

**Rockaways ASC Dev. LLC v Harmony Rockaway
LLC**

2015 NY Slip Op 30999(U)

May 4, 2015

Supreme Court, Queens County

Docket Number: 705808 2014

Judge: Marguerite A. Grays

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

ROCKAWAYS ASC DEVELOPMENT, LLC, X

Plaintiff(s)

-against-

HARMONY ROCKAWAY LLC and URI
KAUFMAN,

Defendant(s)

_____ X

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QUEENS COUNTY

The following papers numbered 1-7 read on this motion by defendants Harmony Rockaway, LLC (Harmony) and Uri Kaufman pursuant to CPLR §3211(a)(1) and (7) to dismiss the complaint; and on the cross motion by plaintiff pursuant to CPLR §3217 granting plaintiff leave to withdraw the third and fourth causes of action in its complaint without prejudice.

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Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

This case arises out of the conversion of a former Courthouse located at 90-01 Beach Channel Drive in Rockaway Beach into an ambulatory surgical center. The Premises are owned by the City of New York. On February 7, 2013, Harmony, a real estate developer, entered into a contract of sale with the New York City Economic Development Corporation

("EDC") to purchase the Premises from the City to develop into a health care facility. EDC and Harmony executed an amended and restated contract of sale for the subject premises dated as of September 12, 2013. Under the EDC agreement, Harmony agreed to take all necessary steps to fulfill certain conditions prior to closing, including (1) obtaining a zoning variance or amendment rendering the proposed use of the building lawful for use as an ambulatory surgical center; (2) producing signed financing commitments and/or other documents that demonstrate, to EDC's reasonable standards, that sufficient funds exist to purchase the Property and finance all construction required for the project to be a fully-operational ambulatory surgical center; and (3) produce a lease with Rockaways ASC for the operation of an ambulatory surgical center for a term of at least ten years. Under the agreement, a closing of title to the subject property was to take place within 210 days of the execution and delivery of the agreement.

In August 2013, Harmony and plaintiff Rockaways ASC entered into a long term lease agreement with respect to the first floor portion of the Premises. Pursuant to the Lease, Harmony, at its sole cost and expense, agreed to pursue the redevelopment of the Premises, including the build-out of the building, in compliance with Tenant Specifications and Approved Plans, all requisite permits, approvals and applicable law. Harmony's work included the construction of a new multi-speciality ambulatory surgical center at the Premises. The Lease required Harmony to be solely responsible for and diligently pursue all authorizations and permits, including zoning, necessary to complete the work. It is alleged that defendant Kaufman provided his limited guarantee up to \$400,000, of Harmony's performance under Article 23.01 of the Lease.

The plaintiff alleges that in March 2014, seven months after the lease was signed, Harmony informed Rockaways ASC that Harmony could not proceed with its financing or take other steps with respect to the project because it was not properly zoned for use as an ambulatory surgical center. Harmony advised Rockaways ASC that two possible solutions to the zoning issue existed: (1) a mayoral override to the current zoning for the Premises (which could take as long as three months) or (2) the issuance of a zoning variance (which could take as long as eight to twelve months). By letter dated April 1, 2014, Rockaways ASC declared Harmony in default of the lease. Rockaways ASC further alleges that Harmony has not timely cured the default within the 30-day cure period.

Rockaways ASC then commenced this action alleging four causes of action. The first cause of action is for specific performance directing Harmony to perform its obligation under the Lease. The second cause of action is for specific performance requiring Harmony to perform its obligations under the contract with the EDC. The third cause of action is for equitable subrogation. The fourth cause of action is for breach of guaranty against the defendant Kaufman.

The defendants have moved to dismiss the complaint. In response, the plaintiff has cross moved to withdraw the third and fourth causes of action. The Court first will turn to the plaintiff's cross motion for leave to withdraw the third and fourth causes of action without prejudice. This cross motion is granted, without prejudice. The determination of a motion for leave to voluntarily discontinue action rests within the sound discretion of the court. The defendant has not presented any special circumstances or prejudice to a substantial right, thus, the cross-motion for voluntary discontinuance should be granted (*Wells Fargo Bank, N.A. v Chaplin*, 107 AD3d 881 [2d Dept 2013]).


The Court will next turn to the motion to dismiss as it pertains to the first two causes of action. On a motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2d Dept 2004]). In order to be successful on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues and completely dispose of the claim (*see Held v Kaufman*, 91 NY2d 425 [1998]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]). In the second cause of action, Rockaways ASC seeks to force Harmony to perform the contract with the EDC. Rockaways ASC, however, is not a party to that contract nor is it an intended third-party beneficiary. A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his or her benefit, and (3) that the benefit to him or her is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost (*see Kotchina v Luna Park Hous. Corp.*, 27 AD3d 696 [2d Dept 2006]); *Mutual Ticket Agents, Local 23293 v Roosevelt Raceway Assoc.*, 172 AD2d 595 [2d Dept 1991]). Here, there is no allegations that would support a finding that the plaintiff was an intended third-party beneficiary of the contract between Harmony and the EDC. Even though the amended contract of sale between Harmony and EDC identified Rockaways ASC as the tenant operator of the ambulatory surgical center, Rockaways ASC is not an intended beneficiary of the contract between Harmony and the EDC. The fact that the plaintiff is to operate the ambulatory surgical center is incidental to the contact to convey the property to Harmony, and there is no specific intent to benefit Rockaways ASC. The goal of the conveyance is to provide healthcare services to the community not to benefit the plaintiff. Therefore, the plaintiff is not entitled to specific performance to force Harmony under the EDC contract, and the second cause of action must be dismissed.

The plaintiff is also not entitled to specific performance under the lease. The defendant Harmony's performance under the lease is dependent upon non-party EDC's performance under the EDC contact. Thus, the parties' Lease, which contains no time of

the essence language, states that if Harmony did not acquire title to the building by September 30, 2014 (the Title Acquisition Date”), either party could terminate the Lease. The Title Acquisition Date had not occurred at the time this action was commenced. It is undisputed that Harmony has not acquired title from the EDC. Thus, without title, Harmony cannot perform under the lease. Here, since, Harmony does not have title to the subject property, the court is without power to enforce the terms of the lease (*see Xiao Yuan v Li Dan Zheng*, 58 AD3d 723 [2d Dept 2009]). Therefore, specific performance cannot be granted at this time and the first cause of action must be dismissed.

Accordingly, the motion by defendant Harmony to dismiss the complaint is granted as to the first and second causes of action and those causes of action are dismissed. The cross motion by the plaintiff for leave to withdraw the third and fourth causes of action without prejudice is granted.

Dated: **MAY 04 2015**



J.S.C.

FILED
MAY 11 2015
COUNTY CLERK
QUEENS COUNTY