

Milan Assoc., L.P. v 124 W. 23rd St., L.L.C

2010 NY Slip Op 30858(U)

April 14, 2010

Supreme Court, New York County

Docket Number: 101711/2009

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Justice

Index Number : 101711/2009

MILAN ASSOCIATES, L.P.

vs.

124 WEST 23RD STREET, LLC

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. 101711/2009

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2,3
4,5

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

FILED

APR 12 2010

NEW YORK
COUNTY CLERKS OFFICE

~~MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.~~

~~CC~~ CC 6/2/2010 2:15 pm

The parties are reminded that Part 12 is a presumptive e-filing part & that this action should be converted to e-filing before the 6/10 conference.

Dated: April 14, 2010 3:38 PM

Paul G. Feinman

J.S.C.

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):

9-15-09

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

-----X
THE MILAN ASSOCIATES, L.P.,
Plaintiff,

Index No. 101711//2009
Mot. Seq. No. 002

- against -

DECISION AND ORDER

124 WEST 23rd STREET, L.L.C., KEVIN J. VERNICK,
and HERZFELD & RUBIN, P.C.,
Defendants.

-----X
124 WEST 23rd STREET, L.L.C.,
Third-Party Plaintiff,

Index No. 590397/2009

- against -

FRANPEARL EQUITIES CORP. and ARTHUR
MINEROF,
Third-Party Defendants.

-----X
For Third-Party Plaintiff:
Herrick, Feinstein LLP
By: Arthur G. Jakoby, Esq.
Two Park Avenue
New York, NY 10016
(212) 592-1400

For Third-Party Defendants:
Kucker & Bruh, LLP
By: Patrick K. Munson, Esq.
747 Third Avenue
New York, NY 10017
(212) 869-5030

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APR 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion to dismiss:

Papers	Document Number
Notice of Motion, Annexed Affidavits, and Memo of Law in Support	1
Affidavit in Opposition	2
Memo of Law in Opposition	3
Reply Affirmation in Support	4
Reply Memo of Law in Support	5

PAUL G. FEINMAN, J.:

Third-party defendants Franpearl Equities Corp. and Arthur Minerof move to dismiss the third-party complaint pursuant to CPLR 3211 (a) (1) and (7). For the reasons discussed below, the motion is denied in part and granted in part.

Background

In May 2007, Franpearl entered into a contract to sell real property located at 124-126 West 23rd Street, New York County to Anbau Enterprises, Inc. (Not of Mot., Ex. A). Arthur Minerof, President of Franpearl, executed the contract. The contract's rider provided that the seller shall convey "an additional 7,120 square feet of zoning floor area [which] can be transferred from the zoning lot created from Tax lots 28, 54, and 57" (Not. of Mot., Ex. A). According to third-party plaintiff 124 West 23rd Street, L.L.C., the additional 7,120 square feet refer to certain development rights associated with the premises located at 118-122 West 23rd Street, which is owned by Milan Associates, L.P. (Compl. ¶¶ 7, 8). Minerof is also the President of Artlaw Ltd., which is Milan's General Partner (Compl. ¶¶ 30-31). The closing was held in September 2008; a deed transferring the premises from Franpearl to third-party plaintiff was executed by Minerof and notarized by Kevin J. Vernick, Esq. of Herzfeld & Rubin, P.C., who apparently represented Anbau at the closing (Not. of Mot., Ex. B).¹

Milan then commenced this action seeking to have two documents removed from the record of the Office of the City Register. The documents are a Zoning Agreement and a Zoning Declaration which seem to convey Milan's development rights to the third-party plaintiff. Milan alleges that those documents, which purport to bear Minerof's signature, were forged; the documents were notarized by Vernick (Compl. ¶¶ 10-14, 40-42, 55-63).²

Third-party plaintiff then filed a third-party summons and complaint against Franpearl

¹ Anbau assigned its rights under the contract to third-party plaintiff (Glascocock Aff. ¶ 8; Compl. ¶ 21; Third-party Compl. ¶ 11; Memo of Law in Opp., at 1 n 1).

² The documents purport to bear Minerof's signature in his capacity as President of Artlaw Ltd., which is Milan's General Partner (Compl. ¶¶ 30-31).

and Minerof. It alleges that contract obliged Franpearl and Minerof to ensure that the development rights were conveyed to third-party plaintiff (Third-party Compl. ¶ 18). The third-party complaint states two causes of action. The first is for breach of contract, alleging that Franpearl and Minerof breached by “refus[ing] to ensure that the Development Rights [we]re conveyed to [third-party plaintiff] and have refused to acknowledge the validity of the Agreement and Declaration or in the alternative re-execute the Agreement and Declaration” (Third-Party Compl. ¶ 25). The second cause of action seeks a declaration that: (1) Minerof and Franpearl defaulted under the [Franpearl’s] contract [with Anbau]; (2) third-party plaintiff is entitled to the development rights; and (3) Minerof must acknowledge the validity of the Agreement and Declaration or re-execute the Agreement and Declaration conveying the Development Rights to third-party plaintiff creating one single zoning lot (Third-party Compl. ¶¶ 30-32).

Analysis

Franpearl and Mineroff move to dismiss on two grounds— failure to state a cause of action and documentary evidence. In the context of a motion to dismiss under 3211 (a) (7), the court must “determine only whether the facts alleged fit within any cognizable legal theory” (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009]). “It is axiomatic that . . . the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every possible favorable inference” (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 458 [1st Dept 2009]). “The test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be *reasonably implied from its statements*, a cause of action can be sustained” (*Ambassador Factors v Kandel & Co.*,

215 AD2d 305, 306 [1st Dept 1995] [emphasis added], quoting *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]).

To state a claim for breach of contract, a plaintiff must allege that: (1) the parties entered into a valid agreement; (2) plaintiff performed; (3) defendant failed to perform; and (4) damages resulted (*see Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303 [1st Dept 2009]; PJI 4:1, Comment, Elements of Breach of Contract).

Here, the third-party complaint alleges the following: (1) Franpearl entered into a contract with Anbau for the conveyance of the real property as well as “certain development rights attached to the property located at 118-122 West 23rd Street” (Third-party Compl. ¶ 6); (2) Anbau’s rights were assigned to third-party plaintiff (Third-party Compl. ¶ 11; Memo of Law in Opp., at 1 n 1); (3) Milan is the owner of the development rights (Third-party Compl. ¶¶ 12, 14); (4) Milan is “controlled by Minerof” (Third-party Compl. ¶ 14); (5) “Franpearl and Minerof were obligated to ensure that the Development Rights were conveyed to 124 West 23rd” (Third-party Compl. ¶ 18); Third-party plaintiff performed by tendering the purchase price (Third-party Compl. ¶ 14); (6) Franpearl and Minerof breached by refusing to ensure that the development rights were conveyed to third-party plaintiff (Third-party Compl. ¶ 25); and (7) Franpearl and Minerof’s conduct caused third-party plaintiff to suffer damages exceeding \$25,750,000.00 (Third-party Compl. ¶ 26). Thus, third-party plaintiff has clearly stated a claim for breach of contract as against Franpearl and the motion to dismiss is denied to that extent.

However, the complaint must be dismissed in its entirety as against Minerof personally. Third-party plaintiffs have not alleged that the corporate veil should be pierced, nor do they dispute that Mineroff was not a party to the contract and only executed the contract in his

* 6]

capacity as Franpearl's president, which the face of the contract plainly demonstrates (Not. of Mot., Ex. A). Thus, the third-party complaint fails to state a cause of action as against Minerof and the motion is granted as against him.

As against Franpearl, third-party defendants are also not entitled to dismissal under CPLR 3211 (a) (1), which is only warranted when "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]) and "utterly refutes plaintiff's factual allegations" (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]). Franpearl's merger doctrine defense is not necessarily meritorious as a matter of law because by no means does the documentary evidence demonstrate that the development rights were not collateral to the conveyance (*see Novelty Crystal Corp. v PSA Institutional Partners, L.P.*, 49 AD3d 113, 116 [2d Dept 2008]; *Barghout v Dweck*, 244 AD2d 190, 191 [1st Dept 1997]). Thus, this branch of the third-party defendants' motion is likewise denied. Accordingly, it is

ORDERED that the third-party defendants' motion to dismiss is granted to the extent that the Clerk of Court is directed to enter judgment on the third-party complaint dismissed it in the entirety as against third-party defendant Arthur Minerof only, and denied in all other respects; and it is further

ORDERED that the remainder of the third-party complaint is severed and continued as against third-party defendant Franpearl Equities Corp.; and it is further

ORDERED that third-party defendant *Franpearl Equities Corp.* shall serve a copy of this decision and order with proof of notice of its entry upon all parties, and the Clerk of Court (60 Centre Street, Basement), who shall enter judgment accordingly and upon the Clerk of Trial

Support (60 Centre Street, Rm 158); and it is further

ORDERED that the Clerk of Part 12 shall schedule this matter for a compliance conference regarding outstanding discovery for June 2, 2010 at 2:15 P.M.; and it is further

ORDERED that third-party defendant Franpearl Equities Corp. is directed to answer the third-party complaint within the time period set forth in CPLR 3211 (f).

This constitutes the decision and order of the court.

Dated: April 14, 2010 3:38 P.M.
New York, New York

Paul J. Feinman

J.S.C.

(101711_2009_002_gms(M2D_BOK).wpd)

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