

Yusupov v 63-95 Austin Owners Corp.

2010 NY Slip Op 30601(U)

March 1, 2010

Supreme Court, Queens County

Docket Number: 18712/08

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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ZHORIK YUSUPOV,

Plaintiff,

Index No. 18712/08
Motion Date: 2/24/10
Motion Cal. No. 63

-against-

63-95 AUSTIN OWNERS CORP., JERRY
PELLIGRINO, TERRY PATEREK, LINDA
KOEVARY, AND I. SOCKWELL-M-LIVINGSTON,

Defendants.

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The following papers numbered 1 to 14 read on this motion by plaintiff for orders to enforce the March 29, 2008 Stipulation entered into between plaintiff and defendants, to vacate the Note of Issue to permit discovery, and for an order pursuant to CPLR 3212 for summary judgment in plaintiff's favor on the second and fourth causes of action; and cross-motion by defendants for an order pursuant to 22 NYCRR§ 130-1.1 imposing sanctions on plaintiff and/or his counsel for making a frivolous motion.

	PAPERS	_____
	NUMBERED	
Notice of Motion-Affirmation-Exhibits.....	1- 4	
Notice of Cross-Motion-Affirmation-Exhibits.....	5-7	
Memorandum of Law	8	
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Memorandum of Law	14	

Upon the foregoing papers, it is ordered that the motion by plaintiff for orders to enforce the March 29, 2008 Stipulation entered into between plaintiff and defendants, to vacate the Note of Issue to permit discovery, and for an order pursuant to CPLR 3212 for summary judgment in plaintiff's favor on the second and fourth causes of action; and cross-motion by defendants for an order pursuant to 22 NYCRR§ 130-1.1 imposing sanctions on plaintiff and/or his counsel are denied, for the following reasons:

This action stems from plaintiff's ownership of stock and the proprietary lease appurtenant to the apartment located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y. Due to plaintiff's unauthorized subletting of this apartment, defendant **63-95 AUSTIN OWNERS CORP**, the Co-op, terminated his lease effective January 31, 2005 and then commenced a holdover proceeding in the Housing Court. On March 16, 2005, this proceeding was resolved by stipulation and a final judgment of possession was entered in favor of the Co-op, with a warrant of eviction to issue immediately. This warrant was stayed until July 31, 2005, if

plaintiff was to cease any illegal sublets, become current on the payment of maintenance, and list the apartment for sale with a broker at a reasonable market price. The term for plaintiff to find a purchaser for the apartment was extended for over two years and during that time, plaintiff introduced applicants to the Co-op board. None were accepted by the Board.

After this two year period had ended, the Co-op board executed on the warrant of eviction and evicted plaintiff from the subject apartment. In response, plaintiff commenced the action under Index number 30205/07. The Co-op began the necessary steps to foreclose on the shares of the apartment by public auction and on January 15, 2008, the sale took place. The Co-op was the purchaser of the apartment, at a sale price of \$95,000.00.

On March 19, 2008, at this Court's motion calendar call for an application by plaintiff to void the foreclosure sale of the subject apartment, the parties entered into a stipulation, wherein the parties agreed to the following:

1. Jointly place the apartment "on market to be sold to a bona fide purchaser through a broker to be mutually agreed upon, within 14 days";
2. " All proceeds from sale (less transfer taxes and broker's fees) to be placed in escrow pending determination of expenses as discussed below;
3. "Defendant will provide plaintiff with proof of all alleged expenses within 30 days (of stip date);
4. "Plaintiff reserves right to object to any alleged expenses"
5. "If parties cannot mutually agree on amount of defendant's expenses, then parties agree to submit matter to Court for an accounting;
6. "Either upon mutual agreement or court order, net proceeds of sale minus defendant's expenses shall belong to plaintiff.";
7. "Board of defendant shall not unreasonably withhold consent to approval of prospective purchasers. However, defendant board does not waive any of its rights of approval under N.Y. Law."
8. "Parties agree that plaintiff's current attorney will represent plaintiff in sale of unit."
9. "All parties agree that they will act in good faith and expeditiously [sic] to execute all necessary documents for the sale of the unit."

On April 16, 2008, plaintiff's application was fully submitted for this Court's decision and on April 22, 2008, the application was denied. The Court found that the application was academic since the Stipulation, dated March 19, 2008, resolved all the issues presented in this application. Thereafter, plaintiff brought the instant action to, *inter alia*, enforce the terms of the March Stipulation and for money damages. In an Order, dated September 29, 2008, this Court denied plaintiff's application for an order enjoining defendant 63-95 AUSTIN OWNERS CORP from transferring, selling renting or encumbering the property located at

63-95 Austin Street, Apt 5C, Rego Park, N.Y.; enjoining defendant 63-95 AUSTIN OWNERS CORP from transferring, selling renting or encumbering any proceeds received from the sale or rental of the property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y.; compelling defendant 63-95 AUSTIN OWNERS CORP to issue an accounting of monies allegedly due and owing from plaintiff for maintenance and other charge from such defendant; compelling defendant 63-95 AUSTIN OWNERS CORP to issue an accounting of monies accepted from the sale of property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y.; and permitting plaintiff access to the property located at 63-95 Austin Street, Apt 5C, Rego Park, N.Y. for the limited purpose of inspection and removing any personal property from this location. This Court found plaintiff's submissions had not established the necessary elements for obtaining the requested relief, however, the Court rejected defendants' arguments and found that the stipulation was valid and thus enforceable. This Court ordered the parties to adhere to the terms of the stipulation, dated March 19, 2008, and adjust the time frames set forth in the stipulation and use September 29, 2008 in place of the stipulation date. Finally, this Court resolved the branches of the motion seeking an accounting and various discovery by ordering the parties to adhere to the related terms in the stipulation.

Plaintiff now makes the instant motion claiming that defendants have failed to adhere to the terms of the March 29, 2008 Stipulation, and he also seeks summary judgment. Defendants have opposed this motion and have cross-moved for an Order sanctioning plaintiff for making a frivolous motion. Plaintiff opposes this cross-motion.

The branch of plaintiff's motion to enforce the Stipulation is denied. Plaintiff claims defendants have breached the explicit terms of the Stipulation and breached the implied covenant of good faith and fair dealing contained therein. Plaintiff claims defendants have taken actions that prevent the sale fo the subject co-op apartment by not allowing plaintiff to participate in choosing a real estate agent, sign the listing agreement, provide input into the listing price, communicate with the listing agent, and to have only three days notice of any offer made for the apartment without a right to object to the sale. Plaintiff has submitted, *inter alia*, his affidavit and various correspondence between the parties to support his claim.

In opposition to this branch of the plaintiff's motion, defendants have submitted affidavits of Russell S. Jamison, defendant 63-95 AUSTIN OWNERS CORP's attorney, Gerald Pellegrino, 63-95 AUSTIN OWNERS CORP's Board of Directors President, and correspondence between the parties attorneys. This evidence shows that, on October 6, 2008, plaintiff, by his counsel, proposed a real estate broker with which to list the subject apartment, and defendants did not respond until they November 7, 2008, when they informed plaintiff of the their choice of real estate broker, a Mr. Warren Fink, of the Co-op Connection. Thereafter, counsel for Plaintiff contacted Mr. Fink and agreed to use his associate, Eileen Massone, provided that the listing price she suggested after visiting the Apartment was

acceptable. Ms. Massone thereafter prepared a listing agreement, which initially was executed by Plaintiff as owner. Since the Co-op purchased the Apartment at auction on January 15, 2008 the sole owner of the Apartment is the Co-op. This position was relayed to counsel for Plaintiff, and he was also advised that plaintiff cannot be listed as an owner, but otherwise, he may execute the listing agreement.

Correspondence also indicates that the Co-op agreed to advise Plaintiff at least three days before entering into a contract of sale, as well as the contracted-for price. This was to give plaintiff an opportunity to do whatever he felt was necessary if he found the accepted offer to be objectionable. Plaintiff did not indicate any disagreement with this provision until the making of the instant motion. On January 13, 2009, plaintiff's counsel was informed that the Co-op determined to lower the listing price from \$139,000.00 to \$124,000.00 based upon lack of interest at the then-current listed price and the fact that a similar apartment in the same building, which was listed at \$124,000.00, recently had sold. Plaintiff failed to indicate to defendants any disagreement with this reduction in price. Plaintiff's counsel also agreed with the Co-op's suggestion, made by its managing agent, that improvements be made to the apartment in order to make it more attractive to prospective purchasers. After making these improvements, the Co-op received and accepted an offer to purchase the Apartment for \$118,000.00, which offer and acceptance was conveyed to plaintiff. Plaintiff did not indicate an objection to this proposed sale. However, the potential buyer backed out of the deal, and this was related to plaintiff. On May 1, 2009, defendant's counsel informed plaintiff that the Co-op had received and accepted an offer to purchase the Apartment for \$112,000.00. Plaintiff did not indicate an objection to this proposed. On May 27, 2009, plaintiff was informed that a contract had been signed, but that an application had not been received or an interview scheduled. Two months later, plaintiff's counsel asked to see a copy of the contract of sale and was provided with a redacted copy of the contract the very next day, July 28, 2009. In early September, the Board formally rejected the application of the prospective purchaser, on purely financial grounds. As set forth more fully in the accompanying affidavit of Martin Marks, there was a change in the financial position of the prospective purchaser between the time that the application was submitted and the time that the management office conducted its investigation. The prospective purchaser was given the opportunity to improve the application, but the documents submitted did not warrant reconsideration. Plaintiff was informed of this rejection on his own, and his counsel wrote to defendants' counsel to confirm "outstanding costs to the coop which [his] client allegedly owes." In response, plaintiff's counsel was advised that the claimed fees and costs remained the same as what was originally submitted to him by prior counsel. Plaintiff was sent confirmation of the basis for the rejection of the second prospective purchaser in an email dated October 7, 2009.

Plaintiff does not refute any of the evidence submitted by defendants. Based on the

above, the Court finds that defendants have not breached any portion of the March 29, 2008 stipulation. Accordingly, the branch of the motion by plaintiff seeking to enforce the Stipulation is denied. Since there has been no breach of the Stipulation, there is no basis to grant any of the other branches of plaintiff's motion. Specifically, there is no basis to vacate the Note of Issue since the motion was made more than twenty days after its filing and no good cause for the delay has been shown. In any event, based on defendants adhering to the Stipulation, no discovery is needed or outstanding. The summary judgment motion is denied since it is based on there being a breach of the agreement by defendants and no such breach has been shown.

The cross-motion by defendants for an order pursuant to 22 NYCRR§ 130-1.1 imposing sanctions on plaintiff and/or his counsel for making this frivolous motion is denied. At this time, the Court does not find this motion to be devoid of merit. While it does seem plaintiff mis-characterizes or fails to understand the import of the correspondence between the parties and the actions taken by defendants, sanctions are not appropriate at this time. However, plaintiff is precluded from making any additional motions in this action without first obtaining permission of this Court and partaking in a conference conducted by the Court with defendants.

Dated: March 1, 2010

ORIN R. KITZES, J.S.C.