

YH Realty & Mgt. LLC v Sofer

2012 NY Slip Op 32397(U)

September 7, 2012

Sup Ct, Orange County

Docket Number: 996-2012

Judge: Lewis Jay Lubell

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Status Conference October 22, 2012 @11:00 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF ORANGE**

-----X

YH REALTY & MANAGEMENT LLC a/a/o
ISAAC HERSKOVITZ,

Plaintiffs,

-against -

JACOB SOFER, ISAAC WEINBERGER,
PECK BUILDING INC., and AFFORDABLE
HOUSING CONSTRUCTION LLC,

Defendants.

-----X

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE**

-----X

AFFORDABLE HOUSING CONSTRUCTION LLC,
and HORIZON GARDENS INC.,

Plaintiffs,

-against-

ISAAC HERSKOVITZ, YH REALTY &
MANAGEMENT, LLC, and PECK BUILDING, INC.,

Defendants.

-----X

LUBELL, J.

DECISION/ORDER

Index No. 996-2012
Action No. 1
Sequence No. 2-4

Index No. 13558-2010
Action No. 2
Sequence No. 2-4

The following papers were considered in connection with the motion **(Sequence 2)** by defendant, YH Realty & Management, LLC for an Order pursuant to CPLR §§3211(a)(1), (4), (7) and (10), dismissing the Complaint in its entirety; the motion **(Sequence 3)** by plaintiff, YH Realty & Management, for an Order pursuant to CPLR 3126 and 3124, and 22 NYCRR 130-1.1, striking defendants' Answer in Action 1 and plaintiffs' Complaint in Action 2, or compelling production and the issuance of sanctions; and the motion **(Sequence**

4) by defendants in Action 1, Jacob Sofer, Isaac Weinberger and Affordable Housing Construction, LLC, and plaintiffs Affordable Housing Construction, LLC and Horizon Gardens, Inc. in Action 2, for an Order (a) pursuant to CPLR 3124 and 3126 striking the pleadings of YH Realty in Action 1 and Action 2 or compelling production of documents and (2) awarding Sofer, Weinberger, Affordable Housing and Horizon Gardens sanctions against YH Realty, as well as costs and disbursements (including attorneys' fees) in connection with the present motion and cross-motion:

PAPERS	NUMBERED
Motion Sequence 2	
Motion/Affirmation/Exhibits A-J (Defendant YH Realty)	1
Motion Sequence 3	
Motion/Affirmation/Exhibits A-W (Plaintiff YH Realty)	2
Affidavit in Opposition/Exhibits A-B (Weinberger/Affordable)	3
Motion Sequence 4	
Cross-Motion/Affidavit/Exhibits A-G (Sofer/Weinberger/ Affordable/Horizon)	4
Reply Affirmation in Support (YH Realty)	5

The background and history of these actions are set forth in the Court's earlier Decisions & Orders, and need not now be repeated except to the extent necessary for the determinations herein reached.

Motion Sequence 2:

YH Realty & Management, LLC's ("YH Realty") motion for an Order pursuant to CPLR §§3211(a)(1), (4), (7) and (10) dismissing the Complaint in Action 2 in its entirety as against it is granted for the reasons hereinbelow stated.

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Breytman v. Olinville Realty, LLC, 54 AD3d 703, 703-704 [2008]; see Moore v. Liberty Power Corp., LLC, 72 AD3d 660 [2010], lv denied --- NY3d ---, 2010 NY Slip Op 73808 [2010]). "[B]are legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such

consideration" (Garner v. China Natural Gas, Inc., 71 AD3d 825, 826 [2010]; see Riback v. Margulis, 43 AD3d 1023 [2007]).

(Velez v. Captain Luna's Marina, 74 AD3d 1191, 1192 [2d Dept 2010]).

First and Second Causes of Action (Action 2)

As to the First and Second Causes of Action in the Amended Complaint (Action 2) wherein plaintiffs, Horizon Gardens Inc. ("Horizon") and Affordable Housing Construction, LLC ("Affordable") seek judgment pursuant to RPAPL Article 15 declaring them fee owners of the Units in dispute to the exclusion of the defendants and every person claiming under them, the Court is satisfied that no actual controversy exists with respect thereto since neither defendant Isaac Herskovitz nor defendant YH Realty are asserting a claim of title to such Units. In any event, both defendants have denounced any such claims. As such, declaratory relief does not lie (see, Winkler v. Spinnato, 134 AD2d 66, 81 [2d Dept 1987] aff'd 72 NY2d 402; Hunt Brothers, Inc., v. Glennon, 81 NY2d 906, 910 [1993]; see also, DiCanio v. Inc. Vil. of Nissequogue, 189 AD2d 223, 227 [2d Dept 1993]).

Third and Sixth Causes of Action (Action 2)

By way of the Third and Sixth Causes of action in the Amended Complaint (Action 2), plaintiffs seek specific performance of the "Informal Agreements" as well as to compel arbitration in accordance with the terms thereof. Absent exception not here shown applicable, it is axiomatic that one seeking to compel performance of an agreement and any terms therein, must allege and ultimately prove that he or she is a party thereto.

Since movants correctly point out that neither Affordable nor Horizon allege to be a party to the contract sought to be enforced, the Court finds that plaintiffs fail to state a cause of action for a determination with respect to same (see, Leist v. Goldstein, 305 AD2d 468, 469 [2d Dept 2003]; Libin v. Board of Education of the City of New York, 119 AD2d 497, 500 [1st Dept 1986]).

Furthermore, since there is no dispute that an offering plan (see General Business Law §352-e[2]) had not issued prior to the contract sought to be enforced, the Court further finds that the Third and Sixth Causes of action in the Amended Complaint (Action 2) seeking specific performance of the "Informal Agreements" as well as the enforcement of the arbitration clause contained therein fail to state a cause of action.

An agreement which is otherwise void and unenforceable is not enforceable in arbitration (Matter of Exercycle Corp. [Maratta], 9 N.Y.2d 329, 335; Durst v. Abrash, 22 AD2d 39). Thus, it has "often [been] held that the broadest of arbitration agreements cannot oust our courts from their role in the enforcement of major State policies, especially those embodied in statutory form" (Matter of Aimcee Wholesale Corp. [Tomar Prods.], 21 N.Y.2d 621, 629) . . .

(Hirsch v. Hirsch, 37 N.Y.2d 312, 315 [1975]; see Sofer v. Reich, Supreme Ct. Orange County, September 21, 2009, Lubell, J., [Index No. 5884-09]; Crosstown Operating Corp. v. 8910 5th Ave. Rest. Inc., 191 AD2d 384 [1st Dept 1993]).

Unless otherwise provided by regulation issued by the attorney general, the offering statement or statements or prospectus required in subdivision one of [General Business Law §352-e] shall be filed with the department of law at its office in the city of New York, prior to the public offering of the security involved. No offer, advertisement or sale of such securities shall be made in or from the state of New York until the attorney general has issued to the issuer or other offerer a letter stating that the offering has been filed.

(General Business Law §352-e[2]). The offering plan is "a statement of the minimum material facts considered necessary by the legislature for the purpose of affording "potential investors, purchasers and participants an adequate basis upon which to found their judgment . . . " (Apfelberg v E. 56th Plaza, Inc., 78 AD2d 606, 607 [1st Dept 1980], citing GBL §352-e [1][b]). It matters not whether it was the buyer who first approaches the seller, as is alleged herein. The contract is not valid absent prior and proper General Business Law section 352 filing and disclosures.

Fourth and Fifth Causes of Action (Action 2)

By way of the their Fourth and Fifth Causes of action in the Amended Complaint (Action 2), plaintiffs seek injunctive relief upon trespass and tortious interference with economic advantage allegations. In contrast to the specific allegations directed at defendant Herskovitz, moving defendant YH Realty is charged therein

upon conclusory factual allegations and/or bare legal conclusions. As such, the Fourth and Fifth Causes of Action (Action 2) are dismissed as against YH Realty (see, Godfrey v. Spano, 13 NY3d 358, 373 [2009]; Garner v. China Natural Gas, Inc., 71 AD3d 825, 826 [2d Dept 2010]).

Having ruled as such, the Court need not address any of the remaining aspects of defendants' arguments with regard to the relief request in Motion Sequence 2.

Motion Sequences 3 and 4

Motion Sequence 3 by YH Realty for an Order pursuant to CPLR 3126 and 3124, and 22 NYCRR 130-1.1, striking plaintiffs' complaint in Action 2 is denied, as moot (see, Motion Sequence 2).

That aspect of Motion Sequence 3 seeking to strike defendants' answer in Action No. 1 or compelling production and the issuance of sanctions, and Motion Sequence 4 for an Order (a) pursuant to CPLR 3124 and 3126 striking the pleadings of YH Realty in Action 1 and (2) awarding Sofer, Weinberger, Affordable Housing and Horizon Gardens sanctions against YH Realty and for related relief, are granted to the extent that they are referred to the Status Conference herein scheduled.

Finally, that aspect of Motion Sequence 4 as it relates to Action 2 is denied, as moot (see Motion Sequence 2, supra).

The parties are directed to appear before the Court at 11:00 a.m. on October 22, 2012, for a Status Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
September 7, 2012

S/

HON. LEWIS J. LUBELL, J.S.C.

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