

New Bedford Ltd v Yanko

2013 NY Slip Op 31343(U)

June 20, 2013

Supreme Court, New York County

Docket Number: 101131/2011

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Barbara Jaffe

PRESENT: [Redacted] Justice

PART 12

Index Number : 101131/2011
NEW BEDFORD LTD.
vs.
YANKO, MICHAEL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 101131/2011
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to [blank], were read on this motion to/for Summary Judgment
Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits [blank] No(s) 3, 8, 8-1 to 8-15
Answering Affidavits -- Exhibits [blank] No(s) 5-7
Replying Affidavits [blank] No(s) 12
transcript = 14

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

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 6/20/13

[Signature] J.S.C.
BARBARA JAFFE
NON-FINAL DISPOSITION

- 1. CHECK ONE: [] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [x] 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 : IAS PART 12

-----X
NEW BEDFORD LTD.,

Plaintiff,

-against-

Index No. 101131/11

Subm.: 2/27/13
Motion Seq. No. 001

DECISION & ORDER

MICHAEL YANKO, ERAN CONFORTY, and
JPMORGAN CHASE BANK, NA, as successor in interest
to WASHINGTON MUTUAL BANK, FA,

Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiff:
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For Chase:
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By notice of motion dated February 23, 2012, defendant JPMorgan Chase Bank, NA
(Chase) moves pursuant to CPLR 3212 for an order dismissing plaintiff's claims against it.
Plaintiff opposes.

I. BACKGROUND

On June 18, 2007, defendants Eran Conforty and Michael Yanko (owner defendants)
executed a promissory note secured by a mortgage on unit PHB of 116 West 22nd Street in
Manhattan (the premises). (Affirmation of Christopher J.W. Verby, Esq., dated Feb. 10, 2012
[Verby Aff.], Exhs. A, B). Washington Mutual Bank (WaMu) originated the note and mortgage.
(*Id.*). Owner defendants defaulted on the note, and on May 15, 2009, Chase, as successor in
interest to WaMu, commenced a foreclosure action against them. (*Id.*, Exh. C).

In June 2009, owner defendants commenced negotiations with plaintiff for its purchase of the premises, and as the outstanding balance on the mortgage exceeded the market value of the premises, they sought WaMu's approval to engage in a short sale. (Affirmation of Daniel F. Spitalnic, Esq., in Opposition, dated Apr. 27, 2012 [Spitalnic Opp. Aff.]). By letter dated June 22, 2009 and addressed to owner defendants' broker, WaMu counter-offered to approve a short sale of the premises for \$1,650,000. (Verby Aff., Exh. D). The letter reflects that it "does not constitute approval or denial of the [s]hort [sale]. . . . If [you] provide no response within 2 business days, the counter offer will be withdrawn and we will close our file." (*Id.*).

By email dated July 7, 2009, the broker informed owner defendants that he received a call from WaMu conveying its urgent need for an "addendum signed by all parties with the agreed upon new sale price of \$1.6M" and a "[r]evised HUD 1 form." (Affidavit of Raz Ofer, dated Apr. 27, 2012 [Ofer Affid.], Exh. 1). There was no short sale. (Verby Aff.; Spitalnic Opp. Aff.).

On July 30, 2009, the tenant in the unit adjacent to the premises moved to intervene in the foreclosure action, and by decision and order dated August 12, 2009, the justice previously presiding in this part granted the motion, stayed the foreclosure, and restrained owner defendants from conveying title to the premises. (Verby Aff., Exhs. K, J).

On January 24, 2011, plaintiff commenced the instant action with the filing of a summons and verified complaint, asserting claims for specific performance and tortious interference against Chase. (*Id.*, Exh. H).

By affidavit dated February 9, 2012, Eric Waller, Home Loans Senior Research Specialist for Chase, explains that "[w]hen a borrower makes [an] application to short sell mortgaged property, an agreement to approve the sale at a price acceptable to the lender is made between the

lender and the borrower and not the potential purchasers of the property.” According to him, as owner defendants failed to accept the June 22, 2009 \$1,650,000 counteroffer in a timely fashion, it expired on June 24, 2009, and Chase’s records reveal no approval of a short sale of the premises for \$1,600,000. Rather, “Chase never entered into an agreement with anyone other than [owner defendants], including [p]laintiff, to approve a short sale of the pr[emises] at any price.” (*Id.*).

By affidavit dated April 27, 2012, Raz Ofer, plaintiff’s president, states that defendant owners accepted the June 22, 2009 \$1,650,000 counteroffer and “proceeded with the necessary steps to complete the transaction,” that plaintiff responded to the broker’s July 7, 2009 email by completing and sending to WaMu an updated HUD-1 form reflecting a \$1,600,000 sale price, and that the tenant’s motion to intervene in the foreclosure action delayed the sale. (Ofer Affid.).

By affidavit dated May 11, 2012, Waller states that his review of Chase’s files pertaining to the subject note and mortgage yielded no “communication of any sort between Chase and a broker from Sotheby’s,” the employer of owner defendants’ broker, that “[h]ad Washington Mutual or Chase ever accepted a \$1,600,000 short sale price for the premises, the respective bank would have memorialized the acceptance in writing and noted it on its books and records, and that [n]othing in the file reveals such an agreement to a short sale price at \$1,600,000.”

II. CONTENTIONS

Chase observes that there exists no contract between it and plaintiff pursuant to which it agreed to a short sale of the premises, and that in any event, it may not approve a short sale as conveyance of the premises is stayed by the August 12, 2009 order. (Verby Aff.). Moreover, it asserts that there is no agreement between it and owner defendants regarding a short sale, and

even if there were, plaintiff may not move to enforce it as it is neither a party to nor an intended beneficiary of the contract. (*Id.*). They note that, to the extent plaintiff's claim that there exists an oral agreement, such an agreement would be void pursuant to General Obligations Law § 5-703[1], and they deny that their conduct provides a basis for plaintiff's tortious interference claim. (*Id.*).

In opposition, plaintiff argues that the email from their broker raises issues of fact as to whether Chase approved of a short sale of the premises for \$1,600,000. (Pl. Mem. of Law in Opp.). It also claims that the motion is premature as Chase has provided them with no discovery, having failed to respond to a demand for discovery allegedly served in May 2011, and that discovery is necessary to determine whether a written agreement regarding the \$1,600,000 exists. (*Id.*). And it asserts that, assuming there exists such an agreement, it may enforce it as an intended third-party beneficiary, having stood to benefit from the sale by obtaining ownership of the premises. (*Id.*).

In reply, Chase denies having received plaintiff's discovery demand, noting that the copy plaintiff provides is unaccompanied by an affidavit of service, and claims, even if it had, that it would have responded with Waller's affidavit reflecting that no agreement regarding a \$1,600,000 sale price exists. (Affirmation of Christopher J.W. Verby, Esq., in Reply, dated May 14, 2012). It also denies that plaintiff would be an intended third-party beneficiary to such an agreement. (*Id.*).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of

fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

Pursuant to CPLR 3212(f), a summary judgment motion may be denied as premature if it “appear[s] from affidavits submitted in opposition to the motion that facts essential opposition may exist but cannot then be stated.” “However, the mere hope that evidence sufficient to defeat [the] motion . . . may be uncovered during the discovery process is insufficient to deny [it].” (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]).

The existence of a valid contract is both a prerequisite to entitlement to specific performance (*Manhattan Theatre Club, Inc. v Bohemian Benevolent & Literary Assoc. of the City of N.Y.*, 64 NY2d 1069 [1985]) and an element of a claim for tortious interference (*Chung v Wang*, 79 AD3d 693, 694 [2d Dept 2010]).

Here, Chase demonstrates, *prima facie*, that there exists no contract between it and owner defendants or plaintiff regarding a short sale of the premises for \$1,600,000. Even assuming that Chase orally agreed to a \$1,600,000 sale price, such an agreement would be void. (*See General Obligations Law* § 5-703[1] [“An estate or interest in real property, . . . or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered, or declared, unless . . . by a deed or conveyance in writing”]).

Absent an affidavit of service, plaintiff fails to demonstrate that it served Chase with its

discovery demands. (See 86 NY Jur Process and Papers § 151 [proof of service requires affidavit of service or admission to having been served]). In any event, in light of Waller's sworn statements, plaintiff's assertion that Chase's response may lead to the discovery of a written agreement is speculative and without evidentiary basis, and is thus insufficient to warrant denial of the instant motion pursuant to CPLR 3212(f).

In light of this determination, the parties' remaining contentions need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant JPMorgan Chase Bank, NA's motion for summary judgment is granted, and the complaint is hereby severed and dismissed as against defendant JPMorgan Chase Bank, NA.

ENTER:


Barbara Jaffe, JSC

DATED: June 20, 2013
New York, New York