

**Cohen v 112 John St., LLC**

2016 NY Slip Op 30355(U)

March 4, 2016

Supreme Court, New York County

Docket Number: 159344/2012

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

JOSEPH COHEN, Plaintiff, -against- 112 JOHN STREET, LLC and EDWARD MONANI, Defendant.

INDEX NO. 159344/2012 MOTION DATE 01-20-2016 MOTION SEQ. NO. 001 MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this Motion for Summary Judgment.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion for summary judgment, is denied. Plaintiff's motion filed under Motion Sequence 002 to extend the notice of pendency, is granted.

112 John Street, LLC (hereinafter referred to individually as "112 John Street") is the fee owner of residential buildings located at 343 East 109th Street, New York, New York 10029 and 1976 Madison Avenue, New York, New York 10035 (hereinafter referred to as "the buildings"). Edward Monani is the sole member of 112 John Street, LLC, he was contacted about plaintiff's interest in purchasing the buildings by a broker, Kobi Zamir. Mr. Monani had informed plaintiff that he was involved in divorce proceedings and needed to avoid certain financial issues. The parties entered into negotiations that were unsuccessful. Plaintiff claims that on October 19, 2012, he scheduled a meeting with Edward Monani and Kobi Zamir, to recommence negotiations. A "Binder Contract of Sale" was prepared by plaintiff in advance and brought to the meeting. Mr. Monani signed the one page "Binder Contract of Sale" on behalf of 112 John Street, agreeing to sell the buildings for \$2,800,000.00 (Mot. Cohen Aff. Exh. A). The "Binder Contract of Sale" includes a reference to a \$100.00 deposit that was given to Mr. Monani, and language expressing a meeting of minds. It also specifically states,

"If a more formal contract is executed, buyer will forward copy to buyer's agent. Closing to take place no later than 12/13/2012 and seller must provide clear and marketable title. Other terms will be determined before a formal signing of contract of sale." (Mot. Cohen Aff. Exh. A).

A proposed "formal contract of sale" was drafted in November of 2012, by William N. Mavrelis, the attorney retained by Mr. Monani, and the parties continued to negotiate the terms of the formal contract of sale with a December 5, 2012 meeting scheduled to finalize the agreement. On December 4, 2012, plaintiff's attorney provided Mr. Mavrelis with his latest version of a proposed contract of sale and sought copies of the mortgage and note for review (Opp. Exh. F). Mr. Mavrelis, was informed about pending injunctions in the matrimonial action involving Edward Monani, and circulated an

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

e-mail on December 4, 2012 to plaintiff's attorney and Mr. Zamir advising that the contemplated transaction could not go forward. A "formal contract of sale" was never executed and the parties did not have a closing.

Plaintiff filed a notice of pendency and commenced this case on December 31, 2012. The Complaint asserts two causes of action for Specific Performance and Breach of Contract. Plaintiff's motion seeks an Order granting summary judgment separately on each of the causes of action asserted in the Complaint, together with a money judgment.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Plaintiff argues that the "Binder Contract of Sale" constitutes a valid and enforceable contract, and that the unambiguous language requires summary judgment be granted on the breach of contract cause of action. Plaintiff claims that the contract expressly states it, "constitutes a meeting of the minds," was valid upon signature by the parties and that the "Binder Contract of Sale" regardless of its title is an actual contract, even if a "more formal contract is anticipated."

To establish a breach of contract claim, a party must allege, "(1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages" (*Harris v. Seward Park Housing Corp.*, 79 AD3d 425, 913 N.Y.S.2d 161 [1<sup>st</sup> Dept., 2010] and *Morris v. 702 East Fifth street HDFC.*, 46 A.D. 3d 478, 850 N.Y.S.2d 6 [1<sup>st</sup> Dept., 2007]). Under those circumstances where the agreement is ambiguous, the use of extrinsic evidence may be required to establish the intent of the parties raising a material issue of fact necessitating the denial of the summary judgment motion (*67 Wall Street Co. v. Franklin Nat. Bank*, 37 N.Y. 2d 245, 333 N.E. 2d 184, 371 N.Y.S. 2d 915 [1975] and *American Express Bank Ltd. v. Uniroyal, Inc.*, 164 A.D. 2d 275, 562 N.Y.S. 2d 613 [1<sup>st</sup> Dept., 1990]). Any ambiguity in a contract must be construed against the party that drafted the agreement (*151 West Associates v. Printsiplies Fabric Corp.*, 61 N.Y.2d 732, 460 N.E. 2d 1344, 472 N.Y.S. 2d 909 [1984] and *Commercial Tenant Services, Inc. v. Northern Leasing Systems, Inc.*, 131 A.D. 3d 895, 17 N.Y.S. 3d 394 [1<sup>st</sup> Dept., 2015]).

Plaintiff admits that he drafted the "Binder Contract of Sale" after the parties broke off negotiations for the sale of the properties and in advance of the first time they resumed negotiations, the October 19, 2012 meeting, which was conducted without defendant's lawyer. There are issues of fact raised by defendant regarding his interpretation of the contract as a right of first refusal, and the title of the agreement as a "Binder Contract of Sale" and not a "Contract of Sale." There are ambiguities in the language of the agreement that refer to a "more formal contract," together with "other terms" that remained to be determined. The ambiguities on the meaning of the agreement are construed against the plaintiff and require denial of summary judgment on the breach of contract cause of action.

Plaintiff also seeks summary judgment on the specific performance cause of action arguing that the Statute of Frauds is satisfied because a memorandum rather than

a full contract is sufficient so long as it evidences all of the essential terms for completion. It is his contention that the "Binder Contract of Sale" contains all of the essential terms for a contract, including the names of the parties, the purchase price, the down payment amount and a deadline for closing.

New York's General Obligations Law § 5-703 codifies the Statute of Frauds. In order to satisfy the Statute of Frauds, the writing must sufficiently state all the essential elements of a complete agreement (*Goebel v. Raeburn*, 289 A.D.2d 43, 735 N.Y.S.2d 4 [1<sup>st</sup> Dept., 2001]). Such as the, "...price, identity of the parties, the parcel of real estate to be sold...the quality of title to be conveyed, adjustments for taxes and risk of loss" (*Argent Acquisitions, LLC v. First Church of Religious Science*, 118 A.D.3d 441, 990 N.Y.S.2d 1, 4 [1<sup>st</sup> Dept., 2014]), the closing date and medium of payment (*Ferchaw v. Troxel*, 112 A.D.3d 1310, 979 N.Y.S.2d 206 [4<sup>th</sup> Dept., 2013]; *Sabetfard v. Djavaheeri Realty Corp.*, 18 A.D.3d 640, 795 N.Y.S.2d 643 [2<sup>nd</sup> Dept., 2005]). The terms of a mortgage and "cash payments to be made" should be included in a contract of sale of real property (*Ashkenazi v. Kelly*, 157 A.D.2d 578, 550 N.Y.S. 2d 322 [1<sup>st</sup> Dept., 1990]).

Defendant raises issues of fact as to whether the "Binder Contract of Sale" contains all of the essential terms for an enforceable contract under the Statute of Frauds. He provides a copy of plaintiff's fax dated November 17, 2012, that lists two properties that were proposed for second mortgages as a collateral for the purchase price and to secure a promissory note (*Opp. Mavrelis Exh. D*). The information concerning the buildings as collateral and second mortgages is an essential element that was not included in the agreement. Defendant raises issues of fact resulting from the absence in the "Binder Contract of Sale" of other essential terms like DHCR compliance and broker commission language.

"Whether or not to award specific performance is a decision that rests in the sound discretion of the trial court." (*Van Wagner Adver. Corp v. S & M Enterprises*, 67 N.Y.2d 186, 492 N.E.2d 756, 501 N.Y.S. 2d 628 [1986]). Specific performance is governed by well established doctrines and principles of equity. It may be, "...denied for mistake even though the mistake is the defendant's own act or omission for which plaintiff is not in the least responsible" (*Da Silva v. Musso*, 53 N.Y.2d 543, 428 N.E.2d 382, 444 N.Y.S. 2d 50 [1981]). Courts require that the plaintiff seeking specific performance have substantially performed its contractual obligations and that such plaintiff was willing and able to perform its remaining obligations (*EMF Gen. Contracting Corp. v. Bisbee*, 6 A.D.3d 45, 774 N.Y.S.2d 39 [1<sup>st</sup> Dept. 2004]).

Plaintiff claims he was willing and able to perform his contractual obligations on the October 19, 2012 "Binder Contract of Sale," but there remain issues of fact as to the essential elements of the agreement under the Statute of Frauds warranting denial of summary judgment on the specific performance cause of action.

Plaintiff's motion filed under Motion Sequence 002, seeks to extend the two Notices of Pendency filed for this action on December 31, 2012. He argues that should summary judgment be denied, the Note of Issue was filed on June 29, 2015, and this matter will go to trial within a three year extension resulting in a final determination.

As to the Notices of Pendency, the authority and procedural requirements are set forth in Article 65 of the CPLR. A properly filed notice places, "the world on notice of plaintiff's potential rights in the action" and the named property (*In Re Sakow*, 97 N.Y. 2d 436, 767 N.E. 2d 666, 741 N.Y.S. 2d 175 [2002]). CPLR § 6513, permits a three year extension of the Notice of Pendency as long as the application is made before the

