Akeroyd v Soho 311 Dev., Inc.
2014 NY Slip Op 30360(U)
February 10, 2014
Supreme Court, New York County
Docket Number: 103925/10
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. Justice

PART 48

Index Number : 103925/2010
AKEROYD, SHANE
VS.
SOHO 311 DEVELOPMENT
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

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). _____

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

Replying Affidavits _____ | No(s). _____

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

Mtn is decided in accordance of the accompanying memorandum ~~de~~ decision/order of this Court.

FILED

FEB 11 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/10/14

JEFFREY K. OING, J.S.C.
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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SHANE AKEROYD,

Plaintiff,

-against-

SOHO 311 DEVELOPMENT, INC.,

Defendant.

Index No.: 103925/10

Mtn Seq. No. 004

DECISION AND ORDER

----------x

JEFFREY K. OING, J.:

Defendant, SOHO 311 Development, Inc., moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint. Defendant also seeks summary judgment on its four counterclaims, and an award of attorney's fees.

In a prior decision and order, entered February 9, 2011, this Court denied plaintiff's motion for summary judgment, and defendant's cross-motion for summary judgment dismissing the complaint:

> In December 2008, plaintiff received notice of a Sixth Amendment to the Condominium Offering Plan ("Sixth Amendment") removing a 20 x 100 foot parcel of land erroneously included in the original Offering Plan. On May 26, 2009, plaintiff signed a third rider amending the Agreement for additional custom work in the Unit, which was performed. On August 10, 2009, plaintiff's counsel informed defendant that plaintiff rescinded the Agreement because the Sixth Amendment contained information that potentially changed the presently unobstructed views of his client. Thereafter, plaintiff did not appear at the September 11, 2009 closing.
>
> Whether the land parcel description constitutes a material error and, therefore, constitutes a breach of the Agreement is disputed. Also, the parties disagree about the plaintiff's obligation to fulfill the Agreement, particularly because plaintiff was on notice of the Sixth Amendment several months prior to signing the third rider of the Agreement. Given that both

> plaintiff and defendant raise material issues of triable facts, the parties' respective motions for summary judgment are denied.

Contrary to defendant's arguments, which are virtually similar to the ones already considered by this Court, a factual issue still remains as to whether removal of the parcel of land included in the original offering plan is material. Indeed, plaintiff continues to maintain that the removal was material:

> Q. You used the word "material." Why was the removal of that plot of land material to you?
>
> A. The plot of land itself was material just by the very nature of its size. It was a building, 200 square feet. And so, you know, in absolute terms that's why I view it as material. From my perspective, I think certainly it's a significant piece of the overall property, which obviously my apartment was going to be a part of.
>
> Also, from my apartment, actually, from the backside actually had uninterrupted views over what was -- what was -- what formerly was that property. And obviously if the land used was to change, then potentially that view would have been affected.
>
> And also from -- you know, again, just from a value perspective obviously associated with that, part of the property were presumably air rights, again, that what would have had value that would have applied to the whole property, which, obviously, if that was taken away, it would not accrue to the property.

(Akeroyd 1/18/13 EBT at pp. 54-55). Further, plaintiff maintains again that he did not waive his right to rescind the contract based on defendant's alleged misrepresentation (Akeroyd 9/11/13 Aff., ¶ 15)

Nonetheless, in light of plaintiff's EBT conducted after the first summary judgment motion, defendant argues that

"materiality" is a red herring and that plaintiff's default was due to other reasons, namely, personal and financial:

> Q. When did you first conclude that you did not want to go through with your purchase?
>
> * * *
>
> Q. Did you ever come to a conclusion at some point that you didn't want to go forward with your purchase?
>
> A. Did I come to that conclusion?
>
> Q. Yes.
>
> A. Yes, I did.
>
> Q. And when was that?
>
> A. It would have been, I guess, the -- I guess I should not say. I recall it was around the end of -- the end of '08, sometime around towards the end of '08, beginning of '09 is when that --
>
> Q. What prompted that determination on your part?
>
> A. It was a -- it was a combination of things. You know, I started to, you know, feel generally uncomfortable with the position due to the general economic circumstances that -- just general economic circumstances. Whether it was, you know, specific to me and generally to the economy.
>
> I think what also happened was that at the time -- at or around that same time, you know, my personal life had changed. And around that time I was separating from -- or began separating from my wife. And so at some point it looked as if they were not going to come over.

(Akeroyd 1/18/13 EBT at pp. 68-69).

Although such testimony may facially demonstrate that plaintiff's arguments concerning "materiality" may be pretextual, defendant, however, conveniently fails to mention the latter portion of plaintiff's EBT testimony:

> Also, around the same time I think, you know, communications broke down with -- with -- with Soho Mews. I think there had been some changes to the people I was dealing with, and, you know, we didn't really have a working relationship. And then the culmination of all that was, you know, when I was made aware of -- of obviously the sixth amendment and, you know, the potential impacts that had to the property and to the value of the property. And, you know, that impacted the -- it impacted Soho Mews generally. And then that was all brought together with conversation with lawyers. And I was actually aware of -- or made aware of my rights to rescind. And that was all -- the string of events there went from basically the end '08 and went into the -- into that summer of '09.

(Id. at pp. 69-70). Thus, contrary to defendant's argument, plaintiff's basis for exercising his rescission right is not clearly pretextual. Rather, under these circumstances, plaintiff's testimony raises a factual issue as to whether his decision to exercise his purported right to rescind the contract was due personal and financial circumstances, or whether his decision was due to the sixth amendment, which gave notice of the removal of the plot of land.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that counsel shall call the Clerk of Part 48 at 646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/10/14

HON. JEFFREY K. OING, J.S.C.