

**Lenox NY, LLC v AA Olympic, LLC**

2014 NY Slip Op 32119(U)

August 4, 2014

Sup Ct, New York County

Docket Number: 654128/2013

Judge: Melvin L. Schweitzer

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Olympic moves, by Order to Show Cause, seeking the issuance of an order pursuant to CPLR 3211 (a) (7), dismissing Lenox's Second Amended Complaint, and pursuant to CPLR 3212, granting summary judgment in both of the captioned actions.

### **Background**

On September 13, 2013, Lenox entered into a purchase agreement (Purchase Agreement) to purchase the Unit from Olympic for the purchase price of \$3,562,500.00. Mr. Azeroual signed the Purchase Agreement on behalf of Olympic. Lenox deposited (Contract Deposit) 10 percent of the purchase price. The Purchase Agreement provides that in the event of a dispute as to the disposition of the Contract Deposit, the Escrow Agent shall continue to hold the funds pending written instructions signed by both parties, or a final judgment from a court of competent jurisdiction. Olympic's law firm is the Escrow Agent designated in the Purchase Agreement. Article 8 of the Purchase Agreement provides:

Seller represents and warrants to Purchaser, as of the date hereof, as follows:

8.5 Seller is not a party to any service, employment or other contract affecting the Unit which is not terminable on or before the Closing Date.

Olympic is a party to an alteration agreement with the Board of Managers of the River Lofts Condominium, dated July 30, 2012 (Alteration Agreement). Mr. Azeroual signed the Alteration Agreement on behalf of Olympic. Paragraph 14 of the Alteration Agreement provides:

Unit Owner (a) shall advise the person or persons to whom it may transfer the Unit ("Purchaser") of the Work undertaken by the Unit Owner pursuant to this Agreement, (b) shall provide copies of the Approved Plans and this Agreement to Purchaser, and (c) shall cause Purchaser to execute and deliver to the Condominium Board an agreement substantially in the form of Exhibit B hereto pursuant to which Purchaser shall assume all of the obligations of the Unit Owner under this Agreement, including the obligation under this Section with respect to any transfer of the Unit by Purchaser.

On October 30, 2013, Olympic provided Lenox a copy of the Alteration Agreement. According to Olympic, the Alteration Agreement mimics the condominium documents that Lenox knew the Unit was subject to at the time they signed the Contract. According to Lenox, the Alteration Agreement is well beyond the landlord's work that was to be assumed by Lenox at Closing, and imposes on the Unit owner many obligations that were not known to Lenox at the time of the Contract. Lenox contends the Alteration Agreement relieved it of its obligation to close.

On November 4, 2013, Olympic's attorneys sent Lenox's attorneys a "time of the essence" letter setting the closing under the Purchase Agreement for November 12, 2013.

On November 5, 2013, Lenox's attorney sent a letter to Olympic's attorneys rejecting the November 4, 2013 "time of the essence" letter.

On November 7, 2013, Olympic's attorneys sent Lenox's attorneys another "time of the essence" letter setting the closing under the Purchase Agreement for November 18, 2013 and further stating that:

Purchaser's failure to appear on the scheduled Closing Date ready, willing and able to purchase the Premises shall be deemed a breach of the Contract and Seller shall avail itself of any and all remedies afforded to it under the law and Contract, including, but not limited to obtaining a release of the Contract Deposit to Seller.

On November 13, 2013, Lenox's attorneys sent a letter to Olympic's attorneys rejecting the November 7, 2013 "time of the essence" letter and further directing them not to release the Contract Deposit to any party without the prior written consent of Lenox.

On November 15, 2013, Olympic's attorneys sent an email to Lenox's attorney responding to the letter of November 13, 2013, and stating that a "time of the essence" closing remained scheduled for Monday, November 18, 2013. A number of documents were transmitted

with this email, including a list of closing adjustments and a bank payoff letter. Also, on November 15, 2013, Olympic's attorneys sent a separate email to Lenox's attorneys transmitting the ACRIS documents for the closing. Lenox's attorneys replied by email on Saturday, November 16, 2013, rejecting the closing scheduled for Monday, November 18, 2013, directing the Escrow Agent not to release the Contract Deposit, and advising Olympic that Lenox would be bringing an action seeking damages, and filing a lis pendens against the Unit.

Lenox's representatives appeared at the Closing.

By letter dated November 19, 2013, Olympic's attorneys advised Lenox that Olympic demanded a release of the Contract Deposit, and that they intended, as Escrow Agent, to release the Contract Deposit to Olympic "within 5 business days." On November 20, 2013 Lenox's attorneys sent a letter to Olympic's attorneys objecting to the release of the Contract Deposit and directing the Escrow Agent to continue to hold the funds in escrow.

Olympic and Mr. Azeroual move for an order cancelling the notice of pendency, and permitting Olympic to sell the property as well as to dismiss Lenox's Second Amended Complaint, and for summary judgment in both actions.

Olympic and Mr. Azeroual contend the existence of the Alteration Agreement is a lame excuse for Lenox's failure to close the transaction because the Alteration Agreement provides for nothing more than the landlord's work agreed to by Lenox under the Purchase Agreement.

Olympic argues that Lenox only appeared at the closing to negotiate a reduction in purchase price. According to Olympic, since it was ready, willing and able to deliver good title and Lenox failed to close at a duly noticed "time of the essence" closing, Lenox breached the Contract and can no longer seek specific performance or a refund of its down payment.

Lenox denies any valid “time of the essence” closing was ever scheduled or held. It also contends that it appeared at the scheduled time and place noticed by Olympic and was ready, willing and able to close.

## Discussion

### Motion for Summary Judgment

Summary judgment is a drastic remedy which should be granted only if there are no triable issues of facts, and the movant has demonstrated that it is entitled to judgment as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The movant must make a prima facie showing, tendering sufficient admissible evidence demonstrating the absence of material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon such a showing, the burden shifts to the nonmoving party to produce sufficient admissible evidence of a triable issue of fact. *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 (2003). The court’s role is solely to determine if a triable issue exists, not to determine the merits. *Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). If there is any doubt as to the existence of a triable issue, summary judgment should be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Olympic argues that Lenox appeared at the Closing solely to attempt to negotiate a discount or force Olympic to perform landlord’s work. Lenox contends that it appeared at the time and place noticed by Olympic with sufficient funds to close and never sought a reduction of the price. Lenox states that it was even ready to pay an additional \$200,000 to close the transaction if Mr. Azeroual undertook to complete the required landlord’s work in accordance with the Alteration Agreement. According to Lenox, Olympic and its attorneys refused to close. Lenox cites the official bank checks it brought to the closing, in the amounts, and made payable

to, the payees designated by Olympic in the November 15, 2013 disbursement request, to demonstrate Lenox's willingness and ability to close on November 18, 2013.

Each party claims the other failed to close and neither party presents sufficient evidence to disprove the other party's argument. Lenox's ability to pay at the closing does not necessarily prove its willingness to close. There are other unresolved factual issues surrounding Olympic's good faith in scheduling the closing and whether Olympic concealed the existence of the Alteration Agreement.

Olympic's motion for summary judgment is denied.

### **Motion to Dismiss**

On a motion to dismiss for failure to state a claim, the court accepts all factual allegations pleaded in plaintiff's complaint as true and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

The fraud claim against Mr. Azeroual is dismissed because it is duplicative of the breach of contract claim against Olympic, and Mr. Azeroual was acting in a corporate capacity.

The fraud cause of action against Mr. Azeroual is duplicative as it arises out of the same facts as the breach of contract claim, and alleges nothing more than that Mr. Azeroual never intended to perform the promises in the Contract. In *Sudual v Computer Outsourcing Services*, the court dismissed the plaintiff's fraud claim accompanying plaintiff's claim for breach of

contractual obligations under an employment agreement because the plaintiff alleged no false promises regarding collateral or extraneous matters, the plaintiff failed to point to any non-contractual duty owed by the defendants that might support a tort or constructive fraud claim, and the only concrete loss the plaintiff showed was in the form of contract damages rather than fraud damages. 868 F Supp 59 (SDNY 1994).

Similarly, in the present case, Lenox's fraud claim involves the same promisor, the same acts of breach of contract, and the same measure of damages. Lenox seeks to hold Mr. Azeroual liable for the express representation that there was no contract affecting the Unit which was not terminable on or before the closing under the Purchase Agreement, for the bad faith Mr. Azeroual exhibited subsequent to the contract formation by concealing the existence of the Alteration Agreement, and for fabricating Lenox's default of the contract by scheduling a sham closing. All the accusations arise from the same set of facts giving rise to Lenox's breach of contract claim.

Also, Lenox cannot sue Mr. Azeroual for acts in his capacity as a managing member of Olympic. New York Limited Liability Company Law Section 609 (a) reads:

(a) Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company (including a person having more than one such capacity) is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company.

Section 610 reads:

A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member's right against or liability to the limited liability company.

Lenox contends that Mr. Azeroual committed an intentional tort and thus assumed personal responsibility for the affirmative representations contained in the Purchase Agreement. Officers and agents of corporations are personally liable for their own acts that bring about tortious harm even if the officer or agent may have been acting for the corporation's benefit. *See Prudential-Bache Sec. v Golden Larch-Sequoia*, 118 AD2d 487, 488 (1st Dept 1986). A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987). Corporate officers' personal liability for inducing the breach of a contract must be attributed to independent torts or predatory acts directed at another. *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp*, 296 AD2d 103, 110 (1st Dept 2002). Merely restating breach of contractual obligations in language familiar to tort law does not transform the breach of contract into a tort claim. *Clark-Fitzpatrick*, 70 NY2d at 390. Lenox fails to allege Mr. Azeroual violated any legal duty independent of the Purchase Agreement. All the accusations against Mr. Azeroual are tied to Lenox's breach of contract claim against Olympic.

In *Joan*, the court noted that a cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract should be governed by a heightened pleading standard that required the plaintiff allege the acts of the corporate officers were done with the motive of personal gain as distinguished from gain to their corporations. 296 AD2d at 109. Because the plaintiff in *Joan* did not assert the individual defendants acted in other than a corporate capacity, the court dismissed the claim against the individual defendants. *Id.* at 112. Likewise, Lenox's pleading fails to include any claim that Mr. Azeroual sought to obtain a personal benefit as opposed to a benefit for Olympic. Mr. Azeroual is not a party to the Purchase Agreement, and no record indicates Mr. Azeroual would benefit himself from the

alleged fraud. Lenox cannot pierce Olympic's corporate veil and hold Mr. Azeroual liable for the alleged fraud.

Additionally, the Purchase Agreement expressly limits Lenox's remedies to specific performance or termination of contract and a refund for its down payment. Suing an officer of Olympic is not a remedy under the Purchase Agreement.

The motion to dismiss the fraud claim against Mr. Azeroual is granted.

### **Lis Pendens**

Lenox's notice of pendency is not cancelled because Olympic did not meet its initial burden of making a prima facie showing of its entitlement to summary judgment dismissing Lenox's specific performance complaint. *See 3801 Review Realty LLC v Review Realty Co. LLC*, 111 AD3d 509, 510 (1st Dept 2013). In *3801 Review Realty*, the court directed the notice of pendency be cancelled because the only cause of action for specific performance had been dismissed due to the plaintiff's lack of proof of its financial ability to close the transaction. *Id.* However, the present case is distinguishable from *3801 Review Realty* in that Lenox has presented two checks with sufficient funds to close the transaction at the Closing. *See No. 1 Funding Ctr. Inc. v H & G Operating Corp.*, 48 AD3d 908, 909 (3d Dept 2008) (stating that plaintiff's lack of sufficient funds necessary to purchase the subject property was a prima facie showing of the defendant's entitlement to summary judgment dismissing the specific performance complaint). As discussed above, there is a triable issue about which party failed to close precluding Olympic's motion for summary judgment.

Olympic's argument that specific performance is no longer available due to the disagreement on price and the improvements to the Unit is unconvincing. There is a lack of evidence showing why the improvements defeat Lenox's right to specific performance.

Additionally, a party cannot be excused from its duty of specific performance by altering the property. Although Lenox is not now entitled to specific performance, it is possible Olympic may be required to deliver the Unit.

Olympic argues that Lenox has not diligently prosecuted its action. Pursuant to CPLR 6514 (b), the court in its discretion, may cancel a notice of pendency without requiring an undertaking if the movant demonstrates that the plaintiff has not commenced or prosecuted the action in good faith. Lenox has submitted an affirmation demonstrating its reasonable diligence in prosecuting the action. Olympic has not adequately sustained its burden of establishing a lack of good faith on the part of Lenox.

Because Olympic may be compelled to specifically perform, the motion to cancel the lis pendens is denied.

Accordingly, it is

ORDERED that AA Olympic, LLC's motion for summary judgment is denied; and it is further

ORDERED that Avy Azeroual's motion to dismiss is granted; and it is further

ORDERED that Lenox NY, LLC's motion to cancel the lis pendens is denied; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendant Avi Azeroual, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

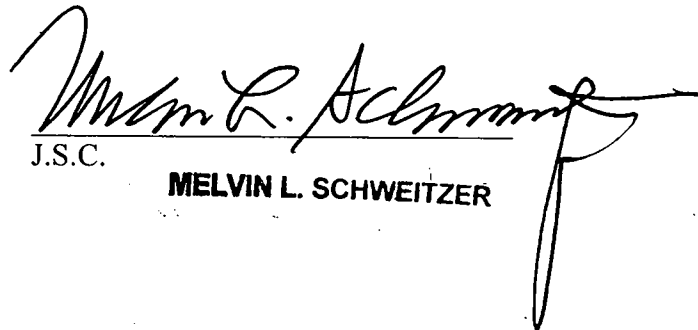
ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal; and it is further

ORDERED that counsel for the moving defendant Azeroual shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial <sup>of the General Clerk's</sup> ~~Office~~ <sup>Office Room 119</sup> ~~Support Office (Room 158)~~ who are directed to mark the court's records to reflect the change in the caption herein.

Dated: August 4, 2014

ENTER:

  
J.S.C. **MELVIN L. SCHWEITZER**