

**CPS Operating Co. LLC v Pathmark Stores,
Inc.**

2009 NY Slip Op 30433(U)

February 13, 2009

Supreme Court, New York County

Docket Number: 604262/07

Judge: Herman Cahn

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

010

PRESENT: Cahn
Justice

PART 49m

CPS Operating Company

INDEX NO. 604262107

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

Pathmark Stores, Inc

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

FILED

FEB 27 2009

COUNTY CLERK'S OFFICE
NEW YORK

NYS SUPREME COURT
RECEIVED
FEB 23 2009
MOTION SUPPORT OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE 002+003

Dated: 2/13/09 [Signature]

J.S.C.
JHC

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

M.A.F.

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
CPS OPERATING COMPANY LLC,
:
:
Plaintiff,
:
:
-against-
:
PATHMARK STORES, INC.,
:
:
Defendant.
:
-----X

Index No. 604262/07

FILED
FEB 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Herman Cahn, J.

Motion sequences 002 and 003 are consolidated for disposition.

Defendant Pathmark Stores, Inc. ("Pathmark") moves, in sequence 002, for summary judgment against Plaintiff CPS Operating Company LLC ("CPS") dismissing the complaint.

CPS moves, in sequence 003, for summary judgment on its claims against Pathmark.

BACKGROUND

This action arises out of a leasehold assignment between CPS and Pathmark, wherein CPS was to purchase the leasehold interests at issue from Pathmark. CPS, a residential real estate developer, was created for the purpose of acquiring those leasehold interests. Pathmark operates a chain of retail supermarket stores. According to the complaint, the contract between the parties provided that, upon its acquisition, the real property corresponding to the leasehold interests at issue was to be re-developed as a residential condominium. *See* Compl, ¶ 32.

The leasehold interests at issue are held by Pathmark and concern two parcels of real property. The parcels are located at 227 Cherry Street (the "Supermarket Parcel") and 235-247 Cherry Street (the "Non-Foods Parcel") in Manhattan (together "the Property"), pursuant to two leases. The first lease, dated August 6, 1981, relates to property owned by Cherry-Pike

Corporation, and covers a Pathmark supermarket and parking lot (the "Supermarket Lease").

The second lease, dated June 12, 1996, relates to property owned by Rosenfein Associates, and covers a commercial building that houses a pharmacy (the "Non-Foods Lease"). (Both Supermarket Lease and the Non-Foods Lease are collectively referred to herein as "the Leases.")

Prior to the execution of the Leases by Pathmark, the Property became the subject of an urban renewal plan, issued by New York City's Department of Housing Preservation and Development ("HPD"). Pursuant to that plan, the City, through HPD, sold parcels of land in blighted areas to purchasers who agreed to develop the parcels in accordance with the guidelines of the plan. HPD and the owners of the Property entered into agreements that governed the development and use of the two parcels.

The agreement pertinent to this action concerns the Supermarket Parcel, which restricted the use and transfer of the parcel (the "Disposition Agreement"). The parcel was: (1) to be utilized as a Pathmark supermarket for a period of 25 years from the completion of the construction improvements comprising the supermarket project, which included the construction of a Pathmark Supermarket and a parking lot; and (2) within that time, the owner could lease or permit a sublease or assignment of the lease to an entity other than Pathmark only upon HPD's prior written approval. *See* Disposition Agmt, § 401(B). Construction of the improvements comprising the supermarket project was to be "deemed completed when . . . a temporary or permanent certificate of occupancy by the Department of Buildings" has been issued. *Id.*, § 206. Pathmark asserts that a temporary certificate of occupancy was first issued in January 1984. The Disposition Agreement provides that if a lease transfer occurs without HPD's written approval, prior to the 25 years from "completion," it would constitute a default. New York City would

then have a claim for breach of the agreement, which could trigger reversion, allowing the city to reclaim the parcel. *See Id.*, § 401(B).

On August 14, 2007, CPS and Pathmark entered into an agreement, pursuant to which CPS was to purchase Pathmark's interest in both Leases for \$87,000,000 (the "Assignment Contract"). Upon the Assignment Contract's execution, CPS made a \$5,000,000 deposit. The closing date on the Assignment Contract was set for November 30, 2007. To adjourn this date, until December 28, 2007, CPS made an additional deposit of \$1,000,000, bringing the total deposited by CPS to \$6,000,000 (the "Earnest Money"). The Assignment Contract provides that the Property and its transfer is subject to certain exceptions, including the Disposition Agreement and the Leases ("Permitted Exceptions"). *See* Assignment Contract, Schedule C, §§ 3, 7.

Pathmark contends that it did not seek HPD's approval of the Supermarket Lease's assignment to CPS because it believed that CPS had waived this right, having not mentioned the approval requirement at any meetings that took place between the parties leading up to the closing. CPS, on the other hand, contends that not raising the issue with Pathmark did not result in waiver. It asserts that it did in fact communicate the need to obtain HPD's prior approval, in an email to Pathmark dated October 29, 2007. Additionally, CPS asserts that it was not required to remind Pathmark to obtain HPD's approval of the assignment of the Supermarket Lease.

On October 31, 2007, approximately two months prior to the adjourned closing date, Cherry Street LLC, now the owner under the Leases,¹ delivered a notice of default to Pathmark. The notice contained allegations that Pathmark was in material default under the Supermarket

¹ Cherry Street LLC purchased the fee interest for 227 Cherry Street and the leasehold of 235-247 Cherry Street.

Lease because Pathmark's Assignment Contract with CPS for the assignment of that lease, without HPD's approval, constituted a material default (the "Default Notice").

Plaintiff asserts that Pathmark represented to CPS that the Leases were valid. The Assignment Contract provides that:

[Pathmark] hereby represents and warrants to [CPS], as of the date hereof that: (a) [Pathmark] is not prohibited from consummating the transactions contemplated in this Contract, by any . . . agreement, instrument or restriction to which [Pathmark] is a party or is bound . . . and (f) as of the Closing, there will exist no material default by [Pathmark] under any Leases which would entitle the landlord thereunder to terminate such Lease

Id., § 8. Further, Plaintiff contends that it is entitled to the return of the Earnest Money, since the contract provides that in the event that "any of the representations of [Pathmark] in this Section 8 are inaccurate in any material respect and . . . not [] cured by the Closing Date . . . [CPS'] sole remedy shall be to terminate this Contract . . . and in such event, [CPS] will be entitled to the return of the Earnest Money" *Id.*

Pathmark contends that it is entitled to retain the Earnest Money. It claims that CPS defaulted by failing to close on the adjourned date of the closing.

Thus, in moving for summary judgment, both parties claim they are each entitled to the Earnest Money because of the other's breach of the Assignment Contract.

DISCUSSION

The party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

The basis of this action is the transfer of leasehold interests in real property. CPS agreed to pay \$87,000,000, in exchange for Pathmark's transfer to CPS of an "insurable leasehold interest to the leasehold estate under the Leases, free and clear of all liens and encumbrances, other than the Permitted Exceptions." Assignment Agmt, § 12.

CPS contends that, in order for it to insure title of the leasehold interests, its title insurance company required Pathmark to deliver an owner's estoppel certificate, declaring that Pathmark was not in breach of the Leases. It alleges, however, that Pathmark never attempted to obtain an estoppel certificate from Cherry Street LLC.

Pathmark contends it was under no obligation to deliver an estoppel certificate from the landlord. It asserts that, under Section 12 of the Assignment Contract, Pathmark itself, as tenant, was required to provide that certificate, as part of its closing obligations.

An examination of the record, however, indicates that it is irrelevant who was required to provide an estoppel certificate. Given the Default Notice that Pathmark received from its landlord, Pathmark was shown to be in breach of the Supermarket Lease.

Notwithstanding the difference in CPS and Pathmark's interpretation of the Assignment Contract with respect to the production of an estoppel certificate, the issue of HPD's approval remains a question of fact. Specifically, the question of whether CPS intended to waive its contractual right to have Pathmark obtain HPD's prior written approval of the assignment of the Supermarket Lease raises an issue of fact to be determined at trial, thus precluding the granting of summary judgment to either party. See *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Management, LP*, 7 NY3d 96, 104 (2006). Pathmark contends that it was not obligated to obtain HPD's approval of the assignment of the Supermarket Lease. However, CPS argues that

* 7]
this obligation is clearly stated in the Disposition Agreement, to which the Assignment Contract is subject.

The Court agrees. Pathmark's obligation to obtain HPD's prior written approval of the assignment of its leasehold interest in the Supermarket Lease is delineated in the Disposition Agreement. *See* Disposition Agmt, § 401(B). This obligation, therefore, also exists in the Assignment Contract, because the Disposition Agreement is one of its enumerated Permitted Exceptions.

Finally, Pathmark argues that it should have been entitled to an automatic 90-day adjournment of the closing date, pursuant to the Assignment Contract, since it was unable to convey to CPS title to the Property in accordance with the Assignment Contract. However, this argument is unavailing because, upon a further examination of the record, there is no indication that Pathmark requested extra time to cure its inability to perform prior to the date of closing. To the contrary, according to CPS, on December 31, 2007, it was informed by a representative of Pathmark that it had been ready, willing and able to close on December 28, 2007.

Neither party has sufficiently demonstrated the absence of a material issue of fact. The issue of fact remains as to whether CPS intended to waive its contractual right to have Pathmark obtain HPD's prior written approval of the assignment of the Supermarket Lease. Thus, summary judgment to either party is precluded. *See Norman Bobrow & Co., Inc. v Theory, LLC*, 51 AD3d 441, 441 (1st Dep't 2008).

Accordingly, it is

ORDERED that Pathmark's motion for summary judgment is denied; and it is further

ORDERED that CPS' motion for summary judgment is also denied; and it is further
ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 13, 2009

ENTER:

Jen Cah

J.H.O.

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FEB 27 2009
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