

**Argent Acquisitions, LLC v First Church of Religious Science**

2013 NY Slip Op 33368(U)

May 2, 2013

Sup Ct, New York County

Docket Number: 650455/13

Judge: Cynthia S. Kern

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

PRESENT: Kern CYNTHIA S. KERN  
J.S.C. Justice

PART 55

Argent Acquisitions, LLC

INDEX NO. 650455/13

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -

First Church of Religious Services

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Dismissal Action

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

Dated: 5/2/13

CK  
CYNTHIA S. KERN  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
ARGENT ACQUISITIONS, LLC,

Plaintiff,

Index No. 650455/13

-against-

**DECISION/ORDER**

FIRST CHURCH OF RELIGIOUS SCIENCE,

Defendant.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Affidavits in Reply.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Argent Acquisitions, LLC (“Argent”) commenced the instant action against defendant First Church of Religious Science (“First Church”) alleging breach of contract and seeking specific performance of said contract. First Church now moves by Order to Show Cause for an Order pursuant to CPLR §§ 3211(a)(1), (a)(5), (a)(7) and (a)(10) dismissing plaintiff’s complaint and vacating plaintiff’s *lis pendens*. For the reasons set forth below, defendant’s motion is granted.

The relevant facts are as follows. First Church is a corporation incorporated under Article 10 of the Religious Corporations Law of the State of New York, with its principal office and church located at 14 East 48<sup>th</sup> Street, New York, New York (the “subject property”). On or about

September 14, 2012, First Church and Argent entered into an agreement whereby Argent agreed to purchase the subject property for \$15,000,000.00 (the "Term Sheet"). The Term Sheet states as follows:

Re: Offer to Acquire 14 East 48<sup>th</sup> Street (the "Property").

Dear Reverend Adkisson:

This letter sets forth the updated indicative terms and conditions pursuant to which Argent...or its designated affiliate (the "Buyer" or "Argent"), agrees to acquire the Property.

Acquisition Terms

Acquisition Price	\$15,000,000
Seller	First Church of Religious Science
Terms	Cash to Seller, conveyance of marketable title to Property at closing
Deposit	An initial, fully refundable deposit of \$500,000 (the "Deposit") shall be paid to an escrow agent upon execution by the parties of a reasonably acceptable escrow agreement.
Due Diligence Period	The Deposit shall become non-refundable following a 30 day due diligence period. This due diligence shall be satisfactory in all respects to the Buyer in its sole and absolute discretion, and upon mutual execution and delivery of Acquisition documentation satisfactory to Buyer in its sole and absolute discretion.
Delivery of Title	At closing, Seller shall convey to Argent fee simple marketable title to the Property. The Property shall be

conveyed vacant and free and clear of all violations, liens and encumbrances.

Closing Date

A date mutually acceptable to the parties, allowing a reasonable period of time for Seller to deliver the Property to Purchaser vacant. Argent wishes to accommodate the Seller's intentions to use the proceeds from the sale of the Property towards the acquisition of a different location for the Seller.

Confidentiality

The Buyer and Seller agrees that this Term Sheet is confidential with the understanding that neither it nor its substance will be disclosed to any third person, except those who are in confidential relationships to Buyer or Seller...or as may be required by law.

Please acknowledge your acceptance of the terms and conditions relating to the transaction described herein by executing the acknowledgement below. We appreciate the opportunity to work together with you. If you have any questions, please do not hesitate to call. **This Term Sheet shall expire on the earlier of notice by Argent or September 14, 2012.**

Both Argent and First Church signed the Agreement on September 14, 2012.

Subsequently, a different buyer allegedly offered First Church more money for the subject property. First Church then informed Argent that it no longer wanted to sell the subject property to Argent unless it (1) paid more money for the subject property; (2) put down a larger down payment; and (3) renegotiated the due diligence clause in the Term Sheet. Argent then commenced the instant lawsuit against First Church by filing its Complaint and attendant Notice of Pendency on February 11, 2013 and serving First Church on February 21, 2013. On March 12, 2013, First Church made the instant motion by Order to Show Cause to dismiss the

Complaint and vacate the *lis pendens*.

On a motion addressed to the sufficiency of the complaint pursuant to CPLR § 3211 (a)(7), the facts pleaded are assumed to be true and accorded every favorable inference. *See Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977), citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956). Further, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the instant action, First Church’s motion to dismiss the Complaint and vacate the *lis pendens* is granted on the ground that the Term Sheet is not an enforceable agreement because it is an agreement to agree which does not include terms material to a contract of sale. It is well-settled that a written agreement shall be deemed an agreement to agree and not an enforceable contract where the terms of said agreement do not include terms material to a contract of sale. *See Keles v. Morningside Heights Housing Corp.*, 8 A.D.3d 160 (1<sup>st</sup> Dept 2004)(holding that the parties’ binder agreement was not an enforceable contract for the sale of a cooperative apartment because the agreement did not include terms material to a contract of sale); *see also RAJ Acquisition Corp. v. Atamanuk*, 272 A.D.2d 164 (1<sup>st</sup> Dept 2000)(the letter agreement was

unenforceable since it failed to state all the material terms of a complete agreement, “a material element of the contemplated bargain ha[ving] been left for further negotiations.”) Material terms of a real estate contract of sale, which must be in writing to be enforceable under the Statute of Frauds, “include those terms customarily encountered in transactions of this nature’...such as the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, adjustments for taxes and utilities, etc.” *Nesbitt v. Penalver*, 40 A.D.3d 596, 598 (2d Dept 2007)(internal citations omitted).

In this case, the Term Sheet is an unenforceable agreement to agree as it is missing certain material terms. Specifically, the Term Sheet is missing (1) the specific terms of the escrow agreement for a contract deposit; (2) the specific closing date; (3) required financing; (4) the risk of loss during the sale period; (5) the time and terms of payment of the purchase price; (6) a specific description of the subject property; (7) the identity of the parties who signed the Term Sheet or what relation the signers to the Term Sheet have to the buyer and seller; and (8) the correct name of the Seller as First Church of Religious Science, New York, N.Y.

The Term Sheet is also unenforceable as a material element of the contemplated bargain, the obligation to make a down payment and when the down payment would actually be made, on an agreement to purchase a \$15,000,000 building, was left for future negotiation. As articulated by the First Department in *RAJ*, an agreement is not enforceable where a material element of the contemplated bargain was left for future negotiation. Here, Argent’s obligation to pay the down payment was left for future negotiation as the Term Sheet specifically provided that such deposit was fully refundable following a 30-day due diligence period, stating as follows:

The Deposit shall become non-refundable following a 30 day due diligence period. This due diligence shall be satisfactory in all respects to the Buyer in its sole and absolute discretion, and upon mutual execution and delivery of Acquisition documentation satisfactory to Buyer in its sole and absolute discretion.

Clearly, the obligation by the buyer of a \$15,000,000 building to make a deposit/down payment is a material element of any contemplated bargain for this type of sale and the Term Sheet did not even require a down payment as it was fully refundable. The Term Sheet also left open for further negotiation the timing of when any deposit would be made, assuming that plaintiff even had an obligation to make a down payment. The Term Sheet also stated that \$500,000 would be deposited "upon execution by the parties of a reasonably acceptable escrow agreement." However, the escrow agreement was never agreed upon or executed and no down payment was ever made.

Additionally, the Term Sheet is unenforceable as subsequent negotiations between the parties indicate that there was no agreement on essential terms. Where subsequent negotiations to a written memorandum indicate that there was never a meeting of the minds on all essential terms of the written memorandum, then the memorandum is an agreement to agree and not an enforceable contract. *See Eastern Consolidated Properties, Inc. v. Morrie Golick Living Trust*, 83 A.D.3d 534 (1<sup>st</sup> Dept 2011)(complaint was dismissed as the exchange of marked up contracts subsequent to the deal memorandum constituted offers and counter-offers and demonstrated that there was never a meeting of the minds on all essential terms); *see also Spier v. Southgate Owners Corp.*, 39 A.D.3d 277 (1<sup>st</sup> Dept 2007)(complaint was dismissed as the letter agreement between the parties was not a contract because the parties' further negotiations showed that there was never a meeting of the minds on all essential terms). In this case, First Church has affirmed

