

**Lee v ADJMI 936 Realty Associates**

2006 NY Slip Op 30477(U)

March 3, 2006

Supreme Court, Kings County

Docket Number: 44511/03

Judge: David Schmidt

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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3<sup>rd</sup> day of March, 2006.

P R E S E N T:

HON. DAVID I. SCHMIDT,  
Justice.

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KWANG HEE LEE,  
Plaintiff,

- against -

Index No. 44511/03

ADJMI 936 REALTY ASSOCIATES, ET AL.,  
Defendants.

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The following papers numbered 1 to 7 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1 - 2
Opposing Affidavits (Affirmations)_____	3
Reply Affidavits (Affirmations)_____	4 - 5
_____Affidavit (Affirmation)_____	6 - 7
Other Papers_____	_____

Upon the foregoing papers, defendants Ray Realty Fulton, Inc., (Ray Realty), Clem Saad, Leon Saad, Eli Saad and Ray Department Store Fulton, Inc. (collectively, the Ray defendants) move, *inter alia*, for a judgment declaring that the lease extension provision of a certain contract, referred to as the Elidex Contract of Sale dated August 30, 1989 (the Elidex Contract), is enforceable. Plaintiff Kwang Hee Lee cross-moves for an order

declaring that the signature on the Elidex Contract is not his signature and that the Elidex Contract is void and unenforceable against him.<sup>1</sup>

### ***BACKGROUND***

On August 30, 1984, Kwang Hee Lee (Lee) and Byoung Heung Oh (Oh) acquired the real property located at 1250-1264 Fulton Street in Brooklyn (the Property), a commercial building of approximately 12,500 square feet, as tenants in common. Oh assumed managerial duties with respect to the property. On or about November 1, 1984, they entered into a written agreement of lease (the 1984 Lease) with defendant Ray Department Store Fulton, Inc. (Ray Department Store), which lease was for a period commencing on November 1, 1984 and ending on October 31, 1994. By written amendments, the parties agreed to extend the term of the 1984 Lease to October 31, 1999.

### ***The Elidex Contract***

On August 30, 1989, Oh and Lee purportedly entered into a written agreement (the Elidex Contract) for the sale of the property to Elidex Realty Corp., an entity related to the Ray defendants. In accordance with the terms of the Elidex Contract, a \$300,000 deposit was paid to Oh and Lee by Elidex.

Paragraph 3 of the Second Rider to the Elidex Contract states that:

In the event Seller properly cancels this Contract, he shall be entitled to retain the deposit, however, Seller agrees to extend the existing Lease of Ray Department Store for an additional five (5) years to existing

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<sup>1</sup>Although the parties have, in several motions, raised a number of issues, the court has rendered orders disposing of all but this branch of the motion for partial summary judgment.

Lease term until 2004 at no rent but all other terms to survive. In the event Purchaser properly cancels this Contract, Seller shall return the deposit within fifteen (15) days, failure of which the renewal term for five (5) years at no rent shall be in full force and effect.

The Elidex Contract was canceled by the Purchaser and Seller did not return the deposit. Accordingly, in 1999, Elidex and Ray Department Store commenced an action in the Supreme Court, Kings County, against Oh and Lee, seeking to enforce Ray Department Store's rights pursuant to the lease provision of the Elidex Contract and to enforce the prepaid rent term from November 1, 1999 until October 31, 2004. A Notice of Pendency was recorded in the Office of the Register of Kings County on June 1, 1990. Said Notice of Pendency, in pertinent part, states that:

NOTICE IS HEREBY GIVEN that an action has been commenced and is pending in this Court upon a complaint of the above-named plaintiffs against the above-named defendants for a judgment compelling defendants to specifically perform their contractual obligations to grant the plaintiff, Ray Department Store Fulton a leasehold extension until October 31, 2004 for the premises known generally as 1250-64 Fulton Avenue (sic).

### ***THE ADJMI CONVEYANCE***

On August 24, 1990, Oh and Lee purported to convey their entire fee interest in the Property to defendant ADJMI 936 Realty Associates (ADJMI), an entity unrelated to the Ray defendants. In 1991, Ray Department Store commenced a second action against ADJMI and in its first cause of action once again sought to enforce its lease rights in the Elidex Contract

for the prepaid rent from the period commencing November 1, 1999 and ending on October 31, 2004.<sup>2</sup>

At some point, Lee stopped receiving money and monthly reports from Oh, causing Lee's father, Sang Dae Lee (Sang) to become suspicious of Oh's activities with regard to the management of the Property. Upon searching the public record relating to the Property, Sang discovered the ADJMI deed, which contained what was later proven to be Lee's forged signature.<sup>3</sup> As was subsequently discovered, Oh's wife impersonated Lee and forged his signature in order to consummate the transactions.

Consequently, in or about January 1993, Lee, making no mention of, or taking any action with respect to, the Elidex Contract, commenced an action against ADJMI in the Supreme Court, Kings County seeking: (1) a declaration that the deed of August 24, 1990 was a forgery as it related to Lee's interest as a tenant in common; (2) an accounting of rents and profits; and (3) the imposition of a constructive trust. Following a non-jury trial (*Kwang Hee Lee v ADJMI 936 Realty Associates and Ray Fulton Realty Inc.*, Index No. 3293/93), Justice Lewis L. Douglass, by decision dated January 14, 1999, and judgment dated October 26, 2001: (1) found that Lee's signature was, in fact, forged; (2) dismissed plaintiff's claim for the imposition of a constructive trust; and (3) in effect, declared that Lee is the owner of

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<sup>2</sup>The two actions commenced by Ray Department Store were consolidated under a joint caption by order dated September 10, 1992.

<sup>3</sup>As testified to by Lee, it was also discovered that Oh encumbered the Property with a mortgage containing Lee's forged signature.

an undivided one-half interest in the property and that the deed purporting to transfer the property to ADJMI was null and void. Following Lee's appeal and ADJMI's cross-appeal, the Appellate Division, Second Department, by order dated May 27, 2003, affirmed the judgment.<sup>4</sup>

In the interim, on or about October 3, 1993, Ray Realty purchased its interest in the Property from ADJMI, subject to Ray Department Store's leasehold.

By order dated May 20, 2005, this court determined that Lee's signature on the Elidex Contract was a forgery.

### ***CONTENTIONS***

Noting that Lee never took any action to extinguish or challenge the validity of the Elidex contract, movants contend that the lease provision contained therein is enforceable as to Oh and Lee. They further cite Lee's trial testimony which demonstrated that he had given Oh the authority to lease the premises. Movants further contend that, while the determination that Lee's signature was forged voids the Elidex Contract as it relates to Lee's potential conveyance of his interest, the Elidex Contract is not void and is enforceable insofar as it relates to Oh's 50% interest since a tenant in common may sell his or her interest without the consent of the other tenants in common. They further assert that Oh's refusal to

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<sup>4</sup>Defendants' motion and plaintiff's cross motion preceded the Appellate Division's order. Subsequent thereto, by order dated June 17, 2003, the instant motion was transferred to this court for all purposes.

convey his fifty percent interest as a tenant in common would have empowered Elidex to sue to judicially compel Oh to convey such interest.

In opposition to the motion and in support of his cross motion, Lee contends that the Elidex Contract, as a forgery, is void and unenforceable against him and that the Ray defendants, who never sought proof of identity of the parties before consummating the transactions, renders Lee blameless. He further contends that the Elidex Contract, including all riders thereto, purports to convey title to 100% of the Property to Elidex and must be construed as a whole document, including its cancellation provisions which were interrelated to, and dependent on, the terms of sale. Lee asserts that the alleged promise of “free rent” was integrally related to the contract deposit in the amount of \$300,000 since the terms of the Elidex Contract provided that the Sellers would return said deposit or “execute a renewal lease pursuant to this rider if it becomes effective”, and if the whole contract becomes void, this provision cannot be singled out for enforcement. Further, Lee argues that awarding movants the relief they seek would constitute a windfall since there is a provision in the sales agreement between defendants ADJMI and Ray Realty (a corporation which subsequently purchased the Property and which is comprised of the same principals as Elidex) which entitles Ray Realty to an “Offset Credit” in the amount of \$300,000 in the event that Lee’s lawsuit before Justice Douglass was determined such a way as to adversely affect title.<sup>5</sup>

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<sup>5</sup>A full discussion of the “Offset Credit” can be found in the court’s accompanying decision and order in *ADJMI 936 Realty Corp. v Ray Realty Fulton, et al.* (26938/02).

Plaintiff avers that it is axiomatic that a co-tenant may only enter into lease agreements for the benefit of both co-owners and that any agreement for “free rent” in connection with ADJMI’s sale of the property to Ray Realty was not entered into for the benefit of both co-owners, Oh and Lee. Thus, it is argued that Lee, who did not consent to any such agreement, cannot be bound thereby because Oh violated his legal duty to his co-tenant by entering into the Elidex Contract in order to deprive Lee of all right, title and interest in the property.

In their reply papers and in opposition to the cross motion, defendants allege that, in spite of Elidex’s having filed a Notice of Pendency against the Property in 1990, Lee failed to take any timely action with respect to the Elidex contract but, rather, permitted the movants to pay the mortgage debt obligations on the Property. Said defendants reiterate their contention that Oh had both actual and apparent authority to deal with the public on all matters relating to the property and they dispute plaintiff’s claim that any lease extension was contingent upon the execution of a renewal lease by noting that negotiation of a lease renewal was rendered impossible due to defendants’ commencement of the lawsuit against Lee and Oh to enforce the terms of the Elidex Contract. Finally, they contend that Lee’s proper remedy was to seek redress from his business partner.

In further support of his cross motion, Lee reiterates his argument that the Ray defendants’ claim in connection with the Elidex contract was resolved by their agreement with ADJMI. He also notes that the complaint in the *Elidex* action specifically states in

several paragraphs that the agreement was a contract of sale, that the \$300,000 was a deposit for the sale of the property, and that no lease agreement was executed by Oh pursuant to the Elidex contract. Moreover, in referring to the terms of the mortgage agreement contained in the Sales Purchase agreement between ADJMI and Ray Realty, plaintiff contends that the parties thereto recognized that, in the event Lee prevailed in his lawsuit, ADJMI, as successor to Oh, was and would be solely liable for Oh's obligations. As further proof of the parties' intent, plaintiff points to a stipulation of discontinuance of the Elidex action, executed on October 4, 1993 (the same day that ADJMI purported to convey title to the Property to Ray Realty) by ADJMI and Ray Department Store, providing, *inter alia*, for extension of the terms of the existing lease until 2004 *at no rent*. Plaintiff contends that this was essentially a duplicate conveyance of the Property to the same principals and, in effect, an attempt to circumvent Lee's ownership interest. Finally, plaintiff maintains that the Elidex contract was entered into by Oh to deprive the other co-owner, Lee, of all right, title and interest in the property and, like the attempted transfer to ADJMI, was a nullity and attempts by either co-owner Ray Realty or ADJMI, as successor to the interest of Oh, to enter into agreements for their sole benefit to the detriment of Lee, violate the common law governing the duty of tenants in common to each other.

### ***DISCUSSION***

Under well-settled New York and general contract law, "a forged

signature renders a contract void *ab initio*. Because there can be no meeting of the minds of the parties when a forgery has been perpetrated, no contract existed in the case at hand." (*Orlosky v Empire Sec. Sys.*, 230 AD2d 401, 403 [1997]; *see also Opals on Ice Lingerie v Body Line, Inc.*, 320 F3d 362, 370 [2d Cir 2003]). Thus, as plaintiff correctly contends, the Elidex Contract was a fraudulent transaction perpetrated by Oh, whereby the latter purported to transfer a 100% interest in the property which he did not own, thereby reaping, exclusively for himself, the benefits of use and enjoyment of the Property. Nevertheless, in spite of the fact that the contract is permeated with fraud (*see DeSola Group v Coors Brewing Company*, 199 AD2d 141, 142 [1993] [plaintiff's allegations of fraud pervading the agreement held to render the entire agreement void]), defendant argues that one provision of the Elidex contract is enforceable because Lee acquiesced in the transaction and validated Oh's authority.<sup>6</sup> The court finds this argument unconvincing.

Defendants' contention that, by failing to take any action for 14 years, Lee acquiesced in Oh's act, is devoid of merit. As demonstrated, there was no reason for Lee to bring legal action to set aside the Elidex Contract. By the time Lee discovered the facts underlying the forgery, the Property had been conveyed to I and Lee promptly commenced litigation to assert his rightful ownership interests therein. Moreover, in October of 1993, the action brought by Elidex and Ray Department Store to enforce the Elidex contract was discontinued. Clearly, Lee had no reason to set aside a contract that: (1) was a nullity; (2)

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<sup>6</sup>The provision provided that, upon termination of the contract, Oh would Elidex's contract deposit or enter into a lease with Elidex for a five-year period at no rent for the premises.

was resolved by agreement between the only parties who could be charged; and (3) was the subject of a lawsuit that was resolved and discontinued against all of the defendants at the time of the transfer to Ray Realty. Thus, Lee's defense against the Ray defendants' instant motion -- that the signature on the Elidex contract was forged -- was a timely assertion of his interests.

Similarly, defendants' argument that Oh was cloaked with authority, either actual or implied, lacks merit. Apart from offering Lee's trial testimony where he stated that Oh had authority to execute leases, defendants fail to offer any evidence in admissible form that Lee empowered Oh to act as his agent to sell the Property (*see* General Obligations Law §5-703[1] ["An estate or interest in real property . . . cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing"]; *Jonap v Norwick*, 83 AD2d 957 [1981]). Moreover, it has long been the law in New York that "[t]he mere fact of ownership by two persons of a parcel of property as tenants in common does not constitute each a general agent of the other to enter into an executory agreement [with respect to] the property[;] [thus] an authority on the part of one cotenant to contract for the sale of the entire freehold will not be implied, and . . . a misrepresentation on the part of one cotenant will not be deemed a misrepresentation of the other or an acquiescence therein." (*Albert v Schrank*, 203 App Div 149, 151 [1922]; *see also Valentine v Healy*, 158 NY 369 [1899]; *Jonap*, 83

AD2d at 957; *Greiner-Maltz Co. v Stevens*, 66 Misc 2d 79, 83 [1971] [in absence of proof that defendant was authorized to act on behalf of his fellow tenants in common to enter into a contract to pay a sales commission, or that the latter two at any time knew of or ratified the oral agreement as to further commissions in the event the tenant purchased the property, trial court held that only the defendant who executed the contract was liable to the plaintiff]).

In accordance with the foregoing, defendants' motion for a declaratory judgment is denied and plaintiff's cross motion for such relief is granted.

This constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT