

**Artists Alliance, Inc. v Clemente Soto Velez Cultural
& Educ. Ctr., Inc.**

2007 NY Slip Op 31623(U)

June 12, 2007

Supreme Court, New York County

Docket Number: 0116311/2006

Judge: Jane S. Solomon

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

PRESENT: **JANE B. SOLOMON**

PART 55

Index Number : 116311/2006

ARTISTS ALLIANCE, INC.

vs

CLEMENTE SOTO VELEZ CULTURAL

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 3/30/07

MOTION SEQ. NO. _____

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

1-3

4-5

6-7

Cross-Motion: Yes No

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

N.B. -- Preliminary conf. is scheduled for July 30, 2007 at 12 noon.

FILED
JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6-12-07

[Signature]
JANE B. SOLOMON J.S.C.

Check if appropriate: DO NOT POST
Check one: FINAL DISPOSITION

REFERENCE
 NON-FINAL DISPOSITION

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 55

-----X

ARTISTS ALLIANCE, INC.,

Plaintiff,

-against-

CLEMENTE SOTO VELEZ CULTURAL AND
EDUCATIONAL CENTER, INC.,

Defendant.

-----X

JANE S. SOLOMON, J.:

DECISION AND ORDER

Index No. 116311/06

FILED
JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

This matter arises in connection with a controversy over the management of, and rental income from, a building located at 107 Suffolk Street, New York, NY (the Building). The Building was leased by the City of New York (the City), in or about February 1984, to Solidaridad Humana, Inc., which, in turn, assigned its interest in the lease to defendant Clemente Soto Velez Cultural and Educational Center, Inc. (CSV) (the Assignment). At that time, CSV was a type-b not-for-profit corporation.

Plaintiff, the Artists Alliance, Inc. (AAI), is a not-for-profit corporation that represents a collective of artists who occupy studios in the Building. In 1999, AAI initiated a rent strike in order to resolve grievances related to the management of the Building, and began placing rent due to CSV into an escrow fund. In 2000, CSV and AAI went to mediation in order to resolve their differences. The outline resulting from that mediation (the Outline) was accepted and agreed as of

November 2001.

The Outline stated, among other provisions, that "[a] new not-for-profit corporation will be formed to operate the [Building] in accordance with its mission to serve the community and to provide below-market space for theaters, visual artists, and not-for-profit cultural organizations." Cancel Affidavit, Exhibit I, ¶1. Hereinafter, the not-for-profit corporation referenced in the Outline shall be referred to as the NFP.

In addition, the Outline provided that: (i) certain hold-over and non-payment proceedings commenced by CSV would be discontinued; (ii) neither party was assuming any liabilities accrued prior to the formation of the NFP; (iii) AAI has no liability for individual artists' payments due; (iv) full disclosure and a formal structure for assuming liabilities would be worked out in a partnership agreement signed prior to incorporation; and (v) a time line would be created and implemented for the transition to management by the NFP.

According to the complaint, in 2002, CSV and AAI twice attempted to form the NFP and both applications were rejected by the New York Department of State. In 2004 and 2005, the Department of Citywide Administrative Services affirmed the validity of CSV's lease, and, with certain reservations as to the form of its incorporation, consented to CSV's continued management of the property.

In 2006, CSV unilaterally reorganized, established new by-laws, held elections, and, under the new by-laws, commenced an arbitration against the parties in occupancy of the Building who owed rent. AAI refused to participate in the arbitration, and brought an action in this court, by order to show cause, to stay it. See Artists Alliance, Inc. v Clemente Soto Velez Cultural and Educ. Ctr., Inc., Order to Show Cause, Index No. 116310/06. Hon. Emily Jane Goodman declined to sign the order as untimely.

AAI brings this action for a declaration that the Outline is valid and enforceable, the recently amended by-laws of CSV are invalid and unenforceable, and any actions taken by CSV's board of directors, elected pursuant to its amended by-laws, are a nullity. CSV now moves, pursuant to CPLR 3211(a), to dismiss the complaint.

There is no indication that either party assented in advance to be bound by the outcome of the mediation, and where a dispute is submitted to alternative dispute resolution, normally there must be prior consent to be bound in order for the resulting award to be enforceable. Wright v Brockett, 150 Misc 2d 1031, 1036 (Sup Ct, Bronx County 1991); compare CPLR § 7501 (written agreement to submit to arbitration is enforceable, and confers jurisdiction on the courts to enforce resulting award). Nonetheless, here, having no obligation to sign the Outline, both parties indicated their assent to be bound by doing so. As such,

the Outline carries the heavy presumption of being a binding and enforceable agreement. People v Inserra, 4 NY3d 30, 33 (2004); Mesibov, Glinert & Levy, Inc. v Cohen Bros. Mfg. Co., 245 NY 305, 310 (1927).

To overcome this presumption, and have the complaint dismissed, CSV must demonstrate that the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. Leon v Martinez, 84 NY2d 83, 87-88 (1994). CSV offers that the Outline (i) had no consideration; (ii) contained an illusory promise; (iii) was based purely on future intent; and (iv) is unenforceable due to waiver or the passage of an inordinate amount of time.

The first of these propositions is without merit; coextensive promises may constitute consideration for each other. Weiner v McGraw-Hill, 57 NY2d 458, 464 (1982). Hence, the mutual obligations contained in the Outline may be sufficient to establish a contract.

Moreover, CSV, relying upon Curtis Props. Corp. v Greif Cos. (212 AD2d 259, 265 [1st Dept 1995]), simply asserts that if the promise of either party is illusory, the contract is unenforceable. First, CSV has made no attempt to demonstrate that the promises contained in the Outline left either party the choice of performance or nonperformance. See Black's Law Dictionary, 6th Ed. Second, CSV fails to mention that Curtis

Props. Corp., in the very next sentence, admonishes that "courts avoid an interpretation that renders a contract illusory and therefore unenforceable for lack of mutual obligation and prefer to enforce a bargain where the parties have demonstrated an intent to be contractually bound." Id. at 265-266 (citations omitted).

CSV's reliance upon Cushman & Wakefield v Equitable Life Assur. Socy. of U.S. (143 AD2d 611 [1st Dept 1988]) for the proposition that expressions of future intent do not give rise to commercial liability for breach of contract is inapposite for at least two reasons. First, that principle applies only where the expression is made without promissory intent. See id.; Restatement (Second) of Contracts §26 (manifestation of assent gives rise to enforceable offer). Here, both parties signed the Outline to manifest their intent that the Outline was "accepted and agreed." See Outline at 3. Moreover, and importantly, Cushman & Wakefield establishes that the issue of whether an enforceable offer or a mere expression of intent has been made is a question of fact for the jury. Id. at 612. Thus, dismissal upon a motion to dismiss is inappropriate.

Finally, CSV makes repeated reference to the passage of time between the creation of the Outline and the bringing of this action, and mentions that the action should be dismissed without reaching, inter alia, waiver and statute of limitations. As the

Outline is dated November 26, 2001, and the complaint was filed as of October 31, 2006, it is impossible that the statute of limitations (six years for breach of contract) applies. What is more, the equitable defense of laches, which seems to underly CSV's suggestion, is unavailable in an action at law, where "dispositive consideration must be given to the applicable Statute of Limitations." Republic Ins. Co. v Real Dev. Co., 161 AD2d 189, 190 (1st Dept 1990). The motion to dismiss the first cause of action for breach of the Outline is denied.

With regard to the second cause of action, in essence, by seeking a declaration that the amended by-laws of CSV are void or unenforceable, AAI is attempting, by court order, to dissolve CSV, or show that it has not been duly re-formed. Such relief is circumscribed by the legislature. To wit, CSV enjoys a presumptive right to "adopt, amend or repeal by-laws ... relating to the activities of the corporation, the conduct of its affairs, its rights or powers or the rights or powers of its members, directors or officers." McKinney's Not-for-Profit Corporation Law (NCL) §202(a)(13).

This court sees no indication that the Outline was meant to dissolve, or restrict the rights of CSV: the establishment of the NFP is clearly independent of the continued existence of CSV. Regardless, whether the Outline placed a limitation on the existence or rights of CSV is patently within

the purview of the Attorney General (AG). In this regard, NCL §112 specifies that the AG may maintain an action or special proceeding to annul the corporate existence, dissolve a corporation that has acted beyond its capacity or power, or restrain it from carrying on unauthorized activities.

Further, NCL §618 gives this court only the power to confirm not-for-profit elections, order new elections, or take such other action as justice may require. Thus, under the principle inclusio unius est exclusio a terius, this court does not have the presumptive power to declare CSV's by-laws invalid; that field of rights is occupied by the AG. See Matter of Westchester County S.P.C.C. v Pisani, 105 AD2d 793 (2nd Dept 1984); see also 20A Carmody-Wait 2d, NY Prac §121:504 (use of the permissive word "may" in NCL §112 does not support argument that a dissolution action can be maintained by private individuals); 18 NY Jur 2d, Charities §85.

CSV's remaining equitable arguments, while potentially pertinent to the question of relief, are irrelevant to the question of whether a cause of action for breach of contract has been stated, and consideration of such arguments is inappropriate on a motion to dismiss. See Rovello v Orofino Realty Co., 40 NY2d 633 (1976); 6 Carmody-Wait 2d, NY Prac §38:19.

Accordingly, it hereby is

ORDERED that the motion of defendant Clemente Soto

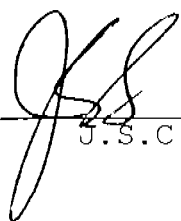
Velez Cultural and Educational Center, Inc., pursuant to CPLR 3211(a), to dismiss the complaint is granted to the extent that the second cause of action for a declaration that the by-laws of CSV are void and/or unenforceable is dismissed, and it is otherwise denied; and it further is

ORDERED that defendant Clemente Soto Velez Cultural and Educational Center, Inc., is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it further is

ORDERED that counsel appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY, on July 30, 2007 at 12 noon.

Dated: June 12 2007

ENTER:



J.S.C.

JANE E. SOLOMON

FILED
JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE