

<b>Griswold Special Care of N. Y., Inc. v Executive Nurses Home Care, Inc.</b>
2008 NY Slip Op 31021(U)
March 27, 2008
Supreme Court, Nassau County
Docket Number: 7947-07/
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

GRISWOLD SPECIAL CARE OF NEW YORK, INC.,

Plaintiff,

INDEX NO.: 017947/2007  
MOTION DATE: 02/26/2008  
MOTION SEQUENCE: 001 and  
002

-against-

EXECUTIVE NURSES HOME CARE, INC.,

X X X

Defendant.

The following papers read on this motion:

Notice of Motion, Affidavit, Affirmation & Exhibits Annexed.....	1
Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment and Consolidation and Alternatively to Stay Another Action.....	2
Notice of Cross Motion, Affidavit, Memorandum of Law & Exhibits Annexed.....	3
Reply Affidavit in Further Support of Patricia O'Malley, Esq., Reply Affirmation of Roni E. Glaser, Esq. & Exhibits Annexed.....	4
Plaintiff's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment and to Consolidate Another Action and in Opposition to Defendant's Motion for Summary Judgment.....	5
Reply Affirmation of Jennifer J. Bock, Esq. & Exhibit Annexed.....	6

This motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment, and an order pursuant to CPLR 602 either consolidating or staying another action pending between the parties under Index No. 017169/2007, and the cross motion by defendant for summary judgment are determined as follows.

Plaintiff commenced this action for a determination of the rights, obligations and liability for damages of the parties in connection with the sale of the assets of defendant, a New York State licensed home care services agency known as Executive Nurses Home Care, Inc.

On May 16, 2006, the parties entered into an agreement for the purchase and sale of certain assets (the ongoing business, name, good will, furniture, fixtures and files and records) of defendant, Executive Nurses Home Care, Inc. The selling price of \$402,400 was turned over to an escrow agent. The purchaser was obliged to obtain a license to operate a licensed home care services agency, and to obtain necessary permits before a closing on the transaction could be held.

Paragraph 12(b)(iii) of the Asset Purchase Agreement provides:

Buyer shall have the right to terminate this Agreement prior to the Closing under the following circumstances: ...

All applicable LHCSA Licenses and regulatory approvals required to consummate the transactions contemplated by this Agreement, and for Buyer to own and operate the Business following Closing, have not been received by Buyer within nine months after the execution and delivery of this Agreement.

The same right was afforded the seller in Paragraph 12 (a)(iii).

The record reflects that plaintiff sent its first stage permit application to NYSDOH on May 26, 2006. There were communications during the ensuing months. On June 26, 2007, DOH approved a license to the extent that two further hearings were scheduled, one on August 2, 2007 before the State Hospital Review and Planning Council, and the other on September 7, 2007 before the Public Health Council.

On July 19, 2007, plaintiff gave notice of its termination of the Asset Purchase Agreement, relying on Paragraph 12(b)(iii) and made a demand for the escrowed purchase price.

It is well established that “[s]ummary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law....” Brill v City of New York, 2

N.Y.2d 649,651 (2004).

When a movant sustains their prima facie burden entitling he or she to judgment as a matter of law (see, Zuckerman v City of New York, 49 N.Y.2d 557, 562), the burden falls upon the opposing party to show the existence of a viable issue as to whether the Asset Purchase Agreement is clear on its face concerning plaintiff's right to terminate it nine months after May 16, 2006 if the necessary permit and or license[s] were not granted.

In order to raise issues of fact sufficient to defeat a motion for summary judgment where the movant has presented prima facie evidence in support of its entitlement to such relief, it is incumbent upon a party opposing summary judgment to raise triable issues of fact based upon more than mere conclusory or unsupported assertions. See Sun Yau Ko v Lincoln Savings Bank, 99 A.D.2d 943, *aff'd*, 62 N.Y.2d p38 (1984) (citing to Zuckerman v City of New York, 49 N.Y.2d 557 (1980)).

Plaintiff relies upon the seminal case of W.W.W. Associates v Giancontieri to enforce its unambiguous right to terminate the Asset Purchase Agreement after February 15, 2007 if neither permit nor license had been issued by the State authorizing plaintiff to operate the business it had endeavored to buy. "When the parties set forth their agreement in a clear and complete document, as here, a Court has no alternative but to strictly enforce the contract according to its express terms. ... The parties intent is irrelevant to what is written in a contract and is inadmissible parol evidence." W.W.W. Associates v Giancontieri, 77 N.Y.2d 157 (1990). Whether a contract is ambiguous is a question of law to be decided by a Court by looking solely at the four corners of the document before it, reading the contract as a whole and giving meaning to each of its terms. Id. The right to terminate after nine months was only conditioned upon receipt of necessary permits and cause, either good cause or no cause, was irrelevant.

Plaintiff has made out a prima facie case of a contractual right to cancel the Asset Purchase Agreement on the event of a mutual contingency which did occur, i.e.

the failure to obtain necessary permits or licenses so as to operate defendant's business within nine months of entering into the agreement. Accordingly, the burden shifts to defendant to raise an issue of fact sufficient to require a trial.

In opposition, defendant argues that the parties mutually waived the termination provision contained in the Contract. Defendant argues that the termination clause expired on February 15, 2007, or precisely nine months after execution of the Contract. The argument implicates the fact that defendant's license was deemed "defunct" for failure to file certain reports, and the delay in approval that this caused, but the connection is not clear. The contract allowed for termination without cause and none is cited. Similarly, defendant attempts to assign blame for the regulatory delay to plaintiff, in some generic sense. Yet, again the connection is a mystery.

Although defendants articulate an accurate statement on the law of waiver, Gresser v Princi, 128 A.D.2d 752 (2d Dept 1987), they do not apply it to the facts of this case. Insofar as either party was at liberty to terminate the contract after nine months, if the regulatory process took longer, defendant has not identified any right, contractual right that is, which colorably was abandoned, either by word or deed. The fact that plaintiff continued pursuit of regulatory approval past the nine month bench mark simply indicates their commitment to the project, and that they had more patience than might be expected. The court rejects defendants contention that plaintiff waived its right to terminate the Contract if the regulatory process extended beyond nine months.

Accordingly, defendant has not submitted opposition sufficient to raise of triable issue of fact as to whether the Asset Purchase Agreement was properly terminated. Plaintiff is granted summary judgment, and it is

ORDERED and ADJUDGED that the complaint is dismissed and plaintiff shall have judgment against defendant for the amount of \$402,000, plus any additional amount of interest accrued in the escrow account until July, 2007, plus statutory interest from the date of termination, and the Clerk of the County of Nassau is directed to enter judgment accordingly, together with taxable costs and disbursements.

Upon thirty (30) days notice a hearing shall be held to determine attorney fees, or, in the alternative, the parties may agree to a determination of attorney fees on a written record.

All other requests for relief not granted are denied.

Dated: March 27, 2008

*Jan B Warshawsky*  
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J.S.C.

XXX  
**ENTERED**  
APR 03 2008  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**