

**113 Discount Bazaar Inc. v Century 2000 Custom  
Home Bldrs. & Devs., LLC**

2015 NY Slip Op 32137(U)

October 22, 2015

Supreme Courtn, Queens County

Docket Number: 705383/13

Judge: Denis J. Butler

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12  
Justice

-----X  
113 DISCOUNT BAZAAR INC., 113 FURNITURE  
BAZAAR INC. and GAGANDEEP SINGH,

Index No.:705383/13

Plaintiffs,

Motion Date:  
August 13, 2015

-against-

CENTURY 2000 CUSTOM HOME BUILDERS  
& DEVELOPERS, LLC, CENTURY CUSTOM  
HOME BUILDERS & DEVELOPERS, LLC  
PHILIP BALDEO AND ALLIED IV LLC,

Cal. No.: 165/142  
Seq. No.: 4 and 5

Defendants.

FILED  
JUL 28 2015  
COUNTY CLERK  
QUEENS COUNTY

-----X  
The following papers read on this motion by defendants,  
Century 2000 Custom Home Builders & Developers, LLC ("Century  
2000") and Philip Baldeo to dismiss the Complaint pursuant to  
CPLR §3212 (Seq. No. 4) and separate motion by plaintiff for an  
order granting summary judgment (Seq. No. 5).

Papers  
Numbered

**Sequence No. 4**

Notice of Motion, Affirmation, Affidavit,  
Memorandum of Law and Exhibits..... EF94-107  
Affirmation In Opposition, Affidavit  
Memorandum of Law and Exhibits..... EF114-127  
Reply Affirmation..... EF178

**Sequence No. 5**

Notice of Motion, Affirmation, Affidavit,  
and Exhibits..... EF 114-127  
Affirmation In Opposition, Affidavit  
and Exhibits..... EF 131-144

The court notes that approximately one month after the submission date for the Seq. No. 4 and Seq. No. 5 motions, defendant Allied IV LLC ("Allied") delivered to Part 12 working copies of their cross-motion, which was filed on August 7, 2015, with a return date of September 16, 2015, and opposition papers to both motions. The cross-motion is improperly noticed additionally, in accordance with the Part 12 Rules, papers forwarded to Chambers after submission in the Centralized Motion Part will not be considered in determining the application. Therefore, defendant Allied's cross-motion and opposition papers are not considered in determining this motion.

Upon the foregoing papers, it is ordered that this motion is determined as follows:

In the complaint in this action plaintiff seeks an order directing specific performance by defendant Allied in accordance with the terms of a lease; a money judgment against defendant Allied in the amount of \$10,000,000; an order voiding the sale of property from defendant Century 2000 to defendant Allied and directing Century 2000 to comply with the terms of the lease; and a money judgment against defendants. Defendants Century 2000 and Baldeo move for an order dismissing the complaint (Seq. No. 4) and by separate motion (Seq. No. 5) plaintiffs move for an order granting summary judgment.

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N. Y. 118). Summary Judgment should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App. Div. 1019), or where the issue is "arguable" (*Barrett v. Jacobs*, 255 N. Y. 520, 522); "issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (N.Y. 1957)).

On the record before the court it is undisputed that plaintiff executed two leases, dated March 5, 2013, with an entity identified as 'Century Custom Home Builders & Developers, LLC'. One lease was for the retail space located on the first floor and basement of the building known as 113-14 Liberty Avenue, Richmond Hill, NY 11419 and the second lease was for the second floor of the building known as 113-12 Liberty Avenue, Richmond Hill, NY 11419. Both leases indicate that the leased premises represent rental space at the premises known as 113-12 - 113-18 Liberty Avenue, Richmond Hill, NY, Block 9536, Lot 4. Both leases include a Rider with Paragraph 31 which reads as follows:

Tenant and Guarantor have the 1<sup>st</sup> option to purchase 113-12 and 113-14 Liberty Avenue for the sum of \$2,500,000. The parties understand that Landlord is completing a subdivision with his adjoining property and Landlord will exercise good faith and best efforts to expedite said subdivision. Upon completion of said subdivision, tenant will be provided a period of thirty days to exercise his right by announcing his intention to proceed with the purchase.

On the record before the court the moving defendants contend that work on the subdivision began on or about July 8, 2013; that the NYC Department of Buildings issued a Notice of Objection on July 15, 2013; that a meeting to discuss the objections was scheduled for August 12, 2013 and thereafter adjourned to August 21, 2013; and that the leased property was conveyed to defendant Allied on September 3, 2013.

The moving defendants argue that upon the conveyance of the leased property to defendant Allied, their obligations pursuant to Paragraph 31 of the leases were assumed by defendant Allied. Defendant Baldeo also contends that since the subject leases inadvertently misidentified the lessor as Century Custom Home Builders & Developers, LLC, instead of Century 2000 Custom Home Builders & Developers, LLC and plaintiff's complaint should be dismissed as against him.

In support of their motions defendants submit, inter alia, sworn statements from Martin Saperstein, Esq., the attorney who represented Century 2000 and Baldeo in the sale of the leased property to defendant Allied and an affidavit from defendant Baldeo.

Martin Saperstein's affidavit is rife with hearsay statements regarding the facts involved in the negotiation and sale of the subject property and therefore, the affidavit lacks probative value. Defendant Baldeo's affidavit incorporates Attorney Saperstein's statements and further relies on statements and actions taken by non-parties unsupported by any competent evidence. Defendant Baldeo's affidavit also lacks probative value.

Based on the record before the court defendants have failed to establish a prima facie case entitling them to summary judgment dismissing the complaint.

In plaintiffs' cross-motion for summary judgment, plaintiffs argue that defendants failed to exercise 'good faith' or make 'best efforts' in fulfilling their obligations pursuant to

Paragraph 31 of the subject leases.

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance (see e.g. Smith v General Acc. Ins. Co., 91 N.Y.2d 648, 652-653, 674 N.Y.S.2d 267, 697 N.E.2d 168 [1998]; Dalton v Educational Testing Serv., 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 663 N.E.2d 289 [1995]; Van Valkenburgh, Nooger & Neville v Hayden Publ. Co., 30 N.Y.2d 34, 45, 330 N.Y.S.2d 329, 281 N.E.2d 142, rearg denied 30 N.Y.2d 880, cert denied 409 U.S. 875 [1972]). This covenant embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (Dalton, 87 N.Y.2d at 389, quoting Kirke La Shelle Co. v Armstrong Co., 263 NY 79, 87, 188 N.E. 163 [1933]). While the duties of good faith and fair dealing do not imply obligations "inconsistent with other terms of the contractual relationship" (Murphy v American Home Prods. Corp., 58 N.Y.2d 293, 304, 461 N.Y.S.2d 232, 448 N.E.2d 86 [1983]), they do encompass "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (See, 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153-154 (N.Y. 2002); Rowe v Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 69, 412 N.Y.S.2d 827, 385 N.E.2d 566 [1978], quoting 5 Williston, Contracts § 1293, at 3682 [rev ed 1937]).

"Best efforts" requires more than "good faith". "Best efforts" requires that defendants pursue all reasonable methods for obtaining the subdivision approval (see, Blask v Miller, 186 AD2d 958, 959). On the this record, there is insufficient evidence to establish, as a matter of law, that defendant exercised good faith or used reasonable methods to fulfill their obligations under Paragraph 31 of the Rider to the lease and therefore, plaintiff has failed to demonstrate a prima facie case.

Based on the foregoing, the motion by defendants Century 2000 and Baldeo (Seq. No. 4) is denied and the separate motion by plaintiffs (Seq. No. 5) is also denied. For the reasons stated above, defendant Allied's cross-motion and opposition papers were was not considered.

This constitutes the Decision and Order of the Court.

Dated: October 22, 2015

  
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Denis J. Butler, J.S.C.

**FILED**  
OCT 26 2015  
COUNTY CLERK  
QUEENS COUNTY