Kolanu Partners, LLC v Becker
2014 NY Slip Op 30375(U)
February 7, 2014
Supreme Court, New York County
Docket Number: 157274/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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KOLANU PARTNERS, LLC,

Plaintiff,

Index No. 157274/2013

-against-

DECISION/ORDER

RONNY BECKER,

Defendant.

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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..................................	1
Affirmation in Opposition..	2
Notice of Cross Motion and Answering Affidavits......................	3
Affirmations in Opposition to the Cross-Motion.........................	4
Replying Affidavits..	5
Exhibits..	6

Plaintiff commenced the instant action pursuant to Civil Practice Law and Rules ("CPLR") § 3213 with a summons and notice of motion for summary judgment in lieu of complaint against defendants to recover the principal amount of $45,754.95, with interest thereon and attorneys' fees. Defendant cross-moves pursuant to CPLR § 3211(a)(1)(3) and (5) for an order dismissing the action. For the reasons set forth below, plaintiff's motion is denied and defendant's cross-motion is denied as premature.

The relevant facts are as follows. Defendant is the current owner of unit Penthouse D (the "Unit") in the condominium building located at 191-121 E. 23rd Street, New York, New York (the "Condominium"). Plaintiff was the developer and sponsor of the Condominium. The Condominium is an unincorporated association made up of unit owners, formed pursuant to an

offering plan filed with the Attorney General of the State of New York (the "Offering Plan") on or about January 18, 2005.

On or about April 21, 2003, while the Condominium was being constructed, plaintiff, as sponsor, initiated the process of obtaining a partial tax abatement pursuant to § 421-a of New York's Real Property Tax Law ("RPTL") for the Condominium. Pursuant to the Offering Plan, plaintiff was to expend its own money to obtain the tax abatement. However, Part I, ¶ 20 of the Offering Plan provided that: "[i]n the event Sponsor's application for a partial abatement from real estate taxes is granted, all Residential Unit Owners shall be required to reimburse Sponsor for all Sponsor's costs in obtaining such abatement." Additionally, Part I, § T, further provided that:

> Sponsor will apply, on behalf of the Unit Owners, to the New York City Department of Housing Preservation & Development ("HPD") for a partial real estate tax abatement under § 421-a . . . In the event that a partial real estate tax abatement is granted, all Residential Unit Owners will be required to reimburse Sponsor for all of Sponsor's costs in obtaining such abatement including, but not limited to, Sponsor's legal and filing fees, consulting fees, application expenses and the costs of purchasing 421-a eligibility certificates.

It is undisputed that on or about January 7, 2007, the § 421-a partial tax abatement was granted with an effective date from July 1, 2006.

Plaintiff now brings the instant action pursuant to CPLR § 3213 alleging that defendant, as a Unit Owner, has breached his obligation under the Offering Plan, Condominium's By-Laws and defendant's contract for the purchase of his Unit (the "Purchase Agreement") by failing to pay his pro-rata share to reimburse plaintiff for the costs it incurred in obtaining the partial tax abatement. Defendant cross-moves to dismiss the action, *inter alia*, on the grounds that the use of § 3213 is not proper here, the action is time barred and plaintiff is not the proper party to bring this action.

As a threshold matter, this court must determine whether this action was properly brought pursuant to CPLR § 3213. CPLR § 3213 provides: "[w]hen an action is based upon an instrument

for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." "[A] document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.'" *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 (1996) (quoting *Interman Indus. Prods. v. R. S. M. Electron Power*, 37 N.Y.2d 151, 155 (1975)). However, "[w]here the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable." *Id.* Stated another way, "[t]he instrument does not qualify [as an instrument for the payment of money only] if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document." *Id.*

In the present case, plaintiff's motion for summary judgment in lieu of complaint must be denied as it is not based upon an instrument for the payment of money only. Plaintiff bases this action on the Offering Plan, Purchase Agreement and Condominium's By-Laws. However, contrary to plaintiff's assertion, these documents do not on their face demonstrate proof of an agreement with defendant to pay a sum of money. Instead, a greater than de minimis deviation from the face of these documents is necessary to ascertain defendant's liability, if any, to plaintiff. Indeed, plaintiff itself relies on several items outside the Offering Plan, Purchase Agreement and By-Laws in its moving papers to make out its prima facie burden. Simply put, defendant's alleged obligation to pay plaintiff the amount of $45,754.95, cannot be proved by any one of the instruments identified above but requires outside proof making the limited procedural remedy of CPLR § 3213 unavailable.

Based on the foregoing, plaintiff's motion for summary judgment in lieu of a complaint is

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denied in its entirety and the court need not address the merits of the case. Furthermore, as plaintiff did not serve a regular complaint, defendant's cross-motion to dismiss is premature and must be denied. Accordingly, plaintiff is directed to serve a regular complaint on defendant, the defendant to answer it within twenty (20) days and the action to proceed accordingly. This constitutes the decision and order of the court.

Date: 2/7/14

Enter: ______________________ J.S.C.

CYNTHIA S. KERN
J.S.C.