

Robinson v Jenkins

2010 NY Slip Op 30020(U)

January 7, 2010

Supreme Court, New York County

Docket Number: 107130/08

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL GEORGE FEINMAN PART 12

Justice

ROBINSON, Faye

- v -

JENKINS, Claudette

INDEX NO. 107130/00
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____.

Notice of Motion/Petition — Affidavits — Exhibits _____
Answering Affidavits — Exhibits (Memo) _____
Notice of Cross-Motion — Affidavits — Exhibits _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this motion

**MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

FILED
JAN - 8 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/7/2010

PAZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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 Preliminary Conf. _____ Compliance Conf. _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IAS PART 12

-----X

FAYE ROBINSON,
Petitioner,

Index No.: 107130/08
Mot. Seq. No. 003

- against -

CLAUDETTE JENKINS,
Respondent.
-----X

Papers reviewed on this motion for injunctive relief:

Papers:	Numbered
Order to show cause, affs., exhibits	1, 1a, 2, 3
Notice of cross motion	4
Movant's reply aff.	5
Cross-movant's reply aff.	6

Appearances: For Petitioner:
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FILED
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NEW YORK
COUNTY CLERK'S OFFICE

PAUL G. FEINMAN, J.:

This CPLR Article 75 proceeding arising out of an arbitration related to the ownership of residential real property by tenants-in-common. The matter was settled by way of a stipulation so-ordered by the court and filed with the August 20, 2008. The parties' agreement envisioned either a buy-out of one party's interest by the other, or a sale of the property to a third-party. To date, neither party has purchased the other's interest, and the property has not been sold to a third-party. Respondent moves by order to show cause for injunctive relief prohibiting petitioner from selling her interest in the property to anyone other than respondent. Petitioner cross-

[*3]
moves, for mandatory injunctive relief compelling the respondent to execute certain documents. Petitioner also seeks appointment of a referee to oversee the sale of the property. For the reasons set forth below, the motion is denied, and the cross-motion is granted in part and otherwise denied.

Factual and Procedural Background

On July 8, 1983, petitioner Faye Robinson and respondent Claudette Jenkins together purchased a residential building (the building) located at 432 West 154th St. in the County, City and State of New York. See Order to Show Cause, Jenkins Affidavit, ¶ 3. Robinson and Jenkins own the building as tenants-in-common, and, on April 29, 1987, they executed an agreement (the tenancy-in-common agreement) that delineated their respective rights and obligations. *Id.*, ¶ 4; Exhibit A. That agreement provides, in pertinent part, as follows:

4. In the event that either party desires to sell her one-half share [in the building], she must first offer said half to the other party at the fair market value of such share in accordance with one independent appraisal from a qualified real estate appraiser.

(a) in the event of such offer, the other party has thirty (30) days to accept or reject the option to purchase the offering party's half interest;

(b) if the offeree accepts the option to purchase, the closing of such purchase must take place within ninety (90) days following the date the offer was made;

(c) if the offeree rejects the option to purchase, then the offeror has a period of ninety (90) days following the rejection to find a bona fide purchaser for such one-half interest and the closing of such purchase must take place within sixty (60) days thereafter; in the event the offeror is unable to find a purchaser, then and in that event, the parties hereto agree to sell the entire premise as soon as possible, using all reasonable means to effectuate the sale.

Id.; Exhibit A at 2. The parties' relationship deteriorated, and the two found themselves

increasingly unable to share and manage the building in an amicable manner.

In May, 2008, Robinson commenced an arbitration proceeding against Jenkins pursuant to the terms of the tenancy-in-common agreement. *Id.*; Jenkins Affidavit ¶ 6. Robinson prevailed, and then commenced this action to confirm the arbitrator's award. On August 15, 2008, the parties executed, and this court so-ordered, a stipulation that settled (stipulation of settlement) this proceeding, and provided, in pertinent part, as follows:

5. [Robinson] established compliance with the [tenancy-in-common agreement], specifically, that she offered to sell the subject premises ... to [Jenkins], that she exerted good faith efforts to locate a bona fide purchaser for her one-half interest in the premises and that she is entitled to compel a sale of the entire premises pursuant to paragraph 4 (c) of the [tenancy-in-common agreement].

6. A sale of the entire premises shall occur as soon as possible and the parties shall use all reasonable means to effectuate the sale, including the retention of a real estate broker by the immediate execution of the broker's agreement offered by Douglas Elliman, ..., and to cooperate with reasonable requests to effectuate the sale of said premises, including execution of the contract of sale, and any other necessary transfer documents, and appearing when [and] where needed.

8. [Jenkins]'s claim for compensation from [Robinson] for care/maintenance and repair of the premises ... is hereby denied as there was no evidence of any agreement to pay for services or that such services were actually performed.

11. [Jenkins] shall comply with each and every provision of [this] award.

12. Judgment in favor of Petitioner [Robinson] and against Respondent [Jenkins] for the costs of this application shall be entered.

Id., ¶ 7; Exhibit B. To date, however, the building remains unsold.

Jenkins alleges that, on June 26, 2009, Robinson's attorney emailed her attorney to accept Jenkins' offer to purchase the building for \$550,000.00. *Id.*, ¶ 9; Exhibit C. That email states, in pertinent part, that Robinson's attorney would provide Jenkins' attorney with a standard contract

of sale, and would afford Jenkins 45 days to obtain a mortgage commitment. *Id.*; Exhibit C.

Jenkins alleges that Robinson's attorney never provided her with a contract of sale, and that she did, in fact, obtain a mortgage commitment for \$630,000.00 on July 31, 2009, within the 45 day period. *Id.*; Jenkins Affidavit, ¶¶ 10-11; Exhibit D. The mortgage commitment letter is unsigned, however, and expired of its own terms at the end of October 2009. Jenkins finally alleges that, on August 6, 2009, Robinson's attorney emailed her attorney to state that Robinson had accepted another buyer's offer for her one-half interest in the building for \$575,000.00, and that Robinson would not proceed with her sale to Jenkins. *Id.*, ¶ 12; Exhibit F.

For her part, Robinson alleges that Jenkins violated the August 15, 2008 stipulation of settlement by refusing the broker access to the building to show it to prospective purchasers, and by refusing to permit the broker to list the building for less than \$1.4 million – a price that Robinson claims is unreasonably high in light of the real estate downturn currently affecting New York City. *See* Notice of Cross Motion, Robinson Affidavit, ¶¶ 10-11. Robinson further alleges that the broker's agreement expired on April 30, 2009, and that Jenkins has unreasonably refused to sign an extension thereof. *Id.*, ¶ 12. Finally, Robinson alleges that Jenkins' assertions regarding the June 26, 2009 email between their respective attorneys are misleading, specifically because her attorney's initial email had required Jenkins to furnish a 10% deposit (in the amount of \$50,000.00) as a condition to Robinson's executing a standard contract of sale, which condition Jenkins refused to accept. *Id.*, ¶¶ 15-16. Robinson presents a copy of a subsequent email from her attorney, dated June 26, 2009, that stated that, unless Jenkins agreed to provide such a deposit, "there is no deal ... my client rejects [Jenkins]'s offer and the property must go back on the market." *Id.*; Exhibit 4. Robinson also presents copies of other email

correspondence between her counsel and Jenkins' attorneys (dated July 7 and 13, 2009, respectively) that indicate that Robinson was willing to forebear from taking legal action for a period of time upon the conditions that Jenkins could provide a mortgage pre-commitment in an amount sufficient to both cover the 10% deposit and pay off the building's outstanding \$100,000.00 mortgage (both amounts to be deducted at the time of sale so that Robinson would receive the full purchase price) and that Jenkins would sign an extension to the Douglas Elliman broker's agreement. *Id.*, ¶¶ 17-20; Exhibits 5, 6, 7. Robinson finally asserts that Jenkins failed to meet either of these conditions. *Id.*

Jenkins submitted the instant order to show cause seeking a preliminary injunction prohibiting Robinson from selling her one-half interest in the building to anyone but Jenkins, and requiring Robinson to furnish Jenkins with a contract of sale as delineated in the June 26, 2009 email correspondence between counsel for the parties. At the time it signed the order to show cause, the court issued a temporary restraining order, valid until the next court appearance, staying Robinson from entering into a contract related to the sale of or transferring title to her half of the property at issue.

Robinson cross-moved for a injunctive relief compelling Jenkins to sign an extension of the now expired real estate broker's agreement, with a modification that the broker be permitted to list the building at a sales price of no more than \$1.15 million, or, in the alternative, to appoint a referee¹ to oversee the sale of the building pursuant to the terms of the August 15, 2008 stipulation of settlement. At the time of oral argument, the parties consented to a continuation of

¹ Robinson's original cross-motion requested the appointment of a receiver, however she acknowledged this as an error in her reply papers, and requested instead that the court appoint a referee. *See* Carponter Reply Affirmation, ¶ 11.

the temporary restraining order while the instant motion and cross-motion were *sub judice*.

Discussion

Pursuant to CPLR 6301:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

The Appellate Division, First Department has consistently held that, “[i]n order to obtain a preliminary injunction, the moving party must demonstrate: (1) likelihood of success on the merits; (2) irreparable injury absent the injunction; and (3) a balancing of the equities in its favor.” *35 New York City Police Officers v City of New York*, 34 AD3d 392, 394 (1st Dept 2006), citing *W. T. Grant Co. v. Srogi*, 52 NY2d 496 (1981).

The Jenkins Motion

Applying the three-prong test for a preliminary injunction to the facts at bar, the court finds respondent Jenkins is not entitled to a preliminary injunction.

Jenkins first argues that, because the August 15, 2008 stipulation of settlement provides that “a sale of the entire premises shall occur as soon as possible[,] ... [t]herefore ... Robinson may not sell her half [interest in the building] to anyone other than [Jenkins] as the entire premises must be sold to the same person.” *See* Order to Show Cause, O’Donnell Affirmation, ¶ 3. However, a simple perusal of the stipulation of settlement reveals that it is devoid of language

to this effect. Rather, the stipulation of settlement in fact lays out a specific procedure for the sale of the building to a third party in the event that Robinson and Jenkins are unable to consummate a sale between themselves. Thus, Jenkins is unable to demonstrate a likelihood that she will prevail on the merits of this argument, and the court rejects it as insufficient to sustain Jenkins' application for a preliminary injunction.

Jenkins next argues that the June 26, 2009 emails between the parties' respective attorneys disclose the existence of a binding contract for Robinson to sell Jenkins her interest in the building. *Id.*, ¶ 4. She specifically asserts that "the email was clear," "the offer was accepted," and "a contract would be prepared." *Id.* Robinson denies this, and argues that there was no meeting of the minds between the parties. *See* Notice of Cross-Motion, Carponter Affirmation, ¶ 3. In support, Robinson offers her attorney's emailed rejection of Jenkins' purchase offer on the ground that Jenkins had refused to comply with Robinson's condition that Jenkins deposit 10% of the proposed purchase price in escrow as a condition to the signing of a contract of sale. *Id.*, ¶¶ 15-16; Exhibit 4. Robinson also offers the subsequent emails from her attorney that required Jenkins to obtain a mortgage pre-commitment letter and to sign an extension and modification of the broker's agreement, as well as her assertions that Jenkins failed to comply with either of these conditions. *Id.*, ¶¶ 17-20; Exhibits 5, 6, 7.

In her reply papers, Jenkins argues that the collected email correspondence does disclose a meeting of the minds, because Robinson gave her "clear, unambiguous and unequivocal" assent to Jenkins' proposed contract. *See* Calabro Reply Affirmation, ¶¶ 6-33. Robinson counters that this interpretation is untenable, because the correspondence instead discloses that the parties never agreed on several essential elements of a contract for the purchase or sale of real property;

namely, the provision and/or amount of a deposit, the provision of a mortgage commitment letter and the existence, enforceability and/or duration of a broker's agreement. See Carponter Reply Affirmation, ¶¶ 4-11. After careful consideration, the court is persuaded by Robinson's reading of the emails that they do not constitute a binding contract for the sale of the half interest in the building.

As the Court of Appeals observed in *Express Industries and Terminal Corp. v. New York State Dept. of Transp.*, 93 NY2d 584, 589 (1999):

To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. This requirement assures that the judiciary can give teeth to the parties' mutually agreed terms and conditions when one party seeks to uphold them against the other. Generally, courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract.

The first step then is to determine whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract. [internal citations omitted]

In the context of contracts for the sale of real property, the Appellate Division, Second Department, has noted that:

The "essential terms" which should be set forth for the writing to be enforceable "include those terms customarily encountered in transactions of this nature" ..., such as the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, adjustments for taxes and utilities, etc. [internal citations omitted].

Nesbitt v Penalver, 40 AD3d 596, 598 (2d Dept 2007). Here, the court cannot find from the evidence presented that the parties ever reached a meeting of the minds with respect to several of the essential terms; specifically, those governing payment, financing, risk of loss and price adjustments. Rather, the subject emails appear to bear out Robinson's contention that she offered

two terms regarding the financing of the sale of her interest in the building - i.e., that Jenkins make a 10% down payment on the price or, in the alternative, that Jenkins present a mortgage pre-commitment letter in an amount sufficient to cover the amount of said down payment - and that Jenkins refused both of these terms. Further, the subject emails are completely silent with respect to any proposed terms of payment, risk of loss and price adjustments. Under these circumstances, the court must reject Jenkins' contention that Robinson made an unequivocal acceptance of her offer, and, therefore, cannot find that there was a meeting of the minds between the parties sufficient to have created an enforceable contract between them. As a result, the court also cannot find that Jenkins is likely to prevail on the merits of her second argument, and must reject it, too, as insufficient to sustain Jenkins' application for a preliminary injunction. Jenkins raises no further arguments in her moving papers. Accordingly, the court finds that Jenkins' application for an order to show cause granting her a preliminary injunction should be denied.

Robinson's Cross-Motion

In her cross-motion, Robinson requests a preliminary injunction to either require Jenkins to sign an extension of the real estate broker's agreement, with a modification that permits the broker to list the building at a sales price of no more than \$1.15 million, or, in the alternative, to appoint a referee to oversee the sale of the building. As previously mentioned, "[i]n order to obtain a preliminary injunction, the moving party must demonstrate: (1) likelihood of success on the merits; (2) irreparable injury absent the injunction; and (3) a balancing of the equities in its favor." *35 New York City Police Officers v City of New York*, 34 AD3d at 394. Here, although Robinson's moving papers did not address each of the foregoing elements with great specificity, the court nonetheless finds that she is entitled to some of the relief requested.

With respect to the likelihood of success on the merits, the court notes the only fair reading of the stipulation of settlement of this proceeding is that Petitioner Robinson was the prevailing party in both the underlying arbitration and this proceeding. Indeed, the terms of the stipulation of settlement provided that the underlying award was confirmed by agreement of the parties, and Petitioner Robinson was awarded a “[j]udgment in [her] favor ... and against the Respondent [Jenkins] for the costs of this application.” Stipulation of Settlement, ¶¶ 2 and 12, Exhibit B to Jenkins Aff. The stipulation of settlement specifically required Jenkins to execute a broker’s agreement, and to “cooperate with reasonable requests to effectuate the sale of [the subject] premises.” See Notice of Cross-Motion, Carponter Affirmation, ¶¶ 9-10. Since the court has already so-ordered the stipulation of settlement that contains the foregoing requirements, there is no question that Robinson has been deemed to prevail on the merits of her claim that it is reasonable to request that Jenkins execute an extension of the broker’s agreement in order to effectuate the sale of the building. Indeed, failure to comply with the so-ordered stipulation of settlement could result in Robinson seeking to have the court punish Robinson for contempt.

Jenkins’ only responses to this argument are her contradictory claims that she “has not obstructed all efforts by [Robinson and the broker] to sell the premises,” but that she is nonetheless “unwilling to move forward with ... the broker” because he has “a condescending attitude.” See Calabro Reply Affirmation, ¶¶ 40-42. These conclusory claims fail to raise a bar to Robinson’s right to relief and she has clearly established a likelihood of success, because she has already succeeded in this proceeding to be awarded judgment in her favor on consent.

With respect to irreparable injury, Robinson notes that she has been “completely stymied

in her efforts to extricate herself from involvement with [Jenkins],” and that “by refusing to permit the broker to reduce the asking price, and to agree to accept an amount lower than \$1.4 million for the property, [Jenkins] has effectively prevented the sale of the property, and has, thus, wholly violated the terms of the so-ordered settlement agreement.” *See* Notice of Cross Motion, Carponter Affirmation, ¶ 19; Carponter Reply Affirmation, ¶ 8. Jenkins responds that she “does not acknowledge the market value of the premises to be \$1.1 million and [that Robinson] has failed to submit and admissible evidence to support her conclusion that the premises is worth \$1.1 million.” *See* Calabro Reply Affirmation, ¶ 51. Robinson replies first, that the irreparable injury is in Jenkins’ continued frustration of the intent of the August 2008 stipulation of settlement, and second, by offering an analysis by the broker of comparable properties that indicates that the value of the building has, indeed, suffered a decline and that it should, therefore, be priced differently. *See* Carponter Reply Affirmation, ¶ 11; Exhibit 8. The court finds that Robinson’s first argument is persuasive, since it appears that continued judicial intervention has indeed proven necessary in order to ensure that Robinson is able to exercise her right to enforce the sale of the building. Thus, the court finds that Robinson has established the second element of her claim for injunctive relief, irreparable injury.

With respect to the balancing of the equities, Robinson asserts that Jenkins has engaged in “a long series of actions ... designed to prevent [Robinson] from extricating herself from a business relationship which has long ago soured,” and that she has been obliged, as her own cost, to seek both arbitration and judicial intervention from 2004 to the present in order to enforce her contractual rights under the tenancy-in-common agreement. *See* Notice of Cross-Motion, Carponter Affirmation, ¶¶ 4-10. Jenkins does not raise any argument regarding the parties’

respective equities in her reply papers. The court notes that Robinson has indeed endured a protracted period of time in her effort to exercise her contractually mandated right to sell the building, and also that she has evidently incurred no small amount of legal fees. As for Jenkins, the court notes that the mortgage pre-commitment letter for \$630,000.00 that she obtained is insufficient to pay off the building's \$100,000.00 mortgage, give Robinson the agreed upon purchase price of \$550,000.00, compensate the broker and take care of the necessary incidental fees of the proposed sale. The court cannot find that it constitutes a good faith effort by Jenkins to purchase Robinson's interest. Under these circumstances, the court finds that the equities of this proceeding balance overwhelmingly in Robinson's favor, and also finds that she has established the third element of her claim for injunctive relief. Accordingly, the court finds that Robinson's cross-motion should be granted to the extent that Jenkins be direct to execute a modified extension of the broker's agreement consistent with the terms and intent of the August 15, 2008 stipulation of settlement.

The second branch of Robinson's cross-motion seeks the appointment of a referee to oversee the sale of the building. The stipulation of settlement of this special proceeding does not contain any authority for appointment of a referee. A review of the County Clerk Minutes reveals that it does not appear that a judgment has yet been entered pursuant to paragraph 12 of the stipulation of settlement. It is unclear from the papers in support of the cross-motion, which are wholly devoid of a single citation to a case or statute, what would be the legal authority for such an action. Thus, this branch of the cross-motion is denied without prejudice to renew in the event respondent Jenkins fails to abide by the court's order to comply with the stipulation of settlement. That agreement, as all contracts, has an implicit agreement that the parties will carry

out their end of the bargain in good faith. The expects the parties to honor their word and is hopeful that it will not soon receive a motion to punish either litigant for contempt for failure to abide by the so-ordered stipulation of settlement or the instant order.

Accordingly, it is

ORDERED that motion by Respondent Claudette Jenkins for injunctive relief is denied *in toto* and the temporary restraining order dissolved; and it is further

ORDERED that the cross-motion of Petitioner Faye Robinson is granted to the extent that Respondent Claudette Jenkins is directed to execute a modified extension of the broker's agreement consistent with the terms and intent of the August 15, 2008 stipulation of settlement within 15 (fifteen) days of service of a copy of this decision and order together with notice of its entry and is otherwise denied without prejudice to renewal in the event of Respondent Jenkins' continued failure to abide by the agreement.

Dated: January 7, 2010
New York, New York


J.S.C.

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