

Moss v Moss
2013 NY Slip Op 31498(U)
July 3, 2013
Supreme Court, New York County
Docket Number: 653809/2012
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Index Number : 653809/2012

MOSS, JAMES A

vs

MOSS, SARA E

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE 6/18/13

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

Based on the submissions, the motion and cross-motion are resolved as follows:

In this breach of contract action, plaintiff James A. Moss (the "Husband") moves to reargue this Court's March 7, 2013 Decision, and upon reargument, granting him summary judgment on various causes of action against the defendant Sara E. Moss (the "Wife"), to dismiss her counterclaims and affirmative defenses, and directing her to, *inter alia*, purchase his interest in the parties' former marital apartment (the "Apartment") in accordance with the parties' March 27, 2003 Separation Agreement (the "Agreement").

In turn, the Wife cross-moves also for reargument, and upon reargument, seeks various forms of relief, including an order compelling the Husband to perform his obligations under the Agreement so as to place the Apartment on the market for sale and to comply with various portions of the Agreement in connection therewith.

Factual Background

This action arises from the parties' dispute regarding the disposal of the Apartment pursuant to the Agreement, which provided that the Apartment:

"... shall be put on the market for sale at the discretion of the Wife, but in no event ... later than one hundred and twenty (120) days following David's graduation ... , provided however, that the Wife shall have a right of first refusal *and* the option of purchasing the Husband's interest in the [apartment] prior to and *in lieu* of such sale, provided that she

Dated: _____, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

shall serve written notice upon the Husband of her irrevocable election to exercise her right of first refusal *or* option to purchase and adhere to the procedures for exercising such rights as set forth below in paragraph C(14)(a) of this Article.” (Article III.C.7 (emphasis added)).

The Agreement further states in paragraph III.C.14(a)(I):

- “14. (a) Notwithstanding the foregoing, the Wife shall have
- (I) a *right of first refusal* to purchase the Husband's interest in the . . . Apartment *in the event the parties obtain a Qualified Offer*. . . . The Wife may exercise her right of first refusal by notifying the Husband in writing of her irrevocable election to do so within ten (10) days of the parties' *receipt of the Qualified Offer* [. . .]; and
 - (ii) the *option to purchase* the Husband's interest in the . . . Apartment. The Wife may exercise this option by notifying the Husband in writing of her irrevocable election to do so at any time *prior to the receipt of a Qualified Offer* For purposes of this subparagraph, the value of the . . . Apartment shall be determined by agreement of the parties or in accordance with the procedures set forth in paragraph C(9) of this Article. . . .” (Emphasis added).

Thus, under the Agreement, within 120 days following David's graduation (which occurred on May 15, 2012), the Apartment was to be sold and the sale proceeds divided between the parties. However, the Wife is permitted, before the occurrence and *in lieu* of any such sale, to purchase the Husband's interest in the apartment for herself, in two ways.

First, at any time *before an offer to purchase the apartment was received* from a third-party buyer, the Wife could buy out the husband's share of interest in the apartment (“option to buy”) (Agreement, Article III.C ¶14 (a)(ii)). *Second*, *after a qualified offer was received* from a third party, the wife had an option to match that offer (“the right of first refusal”) (*id.*, ¶14 (a)(I)).

In order to exercise the option to buy, at any time *before the qualified offer was received*, the Wife was to serve a written notice stating her “irrevocable election” to exercise such option. To exercise her right of first refusal, the Wife was required, *within 10 days after the parties received a qualified offer*, to notify the Husband in writing of her irrevocable election to do so. As stated in this Court's previous decision, while the clause creates the right to both options, the latter part, stating that she could elect “to exercise her right of first refusal *or* the option to purchase,” recognizes that these two options could not be exercised simultaneously (*Kunze v Arito, Inc.*, 48 AD3d 272, 851 NYS2d 182 [1st Dept 2008], citing *Fabulous Stationers v Regency Joint Venture*, 44 AD2d 547 [1974]).

The Wife sent the Husband a letter, dated August 15, 2012 (the “letter”), stating:

“In accordance with Article III, paragraph C (7) . . . , this will serve as written notice of *my irrevocable election to exercise my right of first refusal or option to purchase* the Central Park West apartment. I will adhere to the procedures for executing such rights as set forth

in paragraph C (14)(a) of Article III of the Agreement.”
(Exhibit C to Complaint)(emphasis added).

This Court previously held that (1) the letter was ambiguous as to whether she intended to exercise her election or merely intended to reserve her right to do so at a later time; (2) in the absence of a “qualified” offer from a third party at the time of the letter, her right of first refusal was not triggered, and thus, it could not be said that she made a valid election to exercise her right of first refusal; and (3) based on the record and counsels’ arguments, it was unclear whether at the time of her letter, the Wife could effectively elect to exercise her option to buy. Thus, according to the Court, it was premature to determine that either of the Wife’s rights was triggered by the letter so as to warrant summary judgment in the Husband’s favor.

Given that both parties maintain that the Court misapplied the facts and the law, reargument is granted as to both parties. However, upon reargument, the motion is denied and the cross-motion is granted, in part.

Upon reargument, reconsideration of the parties’ papers, and reconsideration of the terms of the Agreement, the Court finds that the letter could not have been deemed a right of first refusal since no qualified offer had been received (*see Morrison v Piper*, 77 NY2d 165, 170, 566 NE2d 643, 645 [1990] (“the right of first refusal effectively ripens into an option upon the happening of a contingency)). However, contrary to the Husband’s contention, such conclusion does not warrant a finding that the letter constituted option to buy. Instead, when compared with the language of the Agreement, the letter simply reiterates the terms which granted the Wife, under Article III.C.7, the right to provide the Husband with notice of her irrevocable election to exercise her right of first refusal or option to purchase. The letter, as stated by the Court previously, was a “futile gesture.” (Decision, p. 13).

Therefore, in the absence of any legally cognizable election by the Wife at this juncture, and since *the apartment was to be placed on the market no later than 120 days following David’s graduation, i.e., by September 12, 2012*, the apartment must be “put on the market for sale” in accordance with Article III.C.7.¹

Therefore, upon reargument, the Husband’s motion for an order directing the Wife to comply with her exercise of the option to buy is denied. Further, the Court grants the Wife’s cross-motion solely to the extent that the Husband is directed to specifically perform his obligation to cooperate and take all steps pursuant to the Agreement to place the apartment on the market for sale at the price determined according to the Agreement.

Conclusion

Based on the submissions, it is hereby

ORDERED that the motion by plaintiff to reargue and upon reargument, for an order granting him summary judgment, is granted solely as to reargument on the ground that plaintiff argues that the Court misapplied the fact and the law. However, upon reargument, the Court

¹ The Court notes that the Husband commenced this action on November 5, 2012 approximately two months after the expiration of the 120-day period.

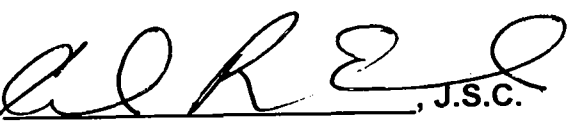
adheres to its earlier determination; and it is further

ORDERED the cross-motion by defendant for reargument of the Court's decision is granted on the ground that defendant argues that the Court misapplied the fact and the law and upon reargument, the Court grants defendant's cross-motion solely to extent that plaintiff is directed to specifically perform his obligations under the parties' March 27, 2003 Separation Agreement so as to place the parties' former marital apartment on the market for sale, and shall take all steps pursuant to the Agreement to place the apartment on the market for sale at the price determined according to the Agreement.

This constitutes the decision and order of the Court.

Dated 7-03-2013

ENTER:


J.S.C.

HON. CAROL EDMED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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