

397 West 12th Street Corp. v Zupa

2005 NY Slip Op 30227(U)

March 21, 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: JUSTICE RICHARD B. LOWE, III
Justice

PART 56M

397 West 12th Street

INDEX NO. 107 542 / 04

MOTION DATE 01/01/05

Victor Zupa et al

MOTION SEQ. NO. 003

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

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

FILED

MAR 24 2005

NEW YORK COUNTY CLERK'S OFFICE

JUSTICE RICHARD B. LOWE, III

Dated: 3/21/05

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check-if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X

397 WEST 12th STREET CORP.,

Plaintiff,

Index No.
107542/04

-against-

VICTOR ZUPA, MADISON CAPITAL
ACQUISITIONS, L.L.C., BLUE STAR, L.L.C.,
DOE CORPORATIONS 1-3, and JOHN and
JANE DOES 1-10,

Defendants.

-----X

RICHARD LOWE, J.:

Plaintiff 397 West 12th Street Corp. (397 Corp.) moves, pursuant to CPLR 3212, 3124, 4102, and 6514, for an order: (a) granting plaintiff summary judgment dismissing the counterclaim of defendant Victor Zupa (Zupa); (b) striking Zupa's jury demand; and (c) directing dates certain with respect to certain depositions which have been previously ordered by this court.

In order to understand the counterclaim, a full description of the litigation is needed. 397 Corp. is the lessee of the premises at 397 West 12th Street, New York, New York (12th Street Property), which is owned and managed by Zupa. 397 Corp. brings this action to enforce its rights under its lease with Zupa, which grants 397 Corp. the option to purchase the property from

Zupa on the "same terms and conditions" as those offered by any prospective purchaser. In effect, this is a right of first refusal, under which, if the lessor chooses to sell the property, the lessee has the right to match the terms of a bona fide offer made by an outside purchaser. Section 55 of the lease provided that the option had to be exercised within 90 days after written notice, via certified mail, was given to the tenant, concerning the terms of the prospective purchaser's offer.

397 Corp. alleges that in January 2004, it learned that defendant Madison Capital Acquisitions, L.L.C. (Madison) was planning to offer to purchase the 12th Street Property for \$11.4 million. At that time, 397 Corp. informed Madison that it intended to offer to purchase 12th Street for \$11.4 million.

397 Corp. alleges that on February 23, 2004, Zupa provided notice to 397 Corp. that Madison had made an offer to purchase the 12th Street Property. Pursuant to the option provision of the lease, Zupa provided 397 Corp. with a copy of the signed contract of sale between Madison and Zupa, which purportedly set forth the complete terms with respect to that transaction (Madison Contract). The Madison Contract set forth \$14 million as the purchase price for the 12th Street Property.

Prior to exercising its option, 397 Corp. learned that Madison intended to purchase another property owned by Zupa, at 140-144 10th Avenue in Manhattan (10th Avenue Property), and that the purchase of the 12th Street Property and the 10th Avenue Property were to be part of a combined transaction.

397 Corp. alleges that, prior to exercising its option, it inquired of Zupa's counsel whether Madison had actually 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 allegedly represented that the properties were not bound together for purposes of a sale, and that Zupa did not have a single purchaser who had made an offer to purchase the two properties together. 397 Corp. alleges that, in reliance upon this representation, it agreed to purchase the 12th Street Property for \$14 million. 397 Corp. contends that this representation was false, and that the terms of Madison's offer contemplated a single transaction, where both the 12th Street Property and the 10th Avenue Property were to be sold together.

On May 6, 2004, 397 Corp. exercised its option, and informed Zupa that it would purchase the 12th Street Property based on the same terms and conditions set forth in the Madison offer, with a down payment of \$700,000.

After exercising its option with respect to the Madison Contract, 397 Corp. allegedly learned that Zupa's counsel's representations concerning the terms of the transaction were false. 397 Corp. contacted Madison to inquire as to why the purchase price under the Madison Contract (\$14 million) was \$2.6 million higher than the maximum bid it had represented it would make for the property (\$11.4 million). 397 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 12th Street Property and the 10th Street Property as part of a single transaction, for a collective price of \$22 million. Madison's principal also stated that Zupa decided to allocate a \$14 million price for the 12th Street Property, even though the market value was actually \$11.4 million, and a price of \$8 million for the 10th Avenue Property, even though the 10th Avenue Property was actually worth \$10.6 million. Since the purchase price was above the market price as to the 12th

Street Property, while below market as to the 10th Avenue Property, the sale of both properties was essential to the transaction.

397 Corp. commenced the instant action, which asserts that, since the option provision in its lease requires Zupa to offer 397 Corp. the same terms and conditions for sale of the 12th Street Property as those offered by a prospective purchaser, Zupa is therefore required to offer it the 12th Street Property and the 10th Avenue Property as part of a single transaction, for a total price of \$22 million. Essentially, plaintiff alleges that, by adding \$2.6 million to Madison's original planned bid for the 12th Street Property, Madison and Zupa forced plaintiff into a position where, if it wanted to purchase the 12th Street Property, it would have to pay an extra \$2.6 million over market value, and that, if plaintiff were to exercise its option to purchase the 12th Street Property for \$14 million, Madison would be unjustly enriched by being able to purchase the 10th Avenue Property alone for \$8 million, instead of its true market value. The first cause of action seeks specific performance of an option to purchase both properties for \$22 million, or in the alternative, to purchase the 12th Street Property alone for \$11.4 million. The second cause of action, against all defendants (Blue Star Corp., and the John Doe Corporations 1-3 and Jane Does 1-10 are claimed to be affiliates of Madison) seeks a declaratory judgment to the effect that Zupa is obligated to offer to sell to plaintiff both the 12th Street and 10th Avenue Properties for \$22 million, or in the alternative, to offer to sell to plaintiff the 12th Street Property alone for \$11.4 million. The third cause of action, against Zupa, alleges breach of the implied covenant of good faith and fair dealing. The fourth cause of action alleges that Madison tortiously interfered with the contract between plaintiff and Zupa. The fifth cause of action seeks recovery against Madison on a theory of unjust enrichment, i.e., it alleges that, to the extent that plaintiff is

required to pay \$14 million for the 12th Street Property without being given the opportunity to purchase the 10th Avenue Property, Madison would be unjustly enriched by at least \$2.6 million, the difference between the reduced price of \$8 million that Madison would be paying for the 10th Avenue Property. Plaintiff seeks a judgment giving it 90 days, after submission by Zupa of an appropriate offer to sell both properties, or to sell the 12th Street Property alone at \$11.4 million, to determine whether or not to exercise the option.

In connection with the commencement of the action, 397 Corp. filed two notices of pendency, one against the 12th Street Property and one against the 10th Avenue Property. Madison filed an action against Zupa, seeking title to the 10th Avenue Property (Madison Capital Acquisitions, L.L.C. v Zupa, Sup Ct, NY County, Index No. 107544/04), filed a notice of pendency as to the 10th Avenue Property in that action, and filed a notices of pendency for both the 12th Street and 10th Avenue Properties in the instant action.

Zupa's answer in the instant action alleges that the complaint fails to state a cause of action, in that plaintiff failed to exercise its option. Zupa's position is that plaintiff should have consummated the option by entering into a contract to purchase the 12th Street Property for \$14 million. Instead, plaintiff filed a notice of pendency encumbering both the 12th Street Property and the 10th Avenue Property, even though, according to Zupa, plaintiff does not own any interest in the 10th Avenue Property. Zupa asserts a counterclaim which alleges that the plaintiff filed the notices of pendency, in bad faith, against the 12th Street Property and the 10th Avenue Property. The counterclaim seeks cancellation of the notices of pendency, pursuant to CPLR 6514 and 6515, and seeks costs and expenses, including legal fees.

Zupa moved for summary judgment dismissing the complaint, dismissing Madison's

cross claims against him, and, pursuant to CPLR 6515, cancelling the notice of pendency filed against the 10th Avenue Property. At the same time, Madison cross-moved for summary judgment dismissing plaintiff's claims against it, and for summary judgment against plaintiff on a counterclaim for a declaratory judgment, and a cross-claim against Zupa for specific performance. Zupa claimed that he negotiated arm's-length transactions for separate sale prices and terms for each of the contracts, and that the prices he negotiated with Madison were based on his understanding of the values of the 12th Street and 10th Avenue Properties. On January 18, 2005, this court issued an order denying the motion and cross-motion. This court reviewed the affidavit of Barry Holden, plaintiff's president, which indicated that Madison's representatives told him that Madison would offer \$11.2 million for the 12th Avenue Property, and found that this suggested that Zupa used the potential sale of the two properties to raise the price on the 12th Street Property. Zupa admitted that, in the event that 397 Corp. decided to exercise its option and purchase the 12th Street Property for \$14 million, Zupa would not be obligated to sell the 10th Avenue Property. In denying the application to cancel the notice of pendency, this court said that, by combining the properties into a single real estate transaction, which was now in dispute, the contract to sell the 10th Avenue Property was being litigated as well.

397 Corp. and Madison have entered into an conditional settlement of their own dispute with respect to the 12th Street and 10th Avenue Properties, subject to the resolution of Zupa's counterclaim against 397 Corp. 397 Corp. states, in its motion papers, that in response to the proposed settlement, Zupa has indicated a desire to close on the sale of the properties for a total of \$22 million. Zupa's answering papers do not state otherwise. Thus, the only remaining issue is whether Zupa still has a viable counterclaim against 397 Corp.

CPLR 6501 states that a notice of pendency can be filed in any action in which the judgment demanded would affect the title to, or the possession, use, or enjoyment of real property, except a summary proceeding brought to recover possession of real property. CPLR 6514 (b) provides that the court, upon motion of any person aggrieved and upon such notice as it may require, may direct the County Clerk to cancel a notice of pendency, if plaintiff has not commenced or prosecuted an action in good faith.

In 5303 Realty Corp. v O & Y Equity Corp. (64 NY2d 313 [1984]), the court said:

In entertaining a motion to cancel, the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501...The same considerations that require strict compliance with the procedural prerequisites also mandate a narrow interpretation in reviewing whether an action is one affecting the title to, or the possession, use or enjoyment of, real property...Thus, a court is not to investigate the underlying transaction in determining whether a complaint comes within the scope of CPLR 6501. Instead, in accordance with historical practice, the court's analysis is to be limited to the pleading's face.

Zupa points out that the Court in 5303 Realty cancelled the notice of pendency because the action involved the stock of a corporation owning the subject real estate, rather than the real estate itself. Nevertheless, 5303 Realty sets forth the basic principles that guide the court in the instant case. Zupa maintains that it was improper for 397 Corp. to file a notice of pendency with respect to the 10th Avenue Property, when 397 Corp.'s option related only to the 12th Street Property. However, this court has previously determined that, by combining the 12th Street and 10th Avenue Properties into a single contemplated sale to Madison, Zupa caused the 10th Avenue Property to become inextricably related to 397 Corp.'s option with respect to the 12th Street Property. In effect, the prior decision of this court means that plaintiff had a good faith basis for

filing a notice of pendency against both the 12th Street and 10th Avenue Properties. Zupa has asked this court for leave to amend its counterclaim to add a claim for malicious prosecution. Even assuming that this court would entertain such a motion on the eve of trial, the motion would be denied on the merits, since this court has already, in effect, determined that 397 Corp. had probable cause to commence the instant action.

Zupa has also sought leave to amend its counterclaim to add a claim for abuse of process. The elements of abuse of process are: (1) the perverted use of (2) regularly issued process, (3) with the intent of causing harm without justification, (4) that results in special damages (Brown v Bethlehem Terrace Assocs., 136 AD2d 222 [3d Dept 1988], citing Bd. Of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889 AFT AFL-CIO, 38 NY2d 397 [1975]). The essence of the tort is that process was improperly used, after its issuance, for a collateral purpose (Brown, supra). Even a malicious motive, without more, does not give rise to an action for abuse of process (id.). Since Zupa combined the proposed sale of the 10th Avenue and 12th Street Properties into a single transaction, and since the option called for 397 Corp. to purchase the 12th Street Property on the same terms and conditions as those offered by a third party, 397 Corp.'s filing of notices of pendency on both properties can be said to have been done for the very purpose of enforcing its rights under the option. Therefore, Zupa does not have a viable claim for abuse of process.

Zupa has previously claimed that 397 Corp. failed to exercise the option within the 90-day period called for under the terms of the lease, although Zupa does not address this point in the current motion papers. In any event, however, since Zupa has never previously notified 397 Corp. of a proposed sale of both the 12th Street and 10th Avenue Properties for the total price of

\$22 million, the 90-day period never began to run.

In light of the above, 397 Corp. is entitled to summary judgment dismissing the counterclaim. Since Zupa will be closing on the sale of both the 10th Avenue and 12th Street Properties for \$22 million, and it is up to 397 Corp. and Madison to determine how the purchase price will be paid, and which entity will receive title, there are no issues left for trial. 397 Corp. or Madison, or both (depending on their own agreement) and Zupa are directed to enter into a contract for sale of both properties for a total of \$22 million. At closing, 397 Corp.'s down payment of \$700,000 shall be credited towards the purchase price. The questions of whether Zupa would have been entitled to a jury trial on the issue of the counterclaim, and whether additional discovery should take place, are now moot.

Accordingly, the plaintiff's motion for summary judgment dismissing the counterclaim is granted. Settle judgment directing the parties to enter into an appropriate contract for the sale of the 12th Street and 10th Avenue Properties for a total of \$22 million, subject to a credit in favor of plaintiff for its previous payment of \$700,000.

Dated: 3/21/05

FILED
MAR 29 2005
NEW YORK
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JUSTICE RICHARD B. LOWE III
J.S.C.