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

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Gladstein, Jane

-v-

Martorella, Christopher

INDEX NO. 602276/2007

MOTION DATE

MOTION SEQ. NO. 2

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

JAN 08 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/22/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

LOUIS B. YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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JANE GLADSTEIN,

Plaintiff,

Index No. 602276/2007

-against-

CHRISTOPHER H. MARTORELLA,

Defendant.

----------x

York, J.S.C.:

This is the latest in a series of lawsuits commenced since 2006 and involving plaintiff and defendant. Previously, plaintiff and defendant were partners in Metropolitan Housing Partners, LLC ("Metro"), a real estate investment partnership which defendant formed in 1999. Following various disputes, the parties ended their business relationship. The terms of the severance of the relationship were memorialized in a settlement agreement ("the Agreement") dated December 15, 2005.

In the Agreement, defendant agreed to buy plaintiff's share in Metro's holdings for $8,000,000. The Agreement refers to several condominium projects which Metro owned: Court Street Project, Huntington Street Project, Soho 25 Project, Sycamore Project, 255 Hudson Street Project, and 505 Greenwich Street Project. All of the above are specifically described as condominium projects. Defendant agreed to make three separate payments to plaintiff, as follows:

(I) $4,000,000, immediately upon the closing of the agreement;

(II) $2,000,000, "on the earlier of (A) the date as of which 75% of the units at the 255 Hudson Street Project shall have been contracted for and a temporary certificate of occupancy for the entire building is issued, or (B) the first (1st) anniversary of the date of this Agreement;

(III) $2,000,000 **"on the later of** (a) the date as of which 75% of the units at both Court Street and Huntington Street Projects **shall have been contracted for**, or (b) the eighteen months anniversary of the date of this Agreement . . .

Agreement ¶ 2(a) (emphasis supplied). The Agreement also contains, at paragraph 3(b), an extremely broad release of defendant's potential or existing claims against plaintiff relating to their prior business relationship. Finally, paragraph 13 of the Agreement entitles the prevailing party in any action to enforce its terms to attorney's fees. A March 9, 2006 document amends the Agreement, but not in any respects that are relevant to the current dispute. Defendant paid plaintiff the initial $4,000,000 due at closing, and plaintiff transferred her shares in Metro to defendant.

Also in 2006, Metro's former Chief Financial Officer sued Metro, plaintiff, defendant and another party following his termination. McGoldrick v. Metropolitan Housing Partners, L.L.C., Index No. 108483/2006 (Sup. Ct. N.Y. County)("McGoldrick"). Among other things, the CFO alleged that (1) plaintiff Gladstein sexually harassed him and (2) plaintiff Gladstein promised him sexual favors if he aligned himself with her in her imminent split with defendant Martorella and Metro. The court dismissed both of these claims in a decision filed March 28, 2007.

The second lawsuit of which the Court is aware is Gladstein v. Martorella, Index No. 604161/2006 ("Gladstein I"). This litigation is more pertinent to the issue currently before the Court. Gladstein I relates to defendant's failure to pay the second payment due under the

agreement, for $2,000,000. The parties have not provided the Court with a copy of the pleadings in Gladstein I or with the relevant motion papers from that action, but it is clear from Justice Acosta's decision dated July 9, 2007 that (1) defendant was found to owe the $2,000,000, and (2) all claims for set-offs, compulsory mediation and breach of fiduciary duty by plaintiff were dismissed as waived by the general release in the Agreement and/or not having a sufficient legal basis and/or resolved by the decision in McGoldrick. The Court notes that the terms of the second payment were more clear cut than the terms of the third payment. The second payment was due, at the latest, one year after the signing of the contract.

Defendant's fiduciary duty argument in Gladstein I at least in part related to plaintiff's allegedly improper relationship with McGoldrick. With respect to this affirmative defense Justice Acosta's decision stated:

> Equally lacking in merit is defendants' affirmative defense that plaintiff breached her fiduciary duties to defendants by speaking with Michael F. McGoldrick . . . about her plans of starting a similar enterprise. Indeed, the evidence indicates that [defendant] actually gave plaintiff permission to speak with McGoldrick. Moreover, there is no indication . . . that plaintiff was able to obtain a better value for her share because of information concerning [Metro] . . . or that she benefitted in any specific way [by] reason of her discussions with McGoldrick.

Gladstein I, Index No. 604161/06 (Sup. Ct. N.Y. County July 9, 2007)(motion sequence no. 1, at p. 3). In that order, the court awarded plaintiff $2,000,000 plus statutory interest and costs. In addition, he awarded attorney's fees, to be determined at a hearing. The court concluded that the parties would "be asked to settle judgment after the attorney's fees hearing. Id. at p. 4.[1]

According to plaintiff, by or before November 12, 2007 – the date of an affidavit by

[1] Defendant challenged the Clerk's decision to enter judgment prior to the attorney's fees hearing, but this is not relevant to the motion currently before the Court.

plaintiff -- the third payment became due under the contract terms. First, she asserts, 75% of the Carroll Gardens Project units had been contracted for by or before that date. In particular, she asserted that 65 had been sold and 96 had been leased – for a total of 89% of the 180 units. Second, she notes that the 18-month anniversary of the signing of the Agreement had passed.

Because based on the above she believed both conditions had been satisfied, plaintiff sought payment of the final payment from defendant. However, defendant refused to render payment. According to defendant, 75% of the units must be sold, rather than sold or rented, in order to satisfy the conditions of the Agreement. As only 65 of the 180 units had been sold, defendant stated, the condition had not been satisfied and the third and final payment under the Agreement was not due. Consequently, plaintiff commenced another lawsuit against defendant for the third payment. Gladstein v. Martorella, Index No. 602276/2007 (Sup. Ct. N.Y. County) ("Gladstein II"). Subsequently, plaintiff moved and defendant cross-moved for summary judgment.

This Court heard argument on the motion on April 16, 2008 and issued an order granting summary judgment to plaintiff and denying defendant's cross motion for that relief. Gladstein II, Index No. 602276/2007 (Sup. Ct. N.Y. County April 16, 2008)(motion sequence 1). The court noted that under the dispositive provision in the Agreement 75% of the units must be "contracted for" in order for payment of the final $2,000,000 to become due, and went on to note, "A lease is a contract. Accordingly, the condition has been satisfied." Id.

In addition, the Court denied defendant's cross motion. The Court noted that defendant's fiduciary duty and other defenses and claims were dismissed by Justice Acosta in Gladstein I and that the same facts were at issue in Gladstein II. Therefore, collateral estoppel prevented defendant from re-raising these claims and defenses.

Finally, the Court awarded judgment on the $2,000,000 plus interest and costs. The Court did not award judgment for attorney's fees but sent that issue to a referee to hear and decide. Under this order, the Court intended for the $2,000,000 judgment to be entered immediately, and for the attorney's fees award to be entered following determination by the referee. The Court issued a Supplemental Order on April 24, 2008, clarifying that interested was to run from June 15, 2007. Plaintiff docketed judgment on April 28, 2008.

By Order to Show Cause dated May 5, 2008, defendant sought an order granting reargument of the Court's April 16, 2008 decision and, upon reargument, denying summary judgment to plaintiff and vacating the judgment. Defendant also sought to restrain plaintiff from enforcing the judgment. The Court granted oral argument to determine whether to entertain reargument. It granted the restraining order only if defendant obtained a bond to secure the judgment, and only on the amount secured by the bond. Now, after reviewing the papers and hearing oral argument, the Court grants reargument and, after reargument, vacates the original order and judgment and directs a hearing on the issue of the meaning of the disputed provision.

It is beyond dispute that a lease is a contract. See, e.g., United West LLC v. Margulies, 12 Misc.3d 1159(A), 819 N.Y.S.2d 213 (Civ. Ct. N.Y. County 2006)(avail at 2006 WL 1417860, at *2); Bay Plaza Community Center, LLC, v. Champion Chicken of Bay Plaza, Inc., 10 Misc. 3d 1075(A), 814 N.Y.S.2d 889 (Civ. Ct. N.Y. County 2006)(avail at 2006 WL 176960, at *2). Equally clear is the fact that in interpreting contracts,

> A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract (*see e.g. Innophos, Inc. v. Rhodia, S.A.*, 10 N.Y.3d 25, 29, 852 N.Y.S.2d 820, 882 N.E.2d 389 [2008]). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms," without reference to extrinsic materials outside the four corners of

the document (*Greenfield v. Philles Records,* 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166 [2002]).

Goldman v. White Plains Center for Nursing Care, LLC, 11 N.Y.3d 173, 176, 867 N.Y.S.2d 27, 29 (2008).

Based on the above, contracts such as the Agreement involved here are to be interpreted according to their clear meanings. In addition, an apartment lease as well as an apartment sale is considered a contract. The portion of the Agreement governing payment is clear to the extent that (1) the first payment was due at once and (2) the second payment was due, at the latest, one year from the date the contract was signed. Of course, these issues are not before the Court. The meaning of the clause governing the third payment is being litigated currently, and its meaning is problematic.

According to plaintiff, the Court should apply the definition of "contract" and the general principle that a contract should be interpreted according to the language contained in the agreement, the apartments in question "shall have been contracted for" when they were leased or sold. Moreover, applying this interpretation, payment became due when (1) 89% of the units were either leased or sold and (2) more than one-and-a-half years from the date of the contract's signing had passed.

Because the term "contract" normally would be interpreted to include leases as well as sales, to prevail here defendant must show that the phrase "shall have been contracted for" is ambiguous and/or not reflective of the parties' intentions. For the most part, defendant's efforts are unsuccessful. First, defendant argues that plaintiff conceded that, with respect to the second payment, also for $2,000,000, "the date as of which 75% of the units at the 255 Hudson Street Project shall have been contracted for" required the units to be sold rather than leased. Allegedly, she made this concession in Gladstein I. However, plaintiff states that she did not

concede the point. Instead, she explains that defendant refused to pay her after 75% of the units had been sold. In Gladstein I, she pointed to this fact in arguing that the condition had been satisfied but did not suggest that the units could not have been leased instead in order to satisfy the condition. Neither party has submitted the papers from Gladstein I, which discussed the Hudson Street Project and included the statement at issue. Moreover, plaintiff's explanation is logical and defendant does not counter it. Defendant's argument is unpersuasive and unsubstantiated; at the least, it is insufficient to show ambiguity.

Second, defendant argues that because the buildings which comprise the Carroll Gardens Projects are referred to as condominiums at other parts of the Agreement, "contracted for" necessarily is limited to mean sales. However, in other critical portions of the contract, the terms "condominium" and "sell" or "sale" are used where appropriate. For example, paragraph 2(d) of the agreement states, "The parties agreed to relinquish all right to use the Metro name – "provided, however, that, until all of the condominium units in the 255 Hudson Street Project **have been sold**, [defendant] shall continue to be entitled to use the . . . name . . . in connection with that project." (emphasis supplied). This shows that elsewhere, where the parties intended to refer to "sales," they used the word "sale" or "sold" to make sure the meaning was clear.

Third, however, defendant argues that because the Carroll Gardens Project involved the conversion of rental units into condominium units, the provision necessarily contemplated sales instead of sales and/or rentals of the units in the buildings. Potentially, this is a more compelling argument. However, neither party provides any data to substantiate his argument. For example, if the building was at least 75% rented at the time the parties entered into the Agreement, then the phrase "shall have been contracted for" would have to refer to sales rather than to rentals. Otherwise, based on plaintiff's definition the condition would have been satisfied at the time of

the contract and the language would be superfluous. On the other hand, if the units in the building were substantially uninhabited, "shall have been contracted for" more likely refers to leases or sales of those units. Under those circumstances, potentially plaintiff would receive no payment for her shares in the Carroll Gardens buildings.

Thus, there are questions as to the meaning of this portion of the Agreement, revealing that the disputed clause is ambiguous. Moreover, there is little to go on regarding the intent of the parties outside of their own self serving affidavits. In light of the confusion of the parties and the amount of money under dispute, the Court errs on the side of caution and concludes that the phrase "shall have been contracted for" is ambiguous. Therefore, the Court refers the issue to a referee to hear and report on the meaning of the phrase.

The Court notes that, contrary to defendant's contention, the Clerk did not improperly enter judgment and set an interest rate without support. Instead, this Court issued a supplemental order clarifying the date from which interest should be set, based on plaintiff's complaint and the other papers before it in consideration of the original motion. For this reason, the challenge to the Judgment based on the failure of the Court to include a date from which interest on the judgment should run has no merit.

Finally, as noted, plaintiff argues that it makes no sense that she would enter into an agreement which potentially provided her with no payment in exchange for her shares in the ownership of these last two, valuable condominium buildings. Defendant also argues that he would not have agreed to this because he cannot afford to make the final payment until the units are sold. The Court notes that it is possible there was no meeting of the minds with respect to this portion of the agreement. In that case, the parties may ultimately have to vitiate this portion of the Agreement, return plaintiff's shares in the Carroll Street Project to her, and begin their

negotiations anew. Alternatively, the parties may decide to resolve their dispute, avoid further litigation of this issue, and enter into a new payment arrangement through which defendant can make payment of the final $2,000,000 on an incremental basis, on dates certain.

The Court has considered all other arguments and they do not alter this decision. Accordingly, it is

ORDERED that the decision in motion sequence one is vacated; and it is further

ORDERED that summary judgment is denied and the issue of the meaning of the phrase "shall have been contracted for" is referred to a referee to hear and determine; and it is further

ORDERED that this matter is referred to the Referee's Clerk, who is directed upon filing of a copy of this Order to place this action on the appropriate referee's calendar to hear and determine the issue, in accordance with the guidelines set forth in this order, and to enter a Judgment thereon; and it is further

ORDERED that following the decision of the referee, the parties will have to move to confirm or disaffirm the referee's report.

ENTER:

Dated: 12/22/08

Louis B. York, J.S.C.