

REP 35 Engel, LLC, v Holber Assoc. L.P.

2012 NY Slip Op 33909(U)

April 16, 2012

Supreme Court, Nassau County

Docket Number: 017604/11

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

ORIGINAL

Present:

HON. STEPHEN A. BUCARIA

Justice

REP 35 ENGEL, LLC,

Plaintiff,

-against-

HOLBER ASSOCIATES, L.P. and WELLS
FARGO BANK MINNESOTA, N.A., As
Trustee for the Registered Holders of
SALOMON BROTHERS MORTGAGE
SECURITIES VII, INC., COMMERCIAL
MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2002-KEY2,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 017604/11

MOTION DATE: March 12, 2012
Motion Sequence # 002

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation/Affidavit in Opposition..... XX
- Reply Affirmation..... X
- Memorandum of Law..... X

Motion by defendants to dismiss the amended complaint on the ground of statute of frauds is **granted** in part and **denied** in part. Motion by defendants to discharge the notice of pendency is **granted**.

Defendant Holber Associates, LP is the owner of commercial property located at 35

Engel Street in Hicksville. On December 1, 1997, Holber entered into a net ground lease with Reckson Operating Partnership, LP for a 20 year term. On November 12, 2003, Reckson assigned the ground lease to plaintiff REP 35 Engel LLC.

Plaintiff alleges that in January 2011 it entered into an oral joint venture agreement with Holber Associates. On January 13, 2011, plaintiff sent Holber Associates a letter of intent setting forth the terms of the joint venture agreement. The letter states that Holber and REP shall each own a 50 % interest in the property, REP shall be responsible for the redevelopment and operation of the property, Holber shall be entitled to the net proceeds of all refinancing up to \$3.5 million, and net operating income shall be shared on a 50-50 basis. The letter of intent states that it is not a "binding agreement" and that the agreement of the parties shall be "incorporated into a mutually acceptable joint venture agreement."

A formal joint venture agreement was never executed. However, plaintiff alleges that the parties operated pursuant to the terms of the joint venture agreement for almost all of 2011. In December 2011, Holber notified REP 35 that it expected the tenant to pay the real estate taxes and mortgage payments in accordance with the terms of the ground lease. REP 35 objected to having to pay these items on the ground that the joint venture agreement provided that expenses would be shared equally by the parties. On December 8, 2011, Holber sent REP 35 a notice of default stating the rent outstanding was \$283,392.98, accrued since October 1, 2010, and the tenant had ten days to cure its default.

Plaintiff commenced this action on December 16, 2011 and filed a notice of pendency against the property. Plaintiff seeks an injunction restraining defendants from declaring the tenant in default, specific performance of the joint venture agreement, and damages for breach of the joint venture agreement. Plaintiff also asserts a claim for unjust enrichment based upon its services in managing and marketing the property. On January 23, 2012, plaintiff discontinued the action without prejudice as to defendant Wells Fargo Bank Minnesota, NA.

By order dated February 27, 2012, plaintiff's motion for a preliminary injunction restraining defendants from interfering with its rights under the lease was denied. The court determined that plaintiff did not seek injunctive relief prior to the expiration of the cure period set forth in the notice of default or in the ground lease. Moreover, plaintiff had not shown that it had the ability to pay the rent and tax arrears and thus cure its default by means short of vacating the premises.

Defendants move to dismiss the amended complaint pursuant to CPLR 3211(a)(5) on the ground of the statute of frauds. Defendants argue that the joint venture agreement is within the statute of frauds because it is a contract to create an interest in real property (General Obligations Law § 5-703) and by its terms was not to be performed within one year from its making (General Obligations Law § 5-701). Thus, defendants argue that the joint venture agreement is void because it was not reduced to writing. Defendants also move to discharge the notice of pendency. In opposition, plaintiff argues that the statute of frauds is not a defense to a claim on an oral joint venture agreement because the interest of each partner is deemed personalty.

The statute of frauds does not render void oral joint venture agreements to deal in real property because the interest of each partner in a partnership is deemed personalty (*Plumitallo v Hudson Atlantic Land Co.*, 74 AD3d 1038 [2d Dept 2010]). Nevertheless, a plaintiff suing for damages on an oral joint venture agreement cannot acquire an interest in real property (Id).

Since the joint venture agreement was never reduced to writing, plaintiff cannot acquire any interest in the Hicksville property and cannot prevent defendant from evicting plaintiff for non-payment of rent or other charges. However, on this motion to dismiss the court must give plaintiff the benefit of the favorable inference that there was in fact an oral joint venture agreement, which can provide the basis for a damages claim.

Accordingly, defendants' motion to dismiss the complaint based on the statute of frauds is **granted** as to the first cause of action requesting an injunction enjoining defendants from declaring plaintiff in default under the lease and the second cause of action for specific enforcement of the joint venture agreement. Defendants' motion to dismiss the complaint based on the statute of frauds is **denied** as to the third cause of action for damages for breach of contract, the fourth cause of action for unjust enrichment, and the fifth cause of action to the extent plaintiff asserts a claim for damages.

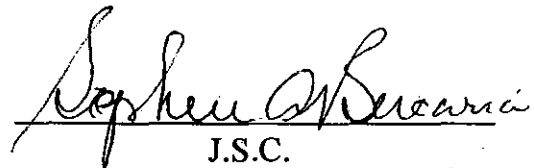
Plaintiff's claim for damages does not affect title to, possession of, or the use or enjoyment of real property (CPLR § 6501). Accordingly, defendants' motion to discharge the notice of pendency is **granted**. The County Clerk is directed to discharge of record the notice of pendency filed against the property known as Section 11, Block 325, lots 47 to 50 and 106 and 204.

A Preliminary Conference has been scheduled for June 21, 2012 at 9:30 a.m. in

Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference shall be fully versed in the factual background and their client's schedule for the purpose of setting firm deposition dates.

So ordered.

Dated APR 16 2012


J.S.C.

ENTERED
APR 18 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE