

**Jeremy's Ale House Also, Inc. v Joselyn Luchnick
Irrevocable Trust**

2006 NY Slip Op 30123(U)

September 13, 2006

Supreme Court, New York County

Docket Number: 0060391/2003

Judge: Marcy S. Friedman

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

PRESENT: Hon. Mercy S. Friedman

PART 57

Index Number : 603917/2003

JEREMY'S ALE HOUSE ALSO INC.

vs
JOSELYN LUCHNICK IRREVOCABLE

Sequence Number : 004

DISMISS

O. _____
DATE _____
SEQ. NO. 004
CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2

Memo of Law MC - m 3
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied per
decision/order dated 9/13/06.

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

Dated: 9/13/06

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

JEREMY’S ALE HOUSE ALSO, INC. and
JEREMY HOLIN,

Index No.: 603917/03

Plaintiff,

DECISION/ORDER

- against -

THE JOSELYN LUCHNICK IRREVOCABLE
TRUST and 254 FRONT STREET LLC,

Defendants.

FILED
OCT 20 2006
NEW YORK
COUNTY CLERK'S OFFICE

_____ x

Defendant The Joselyn Luchnick Irrevocable Trust moves to dismiss plaintiff Jeremy Holin’s claims in his individual capacity, and also moves, pursuant to CPLR 3211(a)(7), to dismiss the amended complaint. The branch of the motion to dismiss plaintiff Holin’s claims is unopposed.

In this action, plaintiff pleads a claim for breach of the implied covenant of good faith and fair dealing (“covenant”) based on defendant’s alleged interference with plaintiff’s exercise of a “last right of refusal” to purchase the premises which plaintiff had occupied under a lease.

By decision and order dated April 8, 2004, this court dismissed the original complaint, which alleged breach of the covenant based on defendant’s failure to sell the premises to plaintiff upon plaintiff’s acceptance of defendant’s September 2003 offer to sell for 2.7 million dollars. This order was modified by order of the Appellate Division, First Department (22 AD3d 6), which affirmed the dismissal of the complaint, although for reasons other than those set forth by

this court, and modified the April 8, 2004 order to grant plaintiff leave to plead breach of the covenant based on defendant's failure, after receipt in November 2003 of a subsequent offer from a third-party to purchase the premises, to permit plaintiff to exercise its right of refusal and to purchase for 3.09 million dollars.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].)

Applying these standards, the court holds that the allegations of the amended complaint are sufficient to withstand this motion to dismiss. The amended complaint pleads that by letter dated November 18, 2003 and delivered to plaintiff on December 15, 2003, defendant advised plaintiff that it had received an offer of 3 million for the premises, and defendant offered to sell the premises to plaintiff, in accordance with the right to purchase agreement, for 3.09 million dollars if plaintiff was willing and able to close by January 31, 2004 without a financing contingency. (Amended Complaint, ¶ 21.) The amended complaint further alleges that on December 16, 2003, plaintiff requested proof that defendant had received the 3 million dollar offer for the premises (id., ¶ 22), and that defendant then in effect took steps to frustrate plaintiff's exercise of the right to purchase. In particular, defendant sent a notice terminating plaintiff's tenancy effective January 31, 2004 (id., ¶ 23), and did not respond to plaintiff's request for proof of the third-party offer until January 13, 2004. (Id., ¶ 24.) The complaint also alleges

that on March 8, 2004, plaintiff accepted defendant's offer to purchase the premises for 3.09 million dollars, and that defendant wrongfully rejected that offer. (Id., ¶ 25.)

Defendant argues that the right of refusal was not carried over into plaintiff's month-to-month tenancy at the expiration of its written lease. Defendant also argues that plaintiff lost the right to purchase the premises because plaintiff negotiated over the purchase price after defendant offered to accept 3.09 million dollars and because plaintiff did not finally accept that offer until March 2004, although its month-to-month tenancy had expired in January 2004.

The complaint pleads facts sufficient to raise an issue of fact as to whether the parties intended the right of refusal to continue into the month-to-month tenancy. (See Coinmach Corp. v Fordham Hill Owners Corp., 3 AD3d 312 [1st Dept 2004].) Moreover, while defendant correctly argues that plaintiff's right of refusal did not extend beyond the termination of the month-to-month tenancy (see Inwood Park Apts., Inc. v Coinmach Indus. Co., 22 AD3d 350 [1st Dept 2005]), the amended complaint in effect pleads that defendant impermissibly delayed in informing plaintiff of the third-party offer to purchase the premises while the month-to-month tenancy was still in effect, and thus frustrated plaintiff's ability to exercise the right of refusal during that tenancy. The court therefore does not find that the complaint fails, as a matter of pleading, to state a cause of action for breach of the implied covenant of good faith and fair dealing.

It is noted that defendant further contends that plaintiff was not entitled to exercise its right of refusal because the third-party offer to purchase, based on which defendant offered to sell the premises to plaintiff for 3.09 million dollars, was never consummated. This argument is not properly considered as it was not made until the reply. (See Ritt v Lenox Hill Hosp., 182 AD2d

560, 562 [1st Dept 1982].) It is, in any event, without merit. It is settled that “[t]he holder of a right of first refusal must be given the opportunity to exercise the preemptive right, but the right is extinguished when the contract with the third party expires or is abandoned.” (Cipriano v Glen Cove Lodge #1458, B.P.O.E., 1 NY3d 53, 59 [2003]; Lin Broadcasting Corp. v Metromedia, Inc., 74 NY2d 54 [1989].) Here, however, the pleading does not allege, nor contain facts from which an inference may be drawn, that the third-party offer at issue was abandoned before plaintiff’s purported exercise of its right of refusal in March 2004.

The court has considered defendant’s remaining contentions and finds them to be without merit.

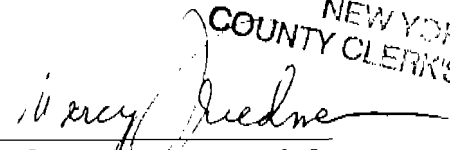
It is accordingly hereby ORDERED that the motion of defendant The Joselyn Luchnick Irrevocable Trust is granted to the extent of dismissing the claims of plaintiff Jeremy Holin individually; and it is further

ORDERED that the caption of the complaint shall be amended to reflect the dismissal of the claims of Jeremy Holin; and it is further

ORDERED that defendant’s motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 13, 2006

FILED
OCT 20 2006
NEW YORK
COUNTY CLERK'S OFFICE

MARCY FRIEDMAN, J.S.C.