

New York Prop. Holding Corp. v Rosa

2011 NY Slip Op 30100(U)

January 18, 2011

Supreme Court, New York County

Docket Number: 100089/2001

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

NEW YORK PROPERTY HOLDING CORP.,

Plaintiff,

-against-

ANNA ROSA, et al.,

Defendants.

INDEX NO. 100089/2001

MOTION DATE Aug. 28, 2010

MOTION SEQ. NO. 008

MOTION CAL. NO. 72

The following papers, numbered 1 to _____ were read on this motion for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion: Yes No

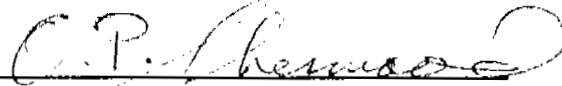
Upon the foregoing papers, plaintiff's motion for a summary judgment is decided in accordance with the accompanying decision and order.

FILED

JAN 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 18, 2011


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

-----X
NEW YORK PROPERTY HOLDING CORP.,

Plaintiff,

-against-

ANNA ROSA, as administratrix of the Estate of
MIGUEL ROSA, and SWINDLER & SWINDLER, ESQ.,
As escrow agent and stakeholder, FAUSTO ROSA,
Defendant.

-----X
O. PETER SHERWOOD, J.:

DECISION AND
JUDGMENT

Index No.: 100089/2001

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

This case arises out of a Contract of Sale for \$725,000 of a mixed use commercial and residential building located at 2 Manhattan Avenue, New York, New York, dated November 15, 1999. The sale did not close at the scheduled time due to alleged federal tax liens disclosed on a title report. It was later discovered that the no tax lien had ever been filed against the property.

In a decision and order, dated October 3, 2003, Justice Heitler of this court granted plaintiff's motion for summary judgment as to liability only on plaintiff's claim for breach of contract against defendant, Ana Rosa¹, as Administratrix of the Estate of Miguel Rosa ("Ana Rosa") and, in a preliminary injunction, enjoined Ana Rosa from "transferring, conveying or otherwise encumbering" the premises. In a subsequent decision and order, dated October 4, 2004, Justice Heitler held that there was no impediment to completion of the transaction and directed the parties to proceed to closing. Ana Rosa appealed the latter decision. The Appellate Division, First Department, affirmed in a decision dated February 7, 2006.

The closing has not taken place. Initially, the closing was delayed due to a need for Ana Rosa to obtain amended letters of administration. By letter dated October 8, 2008, counsel for Ana Rosa advised that she was prepared to proceed and proposed a closing date of October 10, 2008. The buyer was unable to proceed on that date due to issues relating to title insurance. By letter dated January 27, 2009, the seller's counsel advised that the title insurance issues had been resolved and

¹ It appears that Ana Rosa's name is misspelled in the caption and in several of the papers submitted by the parties. The caption will be amended to correct the error.

demanded a closing date of February 27, 2009. Counsel also asserted that Ana Rosa, on behalf of the estate, had entered into a number of "sweetheart leases" in violation of §6.02 of the Contract of Sale and that the matter "must be resolved prior to closing". In response, counsel for Ana Rosa acknowledged that Ana Rosa had signed leases and stated that he did not believe that with the passing of nine years, it was reasonable for the estate simply to allow the leases to lapse "because of some vague contractual obligation." Plaintiff continues to be unwilling to proceed to closing until the alleged "sweetheart leases" are either set aside or plaintiff is compensated for losses flowing therefrom.

Defendant, Fausto Rosa, is alleged to be adult son of Miguel Rosa and the manager of the premises. He was added as a defendant in an amended supplemental summons and complaint dated June 18, 2009 and is represented by separate counsel.

On the motion now before the court (motion sequence number 008) plaintiff, New York Property Holding Corp., (plaintiff or "NYPHC") requests a grant of summary judgment (1) as to the first cause of action against defendant, Fausto Rosa, for ejectment from apartment #6 and a commercial space; (2) as to the second cause of action against, Ana Rosa, for breach of contract; (3) for an order directing a hearing to determine plaintiff's damages; (4) for an order of contempt against Ana Rosa for violating the order of October 3, 2003; and (5) costs and disbursements.

Ana Rosa alleges that the claim for breach of contract should be denied because it was plaintiff who delayed the closing for more than two years (from March 2006 after the Appellate Division decision which affirmed Justice Heitler's finding that there were no liens against the property and May 2008 when plaintiff sought to close). She also asserts that some of the leases entered into were renewal leases for rent stabilized apartments which are required by law and are specifically provided for in the Contract of Sale. Ana Rosa does not identify which apartments are subject to rent stabilization. She offers no explanation for her entry into leases for the commercial spaces. Such spaces are not governed by the Rent Stabilization Law.

In opposing the motion for ejectment, Fausto Rosa maintains that he is an innocent third party who is a rent stabilized tenant residing in apartment #6 since 1989. He also alleges that he leased commercial space at the premises and has put thousands of dollars into the space. He has not advanced any legal argument against the claim for ejectment from the commercial space.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *Alvarez v. Prospect Hosp.*, 68 NY2d 329 [1986]; *Stillman v. Twentieth Century-Fox Film Corporation*, 3NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see Alvarez v. Prospect Hosp.*, *supra* *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v. Silver*, 90 NY2d 204, 208 [1997]). On a motion for summary judgment, it is not the function of the court to assess credibility (*see Ferrante v. American Lung Assn.*, 90 NY2d 623, 631 [1997]). In deciding the motion, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v. Stop & Shop, Inc.*, 65 NY2d 625 [1985]).

In its motion papers, plaintiff failed to include a complete copy of the Contract of Sale. However, no party claims that plaintiff's counsel failed to quote sections 6.01 and 6.02 accurately in his affirmation in support of the motion for summary judgment. Section 6.01 of the Contract of Sale provides that:

Between the date of this contract and the Closing, seller shall not, without Purchaser's prior written consent, which consent shall not be unreasonably withheld: (a) amend, renew or extend any Lease in any respect, unless required by law; (b) grant a written lease to any tenant occupying space pursuant to a tenancy; or (c) terminate any Lease or Tenancy except by reason of a default by the tenant thereunder.

Section 6.02 of the Contract of sale provides in part that:

Between the date of this contract and the Closing, seller shall not permit occupancy of, or enter into any new lease for, space in the building which is presently vacant or which may hereafter become vacant without first giving Purchaser written notice of the identity of the proposed tenant, together with (a) either a copy of the proposed lease or a summary of the terms thereof in reasonable detail and (b) a statement of the amount of brokerage commission, if any, payable in connection therewith and the terms of the payment thereof.

Further, pursuant to the October 3, 2003 decision and order, Ana Rosa and her representatives were enjoined from “encumbering” the premises.

Plaintiff has shown that Ana Rosa entered into at least five (5) residential and three (3) commercial leases at the premises without giving notice to or seeking the consent of the plaintiff. Although plaintiff argues strenuously that all of these leases were signed in violation of the contract and the October 3, 2003 decision and order, there are questions of fact as to whether signing of some or all of the residential leases were required by law under the Rent Stabilization law. To illustrate, plaintiff submits the affidavit of its vice president, Larry Goldstein, who asserts that in 2008, the seller entered into a “sweetheart lease” for Apartment #2 in violation of the Contract of Sale. He asserts that the apartment was registered with the New York State Division of Housing and Community Renewal (“DHCR”) as permanently exempt. In 2008, Ana Rosa signed a two year lease for a monthly rent of \$279.58 while, in the opinion of the plaintiff’s expert, the monthly market rent for the apartment was at least \$1,500. However, by Mr. Goldstein’s own admission, the lease “appears to be a rent stabilized lease” (Goldstein Aff’d ¶10). He then speculates regarding rents that could have been collected for Apartment #2 under scenarios that have not been established, including outcomes “if Apartment #2 is permanently exempt”; “assuming ... Apartment #2 had in fact been permanently exempt”; “even if Apartment #2 was not permanently exempt”; and “even assuming that the legal registered rent was never legitimately raised.” As to Apartment #6, Fausto Rosa, contends that he is a rent stabilized tenant in the apartment since 1989 and has submitted a document which purports to be a copy of a two year lease for the apartment dated October 20, 1989 (*see* Aff’d of Fausto Rosa, Ex. B). As to the three (3) commercial leases, plaintiff has demonstrated to a certainty that Ana Rosa signed them in breach of the terms of the Contract of Sale. Accordingly, plaintiff’s motion should be granted against Ana Rosa as to the second cause of action.

Ana Rosa, who is 85 years old and resides in Florida, has submitted an affidavit in which she states that her stepson, Fausto Rosa, has been taking care of the building since 1999, that in 2007 and 2008, Fausto Rosa sent her leases to sign and that she signed them. The leases included the three commercial leases. Fausto Rosa is the lessee on the longest and most favorable of the leases. Neither Ana Rosa nor Fausto Rosa make any effort to defend signing of the commercial leases in face of the terms of the Contract of Sale.

Relying on *Kaung v. Bd of Mgrs. of Biltmore Towers Condominium Assoc.*, 70 AD3d 1004 [2d Dept 2010]), plaintiff argues that its motion for ejectment against Fausto Rosa should be granted inasmuch as defendants have produced no evidence rebutting plaintiff's claim that the leases were entered into in breach of the Contract of Sale. *Kaung* holds that where a party enters into a lease in excess of its authority, the lease is void. In this case, Ana Rosa, as executor of the Estate of Miguel Rosa, possessed the authority to enter into the leases, but her actions were in breach of the Contract of Sale. Fausto Rosa presented the lease for signing to Ana Rosa with full knowledge that the lease for the commercial space he was renting was in breach of the Contract of Sale and may have violated the terms of the preliminary injunction entered on October 3, 2003. In such circumstances, the court will void the commercial lease and direct ejectment. The court will also direct an immediate trial pursuant to CPLR §3212 (c) to determine the amount or extent of damages, including damages flowing from rental of residential units which plaintiff proves were leased in breach of the Contract of Sale. The court will defer decision as to the request for an order of contempt until after damages have been determined.

Despite the decision and order of October 4, 2004, as affirmed on February 7, 2006, the parties have not proceeded to a closing. Although questions may remain as to the validity of leases entered into by the current owners in 2007 and 2008 and the remedies that should be awarded, the parties should proceed forthwith to a closing as previously ordered.

It is

ORDERED that plaintiff's motion for summary judgment on the first cause of action is GRANTED to the extent that the lease held by Fausto Rosa for the commercial space is declared void and Fausto Rosa shall surrender possession forthwith; and it is further

ORDERED that the motion for summary judgment as to the second cause of action for breach of contract as against Ana Rosa, as executrix of the Estate of Miguel Rosa is GRANTED insofar as it relates to the leases of the commercial spaces; and it is further

ORDERED that an immediate trial shall be had as to plaintiff's damages, including claims for damages flowing from leases of residential units entered into in breach of the Contract of Sale; and it is further

ORDERED that counsel for the parties shall appear on February 22, 2011 at 9:30 AM, in Part 61, Courtroom 341, 60 Centre Street, New York, New York for a pre-trial conference at which time counsel shall also report to the court regarding actions of the parties to conclude a closing on the property; and it is further

ORDERED that plaintiff shall, within seven (7) days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial; and it is further

ORDERED that the clerk of the court is to amend the caption of the case to correct spelling of the name of the first named defendant by deleting the words "Anna Rosa" and substituting in its place the words "Ana Rosa", as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61**

-----X
NEW YORK PROPERTY HOLDING CORP.,

Plaintiff,

Index No.: 100089/2001

-against-

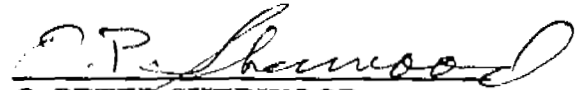
**ANA ROSA, as administratrix of the Estate of
MIGUEL ROSA, and SWINDLER & SWINDLER, ESQ.,
As escrow agent and stakeholder, FAUSTO ROSA,
Defendants.**

-----X

This constitutes the decision and order of the court.

DATED: January 18, 2011

ENTER:


**O. PETER SHERWOOD
J.S.C.**

FILED

JAN 19 2011

**NEW YORK
COUNTY CLERK'S OFFICE**