

Prakash Corp. v Pine Hills Realty, Inc.
2011 NY Slip Op 32308(U)
August 31, 2011
Supreme Court, Albany County
Docket Number: 2145-11
Judge: Joseph C. Teresi
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STATE OF NEW YORK
 SUPREME COURT
 PRAKASH CORP.,

COUNTY OF ALBANY

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 2145-11
RJI NO. 01-11-103694

PINE HILLS REALTY, INC., MKCUBED SHIVA,
 INC. dba BISTRO, MAULIK SHAH, KOMAL PATEL,
 HIMANSHU PATEL, REVAPURI, INC., KOMAL PATEL,
 and MAULIK SHAH dba PINE HILLS REALTY, INC.,

Defendants.

Supreme Court Albany County All Purpose Term, June 27, 2011
 Assigned to Justice Joseph C. Teresi

APPEARANCES:

Lemery Greisler, LLC
 Scott Almas, Esq.
Attorneys for Plaintiff
 50 Beaver Street, Second Floor
 Albany, New York 12207

Tabner, Ryan and Keniry, LLP
 Eric Dratler, Esq.
*Attorneys for Defendants Pine Hills Realty, Inc., Mkcubed Shiva, Inc. dba Bistro, Maulik Shah,
 Komal Patel, Himanshu Patel, and Komal Patel, Maulik Shah dba Pine Hills Realty, Inc.*
 18 Corporate Woods Boulevard
 Albany, New York 12211

TERESI, J.:

Prakash Corp. (hereinafter "Prakash") commenced this breach of contract/specific performance action claiming that Defendants¹ and Revapuri, Inc. (hereinafter "Revapuri") have wrongfully refused to transfer to it a parcel of real property located at 213 Quail Street, Albany,

¹ "Defendants" will hereinafter collectively refer to "Pine Hills Realty, Inc., Mkcubed Shiva, Inc. dba Bistro, Maulik Shah, Komal Patel, Himanshu Patel, and Komal Patel, Maulik Shah dba Pine Hills Realty, Inc."

New York (hereinafter “the premises”). Prior to answering, Defendants move to dismiss the complaint based upon documentary evidence and claims of lack of standing, statute of frauds, the parol evidence rule and failure to state a cause of action. (CPLR §§3211 [a][1], [3], [5] and [7]). After Prakash opposed the motion, this Court converted the “standing” motion to dismiss to a motion for summary judgment and granted the parties leave to supplement the record in accord with Mihlovan v. Grozavu (72 NY2d 506 [1988]). The parties each supplemented their record, and Prakash moved to amend/supplement its complaint. Defendants opposed Prakash’s motion, and cross moved to dismiss the amended complaint. Prakash opposed the cross motion.

Because Prakash sufficiently established its entitlement to supplement its complaint, its motion is granted. Although Defendants failed to demonstrate their entitlement to summary judgment due to Prakash’s lack of standing, they proffered sufficient documentary proof to establish their entitlement to dismissal of Prakash’s amended complaint.

Considering Prakash’s motion first, the CPLR does not provide a litigant with the ability to “supplement” its pleading, i.e. add additional facts which occurred after the prior pleading was filed, “without leave” of court. (CPLR §3025 [a and b]; Siegel, NY Prac §237 [5th ed]; 84 NY Jur 2d, Pleadings §203). Leave to supplement, however, “should be freely given unless the proposed amendments plainly lack merit or would cause the nonmoving party to suffer prejudice or unfair surprise.” (Bastian v. State, 8 AD3d 764, 765 [3d Dept. 2004]; CPLR §3025[b]).

Here, Prakash seeks to add a single allegation, with a supporting document, to its complaint. The new fact is a written “Assignment and Assumption Agreement,” dated July 22, 2011 (hereinafter “July 2011 Agreement”), which was executed after the filing of the complaint herein. It reaffirms the intent of Revapuri and Prakash when they entered a prior “Assignment

and Assumption of Lease,” dated October 8, 2010 (hereinafter “October 2010 Assignment”), which was included in the complaint. Such reaffirmation of a prior assignment already alleged in the complaint, causes no surprise. It merely clarifies Prakash’s position. Nor are the Defendants unduly prejudiced, as this proposed supplement is being sought before issue has been joined or any discovery conducted. Moreover, this new fact does not plainly lack merit. It is supported by affidavits of the parties who entered both it and the October 2010 Assignment.

As such, Prakash established its entitlement to supplement its complaint and its motion is granted.

Next, Defendants’ standing challenge is considered because “[w]hether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation.” (Society of Plastics Industry, Inc. v. County of Suffolk, 77 NY2d 761, 768 [1991]).

As is applicable here, Plaintiff’s standing in this breach of contract action depends upon whether it was possessed, prior to commencement, of the contractual right it seeks to enforce. (Lasalle Bank Nat. Ass’n v. Ahearn, 59 AD3d 911 [3d Dept. 2009]; Palisades Collection, LLC v. Kedik, 67 AD3d 1329 [4th Dept. 2009]; Wells Fargo Bank, N.A. v. Marchione, 69 AD3d 204 [2d Dept. 2009]; Ferry v. Ferry, 13 AD3d 765 [3d Dept. 2004]). To establish their entitlement to summary judgment, Defendants “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact [that Prakash lacks standing], and the evidence produced by the movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference.” (Andrew R. Mancini Associates, Inc. v. Mary Imogene Bassett Hosp., 80 AD3d 933, 935 [3d

Dept. 2011], quoting Rought v. Price Chopper Operating Co., Inc., 73 AD3d 1414 [3d Dept. 2010][internal quotation marks and citations omitted]).

On this record, Defendants failed to demonstrate, as a matter of law, that Prakash lacked standing to commence this action.

Attached first to Prakash's amended complaint is a "Commercial Lease Agreement," effective June 1, 2009 (hereinafter "2009 Lease Agreement"), for the premises. The 2009 Lease Agreement's "landlord[s]" are Komal Patel and Maulik Shah d/b/a Pine Hill Realty, with Revapuri as the named "tenant." Such agreement set forth the term, the rental amount, a provision restricting "Sublease and Assignment," but contained no option for the purchase and sale of the premises.

Instead, Prakash submitted a second agreement, of the same date, which provided Revapuri with an option to purchase the premises. This second agreement, titled "Commercial Sales & Lease Agreement & Amendments," dated June 1, 2009 (hereinafter "2009 Commercial Sales Amendment"), was dated the same day as the 2009 Lease Agreement and was denominated an "amendment." Considering it in a light most favorable to Prakash and affording Prakash all favorable inferences, it is reasonable to infer that the 2009 Commercial Sales Amendment was merely an amendment to, and therefore a right under, the 2009 Lease Agreement.

Also attached to Prakash's amended complaint is the October 2010 Assignment. It is uncontested that, with the October 2010 Assignment, Revapuri specifically assigned all of its rights under the 2009 Lease Agreement to Prakash. As such, because the 2009 Commercial Sales Amendment constitutes an amendment to, a right under, the 2009 Lease Agreement, when

the 2009 Lease Agreement was assigned so too was the 2009 Commercial Sales Amendment.

Additionally, the July 2011 Agreement realleges and affirms Revapuri and Prakash's intention to assign both the 2009 Lease Agreement and the 2009 Commercial Sales Amendment with their October 2010 Assignment.

Considering the foregoing in a light most favorable to Prakash, Defendants failed to establish that Prakash has no standing to pursue its claim. As discussed above, Revapuri assigned its option to purchase the premises, the 2009 Commercial Sales Amendment, to Parakash in October 2010. With such assignment Prakash possessed the contractual right it now seeks to enforce. (Lasalle Bank Nat. Ass'n v. Ahearn, supra). Because the assignment occurred prior to commencement of this action, Defendants did not demonstrate Prakash's lack of standing as a matter of law and this portion of their motion is denied.

Although Defendants failed to establish Prakash's lack of standing, they did demonstrate their entitlement to dismissal based upon documentary evidence and the statute of frauds.

"To succeed on a motion under CPLR 3211(a)(1), a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." (Cerand v. Burstein, 72 AD3d 1262, 1264 [3d Dept. 2010], quoting Adamkiewicz v. Lansing, 288 AD2d 531 [3d Dept. 2001]). A deed, the authenticity of which is not challenged, constitutes documentary evidence upon which a CPLR §3211(a)(1) motion may be based. (Crepin v. Fogarty, 59 AD3d 837 [3d Dept. 2009]).

Here, "General Obligations Law § 5-703 (2) provides, in relevant part, that a contract for the sale of real property is void unless the contract... is subscribed by the party to be charged [or by his lawful agent thereunto authorized by writing.]" (Pentony v Saxe, 2 AD3d 1076 [3d Dept.

2003][emphasis added]; G.G.F. Props. v Yu Mi Hong, 284 AD2d 427 [2d Dept. 2001]).

Moreover, “[b]ecause an option to purchase an interest in real property is in effect a conditional contract for a future conveyance of land, a contract that creates such an option is within the Statute of Frauds.” (Kaplan v Lippman, 75 NY2d 320, 325 [1990]).

On this record, Defendants proffered sufficient documentary evidence to demonstrate their entitlement to dismissal pursuant to the Statute of Frauds. The documentary evidence Defendants rely on is the premises’ deed and the agreements attached to Plaintiff’s amended complaint. The deed conclusively establishes that the premises is owned individually by Komal Patel, Himanshu Patel and Maulik Shah as tenants in common. Not one of these individuals, however, signed the 2009 Commercial Sales Amendment, i.e. the option contract upon which Plaintiff’s entire claim is based. Rather, the 2009 Commercial Sales Amendment is signed only by MKCubed Shiva Inc through Himanshu Patel and Pine Hills Realty Inc by Maulik Shah. Komal Patel did not sign the 2009 Commercial Sales Amendment individually or in a representative capacity. Because the 2009 Commercial Sales Amendment was not signed by the parties to be charged, it is “void and unenforceable.” (Pank v 2734 Wash. Ave. Realty Corp., 298 AD2d 664 [3d Dept. 2002]; Chan v Bay Ridge Park Hill Realty Co., 213 AD2d 467 [2d Dept. 1995]; Mulonet v. Exxonmobil Oil Corp., 81 AD3d 702 [2d Dept. 2011]; Lelekakis v. Kamamis, 41 AD3d 662 [2d Dept. 2007]; Kwang Hee Lee v. ADJMI 936 Realty Associates, 46 AD3d 629 [2d Dept. 2007]). Additionally, as Prakash has not specifically sought recovery against any one of the three tenancy in common interests, it set forth no cause of action for specific performance or damages against the signatories to the 2009 Commercial Sales Amendment. (Chan v Bay Ridge Park Hill Realty Co., supra; SJSJ Southold Realty, LLC v

Fraser, 33 AD3d 784 [2d Dept. 2006]; Bee Jay Indus. Corp. v Fina, 98 AD2d 738 [2d Dept. 1983][plaintiff specifically sought to recover one of the one-half owner's interests]].

Accordingly, Defendants established their entitlement to dismissal.

In opposition, Prakash failed to controvert such showing. The only probative proof Prakash proffered on this issue was the affidavit of Revapuri's president. While his affidavit stated that "M[aulik] Shah indicated that he was authorized to sign the [2009] Lease Agreement on behalf of the owners," such statement is irrelevant to the non-execution of the 2009 Commercial Sales Amendment by the premises' owners. Similarly unavailing is Revapuri's president's statement that he has "no question in [his] mind that [Komal] Patel, [Himanshu] Patel, and [Maulik] Shah were all aware of the [2009] Lease Agreement and the [2009 Commercial Sales Amendment] and specifically the terms of those agreements, and that they were signed by parties authorized to sign those documents." Such statement is not only conclusory but relies upon "[u]nwritten apparent authority[, which] is insufficient to satisfy the statute of frauds." (Urgo v Patel, 297 AD2d 376, 377 [2d Dept. 2002]).

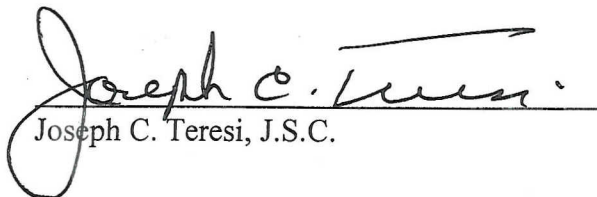
Accordingly, Plaintiff's amended complaint is dismissed.

This Decision and Order is being returned to the attorneys for Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 31, 2011
Albany, New York


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated May 13, 2011; Affidavit of Komal Patel, dated May 12, 2011; Affidavit of Himanshu Patel, dated May 12, 2011; Affidavit of Maulik Shah, dated May 12, 2011; Affirmation of Eric Dratler, dated May 13, 2011, with attached Exhibits A-B.
2. Affidavit of Vaishali Patel, dated June 10, 2011, with attached Exhibit A.
3. Supplemental Affidavit of Komal Patel, dated July 25, 2011; Affidavit of Himanshu Patel, dated July 25, 2011; Affidavit of Maulik Shah, dated July 28, 2011.
4. Corrected Affidavit of Vaishali Patel, dated August 11, 2011, with attached Exhibit A; Corrected Affidavit of Prakash Patel, dated August 11, 2011, with attached Exhibits A-B.
5. Order to Show Cause, dated August 4, 2011; Affidavit of Scott Almas, dated August 14, 2011, with attached Exhibits A-G.
6. Notice of Cross Motion, dated August 23, 2011; Affirmation of Brian Quinn, dated August 23, 2011, with attached Exhibits A-F (including affidavits).
7. Affidavit of Scott Almas, dated August 25, 2011.