

587 Fifth, LLC v Baruch, LLC
2014 NY Slip Op 31242(U)
April 10, 2014
Supreme Court, New York County
Docket Number: 650805/13
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
-----x
587 FIFTH, LLC,

Plaintiff,

Index No. 650805/13

- against -

BARUCH, LLC and ASHER ROSHANZAMIR,

Defendants.
-----x

Hon. Charles E. Ramos, J.S.C.

Plaintiff's motion to renew and/or reargue this Court's prior decision Dated September 30, 2013, is granted and the following is substituted in its place and stead.

Defendants Baruch, LLC (Baruch) and Asher Roshanzamir (Asher, and together with Baruch, defendants) move to dismiss the complaint in its entirety pursuant to CPLR 3211 (a) (1), (2), (3) and (7).

Background

The facts set forth herein are taken from the pleadings and are assumed to be true for purposes of disposition.

This action arises from an agreement of sale and purchase (PSA) relating to a 99-year net ground lease for property located at 587 Fifth Avenue, in Manhattan. The PSA was signed by Asher, on behalf of Baruch, and non-party 587 Fifth JV, LLC (JV). Asher is the managing member of Baruch and claims to hold a 66 2/3 percent interest; non party Elyas Eshagian (Elliot) holds a 33 1/3 percent interest. There is an assertion that Michael

Roshanzamir (Michael), Asher's father, holds a 5 percent interest, which would diminish Asher's interest.

In the PSA, Asher promised to invoke his contractual right under Baruch's operating agreement (BOA) to purchase the other members' interests in order to obtain 100% consent to effectuate sale of the ground lease. To this end, Asher issued a formal written offer to buy Elliot's interest; Elliot issued a counteroffer to buy Asher's interest on the same terms and commenced an action to enforce that offer (First Action), discussed below. Asher also contracted to purchase his father, Michael's, interest in Baruch.

Plaintiff purports to be an assignee of the PSA from JV, and has alleged an assignment from JV to itself, and a consent to that assignment, signed by Asher on behalf of Baruch (Exhibit A, annexed to the Sinatra Aff.).

First Action

In the First Action, Elliot sought to prevent Asher from exercising his buy-sell right under Baruch's operating agreement (BOA), entitled *Eshagian v Roshanzamir*, bearing index number 652577/12 (First Action); Michael intervened in that action. At issue in the First Action is the buy-sell provision contained in the BOA, which provides that if one member of the company no longer wishes to participate in Baruch, that member can offer to purchase the other member's ownership interest at a price

selected by the offering member. In response, the member receiving the offer can elect to sell at the offering price or purchase the offering member's ownership interest at the same price, proportionately adjusted to the offering member's ownership interest.

In furtherance of his obligations under the PSA, Asher presented a buy-sell notice to Elliot under the BOA, and an offer to purchase Elliot's 33 and 1/3 percent ownership interest in Baruch for \$3,000,000 or alternatively, to sell to Elliot Asher's 66 and 2/3 percent interest for \$6,000,000. In May 2012, Elliot provided a counter-notice to Asher that he chose to purchase Asher's ownership interest in Baruch for \$6,000,000; Asher refused on multiple grounds.

In July 2012, Asher notified Elliot that he was rejecting Elliot's counter-notice, and that Asher was going to purchase Elliot's interest based upon the offer that he (Elliot) initially rejected. Thereafter, Elliot commenced the First Action against Asher and takes the position that the BOA obligates Asher contractually to sell to Elliot his interest in Baruch, and Elliot seeks a declaration to that effect.

In October 2012, this Court dismissed the complaint in the First Action upon motion on the ground that Elliot had failed to make the necessary down payment to effectuate his counter-notice under the buy-sell provision of the BOA because the funds he

committed were not his and not "at risk" (10/25/12 Tr 32:7-9).

Following this Court's dismissal of the First Action, Asher purported to terminate the PSA on behalf of Baruch and returned the deposit that JV had paid, which return of the deposit JV rejected (Exhibit Q, annexed to the Sinatra Aff.). Plaintiff commenced this action for specific performance against Asher and Baruch shortly thereafter.

However, in August 2013, this Court granted Elliot's motion to renew and reinstated the complaint in the First Action, based upon new evidence that Asher's deposit which accompanied his initial buy-sell notice to Elliot also was not his "at risk" down payment, raising a factual issue as to the parties' understanding of a BOA contractual term (8/28/13 Tr). If this Court concludes in the First Action that Asher failed to satisfy the condition set forth in the PSA, this motion to dismiss must be granted. The parties in the First Action are in the initial stages of discovery.

Elliot has also commenced a second action against Asher in which he seeks disgorgement of money and access to books and records, entitled *Eshagian v Roshanzamir*, bearing the index number 652088/13.

The Complaint

In this complaint, plaintiff argues that the PSA obligates Asher to exercise his right under Baruch's operating agreement to

acquire the 33 1/3 percent membership interest in Baruch held by Elliot, thereby enabling Baruch to consummate the sale of the ground lease to plaintiff. Plaintiff seeks a declaration to that effect and specific performance of the PSA. Following the Court's dismissal of the complaint in the First Action and prior to its reinstatement, plaintiff took the position that Asher was personally bound to complete the buy-sell process, and that all consents required by section 3.10 of the PSA were timely obtained and Asher is judicially estopped from claiming otherwise.

Plaintiff asserts eight causes of action. The first four causes of action are for declaratory judgment; the fifth cause of action is for specific performance of the PSA; the sixth cause of action is for specific performance against Asher to compel him to acquire Elliot's interest under the BOA; the seventh and eighth causes of action are for legal fees and seek a permanent injunction.

Discussion

Defendants move to dismiss the complaint based upon the terms and provisions of the PSA. Defendants argue that plaintiff lacks standing to sue as it is not the named buyer under the PSA, and the alleged assignment (Assignment) upon which it relies, is not effective. Further, defendants maintain that the written consent to assignment (Consent to Assignment) only takes effect at the time of actual closing of the PSA, which never occurred.

In addition, defendants assert that the PSA terminated pursuant to its terms insofar as the condition precedent set forth in that agreement was not satisfied as Asher was unable to obtain consent to the PSA within the 60 days required under section 3.10 of the PSA. Defendants also seek a mandatory cancellation of the notice of pendency.

A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur" before the contract itself is formed or comes into existence, to be distinguished conceptually from a condition which must occur before a duty to perform arises (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690-91 [1995]).

The PSA, the agreement which establishes the terms for Baruch's sale of the ground lease to JV, and the Consent to Assignment, the writing upon which plaintiff relies as evidence of Baruch's consent to JV's future assignment of the PSA, both contain the unmistakable language of conditions precedent. However, determining whether these conditions have been satisfied involves resolving issues of fact not before the Court in this action, but in the First Action.

At the outset, the Consent to Assignment conditions Baruch's consent to the future assignment of the PSA from JV to plaintiff upon the consummation (closing) of the PSA itself:

The Consent to Assignment provides that it "evidenc[es] Seller's [Baruch's] consent to and approval of that certain

... [Assignment] ... **provided, however, that this Consent [to Assignment] is conditioned on Stanley Chera, Haim Chera and/or Nathan Feldman (...) having the right to exercise the control of the day-to-day activities of the Assignee (plaintiff) through and including the date of the consummation of the transactions contemplated under that certain Agreement of Sale and Purchase (PSA)**" (emphasis added) (Exhibit A, annexed to the Sinatra Aff.).

Moreover, the viability of plaintiff's claim to compel specific performance of the PSA as an assignee of JV, the contracting party to the PSA, and the existence of a justiciable controversy underlying plaintiff's claims seeking declaratory judgments, hinge upon whether closing of the PSA can properly be compelled.

Section 3.10 of the PSA states:

Consent of Managing Members. Asher Roshanzamir, as a managing member of Seller [Baruch], shall exercise his buy-sell right under Seller's operating agreement [BOA] (the acquisition of such interests by Asher Roshanzamir being, the "Buy/Sell") ... **If Asher Roshanzamir is not deemed to be the buyer of the other member's [Elliot's] interests in the Seller pursuant to the buy-sell provision of the Seller's organizational documents within sixty (60) days of the date the Buy/Sell is exercised, then this Agreement shall terminate** ... and, thereafter, the parties shall have no further rights or obligations hereunder" (emphasis added) (Exhibit G, annexed to the Sinatra Aff)..

The condition precedent set forth in section 3.10 establishes a condition to the existence of the PSA itself (see *Openheimer & Co.*, 86 NY2d at 690-91). Under the critical terms of this provision, Asher's failure to acquire Elliot's interest in Baruch within 60 days of Asher's invocation of his buy-sell

right means that Asher is "not deemed to be the buyer" under the BOA, the non-occurrence of which defeats the existence of the PSA itself.

Asher takes the position that he properly terminated the PSA, on behalf of Baruch, under section 3.10 because he was unable to successfully invoke the buy-sell provision of the BOA and acquire Elliot's membership interest within 60 days of his notice to invoke. However, in the First Action, Asher has taken an inconsistent position. Asher has maintained in that action that his offer to acquire Elliot's interest was valid, and that Elliot's counter-offer was invalid, within 45 days of Asher's initial offer under Article 10.5 (a) (iv) of the BOA (Exhibits D, E annexed to the Sinatra Aff.).

Plaintiff insists that, under section 3.10 of the PSA, Asher is "deemed to be the Buyer" of Elliot's interest within the requisite 60 days, and thus, can be compelled to consummate the PSA.

In the event that Asher's initial offer be deemed accepted in the First Action, the open issue remains as to whether Asher has obtained the consents required by section 3.10 of the PSA. Determining whether Asher or Elliot properly invoked the Buy/Sell right under the BOA in the First Action thus impacts the viability of plaintiff's claims in this action and would limit the issues.

For this reason, the Court determines in its discretion that staying this action pending resolution of that issue in the First Action is both prudent and justified (CPLR 2201; compare *American International Group v Greenberg*, 60 AD3d 483, 484 [1st Dept 2009]).

Accordingly it is

ORDERED that this action is STAYED and the motion to dismiss is denied without prejudice to be reinstated, if so advised, following resolution of the action entitled *Eshagian v Roshanzamir*, bearing index number 652577/12.

Dated: April 10, 2014

ENTER:



J.S.C.

HON. CHARLES E. RAMOS