

Alexander Invs., LLC v 3 Cross St. Co., L.P.
2014 NY Slip Op 33887(U)
December 4, 2014
Supreme Court, Rockland County
Docket Number: 032537/11
Judge: Gerald E. Loehr
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
ALEXANDER INVESTORS, LLC, formerly known as
ALEXANDER INVESTMENTS, LLC,

Plaintiff,

DECISION AND ORDER

Index No.: 032537/11

-against-

3 CROSS STREET CO., L.P., SANFORD KRYGER
and LK SUFFERN PROPERTIES, LLC,

Defendants.

-----X

LOEHR, J.

The following papers numbered 1-2 were read on the motion of LK Suffern Properties, LLC to reargue this Court's Decision and Order dated October 14, 2014.

Papers Numbered

Letter of David M. Ascher dated November 4, 2014	1
Letter of Nolan E. Shanahan dated November 6, 2014	2

Upon the foregoing papers, it appears that Plaintiff, formerly a New Jersey limited liability company known as Alexander Investments, LLC, is a New York limited liability company formed on 2006 as a private equity investment company. Mark Alexander is its sole member. Defendant 3 Cross Street Co., L.P. ("Cross Street"), a limited partnership, was formed in 1986, and was formed in connection with the acquisition and development of a residential condominium project at 3 Cross Street, Suffern, New York (the "Project"), which property Orry

Osinga had contributed to Cross Street. In 2002, Plaintiff acquired an 8% interest in Cross Street for \$165,000. In 2004, Plaintiff loaned Osinga \$300,000, secured by a Mortgage on Osinga's home. The Mortgage was later released and the loan restated in an Amended and Restated Promissory Note dated as of February 10, 2006 (the "Osinga Note"). The Osinga Note bore interest at 10% and matured on August 1, 2008. It also contained a provision for attorney's fees upon default and collection. On February 10, 2006, Alfred Katz, as General Partner, and Ossinga and Plaintiff as Limited Partners, entered into an Agreement of Limited Partnership of Cross Street to develop the Project. Katz had a 45% interest, Plaintiff – presumably based on its having made an additional \$400,000 capital contribution – a 20% interest and Osinga a 35% interest in Cross Street. In November 2006, Plaintiff, Ossinga and Defendant Sanford Kryger entered into a First Amended and Restated Agreement of Limited Partnership of Cross Street which recognized, inter alia, that Kryger had acquired Katz' entire general partnership interest, that Kryger was making a capital contribution of \$100,000 to Cross Street, that "Kryger shall be entitled to purchase one (1) penthouse condominium unit at the Property at completion of the Project",¹ that Osinga' limited partnership interest had been converted into a general partnership interest, and that in consideration of Plaintiff's prior \$400,000 capital contribution to Cross Street, Plaintiff would receive, immediately upon their completion, title to two condominium units in the Project. On December 20, 2006, Cross Street entered into a Building Loan Agreement with The Community Preservation Corporation ("CPC") pursuant to which CPC agreed to loan Cross Street \$15,300,000 for construction of the Project (the "Construction Loan"). The Construction Loan was secured by a Mortgage on the Project. Under the terms of the Building Loan Agreement, CPC "may at any time release portions of the Mortgaged Property from the provisions of this Agreement and from the Mortgage executed and delivered pursuant hereto upon such terms and conditions as the [CPC] shall deem fit, in its sole discretion." In July 2007, Osinga sold a 2.5% interest in Cross Street to Plaintiff and 2.5% interest in Cross Street to Lindsay Kryger, Sanford Kryger's daughter. Plaintiff chose units 402 and 408 which were completed in late 2008. Cross Street has failed to deliver title. On January 4, 2009, Plaintiff, Osinga, Sanford Kryger and Lindsay Kryger entered into a First Amendment to First Amended and Restated Agreement of Limited Partnership pursuant to which, inter alia, Osinga, after

¹ What, if anything, Kryger would have to pay for the unit is unclear.

acknowledging his breaches of fiduciary duty as a General Partner of Cross Street, resigned as a General Partner and transferred his remaining 30% to Sanford Kryger who assumed the responsibility to pay Osinga's \$300,000 Note to Plaintiff, and Plaintiff agreed to take \$100,000 as the interest due on such Note. Sanford Kryger has failed to pay the Note, which matured in August 2008, under the January 4, 2009 Agreement.

Plaintiff commenced this action on September 19, 2011 against Cross Street and CPC. On May 23, 2012, CPC sold the Construction Loan to Defendant LK Suffern Properties, LLC ("Suffern LLC"). Suffern LLC's President is Lindsay Kryger. Thereafter, Plaintiff discontinued the action against CPC and joined Suffern LLC. The Second Amended Verified Complaint asserts four causes of action: the First and Second Causes of Action are for breach of contract and specific performance against Cross Street and Suffern LLC based on the former's failure to deliver title to Units 402 and 408 in accordance with the First Amended and Restated Agreement of Limited Partnership of Cross Street and the latter's refusal to release the Units from its Mortgage. The Fourth and Fifth Causes of Action are for breach of contract and unjust enrichment against Kryger for his failure to pay the Osinga's Note which Kryger had assumed.² Plaintiff filed its Note of Issue on September 10, 2013. Summary judgment motions were due, pursuant to the Court's Rules, within 60 days. Plaintiff now timely moves for summary judgment with respect to the First, Second, Fourth and Fifth Causes of Action. Cross Street and Sanford Kryger "cross moved" for summary judgment dismissing the Complaint. Such motion was served more than 60 days after the filing of the Note of Issue without explanation. Although untimely (*Brill v City of New York*, 2 NY3d 648 [2004]), as to all claims other than the Third Cause of Action, inasmuch as the cross motion was made with respect to the same issues as Plaintiff's timely motion, that is sufficient cause in and of itself for the Court to consider the cross motion (*Wernicki v Knipper*, 119 AD3d 775 [2d Dept 2014]).

As to Units 402 and 408, as Cross Street has title to same and agreed to transfer title to Plaintiff, Plaintiff has established its prima facie entitlement to summary judgment. Cross Street opposed the motion upon the basis that it could not transfer title to Units without Suffern LLC's consent and Suffern LLC refused to consent unless it was paid therefor or provided with

² The Third Cause of Action concerns Plaintiff's entitlement to repayment of a \$150,000 loan made to Cross Street in May 2009 in light of Cross Street's current expenses. As Plaintiff did not move for summary judgment with respect to such claim, it is not before the Court.

replacement collateral. Suffern LLC also opposed the motion but the Court overlooked its papers. Based thereon, the Court found Cross Street's opposition disingenuous – how could it know what Suffern LLC was going to do? Suffern LLC has brought this oversight to the Court's attention. In its opposition papers, Lindsay Kryger, daughter of Sanford Kryger, partner of Mark Alexander and President of Suffern LLC, avers that Cross Street is in default under the Building Loan Note and that Suffern LLC will not consent to the transfer the Units nor release them from the Mortgage. As this is a condominium development, Suffern LLC must be constantly releasing Units from its Mortgage after they are completed and sold to purchasers. All parties also therefore know what they are worth. Plaintiff is therefore entitled to summary judgment for specific performance as against Cross Street for a transfer of Units 402 and 408 to Plaintiff free and clear of the Mortgage and Cross Street must do whatever is necessary to do that (*see Sevilla v Valiotis*, 29 AD3d 775 [2d Dept 2006]). Suffern LLC's motion to reargue is granted to the extent that the Court acknowledges that Suffern LLC does not consent to the transfer nor will it release the Mortgage without being paid therefor by Cross Street. If the foregoing cannot be effectuated for reasons beyond the parties' control, the Court will schedule a trial to determine Plaintiff's damages for breach of contract which Plaintiff will then be able to docket as a lien against the Project.

The balance of the original Decision stands. This constitutes the decision and order of the Court.

Dated: New City, New York
December 4, 2014



HON. GERALD E. LOEHR
J.S.C.

COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.
Attorneys for Plaintiff
900 Third Avenue, 16th Floor
New York, NY 10022

CONDON & ASSOCIATES, PLLC
Attorneys for Defendants Cross Street and Sanford Kryger
55 Old Turnpike Road, Suite 502
Nanuet, NY 10954

DAVID M. ASHER, ESQ.
Attorneys for Defendant Suffern LLC
664 Chestnut Ridge Road
Chestnut Ridge, NY 10977