

Courtview Owners Corp. v Courtview Holding, B.V.
2010 NY Slip Op 33552(U)
December 8, 2010
Sup Ct, Queens County
Docket Number: 6913/08
Judge: Robert L. Nahman
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE ROBERT L. NAHMAN**
Justice

IAS PART 16

COURTVIEW OWNERS CORP.,

INDEX NO. 6913/08

Plaintiff,

MOTION

DATE JULY 29, 2010

- against -

COURTVIEW HOLDING, B.V., ET AL,

MOTION

CAL. NO. 2

Defendants.

MOT. SEQ.

NUMBER 1

The following papers numbered 1 to 15 read on this motion by the plaintiff Courtview Owners Corp. for an order (1) granting summary judgment and declaring that the lease term in the Offering Plan to convert the subject property to cooperative ownership dated February 6, 1981 is controlling, and conforming the lease terms contained in the lease dated July 1, 1982 and memorandum of lease dated May 17, 2007 to the terms of the Offering Plan; (2) granting summary judgment on the second cause of action and entering a judgment of ejectment and restoring plaintiff to possession of the commercial space presently occupied by the defendants, issuing a writ of assistance, and awarding a money judgment for fair market use and occupancy from January 1, 2008 through the last date of defendants' occupancy; (3) granting summary judgment on the third cause of action for fraudulent misrepresentation and awarding damages; (4) granting summary judgment on the fourth cause of action and entering a judgment for reasonable attorney's fees; and (5) granting plaintiff interest, costs, and disbursements. Defendants Courtview Holding, B.V., and Courtview (USA) LLC, cross move for an order, inter alia, granting summary judgment dismissing the complaint and awarding attorney's fees and costs incurred in this action.

PAPERS
NUMBERED

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Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiff Courtview Owners Corp. is the owner and landlord of a cooperative apartment building located at 123-35 82nd Road, Kew Gardens, New York. The subject building includes commercial space consisting of five ground floor units. Defendant Courtview Holding, B.V., is a Netherlands Antilles corporation with an office located in New York County. Defendant Courtview (USA) LLC, a domestic liability company, is the successor-in-interest to Courtview Holding B.V. and the holder of the unsold shares as well as the tenant of the commercial space pursuant to the subject master lease.

On February 1, 1981 an Offering Plan to convert the property to cooperative ownership was filed with the New York State Department of Law. The Offering Plan was declared effective on April 2, 1982, and in accordance with the Offering Plan, the closing took place on July 1, 1982, at which time title to the property passed to the plaintiff. The original sponsor is identified in the Offering Plan as 123-35 82nd Corp., and the selling agent and managing agent was Omnia Properties. The Offering Plan states that 123-35 82nd Corp., is a subsidiary of Omnia Properties.

The Offering Plan, at page 34A, contains a provision entitled "COMMERCIAL LEASE" which provides as follows:

"On the Closing Date, the Apartment Corporation will enter into a lease with the Sponsor or Sponsor's designee (referred herein as 'the Commercial Tenant') pursuant to which there will be leased to the Commercial Tenant (subject to the rights of any Commercial Lessee under existing leases or tenancies), portions

of the first floor of the premises, portions of the basement and storage areas, which space is referred to as 'Commercial Space'. Copies of the lease with existing Commercial Leases are on file in the manner described in the Plan at Page 36."

The Offering Plan, at page 34A, further states as follows:

"The terms of the Commercial Lease will expire on December 31, 2007. The Commercial Tenant will have an option to renew the Commercial Lease for an additional fifteen (15) year term at the same basic rent during the initial term of the lease plus additional rent as hereinafter set forth. The Commercial Tenant may, at its sole option, at any time after making the Commercial Lease described herein, require the Apartment Corporation to execute a further lease or leases for any of the commercial space described herein so long as the terms of such lease or leases, when taken together, are equivalent to those which are set forth herein."

The offering plan further set forth rental terms the commercial lease and its subsequent renewals would be governed by, capping same at 20% of the gross income of the Apartment Corp., ensuring it could not be less than the actual operating expenses of the demised premises, and provided a rent escalation clause.

Page 35 of the Offering Plan additionally provides, in pertinent part, that "The Sponsor has entered into the Commercial Lease with the Apartment Corporation at this time because he did not believe he could get such favorable terms with the Apartment Corporation at a subsequent date. The Sponsor projects approximately \$80,000.00 as his maximum profit from the long term lease of the commercial space".

On July 1, 1982, the same date as the closing, the cooperative, Courtview Owners Corp., entered into a lease agreement with Courtview Holding, B.V., which provides in pertinent part as follows:

"[T]he Landlord intends to lease to the Tenant under this lease the store in the Building (the 'Commercial Premises'), all as is more particularly set forth in the Plan of Cooperative Organization entitled "Offering Plan-a Plan to Convert to Cooperative Ownership premises at 123-35 82nd Road, Kew Gardens, New York (the 'Plan'), subject the existing leases covering such spaces".

However, in variance to the offering plan, said commercial lease provides for a term commencing July 1, 1982 and ending on December 31, 2030, with an option to renew for two additional terms of twenty one (21) years each, commencing on January 1, 2031 and terminating on December 31, 2051, and commencing on January 1, 2051 and terminating on December 31, 2072.

The lease rental terms, although not identical to the offering plan, also provided that the rent would at no time be more than twenty (20%) percent of the gross income of the Apartment Corporation in any year, and gave tenant the right, without the landlord's consent, to assign or transfer the tenant's entire interest in the lease or to sublet all or any portion of the commercial premises.

The July 1, 1982 lease was executed by Nancy C. Guiman as president of Courtview Holding, B.V. and by Nancy C. Guiman, as Assistant Secretary of Courtview Owners Corp. and originally named as the tenant "Omnia Properties Inc." Omnia's name was typed over and replaced by Courtview Holding B.V. In 2005 Courtview Holding B.V. assigned the lease to Courtview (USA) LLC.

The next pertinent document pertaining to the commercial premises was not executed by plaintiff until over 20 years later on January 4, 2006. On this date, Susan Gardner, as president of plaintiff Courtview Owners Corp., executed a sworn statement on the cooperative's letterhead, which states as follows:

"Re: Master Lease Agreement

To Whom It May Concern:

Please be advised that the Agreement of Lease dated July 1, 1982 between Courtview Owners Corp., ('Landlord') and Courtview Holding, B.V. ('Tenant') remains as of this date in full force and effect."

More than one year later on May 17, 2007, Susan Gardner, as president of plaintiff Courtview Owners Corp. "Landlord", and Jeffrey M. Heidings, on behalf of defendant Courtview USA LLC, "Tenant", executed a Memorandum of Lease which states as follows:

"WHEREAS, Landlord has leased, demised, and let unto Tenant, and Tenant leased and accepted from Landlord, that certain parcel of land in the Borough and County of Queens, City of New York and State of New York, known as 124-30 to 36 Queens Boulevard, Kew Gardens, New York, 'the Demised Premises', pursuant to a certain lease dated July 1, 1982, by and between Landlord and Courtview Holding B.V., original tenant, and said lease having been assigned by Assignment and Assumption of Lease dated December 30, 2005 between Courtview Holding B.V., tenant-assignor to Courtview USA, LLC, tenant-assignee. . .

NOW, THEREFORE, Landlord, in consideration of the rents, covenants and agreements on the part of Tenant to be paid and performed, leases, lets and demises the Demised Premises to Tenant Assignee, all in accordance with the terms of the Lease.

1. This Memorandum of Lease is made upon all terms and conditions set forth in the Lease, all of which terms and conditions are made a part hereof.

2. The Lease commences on the 1st day of July 1982 and expires on December 31, 2072.

3. The Assignment and Assumption of Lease dated December 30, 2005 is validly recognized by the Landlord.

4. This Memorandum of Lease is to be recorded in the public records in order that third parties may have notice of existence of Lease.

5. All of the terms, conditions, provisions and covenants of the Lease and the Assignment and Assumption of Lease are incorporated in this Memorandum of Lease by reference as though written out at length herein, and the Lease and the Assignment and Assumption of Lease and this Memorandum of Lease shall be deemed to constitute a single instrument or document, provided that in the event of a conflict between this Memorandum of Lease and the Lease, and Assignment and Assumption of Lease, the terms and conditions of the Lease shall govern and nothing herein shall be construed to be a modification of or amendment to any of the terms and conditions of the Lease".

The Memorandum of Lease was filed with on the Office of the City Register on June 15, 2007. It is noted that Jeffrey M. Heidings is the president of Siren Management Corp., the agent for Courtview Holdings B.V. and Courtview (USA) LLC.

Sometime after the execution of the Memorandum of Lease, the cooperative informed the Courtview (USA) LLC that pursuant to the terms of the Offering Plan, the commercial lease expired on December 31, 2007. The tenant, however, asserted that the tenancy remained in effect pursuant to the July 1, 1982 lease.

Plaintiff Courtview Owners Corp. thereafter commenced the within action on March 18, 2008, alleging that the commercial lease termination date set forth in the Offering Plan is controlling, and that as the tenant did not exercise the option to renew, the lease expired on December 31, 2007. It is alleged that when Ms. Gardner, as president of the cooperative executed the Estoppel letter on January 4, 2006 and the Memorandum of the Lease dated May 17, 2007, she believed that the lease term set forth in these documents mirrored the lease term stated in the Offering Plan. It is alleged that defendants did not furnish Ms. Gardner with a copy of the July 1, 1982 lease at that time.

After this action was commenced, the sponsor or its then counsel sought to have the Attorney General approve an amendment to the Offering Plan. Linda Roots, an Assistant Attorney General, in a letter dated September 12, 2008, addressed to Charles Weiss, an attorney, stated that she had been informed that the cooperative's Board of Directors had "instituted an action against the sponsor with respect to its attempt to renew and extend the commercial lease beyond the period set forth in the original Offering Plan. As a result, Twenty-third amendment submitted by you on March 4, 2008 cannot be accepted for filing as Item 2 of the amendment would allow the lease to be renewed and extended by changing the disclosure in the Offering Plan after 27 years." Ms. Roots directed Mr. Weiss to submit for review a revised amendment, which deleted Item 2, and disclosed the nature and status of the within action, and to include any material additions or changes which should be disclosed to prospective purchasers. There is no evidence that any further amendments were submitted to the Attorney General's office.

Insofar as the case before the bar is concerned, plaintiff, in its first cause of action, seeks a declaration to the effect that the commercial lease termination date set forth in the Offering Plan is controlling, rather than the duration and renewal terms set forth in the July 1, 1982 lease, and seeks to conform the July 1, 1982 lease termination date to that of the Offering Plan, thereby deeming the lease term to have expired on December 31, 2007.

The second cause of action seeks an order of ejectment and a writ of assistance, restoring plaintiff to possession of the commercial space, along with a money judgment for use and occupancy beginning January 1, 2008 and ending on the last of day of defendants' occupation of said commercial space.

The third cause of action alleges Ms. Guiman, was a member of a sponsor dominated board, and purported to act on behalf of both the landlord and tenant, and signed a lease that contained terms contrary to that of the Offering Plan. It is further asserted that plaintiff only obtained a complete copy of the lease in 2006, and that defendants subsequently misrepresented terms the lease, estoppel letter and Memorandum of Lease, causing plaintiff to sustain damages. Plaintiff in its third cause of action seeks to recover a sum equal to the fair market value rent of the commercial space from January 1, 2008 to the date of judgment.

The fourth cause of action seeks to recover reasonable attorney's fees.

Defendants served an answer and interposed twenty three affirmative defenses and a counterclaim to recover reasonable attorney's fees.

As to plaintiff's first branch of its motion seeking declaratory judgment to the effect that the Offering Plan takes precedence over the July 1, 1982 lease and seeking to conform said lease to the terms of the Offering Plan, plaintiff alleges that it was not in possession of a complete copy of the July 1, 1982 lease until May 10, 2006, and thus was unaware of the fact that said lease contained a termination date of December 31, 2030, with two 21 year consecutive options to renew, which if exercised would provide for a termination date of December 31, 2072.

Defendants' in their answer preserved the affirmative defense of statute of limitations and now raise this defense in their cross motion both in opposition to the motion and to dismiss the complaint.

A declaratory judgment action is governed by the six-year catch-all statute of limitations set forth in CPLR §213(1), unless the nature of the underlying action reveals that the dispute could have been resolved through a specific action or proceeding for which there is a prescribed limitations period

(See, Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex., 87 NY2d 36, 41, [1995]; Solnick v Whalen, 49 NY2d 224, 229, [1980]; Walter v Starbird-Veltidi, ___ AD3d ___, 2010 NY Slip Op 8095, 2010 N.Y. App. Div. LEXIS 8343, [November 9, 2010]). Here, plaintiff asserts that it was not in possession of the July 1, 1982 lease until May 10, 2006, at which time it discovered that the July 1, 1982 lease expiration date differed from that stated in the Offering Plan. Therefore, plaintiff's cause of action for declaratory judgment action is timely.

Turning to the merits of plaintiff's motion for declaratory judgment, plaintiff contends that with respect to the termination date of the commercial lease, the Offering Plan controls, and seeks to conform the July 1, 1982 lease so that it terminated as of December 31, 2007. Defendants', in their cross motion, assert that the terms of the commercial lease are controlling and assert that the commercial lease remains in effect.

Following conversion to cooperative ownership, a cooperative corporation may challenge sweetheart agreements between the cooperative corporation and the sponsor, or sponsor related entities which are established in the offering plan, including long term leases for commercial space in the building. A cooperative corporation may not maintain a private right of action under the Martin Act (See, CPC International, Inc. v McKesson Corp., 70 NY2d 268, [1987]), but may proceed on the grounds of common law fraud or by utilizing the Federal Condominium and Cooperative Abuse Relief Act (15 USC § 3601 et seq). In this matter plaintiff has not asserted a claim under the federal statute, but relies on common law fraud and its associated claims for relief as stated above.

The court notes that although plaintiff makes reference to the Martin Act, they do not, as defendants claim, seek relief under the Martin Act. The purpose of the Martin Act is to protect the public and prevent fraud in the offering of securities and in that regard General Business Law § 352-e (1) (b) prescribes filing requirements for real estate syndication offerings, including cooperative conversion plans, 'as will afford potential investors, purchasers and participants an adequate basis upon which to found their judgment and shall not omit any material fact or contain any untrue statement of a material fact'.

The offering statement is filed for informational purposes only, in order to provide an adequate factual basis upon which potential investors, prospective purchasers and participants can intelligently make their choice and found their judgment. Implicit in the statutory mandate is a legal obligation on the sponsor of a cooperative conversion plan to accurately and thoroughly disclose the potential risks involved (See, Matter of Whalen v Lefkowitz, 36 NY2d 75; Matter of Greenthal & Co. v Lefkowitz, 32 NY2d 457; Apfelberg v East 56th Plaza, 78 AD2d 606, appeal dismissed 54 NY2d 680).” (Phoenix Tenants Ass’n v 6465 Realty Co., 119 AD2d 427, 429 [1986]).

The Offering Plan is binding on the cooperative as a contract (See, Likokoas v 200 E. 36th St. Corp., 48 AD3d 245, [2008]). While there have been 22 amendments to the Offering Plan which have been approved by the Attorney General, which are relied upon by investors and prospective purchasers, the July 1, 1982 lease agreement cannot serve as a substitute for an approved amendment to the Offering Plan.

“In the proper circumstances, mutual mistake or fraud may furnish the basis for reforming a written agreement. Indeed, the concepts are closely related. In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement (See, Harris v Uhlendorf, 24 NY2d 463; Hart v Blabey, 287 NY 257). In a case of fraud, the parties have reached agreement and, unknown to one party but known to the other (who has misled the first), the subsequent writing does not properly express that agreement (See, Barash v Pennsylvania Term. Real Estate Corp., 26 NY2d 77, 86; Welles v Yates, 44 NY 525).” (Chimart Associates v Paul, 66 NY2d 570, 573-575 [1986]).

It is clear that the sponsor’s Offering Plan contains a 25 year lease term with a single option to renew for a period of 15 years, while the July 1, 1982 lease contains a 48 year lease term, with two 21 year options to renew. The sponsor or its counsel drafted the Offering Plan and the July 1, 1982 lease, and certainly was aware of the fact that said lease did not conform to the terms of the Offering Plan.

There is a “heavy presumption that a deliberately prepared and executed written instrument [manifests] the true intention of the parties” (Backer Mgt. Corp. v Acme Quilting Co., 46 NY2d 211, 219, [1978]), and a correspondingly high order of evidence is required to overcome that presumption (Id., at pp

219-220. The proponent of reformation must "show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" (Backer Mgt. Corp. v Acme Quilting Co., at p 219, supra; Chimart Associates v Paul, supra).

However, the affidavit submitted by plaintiff's current president Carole Hausman is insufficient to establish that the longer lease term and the two options to renew set forth in the July 1, 1982 commercial lease was the product of mutual mistake.

With respect to fraud, Ms. Hausman does not state that Ms. Guiman concealed the terms of commercial lease from the members of the Board of Directors in 1982 or any time thereafter, or that she was not authorized to enter into the lease on behalf of the cooperative. No affidavit has been submitted by a person who was a member of the cooperative's board of directors in 1982 who has personal knowledge of the facts surrounding the execution of the lease. In addition, although plaintiff's counsel speculates as to Ms. Gardner's motives for executing the estoppel letter and Memorandum of Lease, no affidavit has been submitted by Ms. Gardner. Plaintiff's reliance on the audited financial statements prepared by its accountants after May 10, 2006 is misplaced, as plaintiff and its accountants should have known that the July 1, 1982 lease provided for a different termination date than that stated in the Offering Plan.

The court therefore finds that the evidence presented by plaintiff is insufficient to establish prima facie entitlement to relief as a matter of law on the first cause of action for declaratory judgment and the motion is denied.

Likewise, defendants papers do not establish, as a matter of law that the lease is controlling in the face of the issues of fact existing as to its execution. Accordingly, that branch of the cross motion must also be denied.

The second cause of action for ejectment and a writ of assistance is also timely. The statute of limitations to recover possession of real property is 10 years (CPLR §212 [a]). Thus, as plaintiff asserts that lease should have terminated on December 31, 2007, the second cause of action to recover possession of the commercial units is timely.

However, in light of the foregoing, those branches of plaintiff's motion for summary judgment on its second cause of action as well as plaintiff's fourth cause of action for attorney's fees are denied as plaintiff has not established it is entitled to possession of the subject premises and the consequential granting of the related relief.

Plaintiff in its third cause of action for fraudulent misrepresentation, alleges that the defendants acting through Ms. Guinan knew or should have known that the terms reflected in the July 1, 1982 lease extended the term of the lease for 23 years more than that provided in the Offering Plan; that plaintiff only received a complete copy of the lease on May 10, 2006; that the defendants subsequently represented that the lease, estoppel letter and memorandum of lease were an accurate reflection of the terms of the Offering Plan; that the defendants mislead and deceived the plaintiff to believe that said documents accurately reflected the Offering Plan, even though the defendants knew that this was not true, and that plaintiff sustained damages as a result of defendants' actions.

Counsel for plaintiff, pursuant to a stipulation dated July 19, 2010, modified the within motion and deleted the request for summary judgment on the third cause of action for fraudulent misrepresentation. However, defendant has cross moved to dismiss this cause of action.

The time in which to commence a cause of action for fraud is the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it (CPLR §213[8]). Here, plaintiff alleges that it was unaware of the longer lease term until it received a complete copy of the subject lease on May 10, 2006. Plaintiff, however, has not established that it could not have, with reasonable diligence, discovered the alleged fraud at an earlier date. Plaintiff-landlord offers no explanation as to why it was not in possession of the July 1, 1982 lease prior to May 10, 2006. Plaintiff's third cause of action for fraud, therefore, is untimely.

In any event, the court further finds that the complaint fails to state a cause of action based upon fraudulent misrepresentation. Plaintiff alleges that it was in possession of the Offering Plan, the July 1, 1982 lease, and the January 4, 2006 estoppel letter, as of May 10, 2006 and that it thereafter

executed the May 17, 2007 Memorandum of Lease. A comparison of these documents clearly establishes that the Offering Plan and July 1, 1982 lease contain different termination dates. Also, plaintiff has failed to plead with specificity the alleged fraudulent misrepresentations made by the defendants (CPLR §3016). Furthermore, once plaintiff was in possession of the July 1, 1982 lease and the Offering Plan, it was aware or should have been aware of the different lease termination dates, and thus could not have relied upon any claimed misrepresentations.

Therefore, those branches of the defendants' cross motion which seek to dismiss the third cause of action for fraudulent misrepresentation on the grounds of statute of limitations and failure to state a cause of action are granted.

Consequently, those branches of plaintiff's motion which seek summary judgment on the first cause of action for declaratory judgment, on the second cause of action for ejectment, writ of assistance and for use and occupancy and on the fourth cause of action for attorney's fees is denied.

Defendants' cross motion is granted to the extent that the third cause of action for fraudulent misrepresentation is dismissed, and the remainder of the cross motion is denied. Defendants' request for costs and attorney's fees is denied.

Dated: DECEMBER 8, 2010

Robert L. Nahman, J.S.C.