

**CAL-81 LLC v M-GBC, LLC**

2009 NY Slip Op 31033(U)

April 28, 2009

Supreme Court, Suffolk County

Docket Number: 35144-2007

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 35144-2007

SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES  
 J. S. C.

Original Motion Date: 02-25-2009  
 Motion Submit Date: 03-18-2009  
 Motion Seq. No.: 001 MOTD

\_\_\_\_\_ X  
 CAL-81 LLC., and ISLAND  
 INTERNATIONAL INDUSTRIES,  
 INC.,

Plaintiff,

-against-

M-GBC, LLC, as successor in  
 interest to CALVERTON/CAMELOT,  
 LLC,

Defendants.

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Defendant, M-GBC, moves, by Notice of Motion (motion sequence number 001) for an Order, pursuant to CPLR § 3212, granting Defendant Summary Judgment, dismissing the Plaintiff's Amended Complaint, and awarding the Defendant Attorneys' fees. Essentially, Defendant argues that the causes of action, arising from a written contract for the sale of land in the Calverton Industrial Park, are barred based on lack of legal capacity to sue, a defense founded upon documentary evidence (i.e., the language of the contract of sale itself), failure to state a cause of action, and the statute of limitations. Plaintiffs assert that the language of the contract does not bar its claims and, in any case, that it is premature to grant the drastic remedy of Summary Judgment at this early stage of the action.

Cal 81 v M-GBC  
Index Number 35144-2007  
Motion Sequence Number 001 Decision

This action arises entirely out of an Agreement between Calverton/Camelot LLC and CAL 81 LLC (assignor to CAL Reality LLC) dated February 9, 2001 for the sale of industrial property located in the Calverton Industrial Park. On that same date, Calverton/Camelot LLC assigned its right, title and interest in the contract to M-GBC, LLC. On December 27, 2001, the subject parcel, referred to as Parcel 2, was transferred from M-GBC to Cal Reality LLC. The Agreement had several provisions, which form the basis of the Complaint herein. These include:

SECTION 14. Seller's Representations and Warranties.

(B). (1) From and after the Closing Date and until the earlier of the tenth anniversary of the Closing Date or such time as steam heat shall be made available to the Premises at market rates by a public utility or other person or entity, Seller shall cause the steam heat plant servicing the Premises to be operated and maintained at Seller's expense and shall cause steam heat to be provided to the Premises at rates comparable to those imposed in the surrounding area generally.

SECTION 23. Prohibition Against Assignment. Except as provided in the next sentence, Purchaser's rights under this Agreement may not be assigned without the prior written consent of Seller in each instance and any assignment or attempted or purported assignment made without such consent will be null and void and of no further force or effect. Purchaser may assign this Agreement without Seller's consent to a corporation, LLC, or partnership or other entity of which the Purchaser or its principal are majority shareholders, owners or members.

SECTION 24. Entire Agreement: Construction. This instrument constitutes the entire agreement between the parties and no agent of either party has the authority to make representations or other agreements, verbal or written which modify or vary the terms or conditions of this Agreement. . . .

SECTION 34. Use of Utilities : Purchaser acknowledges that the Premises is situated within the Calverton Planned Industrial Park and as such is serviced by certain

Cal 81 v M-GBC  
Index Number 35144-2007  
Motion Sequence Number 001 Decision

utilities located within the Calverton Planned Industrial Park. Provided the charges, fees and rates imposed by such utilities are charged comparable to the charges, fees and rates imposed by public utilities servicing the surrounding area, then and in that event Purchaser agrees to utilize utilities generated from providers at the Calverton Industrial Park.

SECTION 37. Post Closing Subdivision of Property and Deed Reservations Subsequent to Seller's acquisition of fee title to the Property . . . and the closing of title hereunder, Seller at its sole cost and expense shall diligently and expeditiously make application, in its own behalf and in behalf of and as agent for the Purchaser . . . to the Town of Riverhead and to any other governmental agencies or departments having jurisdiction thereover, to further subdivide the Property. . . .

In the event a subdivision map is not filed as is contemplated in this Section 37 by December 31, 2005, then, in that event, Purchaser shall be permitted to make such application to the Town of Riverhead or to any other governmental agency or department having jurisdiction thereover to subdivide the Premises from the Property. . . .

SECTION 39. Roadway Association. The Seller has exhibited and delivered to the Purchaser and Purchaser has read and agrees to be bound by the proposed **Declaration of Covenants and Restrictions** and By-Laws of the Roadway Association . . . as the same may from time to time be amended. . . .With the purchase of the Premises, the Purchaser acknowledges that it will automatically thereby become a member of the Association, subject to its rules and regulations and liable for its assessments. (Emphasis added)

*Declarations. Article V Section 6.* After the Developer has completed its obligations as provided for herein by completing the Easement Area work as may be required by the Town of Riverhead, the Developer shall have the right to terminate its obligations pursuant to this Article, by serving written notice thereof upon each Owner. The Developer, at its sole cost and expense shall then form an organization, incorporated or otherwise for the purpose of assuming Developer's rights and obligations pursuant to this Article with each owner entitled to one vote . . . .

In its Amended Complaint, Island International LLC claims it has suffered damages as a result of the Defendant's breach of the Agreement of February 2001. The

Cal 81 v M-GBC  
Index Number 35144-2007  
Motion Sequence Number 001 Decision

instances of breach include 1) a failure to provide steam service at proper rates; 2) a failure to make diligent application to subdivide Parcel 2; 3) failure to create the road association referred to in Article 39; and 4) misrepresentation of the location of the main electrical power line easement. As a result thereof, Plaintiff Island International claims it is entitled to damages in the amount of \$4,900,000 plus statutory interest. Movant argues that the words of the Agreement are clearly set forth and demonstrate that the Plaintiffs herein state no cognizable cause of action against the Defendant. First, Defendants assert that the only entity to allege any damages in the Amended Complaint is Island International LLC, admittedly, the lessee of the subject parcel. There has been no assignment of the rights of the purchaser, CAL Realty LLC to the lessee pursuant to Article 23 of the parties' Agreement. Accordingly, absent privity of contract, such entity lacks capacity to sue, since it has no rights under the Agreement which it seeks to enforce.

Although the other named Plaintiff, CAL 81 LLC, makes no specific claims in the Amended Complaint, Defendant argues that even if that party, or more specifically its assignee, CAL 81 Realty LLC (the contracting party herein) were the Plaintiff, the Amended Complaint would fail to state cause of action. With regard to the failure to provide steam heat, Defendant produces records demonstrating that neither M-GBC, nor the Town of Riverhead, as the prior owner, ever billed either an owner or a subsequent lessee of this particular parcel for steam heating services for the period from October 17, 2001 (when M-GBC took title to the subject premises) to June 13, 2007, the date on which, pursuant to an order of the Public Service Commission ("PSC"), M-GBC turned over its electric service to LIPA). Defendant also provides a copy of a 2005 settlement agreement between M-GBC and all property owners, including Cal 81 Realty, LLC before the PSC, disposing, inter alia, of the issue of purported overcharges for steam heat. With regard to the failure to apply diligently for subdivision

Cal 81 v M-GBC  
Index Number 35144-2007  
Motion Sequence Number 001 Decision

of parcel 2, Defendant asserts that it has complied with the clear provisions of Article 37 by applying for the subdivision on October 12, 2004, before the December 1, 2005 date "contemplated in the agreement". With regard to the plaintiff that Defendant failed to form the Roadway Association contemplated in Article 39, such is made specifically subject to the Declarations of October 23, 2001, which were amended prior to closing to state, in Article V, Section 6, to provide that the Developer's obligation to form the Roadway Association does not accrue until it has completed the easement work required by the Town of Riverhead. Such work, according to Defendant, is scheduled to be completed in November 2009. With regard to the three causes of Action in the Amended Complaint arising out of the alleged misrepresentation of the locus of a power line easement, Defendant asserts both that there is nothing in the Purchase Agreement concerning the location of a power line and that Article 24 states it is the entire agreement between the parties. In any event, Defendant argues that any claim for breach of contract or negligence arising out of improper placement of the power line would have accrued at the execution of the agreement (February, 2001) and is, therefore, barred by either the three year or the six year statute of limitations.

Plaintiff, in opposition to the motion, asserts 1) that Island International has the authority to assert claims under the Purchase Agreement because M-GBC's billing of that party for utility services acts as a waiver of the non assignment provision of the Agreement; 2) that Island International relied, to its detriment, on Defendant's representations concerning the location of a main power line, which has resulted in such entity being required to pay to move the line in order to complete certain construction; 3) that Defendant failed to provide a steam plant for 10 years as required by Article 14, forcing Island International to expend \$1,500,000 on its own system; and 4) that due to Defendant's delay in applying for a formal

Cal 81 v M-GBC  
Index Number 35144-2007  
Motion Sequence Number 001 Decision

subdivision Island International has been unable to expand its facilities and has been forced to rent outside space at considerable expense.

A party moving for Summary Judgment must, in the first instance, make a prima facie showing of entitlement to judgment as a matter of law, offering the Court evidence to demonstrate that no material issues of fact exist. Goldberger v Brick & Ballerstein, Inc., 217 AD 2d 682, 629 NYS 2d 814 (2d Dep't 1995). (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating that genuine issues of fact still exist which preclude the granting of Judgment. Zayas v Half Hollow Hills Cent. School Dist., 226 AD 2d 714, 641 NYS 2d 701 (2d Dep't 1996).

When interpreting the language of a written agreement, the court is required to arrive at construction that will afford fair meaning to all the language employed so as to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized. Master-Built Construction Co., Inc. v Thorne, 22 AD 3d 535 (2d Dep't 2005). Thus, where the Court can glean a clear meaning from the four corners of the instrument, such language should be enforced in accordance with its terms. See, Reiss v Financial Performance Group, 97 NY 2d 195, 738 NYS 2d 658, 764 NE 2d 958 (2001).

The Defendant has demonstrated, prima facie, entitlement to Summary Judgment, as a matter of law, based on the clear meaning of the terms of the contract on which the Plaintiff herein relies. First, there is no assignment of rights under the contract without consent of the parties and it is clear that Island International, the only party to assert any damages in the Amended Complaint, has never received such written imprimatur. There exist only two parties to the Agreement - M-GBC and Cal Realty LLC, as approved assignee of CAL 81 LLC. Moreover, a waiver of a

Cal 81 v M-GBC  
Index Number 35144-2007  
Motion Sequence Number 001 Decision

writing requirement in a contract, such as found herein, can only occur where the alleged acts of waiver are unequivocally referable to an alleged oral modification of the written agreement. The allegation of Plaintiff's counsel that Defendant sent certain utility bills to Island International, the lessee of the parcel in question, cannot be said to be unequivocally referable to a recognition that such entity was an "assignee" of Cal Realty, LLC, the true contracting party. see, Richardson & Lucas, Inc. v New York Athletic Club of City of New York, 304 AD 2d 462, 758 NYS 2d 321 (1st Dep't 2003).

Second, even if the Court were to give the Amended Complaint its broadest interpretation to include CAL Realty LLC as the party in interest, the Amended Complaint must still fail. The subdivision application, as "contemplated" by the Agreements was indeed filed by December 1, 2005; there is no question that such has occurred. The formation of the Roadway Association, by the express terms of the Agreement, was dependent on completion of construction required by the Town of Riverhead, which is still ongoing and scheduled to be completed in November 2009. Any cause of action in negligence or breach of contract arising from the improper indication by Plaintiff of the location of a power line, which is not found in the agreement, would have expired within three to six years thereafter, before either the original or amended complaint in this action was filed. Accordingly, based on grounds set forth under **CPLR§§ 3211 (a) (1), (3), (5) and (7)**, the Defendant's papers demonstrate that the Amended Complaint should be dismissed. It is hornbook law that a movant under CPLR§ 3212 may utilize any of the defenses set forth under **CPLR§ 3211** as long as such has been included by the movant in its answer. Siegel, Practice Commentaries, 3212:20. In the case at Bar, Defendant has done so.

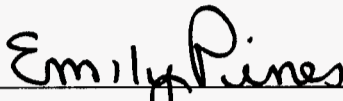
In response to the motion, Plaintiff has reiterated the provisions of the Amended complaint without reference to Articles 23, 24, 37 and 39 of the parties' Agreement. Based

Cal 81 v M-GBC  
Index Number 35144-2007  
Motion Sequence Number 001 Decision

thereon, the Court finds that Summary Judgment is warranted and that Defendant's motion is granted.

The issue of attorney's fees is severed and set down for hearing on May 27, 2009. This constitutes the DECISION and ORDER of the Court.

Dated: April 28, 2009  
Riverhead, New York

  
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EMILY PINES  
J. S. C.