

J & K Parris Constr., Inc. v Roe Ave. Assoc. Ltd.

2014 NY Slip Op 32850(U)

October 28, 2014

Sup Ct, Suffolk County

Docket Number: 22658/11

Judge: Paul J. Baisley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
J. & K. PARRIS CONSTRUCTION, INC.,

INDEX NO.: 22658/11
CALENDAR NO.: 201302145CO
MOTION DATE: 5/6/14
MOTION SEQ. NO.: 003 MOT D

Plaintiff,

-against-

ROE AVE. ASSOC. LTD., SUFFOLK COUNTY
TREASURER, MPPC, L.P., and "JOHN DOE #1"
through "JOHN DOE #10", the last ten names being
fictitious and unknown to the plaintiff, the person or
parties intended being the persons or parties, if any,
having or claiming an interest in or lien upon the
premises described in the complaint,

Defendants.

-----X

PLAINTIFF'S ATTORNEY:
LaVELLE & MENECHINO, LLP
57 East Main Street
Patchogue, New York 11772

DEFENDANTS' ATTORNEYS:
CONFORTI & WALLER, LLP
250 North Sea Road
Southampton, New York 11968

DENNIS M. BROWN
County Attorney
100 Veterans Memorial Hwy.
Hauppauge, New York 11722

Upon the following papers numbered 1 to 43 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-38 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 39-41 ; Replying Affidavits and supporting papers 42-43 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

By short form order dated May 16, 2014 plaintiff's summary judgment motion was denied on the basis that it was not timely served within 120 days after the note of issue had been filed. Upon reconsideration the Court has determined that plaintiff timely served the motion in compliance with CPLR 3212(a). Accordingly it is

ORDERED that the prior May 16, 2014 Order denying plaintiff's motion pursuant to CPLR 3212(a) is hereby vacated; and it is further

ORDERED that the motion by plaintiff J.&K. Parris Construction, Inc. (Parris) for an order pursuant to CPLR 3212 granting summary judgment against the defendant Roe Avenue Assoc. Ltd (Roe) is granted to the extent that the first cause of action seeking a declaratory judgment declaring that the parties September 27, 2005 written agreement is void and unenforceable is granted; and it is further

ORDERED that plaintiff's remaining requests for relief seeking summary judgment with respect to the second and third causes of action set forth in the complaint, dismissal of the defendant's affirmative defenses and counterclaims set forth in the defendant's answer and for an award of attorneys fees is denied; and it is further

ORDERED that the second counterclaim set forth in the defendant's answer is hereby dismissed with prejudice based upon the defendant's application.

On September 27, 2005 the plaintiff Parris entered into an agreement to construct a one family dwelling on real property owned by the defendant Roe. The agreement referred to Parris as the purchaser and Roe as the seller and described the transaction as a "joint venture". The parties intended to have a residence with a cost value of \$300,000.00 built on Roe's property and upon its sale, the builder and the owner were to divide the sale's profits after paying the building costs and management fee. Construction of the dwelling began in January, 2007 and ceased during the fall of 2008. The partially built structure remains on the premises and has never been sold. The builder claims that Parris incurred costs in the sum of \$238,050.52 for building supplies, materials and equipment during the course of construction and seeks judgment against Roe for that amount together with reimbursement for utility payments and homeowner's insurance premiums.

The three page agreement provided that Parris was to be "financially responsible" for construction costs including materials and labor (paragraph 2) and for all carrying costs including taxes, insurance, building permits and certificates of occupancy to complete construction of the one family dwelling (paragraph 4). Paragraphs 5 & 6 set forth the terms for the sale of the dwelling as follows:

5. Purchaser shall set the price of the House. If the Seller disagrees with the price, then the finished house will be appraised so that it may be sold at a fair price and shall give a copy of the report to the Seller so together the Seller and the Purchaser can decide on a price. Purchaser shall also give to the Seller a copy of any advertising, listing agreement and lists of potential buyers of the property.
6. If the house sells within one year, then:
 - a. Seller and Purchase shall set the price for the house to be sold out. At the time of closing, the Purchaser shall receive out of the proceeds, a management fee of \$125,000.00 for building the house and taking care of the land improvements as set forth above.
 - b. Seller shall receive \$400,00 (sic) out of the proceeds for contributing the land.
 - c. Purchaser shall be reimbursed any monies up to \$350,000.00 that he spent in the actual building of the house, including the costs of materials, architects, etc. Seller shall not reimburse Purchaser any monies spent over \$350,000.00.
 - d. Any net profits after paying the costs and management fee as stated above, shall be equally divided 50 percent to Seller and 50% to the Purchaser.

Plaintiff's complaint sets forth three causes of action seeking a declaratory judgment declaring that the September 27, 2005 agreement is null and void due to the indefiniteness of its

terms (first cause of action); seeking an equitable lien on the premises for the substantial construction work performed by the builder (second cause of action) and for unjust enrichment stemming from the builder's performance without any compensation (third cause of action).

Plaintiff's motion seeks an order granting summary judgment against the defendant Roe claiming that the undisputed facts reveal that no viable contract was entered into between the parties since the September 27, 2005 agreement did not set forth sufficient definitive terms to create a valid and enforceable contract. Plaintiff argues that among the terms missing from the contract were: 1) the ultimate sale price of the completed dwelling and how the price would be determined; 2) the distribution of the sale proceeds between the parties if the dwelling sold for less than \$525,000.00; 3) what would happen if the property fails to sell or if the market value of the property is less than the fixed sums due the parties; and 4) what appraiser the parties would use and what would happen if the parties could not agree upon the name of an appraiser. Plaintiff also claims that the contract should be declared null and void since by its terms there clearly existed a mutual mistake of fact since the agreement contemplated a sale price in excess of \$400,000.00 of the actual market value. Plaintiff claims that if the Court declares the agreement null and void, summary judgment must be granted against the defendant on the second cause of action, imposing an equitable lien, and on the third cause of action, granting damages for defendant's unjust enrichment. Finally, plaintiff contends that based upon the evidence submitted all affirmative defenses and the four counterclaims set forth in the defendant's answer must be dismissed.

In opposition the defendant argues that the contract entered into by the parties contained sufficiently definite terms to form a binding agreement and therefore plaintiff's summary judgment motion must be denied since the credibility of the parties to the agreement must be judged at a plenary trial. The defendant claims that no material provisions of the agreement are absent and asserts that certain immaterial clauses may be inserted by the court after a review of the agreement's contents and the prior statements of the principals to the contract. Roe contends that the language contained in the agreement sets forth a mechanism to establish a selling price and, if required, the appointment of an appraiser via mediation. The defendant also contends that plaintiff's claim that the contract did not provide for a "sharing of the losses" is not accurate since the agreement granted the builder unfettered discretion and control to build a dwelling with a cost value of at least \$300,000.00. It is Roe's contention that Parris was responsible for not completing construction of a finished house which was the subject of the joint venture and therefore most of the plaintiff's arguments are premature. Finally the defendant claims that the Dead Man's Statute (CPLR 4519) bars much of the evidence submitted in support of plaintiff's summary judgment motion since Roe's principal, Myron Raisman, suffers from dementia rendering him unable to competently testify about the underlying transactions which form the basis of the lawsuit.

The proponent of a summary judgment motion must make a prima facie showing of entitlement of judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The movant bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact

(CPLR Section 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

In constructing the terms of a contract, the judicial function is to give effect to the parties' intentions (*Mallard Construction v. County Federal Savings & Loan Association*, 32 NY2d 285, 344 NYS2d 925 (1973)). In interpreting a contract, the court must give all the provisions of the contract a reasonable meaning and due consideration must be given to the purpose of the parties in making the agreement (*Seligman v. Mount Arafat Cemetery*, 112 AD2d 928, 492 NYS2d 445 (2nd Dept., 1985)). An agreement should be read as a whole so as to give each section meaning. Where a contract's language admits of only one reasonable interpretation, the court need not look to extrinsic evidence of the parties' intent or to rules of construction to ascertain the contract's meaning (*Bethlehem Steel v. Turner Construction*, 2 NY2d 456, 161 NYS2d 90 (1957)). However, where the language implied is not free from ambiguity, the intent of the parties becomes a matter of inquiry and consideration must be given to the sense in which the words in issue were used, the relations of the parties and all the surrounding circumstances (*Bray Terminals v. Grand Union*, 74 AD2d 965, 425 NYS2d 886 (1st Dept., 1980)).

The doctrine of definiteness or certainty in contract law means that a court cannot enforce a contract unless it is able to determine what in fact the parties agreed to (*Matter of 166 Mamaroneck Avenue Corporation v. 151 East Post Road Corporation*, 78 NY2d 88, 571 NYS2d 686 (1991); *Korff v. Corbett*, 18 AD3d 248, 794 NYS2d 374 (1st Dept., 2005)). An agreement must be sufficiently definite so that a court can ascertain and apply its terms, and the burden of establishing the provisions of the purported contract rests on the proponent (*Sardis v. Frankel*, 113 AD3d 135, 978 NYS2d 135 (1st Dept., 2014)). It is well settled that an agreement to agree, in which material terms are left for future negotiations, is unenforceable unless a methodology for determining the material terms can be found within the four corners of the agreement or the agreement refers to an objective, extrinsic event, condition, or standard by which the material terms may be determined (*Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 NY2d 475, 548 NYS2d 920 (1989), cert. denied 498 US 816, 111 S.Ct. 58, 112 LED.2d 33 (1989)). Where an agreement contains open terms, calls for future approval, and expressly anticipates future preparation and execution of contract documents, there is a strong presumption against finding a binding and enforceable obligation (*Joseph A. Martin, Jr., Delicatessen Inc. v. Schumacher*, 52 NY2d 105, 436 NYS2d 247 (1981); *Carmon v. Soleh Boneh Ltd.*, 206 AD2d 450, 614 NYS2d 555 (2nd Dept., 1994)).

A review of the September 27, 2005 agreement reveals that the contract is unenforceable since the material terms contained in it are insufficiently definite to permit the court to find the document was a binding and enforceable obligation. When reviewed in its entirety, the agreement is in essence an agreement to agree, with most of the important provisions left for future approval and agreement. Most importantly the parties never established a sale price once the dwelling was completed and did not provide any reasonable mechanism for an appraisal, the distribution of proceeds in the event that the sale price ultimately agreed upon was less than the fixed sums set forth in paragraph 6 of their agreement and a closing date. Under these circumstances the plaintiff's motion for summary judgment with respect to the first cause of action seeking a declaratory judgment declaring the September 27, 2005 agreed null and void is granted.

With respect to the plaintiff Parris's remaining requests seeking summary judgment on the second (equitable lien) and third (unjust enrichment) causes of action together with an award for counsel fees, plaintiff's application is denied. The submission of evidence by the parties raises significant factual issues underlying both causes of action sufficient to require a plenary trial. Moreover there is relevant, admissible evidence submitted to support the plaintiff's claim for attorneys fees.

Dated: October 28, 2014

HON. PAUL J. BAISLEY, JR.

J.S.C.