

**Metropolitan Lofts of NY LLC v Metroeb Realty 1
LLC**

2014 NY Slip Op 30118(U)

January 17, 2014

Sup Ct, Kings County

Docket Number: 503441/2012

Judge: Ann T. Pfau

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Commercial 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of January, 2014

P R E S E N T:

HON. ANN T. PFAU,

Justice.

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METROPOLITAN LOFTS OF NY LLC,

Plaintiff,

DECISION and ORDER

-against-

METROEB REALTY 1 LLC and
REDSKY CAPITAL LLC,

Index No. 503441/2012

Defendants.

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The following papers read on motion sequences 07, 08, 09 and 10:

All documents electronically filed with the New York State Courts E-Filing (NYSCEF) system in connection with these motions.

In motion sequence 07, plaintiff Metropolitan Lofts of NY LLC (Metropolitan Lofts) moves for summary judgment on its sole cause of action for specific performance of a contract for the purchase and sale of real estate. The motion is denied for the reasons below.

In motion sequence 08, defendant RedSky Capital LLC (RedSky) moved for an order amending the injunction bond dated December 10, 2012, posted by Metropolitan Lofts in connection with a preliminary injunction granted its favor, to include RedSky as a beneficiary of the bond, and for other relief. In motion sequence 10, Metropolitan Lofts

cross-moved for an order reducing the amount of the bond. In motion sequence 09, defendant Metroeb Realty 1, LLC (Metroeb Realty) moved for a protective order concerning trial subpoenae served upon it and its principal, Aaron Berger, by Metropolitan Lofts.

FACTS:

Metropolitan Lofts commenced this action on October 22, 2012. Metroeb Realty cross-claimed for a judgment declaring that the contract which is the subject of the verified complaint is not a valid or binding agreement. In June 2013, the court granted a motion to intervene by defendant RedSky Capital LLC (RedSky), which claims to have a competing contract to purchase the same property. It seeks judgment declaring that the disputed contract is not valid or enforceable; that its contract with Metroeb Realty is valid and enforceable; for breach of contract and specific performance on its purported contract to purchase the property; and for compensatory damages as against Metroeb Realty.

When the action was commenced, Metropolitan Lofts moved for a preliminary injunction preventing Metroeb Realty from selling the property to anyone else. The motion was granted, subject to plaintiff posting an undertaking in the amount of \$3 million (Interim Decision and Order, dated November 14, 2012). Discovery was completed, and a note of issue was filed on April 18, 2013 (Aff. Of Donald J. Kravet, Esq., paragraph 9). Plaintiff's motion for summary judgment was timely filed sixty days later.

Metropolitan Lofts' principal and sole member is Isaac Jacobowitz. The principal of Metroeb Realty is Aaron Berger. On May 3, 2012, Berger met with an individual named Samuel Sprei (Sprei), who was the authorized agent of Metropolitan

Lofts. Sprei did not disclose to Berger the identity of his principal because he believed that Berger would never agree to enter into an agreement to sell the property with plaintiff (Sprei EBT, annexed to Plaintiff's Notice of Motion, Appendix Ex. 3, 50-51). Sprei presented to Berger a draft of a contract for the purchase of property located at 143-157 Roebling Street and 1-19 Hope Street, in the Williamsburg section of Brooklyn. The property is improved with a commercial building. The proposed contract was already signed on behalf of Metropolitan Lofts by Jacobowitz. Also on May 3, 2012, Sprei presented Berger with two checks totaling \$3 million. The checks, one for \$1 million, the other for \$2 million, were issued by non-party Capital Holdings USA LLC, and made out to Metroeb Realty (Aff. Of Solomon Antar, Esq., Exh. J).

On May 4, 2012, Berger reviewed the contract with Sprei, made changes to it, signed it and handed it back to Sprei. Berger contends that he signed it at Sprei's request to demonstrate his good faith, with the understanding that it was not a final agreement. The contract provided for a purchase price of \$30 million, and obligated Metropolitan Lofts to make a \$3 million down payment. On May 4, 2012, Berger and Jacobowitz exchanged numerous drafts of contracts for sale of the same property containing additional and different terms. It appears that additional terms were discussed, and some terms agreed to, but the parties never executed a contract with these additional terms. On May 7, 2012, Berger sent an e-mail to Sprei advising him that he was pursuing other buyers (Defendant's Response to Rule 19 Statement, Ex. 9).

On May 4, Jacobowitz received the May 4 Proposal. He caused a revised contract to be sent to Sprei that incorporated some, but not all, of Berger's changes, plus he made other revisions (Defendant's Response to Rule 19 Statement, Ex. 6). On May 8 and May 9, 2012, representatives for the parties exchanged revised contracts (Defendant's Response to Rule 19 Statement, ¶¶ 20 - 24). Soon thereafter, Berger and Jacobowitz met in person. According to Berger, Jacobowitz had significant reservations and had requested that any closing take place in 14 months, not as soon as possible, as Berger wanted (Berger EBT, annexed to Defendant's Response to Rule 19 Statement at Ex. 3, 52-53). Berger claims that Jacobowitz told him "I don't think I am interested in the building. I feel that this building is not for me. . . . I can't put the money together" (*id.*, at 54). Jacobowitz called back a few days later and said "its not for us. We're not in this kind of business" (*id.*). Berger did not hear from Metropolitan Lofts again for many months. In the meantime, Sprei again approached Berger with an offer for the building, this time on behalf of a different principal.

Metropolitan Lofts seeks specific performance of the document dated May 4, 2012 that is annexed to the verified complaint as Exhibit A and is hereafter referred to as the "May 4 Proposal". This is the version of the document that has Jacobowitz's signature executed on May 3, 2012, and hand-written changes by Berger, and has Berger's initials on each page and his signature. Jacobowitz never executed the May 4 Proposal, and Metroeb did not deposit Metropolitan Lofts' deposit checks.

DISCUSSION:

Plaintiff's Motion for Summary Judgment:

A motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party (CPLR 3212 [b]). Accordingly, summary judgment should not be granted “where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

Plaintiff argues that the May 4 Proposal manifests a meeting of the minds that is sufficiently clear on its face that it should be enforced. “[W]hen the parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.” (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Metroeb Realty argues that, at most, the May 4 Proposal is nothing more than an unenforceable “agreement to agree” (see *Joseph Martin Jr. Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 [1980]). It further argues that since Berger made alterations to the proposed contract, it constituted not acceptance, but a counteroffer that was never accepted (*Woodward v Tan Holding Corp.*, 32 AD3d 467, 469 [2d Dept 2006]). Metroeb Realty also contends that the actions of plaintiff's agent clearly signified plaintiff's lack of agreement.

Metropolitan Lofts is not entitled to summary judgment on the record before the court. Metroeb Realty correctly argues that there are many open terms to the May 4 Proposal. If the circumstances of the execution of the document clearly evinced an

agreement between the parties to be bound by its terms, the Court could be persuaded of its enforceability. However, Berger's description of his interactions with Sprei and Jacobowitz indicate no meeting of the minds, and supports his contention that he did not sign the May 4 Proposal with the intention to be bound by it. There is a question of fact as to whether he acquiesced to Sprei's suggestion that it be signed with the understanding between them that no final agreement was being made. Sprei's deposition testimony does little to undercut Metroeb Realty's argument; indeed, he indicates that securing his fee was tantamount in his mind during his May 3 and May 4 negotiation with Berger (Sprei Aff., 50-51). He had made offers for the property on behalf of other principals before and after plaintiff's proposal. His actions may be construed as indicating plaintiff's non-acceptance of Metroeb Realty's counteroffer.

In sum, there are material questions of fact as to whether an agreement was made, and if an agreement was made, whether the May 4 Proposal is the written embodiment of that agreement.

Motion and Cross-Motion To Amend The Bond:

Plaintiff's motion for a preliminary injunction preventing the sale of the property was granted in an order dated November 14, 2012. After a hearing, the undertaking for the injunction (CPLR 6312[b]) was set at \$3 million. The bond, dated December 10, 2012, was filed on December 12, 2012. RedSky moved to intervene as a party defendant in May 14, 2013. The motion was granted, and RedSky filed its answer with cross-claims and a counter-claim on July 18, 2013. In motion sequence 07, RedSky

requests that the bond be amended to indicate that it is a beneficiary thereunder, and that the amount of the undertaking be increased by \$1 million to cover its anticipated damages sustained by reason of the injunction in the event that it is determined that plaintiff was not entitled to the injunction (CPLR 6312[b]); i.e., if plaintiff does not prevail at trial. Plaintiff's cross-motion seeks to reduce the bond amount to \$1.5 million.

The amount of the bond was set to cover potential damages in the event the property could be sold to a buyer other than Metropolitan Lofts, even though RedSky was not yet a party to this action. "The fixing of the amount of an undertaking is a matter within the sound discretion of the court" (*1523 Real Estate, Inc. v East Atlantic Props.*, 41 AD3d 567 [2d Dept 2007]). Neither party has shown that the amount of the bond is excessive or inadequate. There has not been a material change in circumstances since the bond amount was set. Neither RedSky nor plaintiff have demonstrated that the amount of the bond should be changed. Accordingly, the motions to change the amount of the bond are denied in the court's discretion.

RedSky persuasively argues that, as the alternative contract purchaser, it should be deemed a beneficiary under the bond. It was not named as a beneficiary in the bond because it was not yet a party to the action. In seeking to enjoin Metroeb Realty from selling the property to someone other than plaintiff, the likelihood that Metroeb Realty had an alternative contract purchaser was not only anticipated but a *sine qua non* of the relief sought. That the alternative contract purchaser would sustain damages and costs if plaintiff were not entitled to the injunction is foreseeable. Therefore, that part of RedSky's motion is granted.

Metroeb Realty's Motion for a Protective Order:

Metropolitan served subpoenae on Metroeb Realty and Berger, dated October 30, 2013, seeking material that had not been sought in discovery (Aff. Of Kenneth J. Rubinstein, Esq., Ex. A and B). Some of the material sought was produced, including original checks and other documents, and an unredacted copy of a document previously produced. At issue in this motion are demands for "telephone records for all telephone lines associated with or used by Metroeb Realty 1, LLC, [non-party] LHR Group, and/or Aaron Berger at the offices located at 143-157 Roebling Street, Brooklyn, New York, including but not limited to, telephone number [. .], for the dates May 3, 2012 through and including May 4, 2012" (Rubinstein Aff., Ex. A and B). These records were not sought in discovery.

Metropolitan argues that the subpoenae are "trial" subpoenae, and as such, no "discovery" is sought so the demand is not subject to the limits on discovery set forth in the preliminary conference order. Metroeb Realty contends that the telephone records are discovery subject to the court's order, and that Metropolitan's time to seek the records is past.

The motion is framed as one for a protective order under CPLR 3103, although it can also be considered as one to quash a subpoena under CPLR 2303. "The standard to be applied on a motion to quash a subpoena duces tecum is whether the requested information is 'utterly irrelevant' to any proper inquiry. Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" (*Gertz v Richards*, 233 AD2d 366 [2d Dept 1996]).

In this case, the subpoenae were served upon a named defendant and its principal. Accordingly, it is party discovery, and is subject to the court's supervision and the limits on discovery set forth in the preliminary conference order. The preliminary conference order directed that all disclosure ended on February 28, 2013 (NYSCEF document number 21).

The Supreme Court has broad discretion in the supervision of discovery (*306 Rutledge, LLC v City of New York*, 90 AD3d 1026 [2d Dept 2011]). Rule 13(a) of the Rules of the Commercial Division of the Supreme Court (Uniform Rules for the New York State Trial Courts § 202.70) provides that "Parties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders."

While a trial subpoena may appropriately be served upon a party or witness to ensure the witness's presence at trial, and that original or most up-to-date documents are presented in court at trial, plaintiff has used the device here to obtain disclosure of new material not previously sought. Metropolitan has not made a motion for an order permitting post-note of issue discovery, nor has it shown that unusual or unanticipated circumstances exist to warrant such discovery (Uniform Rules for the New York State Trial Courts § 202.21[d]). Plaintiff will not be permitted an end run around court-imposed limits on discovery by serving post-note of issue discovery demands (*see* Siegel, NY Prac § 370 [5th ed]). Accordingly, Metroeb Realty's motion for a protective order is granted.

It hereby is

ORDERED that plaintiff's motion for summary judgment (motion sequence 07) is denied; and it further is

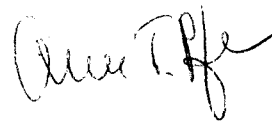
ORDERED that RedSky's motion to amend the bond (motion sequence 08) is granted to the extent that the injunction bond shall be amended, and an amended injunction bond naming RedSky as a beneficiary shall be filed within ten days of service of a copy herewith notice of entry, failing which the injunction may be vacated upon a defendant's motion, and the remainder of the motion is denied; and it further is

ORDERED that plaintiff's cross-motion to reduce the amount of the bond (motion sequence 10) is denied; and it further is

ORDERED that Metroeb Realty's motion for a protective order (motion sequence 09) limiting the subpoenaed parties' obligation to respond to the subpoenae dated October 30, 2013 is granted, and the demand that telephone records be produced is stricken from the subpoenae; and it further is

ORDERED that, after consultation with all counsel, the trial date is adjourned to 9:30 AM on February 24, 2014.

ENTER,



J. S. C.