

**138-140 W. 32nd St. Assoc. v 138-140 W. 32nd St.
Assoc.**

2014 NY Slip Op 30989(U)

April 14, 2014

Supreme Court, New York County

Docket Number: 152064/13

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

138-140 WEST 32ND STREET ASSOCIATES LLC,
Plaintiff,

INDEX NO. 152064/13

-against-

MOTION SEQ. NO. 001

138-140 WEST 32ND STREET ASSOCIATES, a New
York general partnership, JOSEPH SIMHON and
DAVID SIMHON,

Defendants.

The following papers, numbered 1 to 4, were read on this motion to dismiss by defendants to dismiss the complaint and cancel plaintiff's Notice of Pendency.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED	
1	_____
2, 3	_____
4	_____

Cross-Motion: Yes No

This is an action brought by 138-140 West 32nd Street Associates LLC (plaintiff or plaintiff LLC) on or about March 6, 2013, for *inter alia*, declaratory judgment and specific performance of a contract of sale (the Contract), executed on January 9, 2013, for the purchase of two adjoining buildings located at 138-140 and 142 West 32nd Street, New York, New York for the purchase price of \$3,600,000.00. Before the Court is a pre-answer motion by 138-140 West 32nd Street Associates (the Partnership), Joseph Simhon (Joseph) and David Simhon (David) (collectively, defendants), pursuant to CPLR §§ 3211(a)(1) and 6514(a), to dismiss the complaint in its entirety and to cancel plaintiff's Notice of Pendency, on the basis that the Contract is void and unenforceable and was superceded by a subsequent agreement between

the parties. Plaintiff is in opposition to the motion.

BACKGROUND

Joseph and David are brothers, as well as general partners in the Partnership. Joseph and David individually purchased 138-140 West 32nd Street in 1981, and proffer that they are tenants in common owners (see Deed to 138-140 West 32nd Street building, Notice of Motion exhibit D). Subsequently, in 1985 the Partnership purchased the 142 West 32nd Street building. Here, the Contract at issue for the sale of both buildings was executed only by Joseph on behalf of said Partnership and by plaintiff purchaser. There was a signature line for David as well, however he never signed the Contract.

In support of their motion, defendants proffer that the Contract is unenforceable as it fails to satisfy the required elements of a Contract for sale of real property. Specifically, the Contract does not state all of the essential terms of a complete agreement because it lists the Partnership as the seller of both buildings, yet both buildings are not owned by the Partnership. Defendants further proffer that the Contract omits a material term as it does not identify all the parties to the transaction, namely the owners of 138-140 West 32nd Street building. Moreover, it is not signed by all of the parties as it was only signed by Joseph. Further, defendants state that the Contract should be rescinded since it contains a substantial and mutual mistake, as neither plaintiff LLC or Joseph were aware that the buildings had different ownership. Additionally, tenants in common owners do not confer upon each other the authority to enter into an executory agreement for the sale of the building, and an agreement on behalf of one tenant in common does not bind the other, argue defendants. Thus, defendants proffer that Joseph's signature does not render the Contract enforceable or bind David to the sale of the 138-140 West 32nd Street building. Furthermore, defendants proffer that the Contract is unenforceable because it lacks consideration as admitted by the plaintiff in its complaint

(Complaint ¶ 15, 22), since the Contract deposit of \$400,000.00 was not tendered specifically as required by the Contract. Approximately three months after the Contract was signed and after the herein litigation was commenced, on or about March 21, 2013, plaintiff sent to defendants the Contract deposit which was promptly rejected by the defendants.

David submits an Affidavit in support of the motion in which he avers that Joseph signed the Contract for the sale of both buildings without his consent and without his knowledge. David states that he had no intention of selling either of the buildings, especially at such a low sale price which would have resulted in severe tax consequences (David Affidavit at ¶ 7). Additionally, David proffers that there was no meeting of the minds as to the sale of the 138-40 West 32nd Street building as neither Joseph or David Moinian (Moinian), the member/manager of plaintiff, were aware that the two buildings were owned separately (*id.* at ¶ 10). Further, defendants argue that in the event the Court finds the Contract to be enforceable, it was superceded by a subsequent agreement dated February 12, 2013, which constituted a novation and was signed more than a month after the Contract. This subsequent agreement entitled, "Revised Letter of Intent to Purchase" (LOI) is signed by David and Moinian. The LOI sets out a different agreement between the parties than what is contained in the Contract, defendants proffer, wherein the lessee is a "TBD entity owned and managed by David Moinian" who would lease the two buildings from lessors David, Joseph and the Partnership for at least 18 months with an option to purchase/ground lease at a different purchase price depending on what year of the lease the option is exercised (*see* LOI at ¶ 1-6).

In opposition, Moinian maintains that the issue of whether David concurs with the actions of Joseph in signing the Contract for the sale of both buildings is not dispositive of the Contract's enforceability since Joseph, a general partner, had the authority to bind the Partnership to the sale (Moinian Affidavit at ¶ 2). Plaintiff avers in its complaint that Joseph and

David participated in months of negotiation and that all parties were in agreement with the terms of the sale, including the manner in which the purchase price would be paid (Complaint at ¶ 7-8). Plaintiff maintains that the financial structure of the purchase of the buildings generated certain tax benefits for Joseph, "who stood to become a minority member of the Plaintiff subject to a nominal put option" (id at ¶ 9). Additionally, plaintiff points to a section of the Contract which contains representations of the seller which states:

"The person executing this Agreement on behalf of Seller has been duly authorized to do so by the appropriate governing or managing authority of Seller, and this Agreement constitutes the valid and binding obligation of Seller, enforceable in accordance with its terms" (Contract at ¶ 8.1[a]).

Since the initial closing date scheduled in the Contract of March 22, 2013, plaintiff maintains that it was and continues to be ready, willing and able to close the transaction (id. at ¶ 13). Plaintiff proffers that the question of whether the Contract is enforceable is fact specific and discovery is required due to the "unique factual context surrounding the sale", and as such the herein motion should be denied (Moinian Affidavit in Opposition, par. 2).

Further, plaintiff asserts that after 1985, the Partnership came to function as the owner of both buildings and essentially argues that the 138-140 West 32nd Street building became a part of the Partnership. Further, regardless of any disagreement between the brothers regarding the sale of the buildings, plaintiff LLC maintains that the Contract is enforceable. Even if the Court finds that the 138-140 West 32nd Street building is held by Joseph and David as tenants in common, plaintiff avers that the Partnership is still bound by the Contract for the sale of the 142 West 32nd Street building and for Joseph's interests in the 138-140 West 32nd Street building.

STANDARDS OF LAW

Motion to Dismiss

CPLR 3211(a) provides that:

“a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

[1] A defense is founded upon documentary evidence”

When determining a CPLR 3211(a) motion, “we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (see *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (see *Guggenheimer v Ginzburg*, 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002]).

A CPLR 3211(a)(1) motion “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; see also *Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008] [holding that it was proper for the complaint to be dismissed because the documentary evidence refuted the plaintiff’s allegations for breach of contract]; *Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248 [1st Dept 1995]; *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). “To be considered documentary evidence within the meaning of CPLR 3211(a)(1), the evidence must be unambiguous and of undisputed authenticity (*Yue Fung USA Enterprises, Inc. v*

Novelty Crystal Corp., 105 AD3d 840 [2d Dept 2013]). “While the complaint is to be liberally construed in favor of plaintiff on a § 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts (*Robinson*, 303 AD2d at 235).

DISCUSSION

I. Letter of Intent (LOI)

The Court first turns to the question of whether the LOI constituted a novation or modification to the Contract. The requisite elements of a novation include, “a previous valid obligation, agreement of all parties to the new obligation, extinguishment of the old contract, and a valid new contract (*Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952 [2d Dept 1985] [internal citations omitted]). Whether a subsequent agreement is a novation or simply a modification of a prior agreement “turns on the intent of the parties which, in the absence of extrinsic evidence of intent, is a question of law for the court” (*Bowes & Co., Inc. v American Druggists’ Ins. Co.*, 61 NY2d 750, 751 [1984], citing *Mallad Const. Corp. v County Fed. Sav. & Loan Ass’n*, 32 NY2d 285 [1973]).

Defendants proffer that the LOI was a novation which supercedes the Contract, and sets out completely different terms than those contained in the Contract regarding the lease and option to buy/ground lease the buildings by Moinian. “Whether a discharge [of the prior agreement] is effected depends on the intention of the parties, deduced from the documents and the circumstances of their execution” (*Globe Food Servs. Corp. v Consolidated Edison Co. of N.Y.*, 184 AD2d 278, 279 [1st Dept 1992]). Paragraph 12 specifically states that “[t]he terms of this letter of intent shall not be binding on any party unless and until said terms are incorporated into a written contract/lease duly executed by all parties” (LOI at ¶ 12). Furthermore, there is no definitive language in the LOI that states that it shall supercede the

Contract, or that the LOI revokes and cancels the Contract (see *Globe Food Services Corp.*, 184 AD2d at 279; cf. *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 289 [1973] ["supercedes" any prior agreement]; *Citigifts, Inc. v Pechnik*, 112 AD2d 832, 833 [1st Dept 1985], *affd* 67 NY2d 774 [1986] ["in lieu of and shall supercede" any prior agreements]). Here, the plain and unambiguous language in the LOI is clear that it is not binding on the parties, and as such does not create any questions of fact on this issue (see *Northville Indus. Corp. v Fort Neck Oil Terms. Corp.*, 100 AD2d 865, 868 [2d Dept 1984], quoting *Mallad Constr. Corp.*, 32 NY2d at 291 ["where a question of intention is determinable by written agreements, the question is one of law . . . [o]nly where the intent must be determined by disputed evidence or inference outside the written words of the instrument is a question of fact presented"]). The Court finds that the LOI is nothing more than an agreement to agree, which is unenforceable under the statute of frauds (see General Obligations Law § 5-703[2]; *Benedict Realty Co. v City of N.Y.*, 45 AD3d 713, 714 [2d Dept 2007]). As such, the LOI does not constitute a novation or modification of the Contract.

II. The Contract

In its complaint plaintiff asserts causes of action for specific performance, declaratory judgment, fraud, misrepresentation and seeks a preliminary and permanent injunction.

Paragraph 4.2(a) of the Contract required a down payment of \$400,000.00 as consideration upon "the full execution and delivery" of the Contract (see Notice of Motion, exhibit A at p. 5). Plaintiff avers in its complaint, the facts of which we accept as true for purposes of deciding this motion, that the Contract was executed on January 9, 2013 and that "[b]ecause of his status as a general partner, the Contract is and was enforceable immediately upon execution by Joseph, who indicated that he would quickly obtain his brother's signature and deliver same to Plaintiff, whereupon he would pick-up the contract deposit of \$400,000" (Complaint at ¶¶ 15, 17). However, the documentary evidence before the Court demonstrates

that not only was the Contract never fully executed, the deposit was not tendered by the plaintiff LLC until after the commencement of the herein litigation, which is approximately three months after the date that plaintiff avers the Contract was executed and enforceable. Plaintiff's counsel sent a letter to defendants, dated March 21, 2013, which enclosed the deposit check. Such attempt to tender the deposit was promptly rejected by the defendants by letter dated March 26, 2013.

Moinian admits in his affidavit that Joseph delivered the contract to him on January 9, 2013 without David's signature and was thereafter notified that David wanted a more friendly tax structure than what was agreed upon in the Contract (Moinian Affidavit ¶ 19). Moinian avers that plaintiff was thereafter "amenable of attempting to make David more comfortable from a tax perspective" and plaintiff "entertained discussion of an alternative structure on February 11, 2013 and signed the letter of intent" (*id.* at ¶ 20). Moinian further states that David never followed up on the LOI and failed to prepare the Master Lease pursuant to the terms of the LOI. Additionally, Moinian avers that the Partnership continued to market the property despite the Contract, and the herein litigation ensued. It was not until March 2013 that the plaintiff LLC attempted to tender the down payment, which in viewing the allegations contained within the complaint as true, was untimely and violates the terms of the Contract. "All contracts must be supported by consideration, consisting of a benefit to the promisor or a detriment to the promisee" (*Beitner v Becker*, 34 AD3d 406, 407 [2d Dept 2006]; *see also Holt v Feigenbaum*, 52 NY2d 291, 299 [1981]).

Regarding the 138-140 West 32nd Street building, the only documentary evidence before the Court regarding the ownership of this building is the 1981 deed which lists David and Joseph as the owners, but is silent as to exactly how the building is owned. EPTL 6-2.2(a) states that "[a] disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy" (*see e.g. Jackson v Pichler*, 23 AD3d

241 [1st Dept 2005] [brother and sister took title as tenants in common, with no right of survivorship, as no express declaration was included in the deed that they were taking title as joint tenants or that they were husband and wife]). In order to “overcome this strong presumption, a party must establish by clear and convincing evidence that a joint tenancy was intended to be created rather than a tenancy in common” (*Estate of Menon v Menon*, 303 AD3d 622, 623 [2d Dept 2003]). Furthermore, “[t]he mere fact of ownership by two persons of a parcel of property as tenants in common does not constitute each a general agent of the other to enter into an executory agreement for the sale of the property” (*Albert v Schrank*, 203 AD 149, 151 [1st Dept 1922]).

Plaintiff does not argue or put forth any evidence that Joseph and David hold the tenancy to the 138-140 West 32nd Street building as joint tenants or in unequal shares. Rather, plaintiff LLC argues that there are issues of fact as to whether the brothers’ initial joint ownership of this building evolved into or was superceded by the Partnership, which is and has been engaged in the real estate business over the three decades after acquiring the building. Although the presumption of ownership by tenants in common is rebuttable, plaintiff has not met such a burden to rebut the presumption by clear and convincing evidence. Furthermore, defendants offer documentary evidence that shows that the Contract was not signed by David. As such the contract for the sale of the 138-140 West 32nd Street building is unenforceable as the Partnership, the seller, cannot sell a building it does not own. Additionally, Joseph’s signature alone cannot bind both tenant in common owners for the sale of the building.

Furthermore, as general partners Joseph’s signature on the Contract was sufficient to bind the Partnership for the sale of the 142 West 32nd Street building (see New York Partnership Law § 20, 21), however the sale of this building is void as there was no consideration tendered as directed in the Contract on the date that plaintiff alleges in the complaint that the Contract became binding and enforceable. As such, the Court finds that

plaintiff's cause of action for specific performance is dismissed. As the plaintiff's cause of action for specific performance is the only claim asserted that could affect title to real property, that portion of defendants' motion seeking to cancel the notice of pendency is granted (see CPLR 6514[a]; *3801 Review Realty LLC v Review Realty Co. LLC*, 111 AD3d 509 [1st Dept 2013]).

B. *Declaratory Judgment*

Turning to plaintiff's cause of action for a declaratory judgment declaring that: (i) the Contract is effective and enforceable and to compel the sale of the property to plaintiff; (ii) the failure of David to execute the Contract does not render the Contract invalid, since his brother Joseph had the requisite actual and/or apparent authority to act on behalf of the Partnership; and (iii) the defendants should be compelled to accept the deposit which plaintiff has transmitted herewith (Complaint at ¶ 22). Based upon the aforementioned, this cause of action is also dismissed.

C. *Fraud, Misrepresentation, Preliminary and Permanent Injunction*

Although in the notice of motion defendants state that they are seeking to dismiss plaintiff's entire complaint, defendants do not address the remaining causes of action in plaintiff's complaint for fraud, misrepresentation, and for a preliminary and permanent injunction. Thus the Court will not address same and the motion is denied as to the aforementioned causes of action.

CONCLUSION

Accordingly, it is

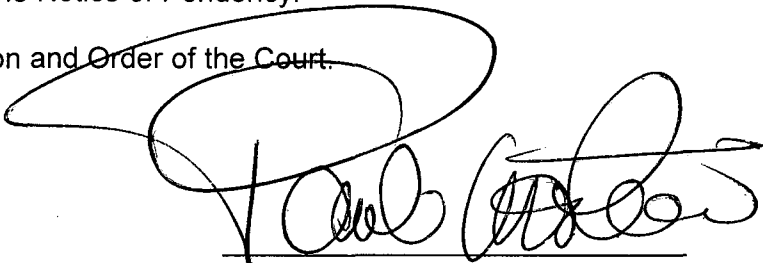
ORDERED that the motion brought by 138-140 West 32nd Street Associates, Joseph Simhon and David Simhon (collectively, defendants), pursuant to CPLR §§ 3211(a)(1) and 6514(a), to dismiss complaint brought by 138-140 West 32nd Street Associates LLC is granted only to the extent that plaintiff's causes of action for specific performance and declaratory

judgment are dismissed and the Notice of Pendency is hereby cancelled, and the motion is denied as to plaintiff's remaining causes of action; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference on June 11, 2014 at 11:00 a.m at 60 Centre Street, Room 341, Part 7; and it is further,

ORDERED that counsel for defendants is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court, who is directed to enter judgment accordingly and cancel the Notice of Pendency.

This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: 4-14-14

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST