

Nisenbaum v McGaw Mgt., LLP

2008 NY Slip Op 32471(U)

September 5, 2008

Supreme Court, New York County

Docket Number: 0112492/2006

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

ELIOT C. NISENBAUM, KINGSLEY HEIGHTS ASSOCIATES, LP, RONEL REALTY ASSOCIATES, LP, ELRON, LLC, KINGSLEY COURT ASSOCIATES, LP, ACPO REALTY CORP., BONDAM REALTY ASSOCIATES, LP, LERON REALTY, LLC, NELRO REALTY, LLC, LENOR REALTY ASSOCIATES, LP, and NOREL REALTY LLC,

Plaintiffs,

Index No.: 112492/06
Motion Date: 02/05/08
Motion Seq. No.: 04
Motion Cal. No.: 65

- v -

MAGAW MANAGEMENT, LLC, and ONIX A. SOSA,

Defendants.

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

FILED
1, 2
3
4, 7

SEP 11 2008

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant plaintiffs' motion for summary judgment on their third cause of action in the amended complaint alleging defendants' violation of Real Property Law 440, but only with respect to the corporate defendant.

Real Property Law 440 (1) provides in pertinent part that

"[R]eal estate broker" means any person, firm, limited liability company or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise,

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):

exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, . . .

The nearly identical Management Contracts between the defendant McGaw Management, LLP and plaintiffs provide in Article II that: "(a) All inquiries received by the Owner for any leases or renewals or agreements for the rental or operation of the premises or any part thereof shall be referred to Agent, and all negotiations connected therewith shall be conducted solely by or under the direction of Agent. (b) Agent shall use its best efforts in the management of the property and due diligence in collecting the rents and other income there from." Furthermore, the monthly financial reports written by defendants as well as the testimony of defendant Sosa at this court's hearing on plaintiffs' contempt motion establish that defendants did collect rents on behalf of the plaintiffs pursuant to the Contracts. It is undisputed that neither defendants was licensed at the time defendant limited liability corporation entered into and performed under the Contracts.

Given these uncontrovered facts plaintiff is entitled to summary judgment against the corporate defendant on their third cause of action under Real Property Law 440. The facts presented here, an unlicensed company engaged in managing real property, are similar to those in Bleecker Charles Co. v A & D Harrison, Inc., 37 AD2d 935 (1st Dept 1971). The Court held there that

In this action a limited partnership sues a corporation for the return of management fees. The fees were paid for the management of a building owned by the partnership, and the basis of plaintiff's claim is that the corporation was not a licensed real estate broker (Real Property Law, §§ 440, 442-e, subd. 3). These facts are not disputed. . . . Proceeding from this premise defendant argues that he is managing his own property and for this no brokerage license is required. . . . Assuming that the individual is the manager, he is acting for all of the general and limited partners. Both the spirit and the letter of the Real Property Law require one so acting to be licensed with the consequent effect for the failure to have a license. There is no factual issue, and the grounds set out in the dissent appear to have been rejected.

Bleecker Charles Co. v A & D Harrison, Inc., 37 AD2d 935 (1st Dept 1971). Bleecker Charles is controlling precedent here and stands for the proposition that a managing agent who engages in collecting rents and leasing premises is required by Real Property Law 440 to be licensed and is subject to the penalties set forth in Real Property Law 442-e (3) for the failure to be licensed. The court shall therefore grant plaintiffs summary judgment against the corporate defendant on their third cause of action. The court shall direct an assessment of damages at the time of trial to determine the amount such defendant "shall have received . . . as commission, compensation or profit by or in consequence of [the] violation" (Real Property Law 442-e [3]) from each plaintiff and the court following such hearing shall then determine the amount of the statutory penalty to be imposed for defendants' failure to have a license ("a penalty of not less than the amount of the sum of money received by him as such

commission, compensation or profit and not more than four times the sum so received by him, as may be determined by the court," Id.). The court declines to grant summary judgment against the individual defendant Onix A. Sosa because such defendant, as an individual, was not a party to any of the Management Contracts before the court. Defendant Sosa signed only as agent of the defendant limited liability company and the Management Contracts define "Agent" under those agreements as the corporate defendant. Plaintiffs have not submitted any prima facie evidence that defendant Sosa should be held personally liable. Newman v Berkowitz, 50 AD3d 479 (1st Dept 2008).

Defendants cross-move for summary judgment dismissing plaintiffs' first cause of action on the grounds of contractual indemnification. The indemnification clauses at issue provide in pertinent part that

Owner agrees: (1) To hold and save Agent free and harmless from damages or injuries to person or property by mason [sic] of any cause, whatsoever either in and about the premises or elsewhere when Agent is carrying out the provisions of this contract [or] is acting under the express or implied directions of the Owner; (2) To reimburse Agent upon demand for any monies which the latter is required to pay out for any reason whatsoever, either in connection with, or as an expense in defense of any claim, civil or criminal action, proceeding . . . affecting or due to the condition or use of the premises. . . ; Nothing contained in subdivisions (1) and (2) of this article shall relieve Agent from responsibility to Owner for gross negligence.

Defendants argue that plaintiffs' complaint is based upon allegations that defendants were negligent in performing their

management duties and that defendants are protected against such claims by the terms of the indemnity. See Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973) ("As to contractual indemnity . . . [i]t has long been recognized that a party may protect itself from losses resulting from its liability for negligence by means of an agreement to indemnify").

In fact, contrary to the defendants' arguments, the allegations in the plaintiffs' complaint are wholly outside the terms of the indemnification and therefore the court shall deny defendants' cross-motion. Defendants attempt to mischaracterize plaintiffs' first cause of action as sounding in tort in support of their assertion that contractual indemnification lies. However, "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract. Here, plaintiff has not alleged the violation of a legal duty independent of the contract." Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 NY2d 382, 389 -390 (1987). The allegations in plaintiffs' complaint set forth claims sounding in contract - that is that the defendants failed to perform the obligations specified in the parties' agreement. Thus, if plaintiffs' claims are sustained

the defendants would be found to have breached the obligations under the contract and be liable to the plaintiffs. Such liability would be premised as a matter of law upon a finding that the defendants had not performed their obligations under the contract. Therefore by its terms the defendants could not claim indemnity because the indemnification is limited to those acts undertaken "when Agent is carrying out the provisions of this contract." Therefore, the court shall deny the cross-motion to dismiss on the basis of indemnification because the indemnification clause by its terms does not include the claims raised by plaintiffs here.

The court shall deny plaintiffs' application to sever the second and third causes of action and apply the funds escrowed pursuant to this court's December 26, 2006, in satisfaction of the first cause of action. There is outstanding discovery in this action that may bear as to the damages that may be awarded under the first cause of action and plaintiffs' remaining claims have yet to be adjudicated.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is GRANTED only as to defendant McGaw Management LLC and only as to plaintiff's third cause of action alleging violations of Real Property Law 440 and the damages and penalties to be imposed

pursuant to Real Property Law 442-e(3) shall be determined at and following the trial of this action; and it is further

ORDERED that defendants' cross-motion for summary judgment is DENIED; and it is further

ORDERED that the other relief sought by the parties is DENIED except that the court shall resolve any issues relating to outstanding discovery at the next court conference; and it is further

ORDERED that the parties are directed to attend a status conference on October 7, 2008, at 11:00 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: September 5, 2008

ENTER:

[Signature]

DEBRA A. JAMES J.S.C.
J.S.C.

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