

**Clark Constr. Corp. v BLF Realty
Holding Corp.**

2007 NY Slip Op 33508(U)

October 19, 2007

Supreme Court, New York County

Docket Number: 0122662/2000

Judge: Shirley W. Kornreich

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

PRESENT: SHIRLEY WERNER KORNREICH
Justice

PART 54

Clark Construction Corporation?
Plaintiff,

INDEX NO. 122662/2000

MOTION DATE 7/19/07

- v -

MOTION SEQ. NO. 017

BLF Realty Holding Corp.,
ATM Holding, LLC and William Fletcher,
Defendants

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for removal of summary judgment

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED
OCT 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/19/07

HON. SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

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

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

2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
CLARK CONSTRUCTION CORPORATION,

Plaintiff,

-against-

BLF REALTY HOLDING CORP.,
AIM HOLDING, LLC and WILLIAM FLEISCHER,

Defendants.
-----X

Index No.:122662/2000

**DECISION and
ORDER**

KORNREICH, SHIRLEY WERNER, J.:

This is an action to enforce an alleged oral contract for the purchase of a condominium. The court assumes familiarity with the facts as they have been set forth in several previous decisions. After numerous motions and two appeals the case has been reduced to Clark Construction Corporation ("Clark") as the single plaintiff, with causes of action for injunction and specific performance and defendants' counterclaims for ejectment and use and occupancy. Now in Motion Sequence No. 17, defendants again move for summary judgment dismissing Clark's claims. For the reasons stated below summary judgment will be denied.

I. Background

In its decision dated November 24, 2004, the court reaffirmed its earlier decision to grant defendants' motion for summary judgment against plaintiffs Clark, Marc E. Elliott and Savas Tsitiridis on their contract claims, and for defendants on their ejectment and use and occupancy counterclaims. The court left intact plaintiffs' claims for fraud. Plaintiffs appealed and the

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Appellate Division, First Department affirmed in part and reversed in part. *Clark Constr. Corp. v. BLF Realty Holding Co.*, 28 A.D.3d 367 (1st Dept. 2006). The appeals court affirmed dismissal of the contract claims by plaintiffs Elliott and Tsitiridis, concluding that the merger clause in their lease agreements barred parol evidence of an oral sales contract. However, the court reversed summary judgment against Clark on the claims for injunction and specific performance, finding that there was no written lease barring consideration of the alleged oral agreement, and that specific performance was not impractical. The court did not address the violation of the Martin Act argument, but did find “the parties’ other arguments unpersuasive,” and thus left intact the dismissal of Clark’s breach of contract claim. In keeping with these rulings, the court reversed the grant of ejectment against Clark and granted Clark’s motion to extend the lis pendens. With respect to plaintiffs’ fraud claims, the court reversed and granted summary judgment, finding the fraud claims to be duplicative of the contract claims. The Appellate Division denied reargument of the appeal and the Court of Appeals denied Elliott’s and Tsitiridis’ applications for leave to appeal. 2006 N.Y. App. Div. LEXIS 9259 (N.Y. App. Div. 1st Dept., July 13, 2006), *appeal den.*, 7 N.Y.3d 717 (2006).

Summary judgment is not appropriate at this time because defendants failed to designate this as a motion for renewal, failed to present new facts, and failed to provide a reasonable explanation for the motion as required by CPLR Rule 2221(e). Moreover, there remain material disputed factual issues that must be decided by a jury. CPLR Rule 3212(b).

II. Statement of Facts

The following facts are not in dispute: Clark and defendant William Fleischer (“Fleischer”) had an oral agreement of some kind regarding the commercial space being rented

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by Clark in a building located at 117-119 Hudson Street, New York, NY ("the building"); Clark's original lease agreement was with defendant BLF Realty Holding Corp. ("BLF"); BLF subsequently sold the building to defendant AIM Holding, LLC ("AIM"); Clark paid \$200,000 to BLF through five checks, with the first check (for \$100,000) designated "for rent"; at some point Fleischer told Clark that the agreement was off, that he would return the money, and asked Clark to vacate the premises so they could be rented to another tenant; by then Clark had allegedly made substantial improvements to the leased space. The parties continue to dispute the elements of the parties' oral agreement, Fleischer's relationship with BLF and AIM, the nature, extent and cost of Clark's improvements to the leased space and other key issues.

In support of this renewed summary judgment motion, defendants do not offer any new evidence or information that they did not or could not have previously produced.

III. *Conclusions of Law*

CPLR 2212(e) provides:

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Defendants do not identify this motion as one for renewal of their prior summary judgment motion. Yet the motion is plainly one for renewal. This Court granted the prior motion for defendants on the contract claims by plaintiff Clark, and the Appellate Division reversed as to

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the first and second causes of action for injunction and specific performance. The fact that the Appellate Division reinstated the contract claims against defendants is the only *new* fact defendants offer to support their renewed motion. It is readily apparent that defendants are not now offering any additional new information or evidence or a change in the law that would change this court's prior determination, as required by CPLR Rule 2212(e), subd. 2. The facts defendants emphasize as undisputed were either before this and the appeals courts or were available to defendants.¹ They are instead asking this court to reinstate its prior decision in spite of the Appellate Division reversal. Since the latter decision is "law of the case" this court would be precluded from granting summary judgment on a motion to renew. *Senf v. Staubitz*, 11 A.D.3d 997 (4th Dept. 2004) (reversing lower court's grant of motion to renew opposition to summary judgment where Appellate Division had affirmed prior order granting summary judgment), *citing Rohring v. City of Niagara Falls*, 185 A.D.2d 685 (4th Dept.), *lv denied* 82 N.Y.2d 662 (1993) (decision of Appellate Division is law of the case until modified or reversed by higher court, and trial court is bound by decision).

Even if this court had the legal authority to grant summary judgment on the remaining contract claims reinstated by the Appellate Division, defendants have failed to meet the standard

¹Indeed, this is the second time defendants have failed to so identify a motion. As this court stated in its November 28, 2005 decision denying defendants' motion for summary judgment on the fourth cause of action for fraud,

"Defendants have neither designated this as a motion for renewal, nor provided a reasonable explanation for its necessity. The new evidence defendants propose - documents and testimony showing that defendants did engage in significant preparation for, and expended "large sums of money" in connection with, "a possible condominium conversion" was available to defendants at the time of the previous summary judgment motion on this issue. Even were such evidence truly "new," it would not support defendants' argument."

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for bringing a motion to renew. They argue that the undisputed evidence before this court shows as a matter of law that the parties' agreement violated the Martin Act. Without addressing the doctrine of "law of the case" defendants attempt to minimize the controlling impact of the Appellate Division's prior decisions. This approach has some merit with respect to the first appellate decision addressing a motion to dismiss, but none with respect to the second decision reviewing summary judgment.

The Appellate Division did not discuss the applicability of the Martin Act in its 2006 decision (*supra*, 28 A.D.3d 367), but implicitly disagreed with this court's conclusion that the alleged oral agreement to sell plaintiffs the premises was illegal because it violated the Martin Act. Although it did not specifically address the Martin Act issue, it stated it considered and rejected "the parties' other points." *Id.* at 369. In any event, the appeals panel's failure to specifically address the Martin Act issue was a basis for seeking reargument before that court (which it denied), and a valid basis for limiting the decision's impact as legal authority on the issue, but does not support defendants' attempt to re-litigate the issue before this court in the context of a renewed motion for summary judgment.

Even if the court were to consider defendants' motion on the merits, it would be denied as material disputed issues of fact remain to be decided by a jury. To obtain summary judgment, movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR 3212, subd [b]); it must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 562-563 (1980). Once movant has met the initial burden, the burden shifts to the party opposing the motion to show facts sufficient to require a trial of any issue of fact. CPLR 3212 (b); *id.* at 560. *See also*

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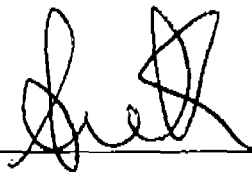
GTF Marketing Inc. v. Colonial Aluminum Sales, Inc., 66 N.Y.2d 965 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v Depew & Schetter Agency*, 154 A.D.2d 513, 515-515 (2d Dept. 1989).

There is no doubt that the parties vehemently disagree about the substance of their agreement over the premises occupied by Clark. Without resolution of this threshold issue in their favor, defendants cannot meet their burden to show they are entitled to judgment as a matter of law. Accordingly, it is

ORDERED that defendants' motion for summary judgment is deemed a motion for renewal and so deemed the motion is DENIED..

The foregoing constitutes the decision and order of the Court.

Date: October 19, 2007



J.S.C.

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