

128 Hester LLC v 128 Hester Realty LLC

2011 NY Slip Op 32225(U)

August 12, 2011

Sup Ct, NY County

Docket Number: 108750/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 108750/2009
128 HESTER

INDEX NO. 108750/09

vs
128 HESTER REALTY

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

/for _____

Answering Affidavits — Exhibits _____

No(s). 1

Replying Affidavits _____

No(s). 2

No(s). 5

Upon the foregoing papers, it is ordered that this motion is

FILED

AUG 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

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

Dated: 8/12/11

[Signature], J.S.C.
HON. JUDITH J. GISCHE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Supreme Court of the State of New York
County of New York

-----X

128 Hester LLC,

Plaintiff,

Decision/Order

-against-

Index # 108750/09
Mot. Seq. #002

128 Hester Realty LLC and William Chan,

Defendant.

FILED

-----X

Hon. Judith J. Gische

AUG 16 2011

Pursuant to CPLR 2219(A) the following numbered papers were considered on this motion:

NEW YORK
COUNTY CLERK'S OFFICE
NUMBERED

PAPERS	
Notice of Motion, STG affirm., WC affd., exhibits.....	1
GAG affirm., KT affd., exhibits.....	2
STG affirm., WC affd.,.....	3

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, William Chan ("Chan"), moves for summary judgment dismissing the complaint as to him. Plaintiff, 123 Hester LLC ("Hester LLC") opposes the motion. Issue has been joined. Although plaintiff claims the motion is untimely, it is mistaken. The note of issue was filed on January 21, 2011. This motion was brought on March 5, 2011, which is well within the 120 day requirement of the CPLR and the preliminary conference order. CPLR § 3212[a]; Brill v. City of New York, 2 NY3d 648 (2004); Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 (1st Dept. 2001).

The underlying complaint seeks damages based upon breach of contract and fraud. The material facts are not disputed. Hester LLC purchased certain real estate located at 128 Hester Street, New York, New York ("property"). The seller, under the

terms of the contract, was defendant 128 Hester Realty LLC ("Hester Realty LLC").

Chan is the president and sole member of Hester Realty LLC. He was not an individual party to the contract.

The closing for the sale of the property took place on July 12, 2007. At that time, Hester LLC and Hester Realty LLC entered into an escrow agreement, which inter alia, was to address the fact that the parties did not have a final bill for water and sewer charges.

When Hester LLC obtained the final bill for the water and sewer charges, he claimed that he was owed \$22,847.08. The balance of the escrow, \$6,650.00, was tendered to Hester, LLC. It now seeks the balance of the water and sewer charges that accrued prior to closing.

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). When only an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Chan argues that he was not a party to the contract or the escrow agreement and that, as a matter of law, he cannot be held personally responsible for the debts of Hester Realty LLC. Hester LLC, claims, however, that Chan personally guaranteed that the water and sewer charges would be paid, while the parties were attending the closing of the property on June 12, 2007. This claim is stated in the affidavit of Kyaw Tun, who was present at closing as the purchaser's representative. Tun claims that he would have adjourned the closing if no such personal guaranty had been made.

For the reasons that follow, the motion for partial summary judgment is granted on the first cause of action for breach of contract.

The relationship and obligations of the parties is controlled by the contracts in this case. The contracts, consisting of the contract of sale and escrow agreement, only obligate Hester Realty, LLC. The two contracts are signed by Chan, but expressly in his capacity as president of Hester Realty LLC. Mr. Chan has no individual liability to perform contracts made by a limited liability company of which he is a member. Retropolis Inc. v. 14th Street Development, LLC, 17 AD3d 209 (1st dept. 2005).

The second cause of action is for fraud. Chan claims that there is no evidence of any wrongdoing by him. Tun claims, however, that plaintiff was induced to go forward with the closing on Chan's representation that he would personally pay any water and sewer charges that turned up later. Chan denies that he made any such representation. Such claims by Tun, if believed, could possibly support a claim for fraudulent inducement. Ventur Group, LLC v. Finnerty, 68 AD3d 638 (1st dept. 2009); Sandra Greer Real Estate, Inc. v. Johnansen Organization, 182 AD2d 468 (1st dept. 1992). The issue of what was actually said at closing is one of credibility that should

be resolved after trial.

Accordingly for the reasons set forth above, the motion for summary judgment dismissing the complaint against defendant William Chan is granted only to the extent that the first cause of action for breach of contract is dismissed. In all other respects the motion is denied.

The parties are directed to proceed with the scheduled mediation, and barring settlement, proceed with trial.

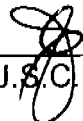
Any requested relief not otherwise expressly granted herein is denied. This constitutes the decision and order of the court.

FILED

AUG 16 2011

Dated: New York, NY
August 12, 2011

SO ORDERED: NEW YORK
COUNTY CLERK'S OFFICE



J.G. J.S.C.

**HON. JUDITH J. GISCHE
J.S.C.**