B. Boman & Co., Inc. v Zionist Org. of Am.
2015 NY Slip Op 31809(U)
September 25, 2015
Supreme Court, New York County
Docket Number: 159730/2014
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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B. BOMAN & CO., INC.,

Plaintiff,

-against-

Index No.
159730/2014

ZIONIST ORGANIZATION OF AMERICA,

Defendant.

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KELLY O'NEILL LEVY, J.:

Motion sequence Nos. 001 and 002 are consolidated for disposition and are disposed of in accordance with the following decision and order.

In motion sequence No. 001, defendant Zionist Organization of America (ZOA) moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing plaintiff B. Boman & Co., Inc.'s (Boman) complaint based on documentary evidence and for failure to state a claim, and, pursuant to CPLR 6514, directing the cancellation of plaintiff's notice of pendency relating to real property located at 4-6 East 34th Street in Manhattan (the Property), filed on October 3, 2014 (exhibit P to affirmation of Morton A. Klein, dated Dec 29, 2014 [Klein affirmation]), or, alternatively, directing the filing of an undertaking by defendant, and upon such filing, canceling plaintiff's notice of pendency unless plaintiff files its own undertaking.

In motion sequence No. 002, Boman moves for an order: (i) disqualifying ZOA's counsel, Sills Cummis & Gross P.C. (Sills), based on Sills' ongoing representation of Boman's principals and of A & E Stores, Inc., a closely related affiliate of Boman; (ii) pursuant to CPLR 3215, granting a default judgment based on ZOA's failure to timely answer the complaint; and (iii)

pursuant to CPLR 602 (a), consolidating this action with a special proceeding entitled *Matter of the Application of Zionist Organization of America for Approval to Sell Real Property Pursuant to Sections 510 and 511 of the Not-For Profit Corporation Law*, index No. 162686/2014 (Special Proceeding).

Boman, a former retail tenant in the building on the Property owned by ZOA, seeks to block ZOA from selling the building to a third-party purchaser based on a provision in its expired lease which required ZOA to give Boman a right of first offer at the time it "desired to sell" the Property. ZOA contends that any alleged right of first offer expired with the lease agreement on January 31, 2014, and that it did not obtain board approval to sell the Property until August 2014, long after the lease and the right expired. Boman counters that ZOA desired to sell the building when it sought an appraisal in December 2013. ZOA's motion to dismiss is granted. The court finds that, under the clear terms of the lease provision, Boman's right of first offer expired, and ZOA's action in seeking the appraisal failed to show a desire to sell in accordance with that provision. Boman's motion for consolidation, default, and disqualification is denied.

BACKGROUND

ZOA is a domestic not-for profit, charitable corporation, with an office located at 4 East 34th Street, New York, New York (the Building). Pursuant to a lease dated May 24, 1982, ZOA leased to Boman certain space in the Building for use as a retail store, which lease expired on June 30, 1992 (exhibit A to plaintiff's order to show cause, complaint ¶ 4; exhibit C to Klein affirmation). The lease was amended and its term extended several times, ultimately to January 31, 2014, when it expired by its terms and was not renewed (exhibits B-I to Klein affirmation).

In an extension of the lease, dated July 1, 1997 (1997 Lease), the parties provided that the

agreement was entered into by ZOA in consideration of Boman causing one of its affiliates to make a mortgage loan to ZOA, and Boman was to pay the rent directly to the lender affiliate (exhibit F to Klein affirmation). This 1997 Lease further provided, in paragraph 10, that:

> "a) If [ZOA] desires to sell the Premises or any other interest in the Property (the 'Offered Property') it shall, prior thereto, first utilize the following procedure:
>
> > A. Owner shall give written notice (the "Offer Notice") of such desire to [Boman]. To be valid, the Offer Notice shall identify the Offered Property and shall specify: (i) the minimum purchase price therefor (the 'Acceptable Price'); (ii) the manner of payment; (iii) the state of the title to the Offered Property that Owner is prepared to deliver (including, without limitation, the leases to which the Offered Property is subject); (iv) the proposed period between the execution of the contract and the closing date (all of the foregoing are hereinafter referred to as the 'Acceptable Terms')"

(Exhibit F to Klein affirmation, 1997 Lease, ¶ 10 at 8). That paragraph also provided that the rights contained therein "shall be [sic] survive the expiration of this lease until the Loan is fully satisfied or, if the Lease expires after the Loan is satisfied, the rights contained in this Paragraph shall expire when the Lease expires" (*id.*, ¶ 10 [E] at 10).

Thereafter, by amended lease, dated July 22, 2003, the parties again extended the lease term to end on January 31, 2014, and provided, among other things, that the prior mortgage loan from the 1997 Lease had been paid and satisfied in full (exhibit I to Klein affirmation, Lease ¶ 4 at 3).

In December 2013, David Drimer, a director of ZOA, requested an appraisal of "A Future Development Site 4 East 34th Street, New York, New York" from Aaron Valuation (exhibit D to

affirmation of Lucas A. Ferrara, dated June 5, 2015 in opposition [Ferrara opposition affirmation]). The appraisal report, dated December 24, 2013, indicated that the intended use was "valuation for potential sale of the property," and concluded that the "reconciled value" was $23 million (*id.* at 3).

Boman's lease expired on January 31, 2014, but it continued to occupy the space as a tenant on a month-to-month basis, from February 1, 2014 through to September 30, 2014, when it vacated the premises pursuant to ZOA's August 22, 2014 notice of termination (exhibit J to Klein affirmation).

On February 12, 2014, CBRE, the real estate brokerage firm hired by ZOA to help it determine the market value of, and potentially sell the Property, sent out a marketing brochure email blast through an internet site to approximately 5,342 developers and investors of retail properties in New York City (affidavit of Daniel Kaplan, dated Dec 23, 2014, ¶¶ 2-3 and exhibit A annexed thereto). The brochure did not contain a price, and its purpose was to explore market interest in the Property, the potential value of it, and elicit potential bids through an internet site (*id.*, ¶ 3). The first and second round of bids were due March 12 and 25, 2014, respectively, and a final round was due April 11, 2014 (*id.*). According to the internet site's tracking information provided to CBRE, the email blast was sent to Alan Ades, a principal of Boman, on February 12, 2014, and Mr. Ades clicked the link on the brochure to the confidentiality agreement form, though he did not sign that agreement, or put in a bid (*id.*, ¶¶ 4-7).

On August 6, 2014, ZOA's Board of Directors approved a resolution authorizing ZOA to proceed to sell the Building (exhibit L to Klein affirmation). On that same date, ZOA entered into a purchase and sale agreement with Caerus Group 4E34 LLC, a third-party purchaser, for

$38,200,000 (PSA) (exhibit M to Klein affirmation).

On September 26, 2014, Boman demanded that ZOA's counsel comply with the provisions in the 1997 Lease with regard to the offer notice, and give Boman an opportunity to make an offer to purchase the Building (complaint, ¶ 20).

On October 3, 2014, Boman commenced this action, seeking: a declaratory judgment and an injunction that ZOA is obligated to issue an offer notice and meet its obligations under paragraph 10 (first and second causes of action); an order enjoining ZOA from marketing and selling or transferring the Property (third cause of action); and an order rescinding any purported contract of sale for the Building (fourth cause of action) (complaint, ¶¶ 22-38).

ZOA moves for dismissal, urging that the right of first offer in paragraph 10 of the 1997 Lease expired when Boman's lease expired on January 31, 2014. It argues that while it is undisputed that ZOA took some preliminary steps before that date, by obtaining an appraisal, it is also undisputed that its governing body, the Board of Directors, did not approve any sale until August 6, 2014, seven months after the lease expired, and that, as a not-for profit corporation, ZOA could not have a "desire to sell" until the board acted. It contends that the language of paragraph 10 supports this argument, because ZOA was obligated to give notice to Boman only after it decided on a minimum purchase price, which it could do only after it canvassed the market and determined such price, which was done after the lease expired. ZOA also argues that Boman's claims are barred by laches in that Boman's principal, Mr. Ades, viewed the email in February 2014, and then failed to assert its rights under the expired right of first offer until late in September 2014. Finally, it urges that Boman's notice of pendency should be canceled because Boman has no claim for relief under the expired right of first offer, and has failed to demonstrate

that it will incur any damages.

In opposition, Boman claims that the appraisal report unequivocally reflects that ZOA manifested an intent to sell the property before expiration of the lease. It contends that the 1997 Lease did not require that ZOA have received an offer from a third party, or that there be a previously stipulated price to trigger Boman's right. It argues that the appraisal report contradicts ZOA's claims in its motion that it was unaware of the Building's market value. It maintains that ZOA's argument that its desire to sell did not occur until the board resolution is disingenuous. It urges that by that time ZOA had already retained the appraiser, retained CBRE to market the Building for bids, reviewed bids, and negotiated the PSA. It points to ZOA's failure to produce an affidavit by David Drimer in which he states that ZOA had no desire to sell prior to expiration of the lease. Boman also points to the fact that, when the PSA was signed, any tenants remaining in the Building were there as month-to-month tenancies as further proof that ZOA had a desire to sell long before the lease expiration.

On the issue of laches, Boman asserts that the mere fact that an email link was "clicked" on does not impute knowledge to any distinct person with regard to the bid solicitation. It also contends that the email did not in any way comport with ZOA's notice obligations under the lease. Further, it maintains that ZOA has failed to demonstrate circumstances that would justify canceling the notice of pendency.

In its motion, Boman asserts that Sills should be disqualified as ZOA's counsel because it has an ongoing relationship representing Boman's principals in their personal capacities, and with A&E Stores, Inc., Boman's affiliate. It urges that Sills has a corporate affiliate conflict, is privy to information regarding Boman, and, thus, an impermissible conflict of interest exists.

Boman further seeks a default judgment contending that ZOA was to respond to the complaint by January 5, 2015, but, instead, electronically filed an order to show cause on December 30, 2014, which was not served on Boman until January 15, 2015, ten days late. Finally, Boman seeks the consolidation of this plenary action with the Special Proceeding, which is seeking approval from this court for the sale of the Building.

DISCUSSION

ZOA's motion to dismiss is granted, and the complaint is dismissed. Boman's motion is denied.

The court will first address ZOA's motion to dismiss, and then Boman's motion for disqualification, default, and consolidation. While on a motion to dismiss for failure to state a claim, the facts are accepted as true and the plaintiff is accorded the benefit of all possible inferences, bare legal conclusions and "factual clams either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [quotation marks and citations omitted]; *see Hicksville Dry Cleaners, Inc. v Stanley Fastening Sys., L.P.*, 37 AD3d 218, 218 [1st Dept 2007]). Where documentary evidence is submitted, the standard is not just whether the plaintiff has stated a claim, but whether it has a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Here, it is undisputed that the Lease expired by its own terms on January 31, 2014 (complaint, ¶ 9), and that because the loan, which was part of the 1997 Lease, was already satisfied in 2003, the right of first offer expired on January 31, 2014. Boman alleges in its complaint, on information and belief, that ZOA desired to sell prior to February 1, 2014, and that

it also made the decision to sell prior to that date (complaint, ¶¶ 16-17).

The documentary evidence, however, conclusively demonstrates that ZOA's desire to sell was not expressed until after the Lease had already expired. The Lease is clear in providing that "if the Lease expires after the Loan is satisfied, the rights contained in this Paragraph shall expire when the Lease expires" (exhibit F to Klein affirmation, Lease, ¶ 10 E at 10). Again, it is undisputed that the loan was satisfied in 2003 (exhibit I to Klein affirmation, Amended Lease dated July 22, 2003, ¶ 4 [A] at 3). While Boman continued as a month-to-month tenant after the expiration of the Lease, "[t]he right of first refusal is an exception to the general rule that the covenants of a lease are extended into a month-to-month tenancy, and it must be expressly re-affirmed" (*Coinmach Corp. v Fordham Hill Owners Corp.*, 3 AD3d 312, 314-315 [1st Dept 2004] [citations omitted]; *see Gulf Oil Corp. v Buram Realty Co.*, 11 NY2d 223, 227 [1962]; *see also Pepe v Stock*, 24 AD3d 527, 528 [2d Dept 2005] [by allowing lease to expire without renewing or extending it in accordance with its terms, following lease expiration, tenant no longer had enforceable right of refusal]). Although a right of first offer differs from a right of first refusal in that a first refusal right gives the holder the right to match a third-party offer to buy, and a first offer right gives the holder the right to receive seller's first offer to sell, both must be expressly reaffirmed in a month-to-month tenancy.

A right of first refusal involves a preemptive right, and "requires the owner, when and if he decides to sell, to offer the property first to the [holder] so that he may meet a third-party offer or buy the property at some other price set by a previously stipulated method" (*Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 163 [1986] [citations omitted]; *see LIN Broadcasting Corp. v Metromedia, Inc.*, 74 NY2d 54, 60 [1989]). Similarly, the right of first

offer does not give the holder the power to compel an unwilling property owner to sell; it merely requires the property owner, when and if he decides to sell, to offer the property first to the holder (*see Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d at 163). The holder's "choice exists only after he receives an offer from the owner" (*id.*).

The point in time at which an owner can be said to have a desire to sell depends, first, on the language of the right of first offer. In *Delco Dev. of Port Washington, L.P. v Stop and Shop Supermarket Co.* (2009 WL 2704074, 2009 NY Misc LEXIS 4169, 2009 NY Slip Op 31897[U] [Sup Ct, Nassau County 2009]), the right of first offer provision required that if either party "desire[d] to sell," the seller shall give the other party, the offeree, written notice that included all material terms and conditions of the proposed sale, including gross cash price and payment terms (*id.* at * 1). The court determined, based on that language, that the seller's desire to sell did not arise until after it sent a notice containing those terms, and that the provision did not prohibit the seller "from listing or marketing the subject property nor does it prevent the [seller] from exchanging drafts or agreements with any third-parties" (*id.* at *11).

Here, the right of first offer language is substantially similar to the language in the *Delco Dev.* case, because it requires ZOA to give notice when it desired to sell, stating the "minimum purchase price," and the "manner of payment" (exhibit F to Klein affirmation, Amended 2003 Lease, ¶ 10 A at 8). Until ZOA had done some investigating and marketing and came to the point where it could propose a minimum purchase price, it did not have the desire to sell. Boman's reliance on the appraisal report, the only action ZOA took before Boman's lease expired, fails to provide a basis for its claims. That report shows only that ZOA was investigating the value of its property for a potential sale. As ZOA aptly points out, there is nothing in the right of

first offer language that precludes ZOA from researching the value of the Property by an appraisal or any other means before it decides that it "desires to sell" for a given minimum price (*see Delco Dev. of Port Washington, L.P. v Stop and Shop Supermarket Co.* (2009 WL 2704074, 2009 NY Misc LEXIS 4169 * 11, 2009 NY Slip Op 31897 [U] ** 7). Under Boman's interpretation, if ZOA sought an appraisal of the property, and determined not to sell, but, instead, to refinance the property, it would have to offer the property for sale to Boman as it had demonstrated a desire to sell. The February 12, 2014 email marketing, clearly after the expiration of the Lease and the right of first offer, also shows that ZOA had not arrived at a desire to sell. Those marketing materials did not include a price for the Property. It was through this marketing that ZOA would decide if it wanted to sell, by exploring the market's interest in the property and the potential value, and what the minimum acceptable price would be (Kaplan affirmation, ¶ 3). Boman fails to explain how, before January 31, 2014 when the right expired, ZOA was to send Boman an offer notice setting forth a minimum purchase price, manner of payment, and time of closing, when it had not even made those determinations.

Even more important, ZOA is a not-for profit, charitable corporation, and, as such, it must obtain approval either from the New York Attorney General or the New York Supreme Court to sell the Property under sections 511 and 511-a of the Not-for Profit Corporation Law (NFPCL). In seeking that approval, ZOA must show that it exercised due diligence to obtain the best price and terms, that is, that the terms of any sale were "fair and reasonable" to the corporation, and that they will promote the purposes of the corporation or the members' interests (NFPCL § 511 [d]; *see Scher v Yeshivath Makowa Corp.*, 54 AD3d 839, 840 [2d Dept 2008] [proposed sale was fair and reasonable to corporation]). Thus, ZOA's board was obligated under

the law to explore the market in the exercise of its due diligence, and determine a minimum acceptable price. Moreover, ZOA did not decide to sell until its board authorized the sale. ZOA is controlled by its board, and could not make any decision to sell without authorization from the board under Article XI, section 2 of its constitution (exhibit A to Klein Affirmation, Constitution at 12), and under section 509 of NFPCL. It was not until August 6, 2014 that ZOA's Board of Directors voted on a resolution to sell the Property (exhibit L to Klein affirmation). The importance of this board resolution is demonstrated by *Concert Radio v GAF Corp.* (108 AD2d 273, 277 [1st Dept 1985], *affd* 73 NY2d 766 [1988]) in which the Appellate Division, First Department held that a board of directors' resolution to sell the property at issue, together with public announcements in the form of press releases, and public SEC filings, manifested defendant seller's unequivocal decision to sell, triggering an option agreement. The Court determined that "this was not a decision to offer [the property] for sale so as to test the market to determine the [property's] value but was, in actuality, as manifested by [seller's] conduct, an unequivocal decision to sell" (*id.* at 277). In affirming the decision, the Court of Appeals made an observation that describes this very case: "[h]ad defendant waited a few more months before issuing its resolution and public announcement, the five-year option would have expired by its own terms and plaintiff would have had no basis for complaint at all" (*id.*, 73 NY2d at 768).

Here, it is clear that the ZOA Board resolution was not passed until August 6, 2014, many months after expiration of the lease. The February email was a test of the market to determine the property value, and also was after the lease expired. The only action before expiration of the lease, obtaining an appraisal, clearly and by definition was a test of the market to determine value, not necessarily a desire to sell. The language in paragraph 10 clearly indicates the parties'

intent that for ZOA to have a desire to sell it had to have determined, at least, the minimum purchase price, the manner of payment, the state of the title it was going to deliver, including whether the Property was subject to any leases, and the time of closing, none of which was determined prior to the January 31, 2014 lease expiration. Therefore, Boman has no basis for its complaint as the right of first offer expired by its own terms on January 31, 2014, and there was no desire to sell at that time which would have triggered ZOA's obligations under paragraph 10 of the lease. Accordingly, Boman's notice of pendency is canceled.

Boman's motion is denied in its entirety. Based on the dismissal of the complaint on the documentary evidence and for failure to state a claim, the branch of the motion to disqualify is denied, without prejudice, as moot (*see Matter of New York County Asbestos Litig. v A.O. Smith Water Prods.*, 92 AD3d 486, 486 [1st Dept 2012] [where action is discontinued, motion to disqualify is moot]; *Spectacolor Inc. v Banque Nationale de Paris*, 207 AD2d 726, 726-727 [1st Dept 1994] [where defendant's motion to dismiss is granted, plaintiff's motion to disqualify opposing counsel is rendered moot]; *Hamer v Chessman*, 129 AD2d 491 [1st Dept 1987] [affirming trial court's dismissal for failure to state a claim and denial of plaintiff's cross motion to disqualify as moot]; *see also Whelan v Pascale*, 610 Fed Appx 19, 21 [2d Cir 2015] [after having dismissed all plaintiff's claims, plaintiff's motion to disqualify was moot]).

The branch of Boman's motion seeking a default judgment also is denied. Boman filed the complaint on October 3, 2014 (exhibit A to plaintiff's order to show cause), and the parties executed several stipulations extending ZOA's time to answer which was set to finally expire on January 5, 2015 (exhibit H to plaintiff's order to show cause). On December 30, 2014, because this action is subject to electronic filing, ZOA electronically filed its order to show cause for the

above dismissal motion. While Boman is technically correct that an order to show cause is not deemed made until the signed order is served, which in this case was on January 15, 2015, this technical default fails to provide a basis for the entry of a default judgment. As an electronically filed case, under New York Uniform Trial Rules § 202.5-bb, the filing and service of all documents in the action that has been commenced electronically, after the initiating documents, "shall be by electronic means" (New York Uniform Trial Rules § 202.5-bb [c] [1]). When ZOA electronically filed this motion, a copy was served upon Boman's counsel, and its counsel acknowledged receipt the next day (exhibit F to affirmation of David F. Segal, dated Feb 5, 2015). This all occurred well within the time to answer, and, thus, Boman fails to present a basis for a default judgment under these circumstances.

Boman's motion for consolidation also is denied. Pursuant to CPLR 602, consolidation is in the trial court's discretion, and is appropriate when the actions involve common questions of law or fact unless the opposing party demonstrates prejudice to a substantial right (CPLR 602; *see Matter of Joseph*, 106 AD3d 1004, 1006 [2d Dept 2013]). Its purpose is to promote judicial economy, by eliminating a multiplicity of actions, saving time and judicial resources, and preventing inconsistent judgments based on the same facts (*Geneva Temps, Inc. v New World Communications, Inc.*, 24 AD3d 332, 334 [1st Dept 2005]). Here, Boman fails to demonstrate common issues of law and fact. This action involved interpretation of Boman's lease, only Boman and ZOA are parties, and, if it were not being dismissed, would have involved discovery including depositions. The Special Proceeding seeks approval of the sale of the Property to Caerus according to the PSA and NFPCL §§ 510 and 511, with a determination as to whether the sale is in the best interests of ZOA. That proceeding will not involve any discovery.

Consolidation is not appropriate, particularly since this action is being dismissed (*see Matter of Joseph*, 106 AD3d at 1006) .

Accordingly, it is

ORDERED that defendant's motion to dismiss (motion seq. no. 001) is granted, the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon presentation of a bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion for disqualification, default judgment, and consolidation (motion seq. no. 002) is denied.

Dated: September 25, 2015

ENTER:

Kelly O'Neill Levy

J.S.C.

HON. KELLY O'NEILL LEVY