

180 E 88th St Assoc., LLC v 180 E 88th St. Apt. Corp.
2007 NY Slip Op 34497(U)
January 31, 2007
Supreme Court, New York County
Docket Number: 105057/06
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 60

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180 E 88th St ASSOCIATES, LLC and
EXTELL DEVELOPMENT CO,

Plaintiff,

Index No. 105057/06

-against-

180 E 88 TH ST. APARTMENT CORP.,

Defendant.
-----X

FRIED, J.:

In this action for inter alia, specific performance of a contract for the purchase of real property from the plaintiffs 180 E 88th St. Associates, LLC (Associates) and Extell Development Company (Extell) (together, plaintiffs). Plaintiffs move for summary judgment pursuant to CPLR 3212 and also seek an award of reasonable attorneys' fees. Defendant 180 E 88th St. Apartment Corporation (the Corporation) opposes the motion, challenging the authenticity of one of the documents, and cross-moves pursuant to CPLR 3212, for summary judgment on the basis that plaintiffs breached the contract.

In August 2005, the parties entered into a contract (Agreement) for Extell's purchase of real property from the Corporation, a cooperative (Co-op) property located at 180 East 88th Street (Property) at a purchase price of \$4.5 million. Both sides were represented by counsel. Section 16.08 of the Agreement provides for the purchaser's right to assign the rights to

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purchase the Property under the following conditions:

16.08 of the Agreement provides that:

[t]his Agreement may not be assigned by Buyer without the written consent of Seller, which consent may be withheld for any reason or for no reason. Notwithstanding the foregoing, Buyers rights under this Agreement may be assigned at Closing to an entity in which Gary Barnett is a managing member provided that Buyer shall remain fully obligated hereunder

[emphasis added].

Upon execution of the Agreement, Extell paid a \$450,000 down payment to the Corporation, to be held in escrow. In February 2006, Extell and the Corporation executed and entered into an amendment to the Agreement (Amendment, annexed to Goldman Aff as Ex D) whereby the parties agreed, inter alia, to postpone the date of the Closing to March 31, 2006 at 10 a.m. at the offices of the Corporation's counsel and explicitly made this new date and time "time of the essence" (Agreement ¶ 4.02). In consideration of defendant's accommodation to Extell, Extell also agreed to a \$50,000 increase in the purchase price to \$4,550,000. Paula Ebbins executed the Amendment on behalf of the Co-op in her capacity as the president of the Co-op.

On or about March 10, 2006, Extell and Associates entered into an agreement to assign Extell's rights to purchase the Property to Associates (Assignment, Goldman Aff, Ex F).

On Friday, March 10, 2006, plaintiffs' counsel corresponded with defendant's transactional counsel, seeking the Corporation's written consent to the Assignment, as required by section 16.08, and sending the unexecuted consent (Consent) as an attachment (E-mail from Extell's counsel to defendant's counsel, Robert Gumenick, entitled "Consent

to Assignment of Contract, annexed to Plaintiff's Reply Affidavit as Ex A). On Monday, March 13, 2006, Extell received two original copies of the Consent and a Division of Housing and Community Renewal (HCR) letter authorizing plaintiffs to obtain records at DHCR, both documents bearing the signature of Paula Ebbins (*id*). The Consent provided in pertinent part that:

This Consent is made this 13th day of March 2006 ... at the request of Extell ...
Whereas, Extell desires to assign its interest as the 'Buyer' under the Agreement to 180 E 88th St. Associates, LLC, a New York limited liability company (the "Assignment"),
... Seller hereby consents to the Assignment substantially in the form annexed hereto as Exhibit A, provided that as required by the Agreement, Extell shall remain liable for the obligations of the 'Buyer'.

The annexed Assignment did not indicate the amount that Associates paid Extell for the Assignment.

On March 27, 2006, plaintiff sent the Corporation a letter, assuring it that the "purchaser will be ready, willing and able to close title to the Property in accordance with the [Agreement] on March 31, 2006 ... " and reaffirmed that "time was of the essence" (Defendant's Ex. B).

On March 29, 2006 defendant learned from its attorney that Extell assigned its interest in the Agreement to Associates for \$1.95 million and that Gary Barnett was not a managing member of Associates (Affidavit of Paula Ebbins dated July 13, 2006, annexed to the Defendant's cross motion). On the that same day, defendant's counsel notified Extell that it was in breach of section 16.08 of the Agreement for failing to assign the rights to the Agreement to a company in which Gary Barnett is a managing member, as well as other "facts made known after the purported assignment was proposed" (Letter from Robert

Gumenick annexed to the defendant's cross motion as Ex A) .

On March 31, 2006, plaintiffs arrived at defendant's real estate counsel's office, ready, willing and able to close the sale of the Property, and at 10:15 am they were informed by the Corporation's counsel that the Corporation would not attend (see, Transcript of Statements recorded at the office of Robert Gumenick on March 31, 2006, annexed to plaintiffs' motion papers as Ex. E).

The plaintiffs commenced this action in April 2006, seeking inter alia, specific performance pursuant to section 4.02 of the Agreement, which provides with respect to default, that:

If the closing shall not take place on or before the Closing Date in accordance with this Agreement by reason of Seller's breach or default of its obligations under this Agreement, ... then Buyer, at Buyer's election, shall be entitled to either the return of the Contract Deposit or the remedy of **specific performance** by reason of Seller's Default [emphasis added].

Plaintiffs also seek attorneys' fees pursuant to section 16.09 of the Agreement. Plaintiffs made this motion in June, after defendant's answer was served.

CPLR 3212 [b] provides that summary judgment shall be granted if, upon all of the papers and proof submitted, the cause of action shall be established sufficiently to warrant the court to direct judgment in favor of a party as a matter of law. Thus, the plaintiff is required to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Even if such a showing is made, the motion must be denied if the plaintiff "produce[s] evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests

his claim" (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The issue here is whether defendant presented evidence sufficient to establish a genuine issue of fact regarding whether the Consent was validly assigned as matter of law pursuant to section 16.08 of the Agreement, and if so, regarding whether Ms. Ebbins actually executed the Consent.

Plaintiffs made a prima facie showing of entitlement to specific performance by annexing to the verified complaint a copy of the Agreement (Ex A), the Amendment (Ex B), Assignment (Ex C), and the Consent (Ex D), and by demonstrating the Corporation's breach by its refusal to transfer title at the closing (Ex E) (*see*, Agreement § 4.02; *ADC Orange, Inc. v Coyote Acres, Inc.*, 20 AD3d 493 [2d Dept 2005], *affd* 7 NY3d 484 [2006]). In addition, plaintiffs have demonstrated that they were ready, willing and able to close the sale and purchase the Property from the Corporation, having substantially performed their obligations under the Agreement and recognizing that time was of the essence (*EMF General Contr. Corp. v Bisbee*, 6 AD3d 45 [1st Dept 2004]).

Defendant has failed to submit "evidentiary proof sufficient to raise a triable issue with respect to the asserted defenses" regarding either its challenge to plaintiffs' interpretation of the assignment clause or its challenge to the authenticity of the Consent so as to defeat the motion (*Mariani v Dyer*, 193 AD2d 456, 457 [1st Dept], *lv denied* 82 NY2d 456 [1993]). Defendant's conclusory assertion that Extell breached the "express condition of the Purchase Agreement that required Gary Barnett to always be a managing member of the Purchasing party" (Affidavit of Paula Ebbins, President of Defendant Cooperative Corporation ¶ 3) or that "any assignee of the contract had to be an entity that included Gary Barnett as a

managing member” (Ebbins Aff, ¶ 7) is a clear misreading of section 16.08, which clearly provides the purchaser with two options for obtaining consent and provides that an assignment was permissible, regardless of Mr. Barnett’s affiliation (*see, Rotuba Extruders, Inc v Ceppos*, 46 NY2d 223, 231 [1978]).

Nor is the claim of Ms. Ebbins, that the signature on the Consent was a forgery (Ebbins Aff, ¶ 26) sufficient, as “averments merely stating conclusions, of fact, or law, are insufficient” to “defeat summary judgment” (*Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Rather, “[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]; *Bronsnick v Brisman*, 30 AD3d 224 [1st Dept 2006]). Ms. Ebbins, the person who admittedly signed the Amendment and who does not deny signing DHCR documents on the same date that the Consent was signed, utterly fails to provide any plausible explanation to contradict the detailed correspondence between her counsel and plaintiffs’ counsel whereby defendant’s counsel advises that he is going to have the Consent signed by his client that very morning (*see*, annexed to Affirmation of Adam Jachimowski Esq., Ex A). Thus, here “there is an absence of factual assertions supporting her claim of forgery” (*id.*). Nor has Ebbins “demonstrated that her prelitigation conduct was consistent with a denial of genuineness” (*id.*). On the contrary, a careful review of the defendant’s own documents submitted in support of its cross motion reveals that the “forgery” was not asserted until after Ms. Ebbins learned of the \$1.95 million price Associates paid for the Assignment (Ebbins Aff), and after this litigation began, despite having the opportunity to object (Letter of Robert Gumenick dated March 29, 2006,

annexed to Ebbins Aff as Ex A). Thus, here the evidence submitted by the parties reveals that no real issues exist barring plaintiffs from obtaining summary judgment on their specific performance cause of action.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on their specific performance cause of action is granted; and it is further

ORDERED that plaintiffs are entitled to reasonable attorneys' fees pursuant to section 16.09 of the Agreement; and it is further

ORDERED the issue of reasonable attorneys' fees is hereby referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by C.P.L.R. § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

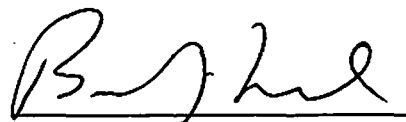
ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special Referee

ORDERED that the defendant's cross motion for summary judgment is denied.

Dated: 1/31/07

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