

**Nuevo El Barrio Rehabilitacion De Vivienda Y  
Economia, Inc. v Moreight Realty Corp.**

2007 NY Slip Op 33462(U)

October 18, 2007

Supreme Court, New York County

Docket Number: 0602698/2006

Judge: Herman Cahn

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PRESENT: **HERMAN CAHN**  
*Justice*

PART 49

Index Number : 602698/2006

NUEVO EL BARRIO  
vs  
MOREIGHT REALTY CORP

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 12/11/06

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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

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

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE.**

**FILED**  
OCT 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10 18 07

Herman Cahn  
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 49

-----X  
NUEVO EL BARRIO REHABILITACION DE  
VIVIENDA Y ECONOMIA, INC.,

Plaintiff,

-against-

Index No. 602698/06

MOREIGHT REALTY CORP., LOS TRES UNIDOS  
ASSOCIATES, and JOHN and/or JANE DOES A through  
Z, who are the current GENERAL and/or LIMITED  
PARTNERS of LOS TRES UNIDOS ASSOCIATES,

Defendants.

-----X

**Herman Cahn, J.:**

In this pre-answer motion, defendants Moreight Realty Corp., Los Tres Unidos Associates, and John and/or Jane Does A through Z move to dismiss the complaint in its entirety as untimely and as barred by documentary evidence, CPLR 3211 (a) (1), (a) (5), (a) (7).

Plaintiff Nuevo El Barrio Rehabilitacion De Vivienda y Economia, Inc. (NERVE) cross-moves for partial summary judgment on liability on the first cause of action for a judgment declaring void ab initio a 1981 agreement transferring NERVE's interests in Tres Unidos and in a housing project to Moreight, CPLR 3212 (e), Not-For-Profit Corporation Law (N-PCL) §§ 510 (a) (3), 511.

NERVE is a Type C not-for-profit corporation (see N-PCL § 402) formed in 1975 to develop habitable housing for low income people in the El Barrio section of East Harlem. Moreight is the managing general partner of Tres Unidos, a limited partnership and redevelopment company formed pursuant to Private Housing Finance Law, Article V.

In 1981, Tres Unidos, in cooperation with NERVE and nonparty United States

Department of Housing and Urban Development (HUD), developed a housing project in East Harlem. The project, as completed, consists of a seven-story apartment building including 135 residential units to be rented exclusively to low and very low income families. The project also includes a security guard station located in the building lobby, an interior courtyard and a parking lot.

In 1980, nonparty the Board of Estimate of the City of New York adopted a resolution approving a proposed agreement between Tres Unidos and the City to convey to Tres Unidos the real property on which the housing project would be constructed. NERVE alleges that, in the proposed agreement, Tres Unidos, acting through Moreight, represented to the City that NERVE was one of its general partners, covenanted to develop the project to provide affordable, low-income housing and agreed that any significant change in the ownership of a general partnership interest in Tres Unidos would constitute a transfer or disposition of the project.

Subsequently, on June 18, 1981, NERVE and Moreight, together with other parties, executed an agreement (the June 18 agreement) pursuant to which NERVE conveyed its interest in the housing project and real property to Moreight, while retaining a minority general partnership in Tres Unidos. HUD similarly transferred to Moreight its interest in the project and real property. The June 18 agreement includes a provision according NERVE a right of first refusal to purchase the project, in certain circumstances.

In 1981, NERVE and Moreight also executed an amended and restated limited partnership agreement for Tres Unidos (the 1981 amended partnership agreement) appointing Moreight as Tres Unidos' managing general partner and NERVE as a general partner. Pursuant to this agreement, NERVE conferred to Moreight a power of attorney authorizing Moreight to act

on NERVE's behalf with respect to Tres Unidos and the project. The 1981 amended partnership agreement includes a right-of-first-refusal provision identical to that set forth in the June 18 agreement.

In August 1981, Moreight, on behalf of Tres Unidos, and the City executed an agreement to convey to Tres Unidos the property on which the project was to be constructed (the land disposition agreement). In the agreement, NERVE is identified as a co-sponsor of the project and Tres Unidos recognizes that a transfer of a general partnership interest in itself is, "for practical purposes," a transfer or disposition of the project (see Land Disposition Agr. §§ [A] [1], 402).

In 1985, Moreight, on behalf of NERVE, entered into a second amendment to the Tres Unidos partnership agreement (the 1985 amended partnership agreement) which converted NERVE's general partnership interest in Tres Unidos into a limited partnership interest.

In the complaint in the instant action, NERVE alleges that, at the time of the execution of the agreements in 1981 and 1985, it was a Type C not-for-profit corporation and, therefore, was required by law to obtain judicial approval before it could enter into the agreements transferring its interests in Tres Unidos and the project. It failed to do so. NERVE further alleges that this failure renders the agreements void ab initio and now seeks to rescind them and the transfers.

NERVE also alleges that in 2003, 2004 and 2005, events occurred that triggered its right of first refusal to purchase the project, in accordance with the terms of the June 18 and 1981 amended partnership agreements. The triggering events include the transfers of NERVE's ownership interests in Moreight and the project, to nonparty Dunwell Los Tres, Inc. in 2004 and the subsequent transfer by Dunwell of its interests in Moreight and Tres Unidos to a third party in

2005. NERVE further alleges that defendants breached the June 18 and amended partnership agreements by failing to advise NERVE that the triggering events had occurred, by refusing to sell the project to NERVE and by refusing to provide NERVE with documentation supporting defendants' representation that a third party had offered \$16 million to purchase the project.

In addition, in the complaint, NERVE alleges that Moreight breached express terms and implied covenants of the June 18 agreement, the amended partnership agreements and the land disposition agreement by failing to advise, consult with and meet with NERVE regarding project management policies and decisions and the maintenance of amicable tenant relations, and by notifying the project tenants that Moreight intended to terminate certain federal subsidies to the project.

On these allegations, NERVE seeks a judgment declaring void the transfer of its interests in Tres Unidos and the project and requiring defendants to take all actions necessary to effectuate the return to NERVE of these interests. NERVE also seeks a judgment declaring that it was entitled, in 2003, 2004 and 2005, to exercise its right of first refusal to purchase the project. NERVE seeks a judgment declaring that Moreight must cure its breaches of the agreements' terms requiring it to properly manage the project and to keep NERVE advised of its management decisions and actions. Finally, NERVE seeks an injunction enjoining Moreight from further breaching these terms.

Moreight, Tres Unidos and Tres Unidos' general and limited partners now seek to dismiss all claims asserted against them as barred by the documentary evidence and as untimely.

In opposition, NERVE cross-moves for summary judgment declaring void ab initio the agreements transferring NERVE's interests in Tres Unidos and the project to Moreight on the

ground that NERVE itself violated the N-PCL by failing to obtain the required leave of court for the transfers.

The motion to dismiss is denied. On a motion addressed to the pleadings, "the court must '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'" (Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 570-571 [2005], quoting Arnav Indus., Inc. Ret. Trust v Brown, Raysman, Millstein, Felder & Steiner, 96 NY2d 300, 303 [2001]; see CPLR 3211 [a] [7]).

The first cause of action, for a judgment voiding the transfers, is legally cognizable. An N-PCL § 201 Type C corporation is required by law to obtain leave of court for the "sale, lease, exchange, or other disposition of all, or substantially all, of [its] assets" (N-PCL § 510 [a] [3]; see N-PCL § 511 [a]). The purpose of the requirement is "to protect the beneficiaries of a charitable organization from 'loss through unwise bargains and from perversion of the use of the property'" (Rose Ocko Found., Inc. v Lebovits, 259 AD2d 685, 688 [2d Dept], appeal dismissed, lv denied 93 NY2d 997 [1999], quoting Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn, 76 AD2d 712, 716 [2d Dept 1980], affd 54 NY2d 742 [1981]; see N-PCL §§ 510, 511). The failure to first apply for, and obtain, leave of court to sell all or substantially all of the assets of a not-for-profit corporation renders such sale invalid (St. Andrey Bulgarian E. Orthodox Cathedral Church, Inc. v Bosakov, 272 AD2d 55, 56 [1<sup>st</sup> Dept 2000] [1978 sale of church property held void ab initio for, inter alia, failure to comply with statutory requirement of notice to attorney general], citing Religious Corporations Law § 12, N-PCL § 511; Century 2000 Custom Home Bldr. & Dev., LLC v United Muslim Org. of New York, 1 Misc 3d 890, 891 [Sup

Ct, Queens County 2003]; cf. Wilson v Ebenezer Baptist Church, Inc., 17 Misc 2d 607, 609 [Sup Ct, Kings County 1959], citing Religious Corporations Law § 12 [9]). The court notes, however, that, where the not-for-profit corporation seeks to repudiate a contract, it must return the moneys expended by the other side in reliance on the contract (see Wilson v Ebenezer Baptist Church, Inc., 17 Misc 2d at 610).

Here, NERVE alleges that it is a Type C not-for-profit corporation and did not seek, or obtain, leave of court for the transfer of its interests in Tres Unidos and the project and that these transfers constitute all, or substantially all, of its assets. Should NERVE prove these allegations, then the contracts may well be held to have been void from their inception and, therefore, not enforceable.

Defendants' contention that the contract claims are time-barred by the six-year statute of limitations (see CPLR 213 [2]) is unavailing. Where a contract is void and without effect at its inception, no limitations period exists (Pacchiana v Pacchiana, 94 AD2d 721, 722 [3d Dept], appeal dismissed 60 NY2d 586 [1983]; see e.g. St. Andrey Bulgarian E. Orthodox Cathedral Church, Inc., 272 AD2d at 55). It has long been established that, where a contract is "void in the beginning, an action to declare the jural relation between the parties could be maintained at any time. A judgment would ascertain, but not create[,] the contract's nullity; it would merely declare what had been the actual legal relationship between the parties all along" (Nusbaum v Nusbaum, 280 App Div 315, 316 [1<sup>st</sup> Dept 1952]).

For these reasons, the first cause of action to void the agreements conveying NERVE's interests in Tres Unidos and the project is legally cognizable. Therefore, that branch of the motion to dismiss is denied.

Also legally cognizable are the second, third, fourth, fifth and sixth causes of action in which NERVE seeks to exercise its right of first refusal to purchase the project, in the event that June 18 agreement and the 1981 amended partnership agreements are found to effect a valid and binding transfer of its interests in the Tres Unidos partnership and the project.

The right-of-first-refusal provision provides:

In the event that the Partnership determines to sell the Project, other than to a cooperative or condominium composed of all or some of the tenants of the project, NERVE shall have the right of first refusal to purchase the Project as follows: whenever the Partnership receives a bona fide offer to purchase the Project acceptable to the Partnership[,] it shall give NERVE written notice thereof and of the terms of such offer and NERVE shall thereupon have thirty (30) days to notify the Partnership in writing of its election to purchase the Project upon the same terms and conditions as are contained in said bona fide offer acceptable to the Partnership. Such sale shall be subject to HUD approval and shall be conditioned upon the obtaining of such approval within 60 days from the date of such election

(June 18 Agr. § 10 [emphasis added]; 1981 Amended Partnership Agr. § 38 [emphasis added]).

In the second, third, fourth, fifth and sixth causes of action, NERVE alleges that the right was triggered by defendants' determination to sell the project, by defendants' receipt of an offer from a third party to purchase the project for a specified sum and by defendants' conveyance of their interest in the project. Specifically, NERVE alleges that, after December 23, 2004, representatives of Moreight/Dunwell Los Tres advised NERVE that Tres Unidos had determined to sell the project and that Moreight, through Tres Unidos, would consider selling the project to NERVE for \$4 million (see Compl, ¶ 62). NERVE further alleges that it promptly advised Moreight that it was exercising its right of first refusal and began to arrange the necessary financing (id., ¶¶ 63, 64). NERVE also alleges that, in September 2005, Moreight advised it that it had received an offer from a third party to purchase the project for \$16 million, and denied

NERVE's request for documentation supporting the existence of this offer (id., ¶¶ 65, 94, 95).

Finally, NERVE alleges that, subsequently, Dunwell Los Tres transferred its interests in Moreight and Tres Unidos to a third party (id., ¶ 66). These allegations are sufficient to support the second, third, fourth, fifth, and sixth causes of action to enforce NERVE's right of first refusal.

Defendants contend that, pursuant to the underlying circumstances as alleged by NERVE, the right of first refusal could not have been triggered because NERVE does not allege the existence of a written agreement to purchase or sell the project and because the transfer of ownership interest in Moreight does not constitute a sale of the project, as defined by the relevant agreements.

The failure to make such allegations does not render the claims fatally defective, nor are the claims barred by documentary evidence. NERVE's right of first refusal is expressly contingent upon Tres Unidos' "determination to sell" and receipt of an "acceptable" "bona fide offer to purchase." However, these terms are not defined in either the June 18 agreement or the 1981 amended partnership agreement. Therefore, the documentary evidence does not conclusively establish a defense to the claims as a matter of law (see Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]; Held v Kaufman, 91 NY2d 425, 430-431 [1998]; CPLR 3211 [a] [1]). Given the ambiguous nature of the provision's language, it would be premature and inappropriate at this juncture to render any determination regarding the contracting parties' intended meanings of these terms and whether the right has been triggered by any of the events upon which NERVE bases its claims (see Kushner v King, 126 AD2d 466, 467 [1<sup>st</sup> Dept 1987]).

For these reasons, the second, third, fourth, fifth and sixth causes of action are legally viable and those branches of the motion to dismiss these claims are denied.

The seventh cause of action for breach of the June 18 agreement and the amended partnership agreements is also legally viable. In this claim, NERVE alleges that Moreight failed to keep NERVE advised with respect to management policies and decisions regarding the project, failed to consult with NERVE about such policies and decisions, and breached the June 18 agreement by failing to meet with NERVE to facilitate suitable and economic management of the project and amicable tenant relations.

Defendants' contention that NERVE bases this claim on purported contractual duties that are nowhere present in the plain language of the agreements is without merit. The June 18 agreement expressly provides that "Moreight shall keep NERVE advised with respect to management policies and decisions and shall seek NERVE's advice with respect thereto. Moreight will arrange to have meetings with NERVE representatives at least quarterly" (June 18 Agr. § 8). Contrary to defendants' contention, whether defendants breached this provision and whether such breach caused NERVE to sustain damage are triable issues not properly resolved on a motion addressed to the sufficiency of the pleadings.

Similarly without merit is defendants' contention that the claim is fatally defective because NERVE cannot prove its allegations that Moreight violated its covenant to dedicate the project for use as affordable, low income housing by advising tenants that it will cease certain federal subsidies and by selling its ownership interest in the project. Issue must be joined and discovery conducted before any determination of these factual issues may be made.

Therefore, that branch of the motion to dismiss the seventh cause of action is denied.

NERVE's cross motion for summary judgment on the first cause of action is denied as premature. Defendants have not served or filed answers to the complaint. A summary judgment motion may not be considered before issue is joined. (City of Rochester v Chiarella, 65 NY2d 92, 101 [1985]; Christian v Goord, 20 AD3d 862 [3d Dept 2005]; see CPLR 3212 [a]).

The court has considered the parties' remaining contentions and finds them to be without merit.

Accordingly, the motion to dismiss and the cross-motion for summary judgment are denied in their entirety. Defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry upon their attorneys.

Dated: October 18, 2007

ENTER:

  
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J.S.C.

**FILED**  
OCT 24 2007  
NEW YORK  
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