

Bannister v Agard

2014 NY Slip Op 33499(U)

June 12, 2014

Supreme Court, Kings County

Docket Number: 11564/13

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS : CIVIL TERM: PART 16

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 GARNER BANNISTER,

Plaintiff,

Index No. 11564/13

- against -

PATRICIA AGARD, K&DZ CORP. and
 BUCKINGHAM DEVELOPMENT CORP.,

June 12, 2014

Defendants,
 -----X

PRESENT: HON. LEON RUCHELSMAN

The plaintiff seeks to renew a decision of the court dated January 14, 2014 which granted the motion of defendants K&DZ Corp., and Buckingham Development Corp., that sought dismissal of, specifically, the fraud cause of action. The defendants oppose the motion. After reviewing the arguments of all parties, this court now makes the following determination.

Background

As recorded in prior decisions this lawsuit concerns premises located at 18 Buckingham Road, Brooklyn, New York 11226. The property was originally owned by defendant Patricia Agard. On or about September 7, 2010 plaintiff entered into a Sale of Agreement to purchase the premises for a price of five hundred thousand dollars (\$500,000). At a later date the defendants K&DZ & Buckingham purchased the premises from defendant Agard for five hundred and ninety thousand dollars (\$590,000) and recorded a

deed as the owners of the premises. The plaintiff amended the complaint alleging specific fraud against K&DZ Corp. and Buckingham Development Corp. The court dismissed that cause of action holding that, essentially, there was no evidence the defendant's committed any fraud. The plaintiff has now moved seeking to renew that determination. They present new evidence in the form of an affidavit from the nephew of defendant Agard, Lloyd Kidd, who states that the defendants knew of the contract between Agard and the plaintiff. Thus, argues plaintiff, evidence of the existence of possible fraud on the part of the defendants has been presented.

Conclusions of Law

It is true that generally, a motion to renew must contain evidence that existed at the time the original motion was filed but was unknown to the moving party (Brooklyn Welding Corp., v. Chin, 236 AD2d 392, 653 NYS2d 631 [2d Dept., 1997]). However, that rule has been defined as 'flexible' and a party may file a motion to renew even if the evidence was known at the time of the original motion provided the party offers a reasonable explanation why the additional facts were not included within the original motion (Progressive Northeastern Insurance Company v. Frenkel, 8 AD3d 390, 777 NYS2d 652 [2d Dept., 2004]).

In this case explanation offered is that attempts were made to locate individuals with knowledge of the alleged transactions and that at this date Mr. Kidd was located. Even if that explanation is deemed acceptable it does not change the ultimate conclusion reached in the earlier decision that no fraud has been adequately alleged against the corporate defendants. First, the corporate defendants dispute that Kidd ever spoke to a representative of their companies and that indeed no such individual described by Kidd ever worked for them. More importantly, even if true that such a conversation took place and the corporate defendants might have been aware of the existence of a contract between Plaintiff and Agard, Kidd's affidavit does not establish any collusion at all. As noted in the prior decision the plaintiff's chief and in fact only claims for fraud can be directed toward Agard. Kidd's affidavit does not alter that conclusion. It does not establish that the actions of the corporate defendants were done specifically to defraud the plaintiff. Rather, the affidavit, if true, merely establishes that the corporate defendants were aware that an unrecorded contract at one point existed between Agard and the plaintiff. The affidavit does not establish the corporate defendants acted with any improper motives toward the plaintiff in any way that alleges fraud.

As noted, the allegations of fraud properly can only attach to Agard. Therefore, based on the foregoing, the motion seeking to renew the earlier decision is denied.

So ordered.

ENTER:

DATED: June 12, 2014
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC