

Brooks v Dormuth

2013 NY Slip Op 31200(U)

May 31, 2013

Supreme Court, New York County

Docket Number: 101959/2012

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

CHRISTOPHER BROOKS,
Plaintiff,

Index No.: 101959/2012

Motion Date: 08/17/12

- v -

Motion Seq. No.: 01

MARIE DORMUTH,
Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
_____	1
_____	2
_____	3

UNFILED JUDGMENT

~~This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).~~

Cross-Motion: Yes

Upon the foregoing papers,

The court shall grant defendant's motion to dismiss the complaint alleging breach of contract pursuant to CPLR 3211.

It is undisputed that there was a valid assignment and assumption of the leasehold interest from defendant to plaintiff including the consent of the landlord dated April 23, 1996. The form of assignment states "Assignor assigns to the Assignee all the Assignor's right, title and interest in a) the lease and b) the security deposit, if any, stated in the Lease." The assignment governed the southern half of the fifth floor of the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

premises while the assignor retained occupancy of the unit on the northern half of the same floor. The Rider to the assignment set forth that the defendant had certain rights to use the roof of the building pursuant to a lease executed between defendant and the landlord and that "[i]nsofar as [defendant] possesses the limited exclusive right to use the roof as set forth herein she assigns only so much of this right to the [plaintiff] as will allow him to install two skylights on the roof in a location specifically detailed in the diagram drawn to scale and appended hereto . . . and an air conditioning compressor in the area of the roof to be determined by an engineer or architect." The Rider continues that "[t]enant's right to use the roof for the installation of an air conditioner and sky lights is conditioned upon and limited by the rights and responsibilities as set forth in the Lease Agreement . . . by and between Max Landau and Marie Dormuth for the 5th Floor North dated April 1, 1995."

The complaint alleges that subsequent to the defendants' leases for the fifth floor and the assignment of the lease of the northern half of that floor to plaintiff, on March 21, 2007, a condominium offering plan seeking to convert the premises to a condominium was filed. It is asserted that pursuant to the offering plan plaintiff purchased the unit that was the subject of the assignment and defendant purchased the unit that she occupied. The complaint states that the offering plan granted

the defendant exclusive rights to the roof which included that portion of the roof that was governed by the original lease assignment between the parties.

Plaintiff alleges that defendant refuses to provide him with access to roof as set forth in the assignment agreement and that such acts constitute a breach of defendant's obligations thereunder.

Defendant moves to dismiss pursuant to CPLR 3211 (a) (1)&(7) on the grounds that the parties' obligations under the assignment were terminated upon their execution of the offering plan and thus the documentary evidence bars plaintiff's claim because there was no obligation extant that could be the subject of an action for breach. The court shall grant the relief sought by the defendant because the plain terms of the offering plan bar plaintiff's claim.

The complaint alleges, and it is undisputed, that upon the conversion of the premises to condominium ownership, plaintiff became an owner of the apartment which was the subject of the lease assignment. Under the Purchase Agreement for the apartment it is stated that "[i]f the Purchaser is currently the tenant (a "Tenant Purchaser") under an Existing Lease of the Unit being purchased, the Purchaser agrees that the Existing Lease shall be terminated and canceled upon closing of the title to the Unit on the Closing Date." Therefore, to the extent that plaintiff was

leasing the subject premises prior to purchasing the apartment, any rights granted therein were extinguished under the Purchase Agreement pursuant to which the plaintiff became an owner of the premises because the lease was terminated. Defendant could not breach a lease agreement that was terminated by the act of the plaintiff.

Even assuming for purposes of this motion that plaintiff argues he was an assignee of the lease rather than the tenant of record for purposes of the Purchase Agreement, such an argument fails to be persuasive. As the defendant also purchased her apartment in the building, her lease for the premises which she assigned to plaintiff also was cancelled pursuant to her Purchase Agreement. As plaintiff's rights under the assignment agreement were specifically conditioned upon defendant's lease which was cancelled when defendant purchased her unit, plaintiff cannot now claim breach under the assignment. See New York Railways Corporation v Savoy Associates, Inc., 239 AD 504, 506 -507 (1st Dept 1933) ("It is a rule of law that if there is a lessee, and he has created an under-lease, or any other legal interest, if the lease is forfeited, then the under-lessee, or the person who claims under the lessee, loses his estate as well as the lessee himself").

The fact that defendant, under the express terms of the offering plan, has rights to area of the roof originally

referenced in the assignment does not change the analysis. The rights defendant has as a result of condominium ownership could not have been the subject of the assignment as they were created in the subsequent offering plan. Furthermore, the "roof rights" assigned by the defendant were terminated under the express terms of the Purchase Agreement.

In accordance with the foregoing, it is

ORDERED that defendant's motion to dismiss the complaint is GRANTED and the complaint is hereby DISMISSED in its entirety; and it is further

ORDERED and ADJUDGED that the Clerk is directed to enter judgment dismissing the action.

This is the decision and order of the court.

Dated: May 31, 2013

ENTER:

~~Debra A. James~~
J.S.C.
DEBRA A. JAMES

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