

Jericho Group, Ltd. v Midtown Dev., LP

2007 NY Slip Op 32226(U)

July 17, 2007

Supreme Court, New York County

Docket Number: 0113274/2004

Judge: Charles E. Ramos

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

Charles Edward Ramos

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PRESENT: _____

PART _____

Index Number : 113274/2004

JERICO GROUP, LTD

vs

MIDTOWN DEVELOPMENT, LP

Sequence Number : 007

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 23 2007

NEW YORK COUNTY CLERK'S OFFICE

is decided in accordance with accompanying memorandum decision and order.

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

Dated: 7/17/07

Handwritten signature and stamps: "MOS J.S.C." and "MOS J.S.C."

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X
JERICHO GROUP LTD.,

Plaintiff,

-against-

Index No. 113274/04

MIDTOWN DEVELOPMENT L.P.,

Defendant.

-----X

Charles Edward Ramos, J.S.C.:

Plaintiff Jericho Group Ltd. ("Jericho") moves pursuant to CPLR 2221 to reargue motion 06 in which Jericho originally moved to vacate the judgment entered on September 19, 2006 dismissing plaintiff's complaint; for permission to serve an amended complaint; and for a preliminary injunction barring defendant from transferring the property. On February 2, 2007, that motion was granted to the extent that the judgment dismissing the action was vacated, but otherwise denied.

Since the February 2, 2007 decision was rendered, defendant Midtown Development LP ("Midtown") has appealed and Jericho has filed a new action which Midtown removed to Federal Court.

Now, Jericho takes issue with the following statements from the February 2, 2007 decision:

On September 24, 2002, Jericho obtained documents from NYDEC which established that Midtown had in fact been in contact with NYDEC in April 2001 and had met with NYDEC in 1998 all concerning the oil spill. By letter dated October 18, 2002, Jericho demanded an explanation from Midtown as to why it failed to provide these NYDEC documents to Jericho initially on June 19, 2002, as required by the contract, or in August or September 2002 when Jericho specifically requested information about the oil spill.

However, Jericho admittedly reviewed the NYDEC

documents in September 24, 2002 and saw NYDEC's correspondence with Midtown. Indeed, by letter to Midtown dated October 18, 2002, Jericho provided Midtown with a copy of Midtown's June 29, 1998 letter to DEC and demanded an explanation from Midtown as to why this 1998 was not produced to Jericho during the study period. The October 18, 2002 letter and attachment were annexed to Jericho's opposition to Midtown's motion to dismiss submitted to this Court and on appeal to the Appellate Division. While Jericho's attorney did not learn of the NYDEC documents and Midtown's possession of them until November 2005, Jericho itself knew of the correspondence between Midtown and DEC well before this action was filed in 2004.

Specifically, Jericho objects to the Court's statement that "Jericho obtained documents from NYDEC which established that Midtown had in fact been in contact with NYDEC in April 2001." In fact, Jericho had seen only one relevant document at DEC, Midtown's June 29, 1998 letter, which was the subject of Jericho's October 18, 2002 letter to Midtown. Midtown's June 29, 1998 letter stated:

RE: Jacob Javits Center . . SPILL . . . Freedom of Information Act Request

Pursuant to our telephone conversation today please be advised that this firm represents Midtown Development LP ("Midtown") owners of Lot 1 in Block 708 the former Conrail property located at 36th Street and 11th Avenue.

It has come to our attention that an environmental contractor, Micro Associates is performing remediation and investigation work on behalf of the State pertaining to the Jacob Javit[s] project referenced above.

We herein request access to your files to review progress of the work being performed on the above-referenced project...

In an October 18, 2002 letter from Jericho to Midtown, Jericho stated:

Please respond to my letter dated September 18, 2002. (copy enclosed). I have obtained a copy of a letter from you to

New York State Department of Environmental Conservation, dated June 29, 1998, concerning the oil spill at this Site.

According to our Contract, Midtown had to provide this information and all the subsequent information and documents, regarding the oil spill, to Jericho, as part of the Diligence material that your firm provided to us with your letter dated June 19, 2002, or at least when we specifically requested them from your firm and Midtown, in August and September 2002.

First, the Court must reject Midtown's objection that Jericho's motion to renew must be denied on procedural grounds because Jericho was originally successful. Rather, Jericho asked to have the judgment vacated, to serve an amended complaint and for a preliminary injunction. While this Court vacated the judgment, it otherwise denied Jericho's motion. Moreover, the complaint remains dismissed by the Appellate Division decision. Therefore, reconsideration is permissible.

It is clear that it was error to refer to "documents" when in fact it was only the June 29, 1998 letter from Midtown to DEC that Jericho saw in the DEC file. Nonetheless, it was the June 29, 1998 letter that was the basis of this Court's decision to deny relief to Jericho under CPLR 5015(a)(2), not any other documents. The fact remains that Jericho became aware of the oil spill by rumor and the June 29, 1988 letter which it reviewed at DEC on September 24, 2002. Therefore, the motion to renew is granted and upon reconsideration, the motion to vacate the judgment entered on September 19, 2006 dismissing plaintiff's complaint remains the same. However, the Court clarifies its February 2, 2007 decision to define the term "documents" to include only the June 29, 1998 letter from Midtown to DEC.

Contrary to the Court's statements on pages 7 and 11, Jericho did not obtain documents from DEC in September 2002 demonstrating that Midtown had contact with DEC in April 2001 nor did Jericho see correspondence from DEC to Midtown.

Jericho makes much of the fact that it did not see the DEC file until September 24, 2002, 11 days after the Study Period ended. However, Jericho's focus on the study period is misplaced. For this Court, the relevant time period for Jericho's CPLR 5015 motion, sequence 06, was 2005 when Jericho opposed defendant's motion to dismiss. Jericho submitted the June 1998 letter in opposition to Midtown's motion to establish that Midtown violated the contract by not producing the June 1998 letter to Jericho during the Study Period. For this Court, that letter was sufficient to deny Midtown's motion to dismiss and press on with discovery. Indeed, subsequent discovery uncovered documents which established Midtown's failure to produce relevant documents during the study period. However, this letter was insufficient for the Appellate Division which granted Midtown's motion dismiss. Instead, the Appellate Division stated:

Had Midtown willfully or deliberately breached its obligations under paragraph 29(a) of the contract, Jericho's first two causes of action would not have been barred by its termination of the contract and recovery of its down payment (*Mokar Props. Corp. v Hall*, 6 A.D.2d 536, 539-540, 179 N.Y.S.2d 814 [1958]). However, Jericho's allegations, to the extent they allege willful or deliberate breach of contract, are either contradicted by the documentary evidence submitted on the motion (see *Arnav*, supra) or premised on a misreading of Midtown's obligations under paragraph 29(a). Thus, the rule articulated in *Mokar* is inapplicable to these facts.


While Midtown's June 29, 1988 letter in DEC's file raised a red flag for Jericho, as evidenced by Jericho's October 18, 2002 letter to Midtown, Midtown's wholesale failure to comply with its obligation to produce documents during the study period and fraud on Jericho was not clear until discovery was had in this action. However, this Court lacks the authority to reverse the findings of fact made by the Appellate Division on Midtown's motion to dismiss: (1) that there was no evidence of actionable fraud when in fact Midtown lied about the Amtrak documents and sent Jericho on a wild goose chase to Amtrak searching for non-existent documents; (2) that Midtown did not wilfully or deliberately breach its obligations under paragraph 29(a) of the contract which required Midtown to provide Jericho with the documents, which we now know Midtown had in its possession regarding the oil spill, since Midtown produced, while the appeal was pending, over 100 pages of documents concerning the oil spill; (3) that Midtown informed Jericho by e-mail dated August 23, 2002 that it had no information regarding the clean-up of an oil spill on neighboring property which e-mail was send to Ms. Emmet who sent it to Mr. Shafren, but was not forwarded to Jericho until September 2, 2002 and which statement was untrue. Therefore, the only remedy available to this court is to grant Jericho's motion to reargue and clarify its February 2, 2007 decision.

Accordingly, it is

ORDERED that plaintiff's motion is granted and upon reconsideration, the February 2, 2007 decision remains the same

except that the term "documents" shall include only the June 29, 1998 letter from Midtown to DEC and references on pages 7 and 11 to demonstrating that Midtown had contact with DEC in April 2001 or that Jericho saw correspondence from DEC to Midtown are struck.

Dated: July 17, 2007



J.S.C.

CHARLES E RAMOS

Counsel are hereby directed to obtain an accurate ~~copy~~ ^{J.S.C.} this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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