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

PRESENT: Hon. JANE S. SOLOMON Justice PART 55

Sacchetti

-v-

World City America, Inc.

INDEX NO. 601036/03

MOTION DATE 11/18/04

MOTION SEQ. NO. 09

MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Notice of x-motion — Answering Affidavits — Exhibits	4 - 7
Replying Affidavits	8 - 10

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

APR 21 2005

COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: 4/15/05

J.S.C.

Dated: 4/15/05

JANE S. SOLOMON

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
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VITO SACCHETTI,

Plaintiff,

Index No. 601036/03

-against-

WORLD CITY AMERICA INC., WORLD CITY CORPORATION and WORLD CITY FOUNDATION, INC.,

Defendants.

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JANE S. SOLOMON, J.:

Plaintiff moves, pursuant to CPLR 3212, for summary judgment against defendant World City America (WCA), directing WCA to issue three and one half shares of its corporate stock to plaintiff. Defendants cross-move for summary judgment dismissing the complaint and awarding defendants costs and attorneys' fees, as well as sanctions pursuant to 22 NYCRR § 130-1.2.

This is an action for specific performance of a written agreement, pursuant to which WCA purportedly promised to issue $250,000 worth of its stock to plaintiff.[1] Defendants contend that the promise was contingent, and the contingency did not occur. Additionally, defendants maintain that there was no

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[1] The complaint also asserts causes of action for money damages in the amount of $250,000 for defendants' failure to issue the stock to plaintiff, and for attorneys' fees in bringing this action. Neither claim has any merit, and plaintiff does not press them here, so defendants' cross-motion for summary judgment dismissing the first and third causes of action is granted without opposition.

consideration, or a failure of consideration, either of which would make the promise unenforceable.

Plaintiff is an owner of the building located at 330 East 43rd Street, New York, New York since 1993. Defendant World City Foundation, Inc. (WCF) and nonparty John Rogers (Rogers) are tenants in the building, and have been since October 1987.

Rogers is the Chief Executive Officer of both WCA and WCF. WCF is a not for profit corporation. WCA uses WCF's office in the building. WCA, and its predecessor World City Corporation (WCC), are corporations which Rogers formed and controls. All are integral to a project of which Rogers appears to be the guiding light. It involves building and operating an unusually large passenger ship, for which much money is required, with the anticipation that sufficient funds would be generated to cause WCF to flourish as a source of grants for the betterment of the world. In a sworn exchange with the court, Rogers stated:

> World City America is in the business of developing and ultimately constructing - - owning and operating a major American flag passenger ship.
>
> * * *
>
> World City Corporation was the first company formed and was a development company, which preceded the formation of World City America and assigned all of the development rights that it had developed up to that point over to World City America . . .
>
> * * *
>
> As to World City Foundation, the business of that company is to receive revenues and potentially ownership interest in World City America so that to the maximum extent possible the proceeds, the revenues, the profits of the operating commercial ship could be channeled into education, environmental, international

understanding, health and other worthy goals. . . .

Notice of Motion, Ex. 2, at transcript pp 6-7.

The tenancy was covered by a Master Lease, a copy of which is not disclosed, but which is said to provide for penalties and consequences if rent is not timely paid. Rogers and his businesses use three of five apartments on the ground floor, and the entire second floor, which includes six apartments. One of the apartments is Rogers' personal residence.

Rogers suffered a stroke in late 1999. Recovery required over a year of hospitalization and rehabilitation. According to defendants, Rogers was absent from the office during the 12 to 14 months after the stroke, and there were five or six occasions when the rent payment was late. Plaintiff contends that rent payments were late throughout the term of the tenancy on numerous occasions.

Ms. Gallagher, Executive Vice President of WCF,[2] managed business affairs of the office while Rogers was incapacitated. She caused $500 to be given to plaintiff as a late fee more than once, although not required to do so by the terms of the lease.

Rogers signature appears on a letter dated November 1, 2000 on the letterhead of WCF addressed to plaintiff. In its

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[2] According to a stock certificate dated September 13, 2001, she was then the Secretary of WCA.

entirety, it reads:

> You have been a good friend, a considerate landlord, and your consideration, cooperation, and even forbearance at times have materially contributed to our ability to realize the *America World City* project.
>
> Therefore, as Chairman, Chief Executive Officer, and principal owner of World City America Inc., the owning company of the project, I intend to recognize your friendship and contribution with shares in the company equal to a value of $250,000.00 based on a project valuation (being used for current investment by third party investors) of $75-million. When these financing arrangements are completed in the coming months, physical share certificates will be issued to you and other investors.
>
> Until that time, this letter stands as an irrevocable agreement to cause such shares to be issued to you personally, or as you may direct.

Notice of Motion, Ex. G. This letter is the basis for this action.

It is undisputed that WCA never physically issued shares of its stock to plaintiff, and that the financing referenced in the letter never was obtained.

In pressing his claim, plaintiff relies not only on the letter but on other writings where WCA, WCF and Rogers acknowledged his status as a shareholder: A December 6, 2001 letter to him from Rogers on WCF letterhead transmits to him "as a shareholder of " WCA a copy of a "White Paper for the President"; a July 16, 2001 letter to him from Rogers on WCF letterhead calls plaintiff "a partner in our project with shares valued at over a quarter of a million dollars."; a January 2,

2001 fax on WCF letterhead states that "the value of the shares we gave you . . ., went up and will go up again when we conclude a $5-million deal . . ."

In the complaint, plaintiff treated the three defendants interchangeably, based on the use of WCF letterhead, and the references to WCA and WCC by Rogers. While the defendants' opposition to the instant motion suggests that some confusion remains, it is apparent that WCA was the only defendant whose stock might have been the subject of the letter. It also is apparent, because Rogers controls the issuance of WCA stock but does not own it all, that the promise he made was that WCA stock would be issued by it to plaintiff. One other arguable ambiguity in the letter also was cleared up during proceedings before me. The amount of stock referred to in the letter is measured by the percent that $250,000 is of $75 million, namely .333. Once it was disclosed that 1000 shares are authorized, the basis for the relief plaintiff seeks, namely 3 and one-third shares, was known.

A WCA resolution of November 1, 1999 (Notice of Motion, Ex. 7) states that there are one thousand authorized shares, and that they are restricted for issuance by Rogers in his sole discretion as treasurer. The parties disagree on whether the calculation of the number of shares plaintiff believes he is entitled to receive should be based on one thousand shares, or

the one hundred shares Rogers claims actually were issued. For the purposes of this motion, it does not matter.

Another issue of which much is made concerns the consideration for the offer, but that too is not an open issue. Not only is the referenced correspondence clear that, but for the consideration of plaintiff as landlord, the project, and WCF, WCA and Rogers himself would have been at risk of losing their headquarters and home.

The issue that remains is whether the circumstances for issuance of the stock have matured. Plaintiff contends the promise is unconditional. Alternatively, he argues that while the particular financing referred to in the letter may not have been received, once other investors received stock, he should have as well. Defendants contend that receipt of the specific financing referred to as being sought when the letter was written was a condition precedent which never materialized so that no stock is due, ever, to plaintiff. Plaintiff counters this argument by stating that defendants thwarted the efforts to raise the financing referenced in the letter.

The latter claim is unsupported by any facts; WCA's failure to obtain the financing appears to be a natural result of the financial realities of the project. However realistic it was before September 11, 2001, it seems quite fanciful today. It is no closer to fruition today than it was in September 2000. Thus,

this lawsuit has no economic value, nor much else to commend it.[3]

Plaintiff contends that summary judgment should be granted in his favor, and an order and judgment should be entered directing WCA to issue three and one third shares of its corporate stock to him based on a calculation set forth in the exchange with me on July 23, 2004 (Notice of Motion Ex. 2, p. 12-13).

There is nothing in the evidence before the court that suggests that WCC was involved in the November 2000 letter. WCC is not mentioned in the letter; unlike WCF, its letterhead was not used; nor is it a tenant of the premises. Plaintiff's sole basis for including WCC as a defendant is that WCC is a related corporation that utilizes the premises. That is insufficient to assert any cause of action against it. Accordingly, the complaint, as against WCC, is dismissed.

With respect to WCF, the connection to the November 2000 letter is not as tenuous. The letter was written on WCF's letterhead, and WCF is the tenant. However, that is still not a sufficient connection to the promise to warrant keeping WCF in the action. There is no evidence that WCF was in any way involved with the promise made in the November 2000 letter, nor

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[3] Although the action may be subject to dismissal under the venerable maxim "de minimis non curat lex" ("the law cares not for trifles", Wisconsin Dept of Revenue v. Wrigley, 505 US 214, 231 [1992]), the merits of the claim are nonetheless addressed herein.

is there any evidence that WCF has any ownership interest in WCA shares. There is no basis for plaintiff to obtain any relief as against WCF, and the complaint is dismissed as against it.

The question at the heart of this lawsuit is whether or not the promise in the November 1 letter to issue shares was conditional. Where a party has made a promise conditionally, the condition precedent must be met before the promise can be enforced against the promisor. Saferstein v Mideast Sys., Ltd., 143 AD2d 82 (2d Dept 1988).

The letter states that shares will be issued to plaintiff when certain financing arrangements are completed. The financing referred to never happened. As a result, the obligation Rogers undertook on behalf of WCA never matured, and plaintiff cannot enforce the promise.

Plaintiff's argument that he should be issued shares because WCA issued shares to others is not convincing. The language of the November 2000 letter did not promise that plaintiff would receive shares when other investors received shares. It stated that he would receive shares when the financing arrangements were completed. The fact that other, unnamed, investors were to receive shares at that time as well does not alter the condition precedent.

Although plaintiff seeks three and one third shares of WCA share, undisputed facts demonstrate that its claim is for

just one third of a share. The November 1, 2000 letter states that shares in the company equal to a value of $250,000 were offered, based on a valuation of $75 million. This amounts to one three-hundredth of the company. One thousand WCA shares were authorized, but only one hundred shares were issued at the time, so plaintiffs share would be one third of a share. Business Corporation Law § 509(a) provides that "A corporation may, but shall not be obligated to, issue fractions of a share . . ." Under this statute, plaintiff's demand that WCA be compelled to issue him a fraction of a share cannot be enforced.

Finally, defendants seek sanctions against plaintiff for bringing this action against WCC and WCF, claiming that the suit was, as against them, frivolous. However, at the time that the complaint was filed, it was unclear what the precise relationship was between the various corporations. Under those circumstances, the fact that plaintiff brought this action against all three corporations does not warrant sanctions. Accordingly, it hereby is

ORDERED that plaintiff's motion for summary judgment is denied; and it further is

ORDERED that the cross motion is granted to the extent that summary judgment dismissing the complaint against all defendants is granted, and the Clerk is directed to enter judgment in favor of defendants, with costs and disbursements as

taxed by the Clerk upon the submission of an appropriate bill of costs, and is otherwise denied.

Dated: April 15, 2005

ENTER:

J.S.C.

JANE S. SOLOMON