

Montaperto Ltd. v Liu
2009 NY Slip Op 32372(U)
October 13, 2009
Supreme Court, New York County
Docket Number: 102060/07
Judge: Marcy S. Friedman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

MARCY S. FRIEDMAN

PRESENT: _____

PART 57

Index Number : 102060/2007

MONTAPERTO LTD.,

VS.

LIU, IRWIN K.

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. 102060/07

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

this motion for summary judgment

PAPERS NUMBERED

1

2, 2A

3, 4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Memo of Law M1-M3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and Cross-motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10-13-09



MARCY S. FRIEDMAN /s/g

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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

MONTAPERTO LTD., ANGELO MONTAPERTO
and DEBORAH MONTAPERTO,

Index No.: 102060/07

Plaintiff(s),

- against -

DECISION/ORDER

CINDY LIU, as Executor of the Estate of IRWIN K.
LIU, CHIN PO LIU, 14 JAY STREET OWNERS
CORP., 14 JAY COMMERCIAL LLC., MARIA
NARDONE and JOHN DOE #1-5 (names being
fictitious and unknown),

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

X

In this action for declaratory and injunctive relief, plaintiffs Angelo Montaperto, Deborah Montaperto, and Montaperto Ltd. (collectively "Montaperto") sue for damages arising from the assignment of a master lease. Defendants 14 Jay Street Owners Corp. ("Owners Corp."), 14 Jay Commercial LLC ("Jay Commercial") and Maria Nardone (collectively "Jay defendants") move for summary judgment dismissing the complaint against them, and for summary judgment on their claim against Montaperto for attorney's fees. Montaperto cross-moves for partial summary judgment as to liability on its third, fifth, sixth, and seventh causes of action against defendants. The Liu defendants oppose Montaperto's motion and support the Jay defendants' motion, but do not move for summary judgment.

The complaint pleads seven causes of action for: 1. a judgment declaring that the right of first refusal exercised by Owners Corp. is void and unenforceable; 2. a permanent injunction

preventing the sale, assignment, or transfer of the master lease from Liu to Owners Corp. and directing the sale, assignment, and transfer of the master lease to Montaperto; 3. breach of contract against Liu depriving Montaperto of “its contractual right of assignment” of the master lease (Complaint, ¶50); 4. breach of contract depriving Montaperto of its “contractual right of first refusal set forth” in the sublease (*id.* ¶54); 5. breach of contract by defendants in that the exercise of the right of first refusal was “wrongfully, wantonly, maliciously an[d] improperly exercised and accepted in bad faith” (*id.* ¶58); 6. breach of the duty of good faith and fair dealing by Liu; 7. tortious interference with contract against the Jay defendants.

Plaintiff’s second cause of action must be dismissed as moot, as it is undisputed that the Liu defendants assigned the master lease to the Jay defendants during the pendency of this action. (See Koehler v Town of Smithtown, 305 AD2d 550 [2d Dept 2003].) Montaperto’s fourth cause of action was withdrawn pursuant to the parties’ stipulation dated September 9, 2008. (See Jay Defendants’ Motion [“Jay Motion”], Ex. W.) On its cross-motion, Montaperto asserts its third, fifth, and sixth causes of action for breach of contract only as against the Liu defendants, and its seventh cause of action for tortious interference with contract only as against the Jay defendants. (See Blumenstein Aff. in Support of Cross-Motion, ¶ 43.)

The following material facts are undisputed: Owners Corp. owns a cooperative building with a ground floor retail premises. By lease dated September 17, 1984 (“master lease”), Owners Corp.’s predecessor leased the premises to Liu. This lease is set to expire on June 30, 2023.¹

¹ The lease was executed between Owners Corp. and the building’s sponsor, non-party Atlantic and Hudson Limited Partnership (“Atlantic”). By Assignment and Assumption of Lease dated December 18, 1988, Atlantic later assigned the lease to Irving K. Liu as agent for Chin Po Liu. After Irving Liu’s death, Cindy Liu, as Executor for the estate of Irving Liu, was substituted in his place and stead in the instant action by order dated September 11, 2008.

(See Jay Motion Ex. A.) By sublease dated August 20, 2004 (“sublease”), Liu sublet the retail premises to plaintiffs Angelo and Deborah Montaperto d/b/a Angelo Montaperto Co. Inc. (See id., Ex. B.)

Article 50(f) of the master lease provides that “Owner [Owners Corp.] shall have a right of first refusal to take the premises upon the same terms and conditions as set forth in the proposed assignment if notice [sic] of such intent is given to Tenant [Liu] within 10 days after receipt by Owner or it’s [sic] agent of the proposed notice of assignment as provided for in paragraph 50(d) above [not here relevant].”

By Assignment and Assumption of Lease dated September 22, 2006 (“Montaperto contract of assignment”), Liu agreed to assign the master lease to Montaperto in consideration of \$140,000, and subject to the exercise of the right of first refusal by Owners Corp.² (See id., Ex. C.) By letter dated December 13, 2006, Liu notified Owners Corp. of the proposed assignment of the master lease to Montaperto for \$140,000. (See id., Ex. E.) By notice dated December 18, 2006 (“Owners Corp.’s acceptance”), Owners Corp. notified Liu that it intended to exercise its right of first refusal for assignment of the master lease for \$140,000. (Id., Ex. G.) By letter dated December 22, 2006, Liu rejected the proposed election of Owners Corp. to exercise the right of first refusal. (Ps.’ Cross-Motion, Ex. 12.) By letter dated January 17, 2007, Owners Corp. repeated to Liu its demand for the exercise of first refusal, and further stated that Liu’s failure to assign the master lease pursuant to Article 50(f) would be deemed by Owners Corp. a material

² The parties do not dispute that although on its face, the Montaperto contract of assignment provides for consideration in the amount of \$10.00, the actual consideration was \$140,000. Similarly, although the assumption agreement does not by its terms provide that it is subject to the exercise of Owners Corp.’s right of first refusal, the parties do not dispute this fact.

default under the master lease. (Id., Ex. 13.) By letter dated January 26, 2007, Liu consented to “the election by 14 Jay Street Owners Corp. to the assignment of the lease to the corporation’s nominee.” (Jay Motion, Ex. H.)

The instant litigation followed. Subsequently, by order dated May 30, 2007 (“May 30, 2007 order”), this court denied Montaperto’s motion for a preliminary injunction seeking to enjoin the proposed assignment to Owners Corp. By Assumption and Assignment of lease dated June 18, 2007, Liu assigned the master lease to Jay Commercial. (See id. Ex. O.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

As a threshold matter, the Jay defendants argue that Montaperto does not have standing to maintain its claims against Liu for breach of contract for Liu’s alleged failure to comply with the master lease, and that Montaperto is not a third-party beneficiary of the master lease. As it is undisputed that Montaperto is not a named party to the master lease, in order to enforce its claims against Liu for breach of the Montaperto contract of assignment, it must establish that it was an intended beneficiary, and not merely an incidental beneficiary, of the master lease. (See generally Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.,

291 AD2d 40 [1st Dept 2001], lv denied 97 NY2d 613 [2002], 98 NY2d 608 [2002].) Putative buyers or assignees of a lease who “were neither parties to nor intended beneficiaries of the lease” may not use it to enforce their contract rights. (See Babu v Jack & George Murdich, Inc., 141 AD2d 593, 594 [2d Dept 1988], lv denied 73 NY2d 705 [1989]; Salm v Sammito, 111 AD2d 844 [2d Dept 1985], affd for reasons stated below 66 NY2d 661.) Montaperto’s assertion that because the master lease provides Liu with the right to assign the master lease, Montaperto is a third-party beneficiary of the lease, is wholly without merit. In the absence of any evidence to demonstrate that Montaperto is an intended beneficiary of the master lease, it may not assert its breach of contract claims against Liu, and the complaint should be dismissed.

As discussed below, even assuming arguendo that Montaperto may maintain its claims against Liu for breach of contract, plaintiff fails to demonstrate colorable claims against either the Liu defendants or the Jay defendants. As plaintiff’s claims against the Jay defendants depend upon Montaperto’s entitlement to acquire the assignment of the master lease, the court will first address Montaperto’s cross-motion for summary judgment.

Plaintiff’s Cross-Motion

In moving for summary judgment as to liability on its breach of contract claims against the Liu defendants, Montaperto argues that Liu breached the Montaperto contract of assignment for the reason, among others, that Owners Corp.’s exercise of its right of first refusal was not valid, and that Liu was therefore required to assign the master lease to Montaperto.

“The right of first refusal, a well-accepted term, is a preemptive right that requires the owner, when and if he decides to sell, to offer the property first to the [holder] so that he may meet a third-party offer or buy the property at some other price set by a previously stipulated

method.” (Jeremy’s Ale House Also, Inc. v The Joselyn Luchnick Irrevocable Trust, 22 AD3d 6, 9-10 [1st Dept 2005] [internal quotation marks and internal citations omitted]. See also LIN Broadcasting Corp. v Metromedia, Inc., 74 NY2d 54 [1989].) A holder of a “a right of first refusal may create a ‘binding contract’ with the grantor by exercising the right before the third-party contract expires.” (Cipriano v Glen Cove Lodge #1458, B.P.O.E., 1 NY3d 53, 59 [2003] [internal quotation marks and citation omitted]; Yudell Trust I v API Westchester Assocs., 227 AD2d 471 [2d Dept 1996].) “[A] right of first refusal does not give a party a right to purchase the property on any terms so long as the price offered by the third party is met.” (M & A Motors v Disco Realty, Inc., 24 AD3d 519, 520 [2d Dept 2005].) However, it has been held that “although the terms of the sale to such holder [of the right of first refusal] were not identical to those contained in the subject contract, specific performance [on behalf of the proposed buyer] was not warranted where the total substantive value of the holder’s offer was at least equivalent, if not better, than what [seller] would have received from [proposed buyer].” (34th & 7th Ave., L.L.C. v 152 W. 34th St., Inc., 269 AD2d 153, 154 [1st Dept 2000]. See also Salm v Sammito, 111 AD2d 844, supra.)

On this record, Montaperto fails to demonstrate the merits of, or to raise a triable issue of fact as to, its claim that Owners Corp.’s exercise of its right of first refusal was invalid. Even assuming that Montaperto has standing to assert its contention that Owners Corp.’s exercise of the right of first refusal was untimely – which it does not – Owners Corp.’s December 18 acceptance of the assignment was timely. It was sent within 10 days of the December 13 notice by Liu of Montaperto’s contract of assignment, and thus complies with the time requirements of Article 50(f) of the master lease. (See Iša v Gas Elezaj Corp., 303 AD2d 636 [2d Dept 2003].)

Montaperto also fails to show that Owners Corp.'s decision to set up a nominee corporation [Jay Commercial] to hold the master lease rendered Owners Corp.'s acceptance invalid where, as here, the master lease does not prohibit such assignment. (See 397 W. 12th St. Corp. v Zupa, 34 AD3d 236 [1st Dept 2006], lv denied 8 NY3d 815 [2007].)

Nor can Montaperto prevail on its claim that the assignment of the master lease to Jay Commercial was not made on the same terms and conditions as Montaperto's contract of assignment. Montaperto contends that Owners Corp.'s offer was for less value than the Montaperto offer. It is undisputed that Owners Corp. matched the \$140,000 payment that Montaperto offered. However, Montaperto contends that its obligations under the contract of assignment also had value. Montaperto relies principally on the provision in its contract of assignment that required it to "indemnify and hold Assignor [Liu] harmless from any legal actions, damages and expenses, including legal fees that the Assignor may incur arising out of the lease." (Jay Motion, Ex. C.) Montaperto argues that because Owners Corp.'s acceptance did not also contain such a provision, Owners Corp. offered Liu less value.

Montaperto fails to make any showing of the value of this indemnification provision. Montaperto appears to argue that its claims in this lawsuit would be covered by the indemnification provision. However, Montaperto does not address the proper interpretation of the indemnification provision, and it does not appear that Montaperto's claims "arise out of" the master lease, rather than out of its own contract of assignment, and that Liu's attorney's fees for defense of this action would therefore be subject to indemnification from the Jay defendants. (See Babu v Jack & George Murdich, Inc., 141 AD2d 593, supra.)

The court has considered Montaperto's remaining contentions and finds them without

merit.³ Accordingly, the branch of Montaperto's motion seeking partial summary against the Liu defendants on its third, fifth, and sixth causes of action must be denied, and the claims for breach of contract against Liu dismissed.

Jay Defendants' Motion

The Jay defendants move for summary judgment dismissing Montaperto's claims for tortious interference with contract against them. In light of the court's holding dismissing plaintiff's breach of contract claims, Montaperto's claims for tortious interference with contract must be dismissed. (See 397 West 12th St. Corp. v Zupa, 34 AD3d 236, *supra*; Galison v Greenberg, 51 AD3d 466 [1st Dept 2008].) Montaperto's claims against Maria Nardone, president of the Board of Owners Corp, should also be dismissed, as Montaperto fails to show any basis for claims against her in her individual capacity.

The branch of the Jay defendants' motion for summary judgment on their claim against Montaperto for attorney's fees should be denied. In seeking attorney's fees, the Jay defendants rely upon section 19 of the sublease between Liu and Montaperto, which provides that if "Owner, in connection . . . with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder." (See Ps.' Cross-Motion, Ex. 4.) The

³ While the court's May 30, 2007 order denying plaintiff's motion for a preliminary injunction is not law of the case, Montaperto makes several of the same arguments it made on the prior motion but fails to remedy the deficiencies on the prior motion, and, in particular, to submit new authority or new facts supporting its claims that Owners Corp.'s exercise of the right of first refusal was invalid.

instant action does not involve a default by Montaperto under the lease and therefore is not covered by section 19.

It is accordingly hereby ORDERED that the motion of 14 Jay Street Owners Corp., 14 Jay Commercial LLC and Maria Nardone is granted to the extent that it is

ORDERED, ADJUDGED and DECLARED that the assignment of the master lease dated June 18, 2007 between defendant Liu and 14 Jay Commercial LLC is valid and enforceable; and it is further

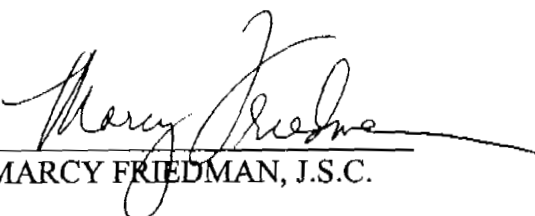
ORDERED that plaintiff's remaining claims are dismissed; and it further

ORDERED that the claim of the Jay defendants for attorney's fees is dismissed; and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' cross-motion is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 13, 2009


MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).