

Panaisa Estate, Inc. v Broche

2009 NY Slip Op 32037(U)

August 31, 2009

Supreme Court, New York County

Docket Number: 104355/09

Judge: Marilyn Shafer

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

PRESENT: SHAFFER
Justice

PART 8

PANASIA ESTATE, INC.

INDEX NO.

104355/09

MOTION DATE

-v-
DANIEL R. BROCHE

MOTION SEQ. NO.

01

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

is decided in accord with the enclosed memorandum.

FILED

SEP 09 2009

COUNTY CLERK'S OFFICE
NEW YORK

MAHILTY STAFFEN

Dated: 8/31/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

THIS MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

PANAISA ESTATE, INC.,

INDEX NO. 104355/09

Plaintiff,

MOTION DATE _____

-against-

MOTION SEQ. NO. 001, 002

DANIEL R. BROCHE, as Ancillary Executor of
the Estate of Agnes M. Broche,

Defendant.

The following papers, numbered 1 to 6, were read on these motions:

PAPERS NUMBERED

| | |
|---|-----|
| Order to Show Cause – Affirmation – Exhibits | 1,2 |
| Supplemental Order to Show Cause – Affirmation – Exhibits | 3,4 |
| Affirmation In Opposition – Exhibits | 5 |
| Reply Affirmation | 6 |

FILED
SEP 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the Order to Show Cause and the Supplemental Order to Show Cause are decided as follows:

These Orders to Show Cause untimely sought to enjoin the transfer of two buildings which were the subject of a contract of sale which went awry.

Background

The following facts appear to be undisputed. On October of 2008 the defendant, as seller, entered into a contract of sale for two buildings in Manhattan to an entity, not a party herein, who assigned its rights to the plaintiff, as purchaser, in January of 2009. The assignment was

signed by the defendant.

The seller represented that the buildings were legally occupied in accordance with their Certificates of Occupancy (Rider, §10). That representation was untrue, since one building was an illegal SRO and the other did not have a residential C of O. The contract further provided:

If seller shall be unable to convey title to the Premises at the Closing in accordance with the provisions of this contract ...purchaser, nevertheless, may elect to accept such title as seller may be able to convey with a credit against the monies payable at the Closing equal to the reasonably estimated costs to cure the same (up to the Maximum Expense described below...) (§13.02)

Finally, the contract "capped" the seller's obligations at \$50,000 for compliance with "title exceptions that are susceptible of being reduced to liquidated amount." (Rider §1)

On March 17, 2009, defendant, by attorney's letter, terminated the contract and refunded the down payment on the ground that "Seller cannot comply with Purchaser's demand that Seller convey title in accordance with §10 of the Rider to the Contract."¹ Purchaser's attorney rejected the termination, returning the check and filing a *lis pendens*. On March 27 the parties attempted to negotiate a settlement. However the defendant advised the plaintiff that any agreement they entered into would be subject to cancellation of a second contract of sale which defendant entered on March 16.² Defendant subsequently advised the plaintiff that it was unable to avoid that contract, notwithstanding that it was explicitly subject to the previously-entered contract with the plaintiff.

Plaintiff initiated an action for specific performance on March 30, 2009 and moved by

¹ In its opposition papers, defendant claims this compliance would cost hundreds of thousands of dollars. Plaintiff disputes this.

² The contract of sale is to Property 215 LLC.

Order to Show Cause, dated April 7, 2009, to enjoin defendant from conveying the buildings. However, the buildings had been conveyed the day before; the day on which it was advised of the filing of plaintiff's TRO.³ Plaintiff filed a supplemental order to show cause seeking various relief, some of which was resolved by stipulation.

Argument

The law is clear that a preliminary injunction may be granted where a plaintiff can demonstrate (1) a likelihood of success; (2) irreparable injury; and (3) that the equities are in its favor. (*Doe v Axelrod*, 73 NY2d 748 [1988]) This Court finds that the plaintiff has satisfied the three-pronged test for the granting of a preliminary injunction.

The failure to obtain a certificate of occupancy or the failure to conform with a certificate of occupancy is not a title issue and does not affect the delivery of marketable title. (*Cara v Bell Bay Properties, Inc*, 143 Ad2d 870 [2d Dept `1988]) Thus, §10 of the Rider is inapplicable to any expenses that may or may not have been required to conform the buildings to the contract representations regarding tenancies and C of O's. Moreover, even if §10 were applicable, the explicit terms of §13.02 required defendant to offer plaintiff the option of accepting title as is, which it failed to do. Finally, the expenses were mandated by the misrepresentations knowingly made by the defendant in the contract. Defendant is therefore estopped from using its own misrepresentations to avoid its obligations. (*Werking v Amity Estates, Inc*, 2 NY2d 43[1956])

The defendant has offered nothing more than its own misrepresentations to justify

³ The buildings were conveyed to Property 51 LLC, as assignee of defendant's contract with Property 215 LLC.

disregard of its contractual obligations, rendering success on the merits unlikely. The questions raised regarding the legitimacy of the transfer were known, or should have been known, to Property 51 LLC, tipping the balance of equities in favor of the plaintiff

We have considered the other arguments of the parties and find them to be without merit.

For the aforementioned reasons, it is hereby

ORDERED that plaintiff's application to serve the Supplemental Summons and Amended Complaint adding as defendants Property 51 LLC and Property 215 LLC is granted; and it is further

ORDERED that the attorney for the plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein as follows:

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

PANASI ESTATE, INC.,

Plaintiff,

INDEX NO. 104355/09

-against-

DANIEL R. BROCHE, as Ancillary Executor of the Estate of
Agnes M. Broche, PROPERTY 51 LLC, and PROPERTY
215 LLC,

Defendants.

_____; and it is further

ORDERED plaintiff's application for leave to take the immediate depositions of defendants Daniel R. Broche, Property 51 LLC and Property 215 LLC is granted; and it is further

ORDERED that plaintiff's application for leave to take the immediate deposition of attorney Andrew Weltchek, Esq. is denied, without prejudice; and it is further

ORDERED that defendant Property 51 LLC is enjoined and restrained *pendente lite* from selling, conveying, transferring, leasing, disposing of, or from encumbering or taking any further steps of any kind or nature to alter, improve, modify or otherwise take any action affecting the subject premises at 51 and 53 West 19th Street, New York, NY, including the entering into of any occupancy agreements or leases with respect thereto, and from taking any steps to change, modify, obtain or secure a Certificate of Occupancy for either of said buildings; and it is further

ORDERED that Defendant Daniel R. Broche and his attorney, Andrew Weltchek, Esq., deliver to a joint *escrow* account in the name of the plaintiff's counsel and any designated counsel of Broche a total of \$285,000.

This reflects the decision and order of this Court.

Dated: 8/21/09

REGISTERED

J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

FILED
SEP 09 2009
COUNTY CLERK'S OFFICE
NEW YORK