

Enoteca, Inc. v New York Univ.

2013 NY Slip Op 32324(U)

September 25, 2013

Sup Ct, New York County

Docket Number: 152421/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 152421/2012
ENOTECA, INC.
vs
NEW YORK UNIVERSITY
Sequence Number : 001 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
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). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

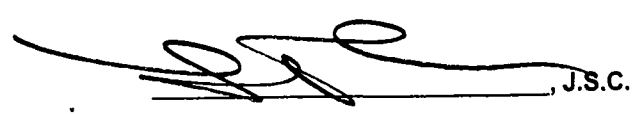
Replying Affidavits _____ | No(s). 4

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 9/25/13


_____, J.S.C.

HON. EILEEN A. RAKOWER

- 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

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

ENOTECA, INC., AND 129 MACDOUGAL STREET ASSOCIATES, INC.,

Plaintiff,

- v -

NEW YORK UNIVERSITY,

Defendants.

INDEX NO. 152421/2012

MOTION DATE _____

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answer — Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Presently before the Court is Plaintiffs’ motion, pursuant to CPLR §2221(a), seeking leave to Plaintiffs to reargue the Decision & Order (“Decision”) dated May 6, 2013, and upon such leave, amending said Decision on the grounds that the Court misapprehended a certain fact. Plaintiffs seek only to reargue that part of the Decision which granted Defendant New York University’s (“NYU”) motion to dismiss the fourth cause of action in the Complaint for breach of contract as third party beneficiary. NYU opposes.

CPLR §2221(d) provides that a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion ...”

Plaintiff Enoteca, Inc. (“Enoteca”) rents the building located at 131 MacDougal Street. Plaintiff 129 MacDougal Street Associates, Inc. owns the building located at 129 MacDougal Street. Defendant New York University owns the premises located 133-139 MacDougal where the subject construction took place, which Plaintiffs allege caused property damages to their respective properties.

One seeking to maintain an action for breach of contract as a third party beneficiary must establish that: (1) there is an existing valid and binding contract between the signatories; (2) the contract was intended for the third party’s benefit; and (3) the benefit to the third party is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate that party if the benefit is lost. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182 [2011]; *Mendel v. Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 787 [2006]).

In their fourth cause of action, Plaintiffs plead that there is a binding agreement between NYU and the Community Board for the direct benefit of the local community, which plaintiffs identify as the NYU Community Board Agreement. Plaintiffs assert that the businesses and residents in the Community Board No. 2 area were intended to be the direct beneficiaries of the Agreement. Further, plaintiffs allege that, being neighbors of NYU, they were included as the direct and intended beneficiaries of the Agreement. The minutes of the May 28, 2008 meeting which produced the alleged Agreement are attached to the complaint.

With respect to Plaintiffs’ fourth cause of action, while the Court correctly held that the Community Board Agreement was only intended to benefit those properties which were south and west of the Project, it incorrectly held that 129 and 131 MacDougal Street are north of the Project and that therefore could not be intended beneficiaries. Therefore, upon review of the Decision, the Court grants Plaintiffs leave to reargue that portion of the Decision that relates to the fourth cause of action, and upon such leave, amends said Decision to hold that the four corners of the Complaint state a cause of action for breach of contract as third party beneficiary. While NYU maintains that there was no express agreement signed by NYU as a result of the May 28, 2008 meeting, accepting the allegations of the Complaint as true as required upon a motion to dismiss, Plaintiffs’ fourth cause of action is stated.

Wherefore, it is hereby,

ORDERED that Plaintiffs' motion for leave to reargue the Decision & Order dated May 6, 2013 is granted; and it is further

ORDERED that the Decision & Order dated May 6, 2013 is amended to the extent that the fourth cause of action contained in the Complaint for breach of contract as third party beneficiary remains.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 01/25/13


HON. EILEEN A. RAKOVER
U.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE