May 6, 2004, 12th Street Corp. exercised its option and informed Zupa that it would purchase the West 12th Street property based upon the same terms and conditions set forth in the Madison offer that Zupa conveyed to 12th Street Corp.

Subsequent to exercising its option with respect to the Madison Contract, 12th Street Corp. learned that Zupa's counsel's representation concerning the terms of the transaction were false. 12th Street Corp. contacted Madison to inquire as to why the purchase price under the Madison Contract was \$2.6 million higher than the maximum bid it had represented it would make for the Property. 12th Street Corp. alleges that Madison's principal admitted that, contrary to Zupa's counsel's representation, Madison had in fact, made a deal to purchase the West 12th Street property and the 10th Avenue property as part of a single transaction, for a collective purchase price of \$22 million. Madison's principal also stated that Zupa determined to allocate a \$14 million price for the Property, even though the market value did not exceed \$11.4 million, and a price of \$8 million for the 10th Avenue property, even though that property was actually worth \$10.6 million. Because the purchase price was above market as to the Property, while below market as to the 10th Avenue property, the sale of both properties was an essential component of the transaction.

12th Street Corp. commenced the within action on May 17, 2004. 12th Street Corp. contends that, since the option provision in its lease requires Zupa to offer 12th Street Corp. the same terms and conditions for sale of the West 12th Street property as those offered by a prospective purchaser, Zupa is therefore required to offer it the West 12th Street property and the 10th Avenue property as part of a single transaction, for a total purchase price of \$22 million. 12th Street Corp. alleges causes of action for breach of contract and specific performance against Zupa

(first cause of action), declaratory judgment (second cause of action), breach of the implied covenant of good faith and fair dealing (third cause of action), tortious interference with contract as against Madison (fourth cause of action), and unjust enrichment against Madison (fifth cause of action).

Defendants Madison and Blue Star, a related limited liability corporation, assert that they had made an offer to purchase both properties for \$22 million, and that Zupa made the allocation between the properties when he tendered the written contracts for sale, which listed the purchase price for the West 12th Street property as \$14 million, and the purchase price of the 10th Avenue property as \$8 million. These defendants counterclaim for declaratory judgment against 12th Street Corp., finding that there is a controversy as to whether 12th Street Corp. exercised its right of first refusal (first cause of action), for specific performance regarding the sale of both properties (second cause of action) and for breach of contract against Zupa (third cause of action).

In support of his motion for summary judgment dismissing the claims against him, Zupa asserts that he negotiated arm's-length transactions for separate sale prices and terms for each of the described contracts. He states that prices were negotiated with Madison based upon his understanding of the value of the West 12th Street property and the 10th Avenue property. Zupa states that he wished to sell both properties at the same time, and provided for a rescission of the contracts of sale unless 12th Street Corp. offered to purchase the 12th Street premises for \$14 million, pursuant to its right of first refusal. Thus, paragraph 28 (iv) of the Contract of Sale of the 10th Avenue property provides that: "In the event seller shall terminate the 12 Street Contract by reason of the Tenants Election to exercise its Right of First Refusal, Both Contracts shall be

deemed terminated and the Down payments under Both Contracts shall be returned to Purchaser” (Zupa Aff., at 4).

Zupa also contends that 12th Street Corp.’s option to purchase the premises has expired, since it did not sign a contract to purchase the West 12th Street premises, pursuant to paragraph 55 of the lease.

Despite Zupa’s protestations that the valuation of the West 12th Street property was made in good faith, the affidavit of Barry Holden, the president of 12th Street Corp., indicates that Madison representatives indicated to Holden’s associate that they would offer \$11.2 million for the property. This suggests that Zupa used the potential sale of the two properties to raise the price on the West 12th Street property. In fact, Zupa acknowledges that, in the event that 12th Street Corp. decided to exercise its option, and purchase the West 12th Street property, for an assumed \$14 million, Zupa would not be obligated to sell the 10th Avenue property.

Summary judgment is a drastic remedy that should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Talansky v Schulman, 2 AD3d 355 [1st Dept 2003]; Mason v Dupont Direct Fin. Holdings, 302 AD2d 260 [1st Dept 2003]). Therefore, that part of Zupa’s motion to dismiss the complaint is denied. Further, the motion to vacate the Notice of Pendency regarding the 10th Avenue property is denied. By combining the properties into a single real estate transaction, which is now in dispute, the contract to sell this property is now being litigated as well.

As to Madison and Blue Star’s counterclaim against Zupa for breach of contract, this claim is based upon Zupa’s alleged failure to make a good-faith effort to induce 12th Street Corp. to enter into an agreement to surrender its right of first refusal. As to this claim, it is unclear as

to what, if any, steps Zupa could have, or was required, to have taken, regarding this issue.

Inasmuch as the parties have not yet had discovery, this part of the motion is denied with leave to renew.

As to Madison and Blue Star's motion for summary judgment dismissing 12th Street Corp.'s claims against them, 12th Street Corp alleges that, during the period when it was still considering whether to exercise its option, Zupa and Madison were engaged in a concerted effort to conceal their secret arrangements and to drive up 12th Street Corp.'s purchase price. 12th Street Corp. alleges that, in an e-mail dated April 6, 2004, Madison's John Jacobson illustrated their scheme to either dispose of 12th Street Corp.'s option rights or to buy the 10th Avenue property for \$10 million:

We should have the tenant issue [waiver of 12th Street Corp's option] resolved by the 19th April (2 weeks). That is when the \$4 Million goes hard. On a worst case scenario if he exercises his right of first refusal be (sic) should be prepared to move fast on West 19th [10th Avenue]

(Scharf Aff., Ex. 38). According to 12th Street Corp., this e-mail illustrates first, an effort to get 12th Street Corp to waive its option ("the tenant issue"), and second, to consummate the secret "handshake" agreement that would allow Madison to acquire the 10th Avenue property for a below market price. I agree that this e-mail presents a sufficient issue of fact requiring denial of Madison and Blue Star's motion for summary judgment.

As to that part of Madison and Blue Star's motion for specific performance on their contracts to purchase the West 12th Street property and the 10th Avenue property, as already noted, there are issues of fact as to 12th Street Corp.'s right to purchase those properties. These parties' request for a declaratory judgment regarding 12th Street Corp.'s proper exercise of its

option to purchase is premature at this time.

Accordingly, based upon the foregoing, it is

ORDERED that the motion by defendant Victor Zupa for summary judgment, and to vacate the Notice of Pendency filed against the property located at 144 10th Avenue, is denied; and it is further

ORDERED that the cross motion by defendants Madison Capital Acquisitions, LLC and Blue Star LLC for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: January 18 , 2005

J.S.C.

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