Hampshire LIC Holdings, LLC v Toyoko Inn Dev. Co., Ltd.
2008 NY Slip Op 31692(U)
May 22, 2008
Supreme Court, New York County
Docket Number: 0112626/2007
Judge: Richard B. Lowe
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SCANNED ON 5/28/2008

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Hampshire R/C Holdings

- v -

Toyoko Development Co

INDEX NO. 112626/07

MOTION DATE 3/4/08

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this 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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAY 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/22/08

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 56

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HAMPSHIRE LIC HOLDINGS, LLC,
Plaintiff

Index No.: 112626/07

-against-

DECISION AND ORDER

TOYOKO INN DEVELOPMENT CO., LTD; LAW OFFICE OF FLORENCE ROSTAMI-GOURAN; FLORENCE ROSTAMI a/k/a FLORENCE ROSTAMI-GOURAN; TOYOKO INN NEW YORK, LLC; GRAND CENTRAL LEASING CORPORATION; and HIROFUMI SUGANO,

Defendants.

---X

FILED
MAY 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Richard B. Lowe, III:

The defendant brings this motion to dismiss the complaint for an alleged breach of contract pursuant to CPLR 3211 (a) (1) and (7).

Background

Defendant Toyoko Development Co., Ltd. (Toyoko) is a Japanese corporation engaged in the business of developing moderate-priced hotels, and plaintiff is a New York company involved in a similar business. Plaintiff had entered into several contracts for the purchase of properties that Toyoko was interested in acquiring. On May 1, 2007, the parties entered into an agreement whereby plaintiff agreed to assign its purchase rights in the properties to Toyoko for the sum of $1.1 million.

The agreement between Toyoko and plaintiff identified six separate lots, numbered 13, 14, 20, 21, 22 and 17 respectively. These lots were adjacent properties on the same bock and were needed collectively to construct the anticipated hotel.

The agreement required Plaintiff to assign to Toyoko its existing contracts for the purchase of Lots 20, 21 and 22 and to cease all purchase activities on the subject city block for a period of one year. Additionally, Toyoko had the right to accept or reject assignment of the purchase contracts for Lots 13 and 14.

At the time the parties entered into the subject contract plaintiff had already entered into contracts with the owners of the properties for all of the lots except for Lot 17. According to Paragraph 4 of the agreement, Toyoko was to pay the $1.1 million to plaintiff when plaintiff executed a legally binding contract for the purchase of Lot 17 "with terms and conditions similar to terms and conditions in the other contracts ... ." If plaintiff could not enter into such a contract for the purchase of Lot 17 within one week of the execution of the agreement (May 8, 2007), the parties would be released from the entire contract. The plaintiff asserts that it did enter into a contract for the purchase of Lot 17 with provisions similar to those appearing in the contracts for the acquisition of the other lots. The plaintiff maintains that, despite its fulfilling its contract obligations, Toyoko refused to honor the agreement.

Conversely, Toyoko alleges that the contract provisions for the purchase of Lot 17 were not similar to the provisions in the other contracts and therefore the plaintiff failed to meet the condition precedent of the agreement which relieved Toyoko of its obligations.

The operative provisions of the contracts for Lots 20, 21 and 22, which are identical, all appear in section 10.02(d) of the individual sales agreements. This provision states that a condition of the purchase is that "Seller shall have delivered to Purchaser vacant possession of the Property free of tenancies and occupancies ..." as of the closing date.

Section 10.02(d) of the contract for the sale of Lots 13 and 14 states that, by the closing

date, "Seller shall deliver to Purchaser vacant possession of the Property free of all tenancies and occupancies ("Vacant Possession") ... If Seller ... is unable to deliver Vacant Possession to Purchaser, Purchaser may, at its election, either (i) close title subject to the rights of tenants under those of the Leases set forth in Schedule 4 hereto which remain in effect on the Closing Date; or (ii) terminate this Agreement ... ." Notwithstanding any other provision of the subject contract, Toyoko could opt out of the assignment of the purchase contract for these two lots (13 and 14) by giving notice to plaintiff. If Toyoko did opt out of these contracts, plaintiff was not to acquire these lots itself but was required to terminate that purchase agreement.

On May 4, 2007, plaintiff entered into a contract for the purchase of Lot 17. According to Section 10.02(d) of this contract, by the closing date "Seller shall have delivered to Purchaser vacant possession of the Property free of all tenancies and occupancies." Section 3.01(b) of this contract states that, "not withstanding anything to the contrary contained" in the contract, if the Seller cannot deliver vacant possession by the closing date, "Purchaser shall have the right to waive such condition to Purchaser's obligations ... and in such event Purchaser shall receive at Closing a credit against the Purchase Price in the amount of Seven Hundred Thousand and 00/100 ($700,000) Dollars ... ." On the same day this contract was executed, plaintiff delivered it to Toyoko.

On May 5, 2007, Toyoko, through its agent defendant Rostami, notified plaintiff that it was rejecting the contract for Lots 13 and 14, and as a consequence plaintiff terminated its contract with the seller for this parcel.

According to Toyoko, on or about May 7, 2007, it informed plaintiff that, because Lot 17 had a tenant in possession and could not be delivered free of tenancies, plaintiff failed to satisfy

the key condition precedent to Toyoko's contractual obligations. Toyoko further asserts that it stood ready to place the full contract price in escrow to provide plaintiff additional time to perform its obligation.

When Toyoko failed to pay the agreed-upon price for the assignments, plaintiff cancelled its other contracts for the purchase of Lots 17, 20, 21 and 22. Toyoko states that by plaintiff terminating its contracts, plaintiff indicated its unwillingness to perform so as to relieve Toyoko of any other obligation.

Conversely, plaintiff maintains that the provisions for the purchase of Lot 17 were similar to those of the other contracts, and that at the time the purchase contracts were executed there were tenants in possession on Lots 21 and 22, a fact of which Toyoko was aware. Plaintiff additionally states that on May 18, 2007, Toyoko formed Toyoko Inn New York, LLC (Toyoko New York) which subsequently negotiated for and purchased all of the lots in question directly from the third-party sellers.

Plaintiff instituted the present action claiming four causes of action: Breach of contract against Toyoko (first cause of action); Breach of contract against Toyoko New York as the undisclosed principal of Toyoko for the May 1, 2007 agreement (second cause of action); Fraud against all the defendants (third cause of action); and Tortious interference of contract against the non-contracting defendants (fourth cause of action).

All the defendants have moved to dismiss this action pursuant to CPLR 3211 (a) (1) and (7) and 3016 (b), alleging that the documents prove that plaintiff failed to fulfill the condition precedent to trigger their contractual obligations.

DISCUSSION

CPLR 3211 (a), Motion to dismiss cause of action, states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or ...

(7) the pleading fails to state a cause of action .... .

Under CPLR 3211 (a) (1) a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83 (1994). As stated in *Ladenberg Thalman & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 (1st Dept 2000),

> The court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (Leon v. Martinez, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88).

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), the opposing party need only assert facts which "fit within any cognizable legal theory." *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188, 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 (a) (1) is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

First Cause of Action: The Breach of Contract Claim Against Toyoko

It is a settled rule that whether a contract is unambiguous is a question of law that may be

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decided by the court. *Bailey v Fish & Neave*, 8 NY3d 523 (2007); *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 (1990). In the instant case, the contract clauses have been provided. The court's review of the provision in question in the contract for the purchase of Lot 17 shows that it is similar, if not identical, to the provisions covering the same items in the contracts for the sale of the other lots. The fact that tenants may or may not be in possession is irrelevant to whether plaintiff fulfilled its condition precedent.

The contract for the assignment of rights only required that the provisions in the purchase contracts be similar. The condition precedent did not require that Toyoko be guaranteed vacant possession; it merely mandated that the purchaser's rights to have vacant possession at closing be similar in all the agreements.

Based on the foregoing, the court concludes that plaintiff has alleged a case of breach of the agreement and the motion to dismiss this cause of action must be denied.

Second Cause of Action: The Breach of Contract Claim Against Toyoko New York as an Undisclosed Principal

There is no factual dispute that at the time the May 7, 2007, agreement was entered into by Plaintiff and Toyoko, Toyoko New York was not in existence. In order to create a principal-agent relationship, "the consent of one person to allow another to act on his or her behalf and subject to his or her control, and the consent of the other to so act" is required. *Time Warner City Cable v Adelphi University*, 27 Ad3d 551, 552 (2d Dept 2006) citing *Maurillo v Park Slope U-Haul*, 194 AD2d 142 (2d Dept. 1993). "The agent is a party who acts on behalf of the principal with the latter's express, implied or apparent authority." *Id.* It is therefore axiomatic that, if the principal is not in existence, it is unable to grant such consent.

The court notes, and the parties do not assert, that this is not a situation in which a contract is executed by an agent on behalf of a corporation to be formed. That is a situation in which the proposed principal is disclosed but not yet created, and that relationship is known and agreed to by the other contracting party. In this type of situation, the proposed principal, when formed, would be the party liable under the agreement. *See e.g. Weiss v Baum*, 248 AD2d 83 (2d Dept 1926).

This court finds that this second cause of action by plaintiff against Toyoko New York as an undisclosed principal cannot be supported as a matter of law, and therefore this claim must be dismissed.

Third Cause of Action: The Claim of Fraud Against All the Defendants

As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

> "A mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 199]). Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

Plaintiff alleges that the defendants had no actual interest in acquiring the contracts entered into by plaintiff with the third-party sellers, but wanted to induce plaintiff to cancel those contracts so that they could negotiate with the sellers directly. However, Plaintiff also asserts that it is in the same business as the defendants and is one of their competitors, and provides no

plaintiff cannot maintain this cause of action. *NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614 (1996).

Additionally, plaintiff has failed to allege that it suffered any damages resulting from its cancellation of the sales contracts with the third-party sellers. Plaintiff's only claim for damages is for the alleged breach of its contract with defendants.

Based on the foregoing, defendants' motion to dismiss this cause of action must be granted.

CONCLUSION

It is ORDERED that defendants' motion to dismiss plaintiff's first cause of action is denied ; and it is further

ORDERED that defendants' motion to dismiss the second, third ans fourth causes of action are granted; and it is further

ORDERED that defendant Toyoko is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: May 22, 2008

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.

FILED

MAY 28 2008

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NEW YORK