

Fuller v 79 Hamilton Place Hous. Dev. Fund Corp.

2016 NY Slip Op 30315(U)

February 26, 2016

Supreme Court, New York County

Docket Number: 150028/2016

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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EMMA FULLER AND MICHAEL OVERBY,
Plaintiffs,

Index No. 150028/2016

-against-

DECISION/ORDER

79 HAMILTON PLACE HOUSING DEVELOPMENT FUND
CORPORATION,
Defendant.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for: _____

Papers Numbered

Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition to the Motion /Cross-motion.....	<u>2</u>
Reply Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs have brought the present motion for a preliminary injunction enjoining defendants from selling or otherwise transferring the shares of a cooperative unit to anyone other than plaintiffs. As will be explained more fully below, the motion for a preliminary injunction is denied as plaintiffs have failed to establish a likelihood of success on their claims to enjoin defendant from selling the cooperative unit.

A party seeking a preliminary injunction must demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction and a balancing of the equities in the movant's favor. *Nobu Next Door, LLC v. Fine Arts House, Inc.*, 4 N.Y.3d 839 (2005).

General Obligations Law section 5-703(2) provides that "A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void

unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.” For a writing to satisfy the statute of frauds, there must be a memorandum signed by the party to be charged which designates the parties, identifies and describes the subject matter and states all of the essential terms. *Generas v. Hotel des Artistes*, 117 A.D.2d 563 (1st Dept 1986).

It is well-settled that a written agreement to purchase real property will not constitute an enforceable contract pursuant to the statute of frauds where the terms of said agreement do not include terms material to a contract of sale. *See Goebel v. Raeburn*, 289 A.D.2d 43 (1st Dept 2001) (“In this action alleging breach of a contract to purchase real property, the motion court properly found that a letter from plaintiff’s counsel to defendant’s counsel and a letter from defendant’s counsel to plaintiff did not constitute writings sufficient to take the alleged agreement out of the Statute of Frauds, since the relied upon writings failed to state all the material terms of a complete agreement”). *See also Keles v. Morningside Heights Housing Corp.*, 8 A.D.3d 160 (1st Dept 2004)(holding that the parties’ binder agreement was not an enforceable contract for the sale of a cooperative apartment because the agreement did not include terms material to a contract of sale); *RAJ Acquisition Corp. v. Atamanuk*, 272 A.D.2d 164 (1st Dept 2000)(the letter agreement was unenforceable since it failed to state all the material terms of a complete agreement, “a material element of the contemplated bargain ha[ving] been left for further negotiations.”).

Material terms of a real estate contract of sale, which must be in writing to be enforceable under the Statute of Frauds, “include those terms customarily encountered in transactions of this nature’...such as the purchase price, the time and terms of payment, the

required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, adjustments for taxes and utilities, etc.” *Nesbitt v. Penalver*, 40 A.D.3d 596, 598 (2d Dept 2007) (internal citations omitted). See also *Argent Acquisitions, LLC v. First Church of Religious Science*, 118 A.D.3d 441 (1st Dept 2014).

In the present case, the court finds that plaintiffs are not entitled to a preliminary injunction as they cannot establish a likelihood of success on the merits of their claim that there is an enforceable written agreement between the parties which includes all the terms material to a contract of sale sufficient to satisfy the statute of frauds. Plaintiffs’ argument that the memorandum sent by the real estate broker for the defendant satisfied the statute of frauds because it contained all the material terms of the transaction to which the parties had agreed is without merit. Initially, the memorandum sent by the real estate broker is not a writing signed by the party to be charged as the real estate broker for the defendant is not the defendant but is an independent third party. Even assuming, *arguendo*, that the memorandum could be considered a writing signed by the party to be charged, it would be insufficient to satisfy the statute of frauds as it does not contain all the material terms of a complete agreement for the purchase of property. It does not state what the closing date for the sale will be; it does not state when the plaintiffs will be required to pay the down payment to defendant; it does not contain any provision for adjustments for taxes and utilities; it does not contain any provision regarding the risk of losses during the sales period; and it does not contain any provision regarding the quality of title to be conveyed. Although the contract of sale exchanged between the parties does contain these provisions, neither party ever signed the contract of sale or agreed to be bound by the provisions contained in the contract of sale and the plaintiffs never made the down payment required by the

