

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

2008 NY Slip Op 30193(U)

January 18, 2008

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: KORNREICH  
Justice

PART 54

CLARK CONSTRUCTION  
CORP

BLF REALTY HOLDING  
CORP

INDEX NO. 122662/00  
MOTION DATE 1/18/07  
MOTION SEQ. NO. 18  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion to/for reargument  
+ records on appeal & prior papers &  
proceedings herein

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-2</u>
<u>3</u>
<u>4-5</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JAN 24 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 1/18/08

[Signature]  
**HON. SHIRLEY WERNER KORNREICH**  
J.S.D.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

**FILED**  
JAN 24 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

**SHIRLEY WERNER KORNREICH, 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 based upon breach of contract and defendants' counterclaims for ejectment and use and occupancy.<sup>1</sup> In the context of a post-appeal motion *in limine* (Motion Sequence 16), the court permitted the defendant to move for summary judgment on its defense under the Martin Act. *See*, Transcript dated June 4, 2007, pp. 55-57. Defendants again moved for summary judgment dismissing Clark's claims in Motion Sequence 17. That motion was denied by decision and order of this court dated October 19, 2007. Defendants now seek to reargue the October 19, 2007 decision which denied their motion for summary judgment. For the reasons stated below reargument is granted but the court adheres to its original determination for

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<sup>1</sup> Use and occupancy is also still relevant in regard to former plaintiffs Mr. Elliott and Mr. Tsitiridis .

the reasons that follow.

### **I. Background**

On June 29, 2004, this court granted 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. On November 24, 2004, this Court adhered to that determination on a motion for reargument. Plaintiffs appealed and the Appellate Division, First Department affirmed in part and reversed in part. *Clark Constr. Corp. v. BLF Realty Holding Co.*, 28 A.D.3d 367 (1<sup>st</sup> Dept. 2006). The appeals court affirmed dismissal of Mr. Elliott's and Mr. Tsitiridis' contract claims, concluding that the merger clause in their lease agreements barred parol evidence of an oral sales contract. However, the court dismissed the Clark's fraud claims and 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, but did find "the parties' other arguments unpersuasive," and thus left intact 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. 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. 1<sup>st</sup> Dept., July 13, 2006), *appeal den.*, 7 N.Y.3d 717 (2006).

Upon reargument, the court corrects the October 19, 2007 decision insofar as it held that defendants' renewal of their summary judgment motion was not appropriate under the standards

of CPLR Rule 2221(e). As the court gave permission for the motion on the record on June 4, 2007, this was error. However, the court adheres to the determination that there remain material disputed factual issues regarding whether there was a violation of the Martin Act that must be decided at trial. 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 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; Clark claimed he 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.

## **III. Conclusions of Law**

This court’s decision of July 29, 2004 granted defendants’ motion for summary judgment dismissing Clark’s contract claims, but the Appellate Division reversed as to the first and second causes of action for injunction and *specific performance*. Defendants emphasize on this motion that the presence of other residential tenants in the building was not before the First Department when it determined that defendants were not entitled to summary judgment based upon the

Martin Act. However, this court's decisions of July 29, 2004 and November 24, 2004 mentioned these other tenants, reasoning which failed to persuade the Appellate Division. The statements in an affirmation by Clark's counsel on the motion *in limine*, also relied upon by defendants on this motion, are no different in substance than the claim made by Clark throughout this litigation that defendants promised to convey his loft to him upon the filing of a condominium conversion plan with the New York State Attorney General.

The Appellate Division reversal is "law of the case," and this court is precluded from granting summary judgment on a theory rejected by the higher Court. *Rohring v. City of Niagara Falls*, 185 A.D.2d 685 (4<sup>th</sup> Dept.), *lv denied* 82 N.Y.2d 662 (1993) (decision of Appellate Division is law of case until modified or reversed by higher court, and trial court is bound by decision). 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.

The instant motion must be denied because this court is constrained to hold that there are material disputed issues of fact to be decided at trial. 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 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 (1<sup>st</sup> 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, including whether there was a public offering that violated the Martin Act or a private offering that would not bring the Act into play. The Appellate Division's disposition of the appeal left those issues of fact open for trial.

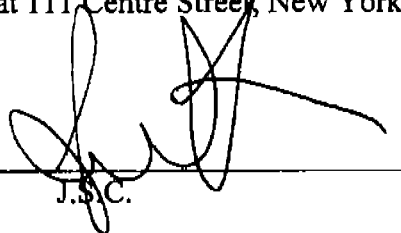
Accordingly, it is

ORDERED that defendants' motion to reargue their motion for summary judgment based upon the Martin Act is denied; and it is further

ORDERED that the parties are directed to appear for trial on February 20, 2008 at 10:00 a.m. in Part 54, Room 1227, of the Courthouse located at 111 Centre Street, New York, NY.

Date: January 18, 2008

**FILED**  
JAN 24 2008  
NEW YORK 5  
COUNTY CLERK'S OFFICE

  
J.S.C.