

SHS Baisley LLC v RES Land, Inc.

2009 NY Slip Op 33124(U)

December 8, 2009

Supreme Court, Queens County

Docket Number: 13931/09

Judge: Orin R. Kitzes

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SHORT FORM ORDER

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

**PART 17
HON. ORIN R. KITZES**

-----X
SHS BAISLEY LLC.,

Plaintiff,

-against-

**Index No. 13931/09
Motion Date: 12/2/09
Motion No. 56**

RES LAND, INC.,

Defendant.

-----X

The following papers numbered 1 to 20 read on this motion by plaintiff for an Order granting plaintiff Summary Judgment pursuant to CPLR Section 3212 against defendant on plaintiff's first cause of action directing defendant to pay plaintiff the amount of \$125,000 with interest thereon from January 30, 3006 along with reasonable attorneys' fees, and on plaintiff's second cause of action directing defendant to execute certain construction documents provided by plaintiff to defendant along with reasonable attorneys' fees; and cross-motion by defendant for an order granting summary judgment in defendant's favor and dismissing the plaintiff's first and second Causes of Action; or dismissing that portion of plaintiff's first Cause of Action seeking interest on the \$125,000 construction security deposit.

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Upon the foregoing papers it is ordered that the motion by plaintiff for an Order granting plaintiff Summary Judgment pursuant to CPLR Section 3212 against defendant, on plaintiff's first cause of action directing defendant to pay plaintiff the amount of \$125,000 with interest thereon from January 30, 3006 along with reasonable attorneys' fees, and on plaintiff's second cause of action directing defendant to execute certain construction documents provided by plaintiff to defendant along with reasonable attorneys' fees; and cross-motion by defendant for an order granting summary judgment in defendant's favor and dismissing plaintiff's first and second Causes of Action; or dismissing that portion of plaintiff's first Cause of Action seeking interest on the \$125,000 construction security deposit, are denied for the following reasons:

According to the complaint, this litigation arises out of defendant's breach of the Settlement Agreement and the Ground Lease. The settlement concluded an action that plaintiff had commenced

against defendant in Supreme Court, Queens County (hereinafter, “prior action”), that involved claims of defendant’s breach of a Ground Lease Agreement, dated December 15, 1998 between plaintiff, as tenant, and defendant, as landlord (hereinafter, “Ground Lease”) for the lease of the rear portion of the Overall Premises (hereinafter, “leased premises”). In the prior action, plaintiff sought, *inter alia*, a declaratory judgment that all of the unused floor area ratio for the overall premises at the time that the Ground Lease was entered belonged to plaintiff. Plaintiff and defendant resolved the prior action towards the conclusion of the trial of the prior action by entering into a settlement agreement “So Ordered” by the J.H.O. Geller on January 13, 2009 which, *inter alia*, granted plaintiff as part of the leased premises “All of the unused Floor Area Ratio as of 12/15/98 for the Overall Property“. The Settlement Agreement provides that it shall serve as an amendment to the Ground Lease.

On or about May 28, 2009, Plaintiff commenced this action, claiming defendant violated the Settlement Agreement. In particular, plaintiff claims that, defendant is in violation of Paragraphs “2” of the Settlement Agreement which requires defendant to execute certain documents required by the New York City Department of Buildings or any other governmental authority in order for plaintiff to proceed with construction of its self-storage building at the Leased Premises utilizing the Floor Area Ratio for the Overall Premises (hereinafter, “Construction Documents”). Plaintiff also claims that defendant is also in violation of Paragraph 9 of the Settlement Agreement which eliminates the requirement of a construction security deposit under the Ground Lease in the amount of \$125,000.00 (hereinafter, “Construction Security Deposit”) and requires that the Construction Security Deposit be released to Plaintiff. Plaintiff also seeks attorneys’ fees and costs for this action pursuant to Paragraph 14.2 of the Ground Lease. Plaintiff has now brought the instant motion and defendant has opposed it and brought the instant cross-motion which is opposed by plaintiff.

Regarding plaintiff’s summary judgment motion, it claims that defendant breached the settlement agreement by failing to turn over the construction security deposit to plaintiff. Plaintiff claims that it deposited the sum of \$125,000.00 with the Office of the Queens County Clerk representing the additional construction security deposit due under the Ground Lease. Paragraph 20.1 of the Ground Lease provides that the sum of \$125,000.00 be provided to Defendant as landlord prior to the commencement of any construction at the Premises to be held in an interest bearing account by Defendant. Subsequently, the Clerk released the sum of \$236,044.59 to defendant with the approval of Plaintiff. This amount included the Construction Security Deposit along with an additional \$94,411.16 for real estate taxes held by the Clerk plus accrued interest of \$16,633.53. Paragraph 9 of the Settlement Agreement and Ground Lease (as amended by the Settlement Agreement), provides that, “[L]ease Amendment shall eliminate the requirement under the lease of the \$125,000 additional construction security deposit [the Additional Security Deposit] and shall consent to the release to SHS Baisley of the \$125,000 construction security deposit currently held by the Court. Plaintiff has

submitted various documents and the affidavit of Kenneth Henick, the managing member of the plaintiff to support the above claims.

Plaintiff claims that defendant still has the construction security deposit in its possession and, upon information and belief, has failed to deposit such funds in an interest bearing trust account as required by the ground lease, as per its terms prior to the amendment. Plaintiff has demanded the return of this deposit, but, defendant has refused to turn it over. Plaintiff also claims that it is entitled to interest along with the return of the deposit, pursuant to Paragraph 20.1 of the Ground Lease.

Plaintiff also claims that defendant has breached the Settlement Agreement due to its failure to execute the Construction Documents. Pursuant to Paragraph “2” of the Settlement Agreement, Defendant agreed that, “Upon execution of the Settlement Agreement, RES Land, Inc. shall execute PW-1 for Building Permit, Caretakers Declaration and all other related documents [collectively referred to herein as the “Construction Documents”], for plans filed with the DOB or any other governmental authority (the “Plans”) showing property owned by RES Land, Inc. (the “Overall Property”). A copy of the Plans shall be provided prior to execution of the Settlement Agreement.” Plaintiff claims to have delivered to Defendant’s counsel a copy of the Plans, as well as a complete set of the Construction Documents, in accordance with the Settlement Agreement on or about February 6, 2009. Despite the requirements of the Settlement Agreement, Defendant has refused to execute the Construction Documents. Plaintiff has submitted various documents and the affidavit of Kenneth Henick, the managing member of the plaintiff to support the above claims.

Defendant opposes plaintiff’s summary judgment motion by claiming that, contrary to plaintiff’s claim, the prior litigation was not resolved by way of a Settlement Agreement, but rather by the parties entering into a term sheet entitled the “Settlement Term Sheet” that contained the principles of the parties’ agreement but expressly contemplated a future complete agreement based on the parties’ negotiations of several open, but essential, terms as well as the attachment of several crucial exhibits formalizing the parties’ relationship. As such, plaintiff’s motion must be denied so the parties may finalize their settlement through good faith negotiations that will lead to the completely integrated “Settlement Agreement and Lease Amendment” the parties specifically contemplated executing when they signed the Settlement Term Sheet. This same argument is the basis for defendant’s cross-motion to dismiss the plaintiff’s complaint. Defendant has submitted various documents and an affidavit by Eva Kukielka, President of defendant, to support these claims.

In particular, defendant points out that the Terms of Settlement document begins by stating that “The following are the terms of the settlement, which shall be embodied in a settlement agreement (the ‘Settlement Agreement’) and amendment to the Lease (the ‘Lease Amendment’). Defendant claims that after executing the Settlement Term Sheet there remained, *inter alia*, two essential terms that required further negotiation: (I) a corrected metes and bounds that accurately described Baisley’s interest in the

Leased Premises; and (ii) the specific terms of the four year lease extension Baisley was to receive. Despite negotiations after the signing of the Term Sheet, these terms remain unresolved.

Defendant also claims that the Settlement Term Sheet expressly provided that certain obligations upon the parties would become effective only upon the execution of the future agreement: the Settlement Agreement and Lease Amendment. This further shows that the Agreement plaintiff seeks to enforce was not an agreement, but merely a Settlement Term Sheet that cannot be enforced. Specifically, the Settlement Term Sheet provided the following:

“Upon execution of the Settlement Agreement [and Lease Amendment], [RES] shall execute the execute PW-1 for Building Permit, Caretakers Declaration [(collectively, the Construction Documents’)] and all other related documents, for plans field with the DOB or any other governmental authority (the “Plans”) showing [Baisley’s] use of all of the unused FAR for the entire [Property] owned by [RES].”

“Upon execution of the Settlement Agreement [and Lease Amendment], [RES] shall approve [Baisley’s] signage to the extent [Baisley’s] proposed Signage is in accordance with the terms of the [Ground] Lease and execute all required applications in connection therewith.”

“At the time of the execution of the Settlement Agreement [and Lease Amendment] [RES] shall represent in the Settlement Agreement [and Lease Amendment] that its auto repair month-to-month tenant is not presently permitting vehicles to be parked on the Easement Area”

“The [Settlement Agreement and] Lease Amendment shall eliminate the requirement under the [Ground] Lease of the \$125,000 additional construction security [(the “Construction Deposit’)] and shall consent to the release to [Baisley] of the [Construction Deposit] held by the Court.”

“Upon execution of the Settlement Agreement [and Lease Amendment], [Baisley] shall agree to cooperate and execute a Correction Memorandum of Ground Lease with the corrected metes and bounds description for the [leased] Premises.”

“The [Settlement Agreement and] Lease Amendment shall permit RES Land to encumber the Overall property with a mortgage in the maximum principal amount of \$300,000”

“The [Settlement Agreement and] Lease Amendment shall describe the No Build Area referred to in Section 6.1 of the Lease by highlighting the NO Build Area on the survey attached as an exhibit to the [Settlement Agreement and] Lease Amendment.

Defendant claims that subsequent to executing the Settlement Term Sheet, the parties spent significant time negotiating the exhibits that were to be annexed to the Settlement Agreement and Lease Amendment including the Corrected Metes and Bounds. However, the Parties never agreed upon or

executed the Settlement Agreement and Lease Amendment. As such, defendant claims that given the essential terms that were left open for further negotiation and inclusion in a completely integrated further document, the Settlement Agreement and Lease Amendment, defendant had only the legal obligation to negotiate said terms in good faith. Furthermore, even if the Court determines that the Settlement Term Sheet created legal obligations other than the duty to negotiate a future agreement in good faith, Plaintiff's first and second causes of action must still be summarily dismissed because, pursuant to the express terms of the Settlement Term Sheet, the contractual obligations plaintiff are attempting to enforce only arise upon the execution of the Settlement Agreement and Lease Amendment, which has not been done.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v County of Albany*, 50 NY2d 247 (1980); *Miceli v Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." In the instant case, there are triable issues of fact that prevent this Court from granting plaintiff's motion.

Plaintiff properly asserts that stipulations and settlements in court are encouraged as a means of expediting and simplifying resolution of disputes. *Will of Kanter*, 209 AD2d 365 [1st Dept 1994] [citations omitted] As was said in *Hallock v State of New York*, 64 NY2d 224,(1984),"strict enforcement [of settlement agreements] not only serves the interest of efficient dispute resolution but is also essential to the management of court calendars and integrity of the litigation process." Moreover, it is clear that a stipulation of settlement in a pending suit binds the parties based on the theory that the settlement ends the existing litigation and gives rise to a new superseding agreement which is the measure of the parties' obligations.

In the instant case, both parties executed the Agreement. However, contrary to plaintiff's claim, based on the document signed and the testimony in Court, it is not clear that defendant intended to be bound by the terms of the Agreement prior to the outstanding terms being negotiated and settled upon and reduced to a Settlement Agreement. Nor is it clear that defendant intended to be bound by the terms prior to the completion of the obligations specifically set forth as terms in the signed document. Accordingly, there is an issue of fact as to whether the signed document is an enforceable agreement or a "Term Sheet" that constituted nothing more than an agreement to agree, and not an enforceable agreement between the parties. *Meyers Assocs., L.P. v. Conolog Corp.*, 2009 NY Slip Op 3044 (N.Y. App. Div. 1st Dep't 2009.) Finally, since there is conflicting evidence regarding the tendering of the

security deposit, there is an issue of fact as to whether interest shall be payable upon the return of the security deposit. As such, the branch of the cross-motion seeking dismissal of plaintiff's claim for interest is also denied.

Furthermore, even if there was a valid settlement agreement in this case, defendant's obligation to return the security deposit and provide certain construction documents never became enforceable because agreed-upon conditions, were not met. "[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'. Greenfield v Philles Records, 98 NY2d 562, 569(2002)." Further, a condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises . See Merritt Hill Vineyards v Windy Hgts. Vineyard, 61 NY2d 106, 112-113 (1984).

Here, the settlement document contemplated the occurrence of the negotiation and execution of two additional agreements, the settlement agreement and the ground lease. Regarding the security deposit, the clear intent of the parties was that it was to be eliminated upon the completion of the settlement agreement. Similar intent is present regarding the construction documents. As such, it cannot be said that defendant breached its obligations by not returning the deposit or providing the documents to plaintiff because the settlement agreement has not been executed as of yet. Accordingly, were this Court to find the January 13, 2009 agreement to be valid and complete, plaintiff's motion would be denied since conditions precedent for defendant to have performed the subject obligations have not arisen. IDT Corp. v. Tyco Group, S.A.R.L., 2009 NY Slip Op 7481 (N.Y. Ct. of App. Oct. 22, 2009.)

Nevertheless, under the settlement agreement, the parties were required to negotiate in good faith the open issues of the January agreement. Despite the fact that the parties have negotiated various open terms on and off since January, issues remain. The parties are obligated to continue their negotiations and appear for the previously scheduled conference in Part 17, on March 16, 2010. To the extent any issues remain, they shall be discussed at the conference.

Accordingly, based on the above, the motion by plaintiff and the cross-motion by defendant are denied.

DATED: December 8, 2009

ORIN R. KITZES, J.S.C.