

Omansky v Gurland

2008 NY Slip Op 33523(U)

December 30, 2008

Supreme Court, New York County

Docket Number: 600647/99

Judge: Herman Cahn

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

PRESENT: Cahn _____

PART 49

Index Number : 600647/1999

OMANSKY, LAWRENCE A.

vs

GURLAND, ROBERT

Sequence Number : 012

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAFERS 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

FILED
JAN 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE . . .**

Dated: 12/30/08 _____

[Signature]

J.S.C.

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: IAS PART 49

-----X
LAWRENCE A. OMANSKY and 64 N. MOORE
ASSOCIATES,

Plaintiffs,

-against-

Index No. 600647/99

ROBERT GURLAND, MARK WINKELMAN, DRU
WHITACRE, THE SPICE BUILDING
CONDOMINIUM and 64 NO MORE, LLC,

Defendants.
-----X

FILED

JAN 12 2009

COUNTY CLERK'S OFFICE
NEW YORK

Herman Cahn, J.:

In this breach of contract action, defendants Mark Winkelman and 64 No More LLC move for summary judgment dismissing the first, second and third causes of action in the Complaint, CPLR 3212. Plaintiffs Lawrence A. Omansky (Omansky) and 64 N. Moore Associates cross-move for summary judgment. For the reasons stated below, defendants' motion is granted and the first, second and third causes of action are dismissed. Plaintiffs' cross-motion is denied.

This action arises from the sale of a commercial condominium unit owned by plaintiff/partnership 64 N. Moore Associates (64 Associates).¹ Plaintiff Omansky is a partner in 64 Associates along with defendants Robert Gurland, Mark Winkelman and Dru Whitacre. The partnership is the former owner of the commercial unit at issue as well as the owner of the

¹ The facts of this case have been set forth in detail in the previous decisions in this action and are only recited briefly herein. See, *Omansky v Gurland*, 4 AD3d 104 [1st Dept 2004].

building itself, known as The Spice Building, which is also a defendant here. Defendants Gurland, Winkelman and Whitacre own residential condominiums in the building.

64 Associates received an offer from a third party to buy the unit in October of 1996. In April of 1997, the partners convened to discuss that offer and the respective rights of first refusal belonging to the partnership, the Building and the individual unit owners. Defendant Whitacre submitted an offer on behalf of a corporation with which he was affiliated and in June of 1997, 64 Associates notified the partners of that offer. None of the partners elected to exercise a right of first refusal. The Spice Building also declined to exercise its right of first refusal.

Sometime before July 25, 1997, Gurland and Winkelman both exercised their rights to purchase the unit. Whitacre subsequently commenced an action for specific performance to compel acceptance of his offer to buy the unit. That action was settled by a stipulation of settlement (Whitacre Stipulation) pursuant to which, among other things, Whitacre's downpayment was returned and 64 Associates agreed to sell the unit to 64 No More, LLC (64 No More), an entity controlled by Gurland and Winkelman.

In conjunction with the Whitacre Stipulation, 64 Associates and 64 No More executed a Possession Agreement whereby 64 Associates agreed to give possession of the property to 64 No More on May 15, 1998. It was further agreed that 64 No More would pay use and occupancy of \$2100 per month up to and including the closing date of the contract to sell the premises, which was August 1, 1998. In the event that the closing did not take place on that date, the use and occupancy would be \$1.00 per month until the closing occurred.

Plaintiffs commenced the instant action in January of 1999, asserting claims for breach of fiduciary duty, breach of contract and legal fees. This action arises from an allegedly wrongful delay in the closing of the sale of the commercial unit to 64 No More.

Defendants now move for summary judgment dismissing the first, second and third causes of action. Plaintiffs cross-move for summary judgment. A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v NYU Medical Ctr*, 64 NY2d 851 [1985]; *Grob v Kings Realty Assoc., LLC*, 4 AD3d 394 [2d Dept 2004]. The party opposing the motion then has the burden of demonstrating the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].

As a threshold matter, plaintiffs contend that defendants' motion is defective because it is supported only by an attorney's affidavit. However, defendants' motion is also based on a 1997 affidavit of defendant Winkelman, who has personal knowledge of the underlying facts here. As such, the attorney's affidavit is properly employed to present the evidence relied on by defendants in support of the motion, ie the Winkelman affidavit. *See, Ellman v Village of Rhinebeck*, 41 AD3d 635, 643 [2d Dept 2007].

Plaintiffs' first cause of action is for breach of contract. Plaintiffs allege that defendants breached the Whitacre Stipulation and the Possession Agreement by failing to timely close on the contract for the sale of the commercial unit.

This cause of action is dismissed. It is undisputed that Omansky was not a party to the Whitacre Stipulation and he has not set forth any evidence to demonstrate that he was an intended beneficiary of that agreement. Therefore, he cannot assert a claim for breach of the Whitacre Stipulation. Similarly, it is undisputed that Omansky was not a party to the Possession Agreement and he has not demonstrated that he was an intended beneficiary of that agreement. Therefore, he cannot assert a claim for breach of the Possession Agreement.

Omansky has also not demonstrated that he is authorized to assert any breach of contract claims derivatively on behalf of plaintiff 64 Associates. In any event, such a claim could not be sustained because, according to Omansky, it was 64 Associates that allegedly breached the Whitacre Stipulation and the Possession Agreement by failing to timely close on the contract of sale. Therefore, the first cause of action is dismissed.

The second cause of action is for breach of fiduciary duty. Plaintiffs allege that Winkelman breached his fiduciary duty by conspiring with the other defendants to delay the closing on the contract for the sale of the commercial unit. Defendants allegedly delayed the closing in order to pay less than adequate use and occupancy for the commercial unit during the time period before the closing eventually took place.

“In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant’s misconduct.” *Fitzpatrick House III, LLC v Neighborhood Youth & Family Serv.*, 55 AD3d 664 [2d Dept 2008], quoting *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007].

It is undisputed that the closing took place in March of 1999, several months after the original date set for the closing, which was August 1, 1998. However, plaintiffs have not set forth any evidence to demonstrate that any of the defendants, including Winkelman, conspired or otherwise wrongfully acted to delay the closing in order to pay less than adequate use and occupancy during the period of time before the closing occurred. Therefore, this cause of action is dismissed.

Plaintiffs' third cause of action seeks to recover legal fees incurred in prosecuting the instant action. This claim is based on a provision in the Whitacre Stipulation which provided for the recovery of attorneys' fees by the parties to that agreement under certain circumstances.

In general, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc., Ltd v AGS Computers*, 74 NY2d 487, 491 [1989]; *see, TAG 380, LLC v Commet 380, Inc.*, 10 NY3d 507 [2008].

As set forth above, Omansky was not a party to the Whitacre Stipulation in his individual capacity. Nor has he demonstrated that he was an intended beneficiary of that agreement. Therefore, there is no basis for awarding him legal fees pursuant to that agreement in his individual capacity. Moreover, he has not demonstrated that he is authorized to litigate this action on behalf of the partnership. Therefore, he has not demonstrated any basis for recovering legal fees here and the third cause of action is dismissed.

With regard to plaintiffs' cross-motion for summary judgment, for the reasons addressed above, they have failed to make a prima facie showing of entitlement to judgment as a matter of law. The cross-motion is denied.

Inasmuch as all the causes of action in the Complaint have been dismissed, and there are no counterclaims, the action is hereby dismissed.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the first, second and third causes of action is granted and the action dismissed; and it is further


ORDERED that plaintiffs' cross-motion for summary judgment is denied; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

DATED: December 30, 2008

ENTER:

FILED
JAN 12 2009
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NEW YORK



J.S.C.