

**Little Cherry, LLC v Two Bridges Hous. Dev. Fund
Co.**

2016 NY Slip Op 30435(U)

March 17, 2016

Supreme Court, New York County

Docket Number: 653817/2014

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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LITTLE CHERRY, LLC,

Plaintiff,

-against-

TWO BRIDGES HOUSING DEVELOPMENT FUND
COMPANY, TWO BRIDGES ASSOCIATES, L.P.,
SETTLEMENT HOUSING FUND, INC., AND TWO
BRIDGES NEIGHBORHOOD COUNCIL, INC.

Defendants.

Index No. 653817/2014

Mtn Seq. No. 003

DECISION AND ORDER

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JEFFREY K. OING, J.:

Relief Sought

Defendants Two Bridges Housing Development Fund Company,
Inc. ("HDFC"), Two Bridges Associates, L.P., Settlement Housing
Fund, Inc., and Two Bridges Neighborhood Council, Inc.

(collectively "defendants"), move for an order, pursuant to CPLR
3212, for summary judgment dismissing the amended complaint of
plaintiff Little Cherry, LLC ("Little Cherry").

Little Cherry cross-moves for an order, pursuant to CPLR
3211(b), dismissing defendants' first, fourth, and sixth
affirmative defenses.

Factual Background

HDFC is a not-for-profit corporation which owns the
Manhattan premises located at 235-247 Cherry Street (the

"Premises") (Am. Compl., ¶ 6). Little Cherry maintains that the remaining defendants are alter egos of each other and HDFC (Am. Compl., ¶¶ 18-19).

In a Contract of Sale, dated June 1, 2012 (the "Contract"), HDFC agreed to sell Little Cherry the Premises for \$4 million (Contract at p. 1, Sewell Aff., Ex. 4). The Contract contemplated that a new building would be constructed on the Premises which would include "at least 70 rent stabilized one, two and three bedroom apartment units for low-income households" (the "Building") (Contract at pp. 1-2; Sewell Aff., Ex. 4). In order for construction on the Building to proceed, Little Cherry -- or an entity it designated as the developer of the Building -- had to obtain certain consents to the Building from neighboring property owners (the "Plan Consents") (Contract at pp. 1, 3-4, Sewell Aff., Ex. 4). In addition, a Permit Modification from the New York City Department of City Planning was required for the project to move forward (Id. at p. 3). The Contract provided that if the Plan Consents and Permit Modification were not obtained within twelve months after the execution of the Contract the "Development Agreement" (which was not defined in the Contract) would terminate (Id. at pp. 3-4). Little Cherry was permitted to extend its "right to obtain both

the Plan Consent and DCP Permit Modification" for up to six three-month periods as long as certain conditions were satisfied (Id. at p. 3). Each of the first three extensions increased the amount of the down payment Little Cherry would pay for the Premises, while each of the final three extensions increased the total purchase price of the Premises (Id. at pp. 3-4).

Little Cherry and HDFC agreed to "consult in good faith and cooperate with each other with respect to obtaining city zoning and development approvals" and that the applications for these approvals would be handled by counsel retained by Two Bridges, at Little Cherry's sole cost and expense, under the joint direction of Little Cherry and Two Bridges (Id. at p. 4).

Defendants also agreed to use their best efforts to obtain any necessary approvals from the New York State Attorney General's Office and New York State Supreme Court pursuant to Not-for-Profit Corporation Law §§ 510, 511 and 511-a. If defendants' good-faith efforts to do so failed, the Contract would terminate (Id. at p. 4).

The closing of the sale was to take place approximately ninety days after, inter alia: (i) the Plan Consents were obtained; (ii) the Permit Modification was approved by the Department of City Planning; and (iii) the plans for the Building

were approved by the Department of Buildings (Id. at ¶¶ 2[a][ii]; 14).

On February 20, 2014, defendants filed a Pre-Application Statement Form ("PAS") with the Department of City Planning, commencing the process to obtain the Permit Modification (Am. Compl. ¶ 55). Little Cherry maintains that the twenty month delay between the execution of the Contract and the submission of the PAS was caused solely by defendants' failure to settle on a proposal to submit to the Department of City Planning (Schoenberg Aff. in Opp., ¶¶ 42, 49, 52). Defendants, by contrast, maintain that plaintiff caused the delay by failing to select an architectural team or development team to develop the design plan to be submitted with the PAS (Sewell Aff., ¶ 33).

Plaintiff also alleges that, after the PAS was filed, defendants failed to cooperate in obtaining the Plan Consent and Permit Modification by: (i) instructing plaintiff not to attend a March 21, 2014 meeting with the Department of City Planning to discuss subsequent steps in obtaining the Permit Modification; (ii) notifying plaintiff on or about March 28, 2014 that the Contract was terminated (although this notice was subsequently withdrawn on May 23, 2014); (iii) cancelling an April 8, 2014 meeting with plaintiff and the architect involved in the project,

based on the March 28, 2014 termination; and (iv) failing to provide their Plan Consent to plaintiff (Am. Compl. ¶¶ 54, 57-58, 61-62, 65-67, 71, 73). Plaintiff asserts that neither the Plan Consents nor the Permit Modification were obtained by November 30, 2014 as a result of defendants' actions (Am. Compl., ¶¶ 76-78).

On or about December 2, 2014, Two Bridges notified Little Cherry that the Contract was terminated due to Little Cherry's failure to obtain the Plan Consent and Permit Modification on or before November 30, 2014, (Am. Compl., ¶ 78).

Little Cherry now brings this action seeking: (i) a declaration that the Contract is not terminated and/or is extended due to either the defendants' breaches or defendants' failure to provide plaintiff with notice and an opportunity to cure its failure to obtain the Permit Modification and Plan Consent; (ii) specific performance and injunctive relief directing defendants to cooperate in obtaining the Permit Modification and Plan Consent and close on the sale of the Premises; (iii) specific performance and injunctive relief directing defendants to close on the sale of the Premises; or, alternatively, damages for (iv) breach of contract; and (v) tortious interference with Contract (Am. Compl. at ¶¶ 81-119).

Defendants interposed an Answer asserting affirmative defenses including, inter alia: (i) failure to state a claim (first affirmative defense); (ii) laches and waiver (fourth affirmative defense); and (iii) impossibility (sixth affirmative defense).

Discussion

I. Defendants' Motion for Summary Judgment

1. Breach of Contract - Specific Performance

In its third cause of action, plaintiff alleges that, while it has substantially performed its obligations under the Contract and remains ready, willing, and able to perform all of its remaining obligations thereunder, defendants have refused to perform their obligations under the Contract, including cooperating in obtaining zoning approvals and obtaining any necessary approvals from the New York State Attorney General and Supreme Court, thereby breaching the Contract and causing plaintiff to lose the opportunity to develop the Premises (Am. Compl., ¶¶102, 104-107, 109). Plaintiff seeks a judgment directing specific performance of the Contract and an injunction directing defendants to perform their obligations under the Contract, including cooperating in obtaining the Plan Consent and

Permit Modification and closing on the sale of the Premises (Am. Compl. ¶110).

As specific performance is a remedy for a breach of contract claim, rather than an independent cause of action (Cho v. 401-403 57th St. Realty Corp., 300 AD2d 174, 175 [1st Dept 2002]), and a grant of injunctive relief depends on "its proponent [being able to] establish[] the merits of its substantive cause of action against that defendant" (Weinreb v 37 Apartments Corp., 97 AD3d 54, 59 [1st Dept 2012]), plaintiff's third cause of action will be treated as a breach of contract claim.

Defendants argue that this claim should be dismissed because the Contract automatically terminated on November 30, 2014 due to plaintiff's failure to procure the Permit Modification and Plan Consents (Contract at p. 3, Sewell Aff., Ex. 4). In fact, the Contract does not state that it will be terminated upon the failure to gain approval for the Permit Modification and Plan Consents by that date, but, instead states that "this Development Agreement" will terminate. What is unclear is whether the "Development Agreement" refers to the Contract, especially in light of the fact that subsequent provisions of the Contract expressly contemplate its termination if the Building Plans were not obtained within a certain window (Contract at p. 4, Sewall

Aff., Ex. 4). As the Contract is ambiguous on this point, summary judgment is inappropriate (NFL Enterprises LLC v Comcast Cable Communications, LLC, 51 AD3d 52, 61 [1st Dept 2008]). Furthermore, even assuming arguendo that the "Development Agreement" refers to the Contract, Two Bridges may not rely on this provision in its motion for summary judgment in light of plaintiff's claim that it failed to obtain the Permit Modification and Plan Consents by the deadline set forth in the Contract because defendants delayed in submitting the PAS to the Department of City Planning (ADC Orange, Inc. v Coyote Acres, Inc., 7 NY3d 484, 490-91 [2006] [although plaintiff purchaser failed to obtain subdivision and site plan approval from planning board by required date, defendant seller was not entitled to summary judgment dismissing plaintiff's claim for specific performance where plaintiff alleged that defendant frustrated its ability to obtain the required approval]; see also Is. Estates Mgt., Inc. v MBA-Manorhaven, LLC, 21 Misc 3d 1121(A) [Sup Ct 2008] affd., 66 AD3d 839 [2d Dept 2009]).

Defendants next argue that this claim must be dismissed because an injunction directing defendants to "cooperate" in obtaining the Plan Consent and Permit Modification would fail to "define specifically what the enjoined person must or must not

do, in language so clear and explicit that a layman can understand what he is expected to do, or refrain from doing" (Xerox Corp. v Neises, 31 AD2d 195, 197-98 [1st Dept 1968] [injunction]), and would, as a result, create a situation requiring judicial supervision over an extensive period of time to determine whether defendants were adequately cooperating.

Contrary to defendants' concern, the relief sought here is sufficiently specific to avoid dismissal (See Lieberman Properties, Inc. v Braunstein, 134 AD2d 55, 58-59 [2d Dept 1987] [judgment directing defendants to perform obligations under contract of sale by continuing to consent to application for subdivision approval and cooperating with the plaintiff and its agents in allowing access to premises to collect data required for the subdivision application]; Engelhardt v Fessia, 31 Misc 2d 127, 129 [Sup Ct 1961] [court was empowered to restrain the defendants from failing "to cooperate fully, promptly and expeditiously" in prosecution of application for approval of commission]). Furthermore, dismissal of this claim based on concerns of continued judicial superintendence of the defendants' performance would be premature at this juncture (Bush Term. Buildings Co. v Bush Term. R. Co., 47 NYS2d 330, 333 [Sup Ct 1944] affd sub nom. Bush Term. Buildings Co. v Bush Term. R.R.

Co., 267 AD 991 [2d Dept 1944] [that a court may ultimately withhold the remedy of specific performance on the ground that it may involve too complicated a problem of judicial superintendence over an extensive period of time does not affect the sufficiency of the complaint and may not be taken advantage of on a motion to dismiss]; High v Trade Union Courier Pub. Corp., 31 Misc 2d 7, 8 [Sup Ct 1946] affd sub nom. High v Trade Union Courier Publ. Corp., 275 AD 803 [1st Dept 1949] ["[w]hile it is true that some difficulty may arise in supervision of the decree ... the ground for jurisdiction is adequately present in the pleading regardless whether, upon the trial, its exercise may be withheld. To what extent, if any, equitable relief may ultimately be granted must rest with exigencies as they appear upon trial"]; Riverbay Corp. v Thyssenkrupp N. El. Corp., 116 AD3d 487, 488 [1st Dept 2014]).

Finally, defendants argue that dismissal is appropriate because approvals of the sale from the New York State Attorney General, Supreme Court, and the New York City Department of Housing Preservation and Development are required, but may never be granted. This argument is unavailing. While courts will not grant specific performance of the sale of a property where the seller does not have the power to convey the property in question, specific performance may be granted as long as the

court is satisfied that it lies within the seller's power -- or within the seller's power as supplemented by that of the court -- to do so (S.E.S. Importers, Inc. v Pappalardo, 53 NY2d 455, 464 [1981]). Defendants do not claim that the sale will never be approved, however, but only argue that such approval is unlikely.

Accordingly, defendants' motion for summary judgment dismissing the third cause of action is denied (cf. Calligar v Fradkoff, 154 AD2d 495, 498 [2d Dept 1989] [court could not grant purchaser specific performance where seller was unable to convey the property at issue due to intervention of third-party litigation outside of seller's control]).

In its fourth cause of action, plaintiff repeats the allegations set forth in its third cause of action and further alleges that it has "repeatedly requested that Defendants close on the sale of the Premises, even without the Plan Consent and DCP Permit Modification", and seeks specific performance of the Contract and an injunction directing the defendants to close on the sale of the Premises without the Plan Consent and Permit Modification (Am. Compl., ¶¶ 111-114).

As the Plan Consent and Permit Modification are conditions precedent to the Closing (Contract, ¶ 14, Sewell Aff., Ex. 4) and a grant of specific performance depends on the satisfaction of

conditions precedent (Lieberman Properties, Inc. v Braunstein, 134 AD2d 55, 59-60 [2d Dept 1987]), specific performance may not be granted (F & F Rest. Corp. v Wells, Goode & Benefit, Ltd., 61 NY2d 496, 502 [1984] [purchaser who obtains specific performance of contract is entitled to no greater rights than he would have had if the contract been performed at the agreed time]). In addition, plaintiff fails to provide any legal authority to support its request for injunctive relief ignoring the requirements of the Contract. As such, defendants' motion for summary judgment dismissing the fourth cause of action is granted, and it is dismissed.

2. Breach of Contract - Damages

In its fifth cause of action, for breach of contract, plaintiff seeks, as an alternative to specific performance, money damages for defendants' alleged breaches. While defendants argue that this cause of action must be dismissed because there has been no breach of the Contract, the record sufficiently demonstrates that a factual issues exist as to whether defendant failed to satisfy its contractual obligations to cooperate in obtaining city zoning and development approvals..

Accordingly, defendants' motion for summary judgment dismissing the fifth cause of action is denied.

3. Declaratory Relief

In its first and second causes of action plaintiff seeks a declaratory judgment that the Contract: (i) did not terminate on November 30, 2014, or (ii) is extended to a reasonable time (to be fixed by the Court) to allow for the completion of the Plan Consent and Permit Modification. A declaratory judgment is unnecessary where a plaintiff can be accorded complete relief at law (Empire 33rd LLC v Forward Ass'n Inc., 87 AD3d 447, 448 [1st Dept 2011]; 61 W. 62 Owners Corp. v CGM EMP LLC, 77 AD3d 330, 341 [1st Dept 2010] affd as mod and remanded, 16 NY3d 822 [2011]).

Here, a declaratory judgment that the Contract remains in effect would duplicate the remedy plaintiff seeks in its breach of contract causes of action for specific performance of the Contract. Given that "plaintiff may not seek a declaratory judgment when other remedies are available, such as a breach of contract action" (Singer Asset Fin. Co., LLC v Melvin, 33 AD3d 355, 358 [1st Dept 2006]), defendants' motion for summary judgment dismissing the first and second causes of action is granted, and they are dismissed.

4. Tortious Interference

In its sixth cause of action, plaintiff alleges that defendants Settlement Housing Fund, Inc. ("SHF") and Two Bridges

Neighborhood Council, Inc. ("TBNC"), through their domination and control of HDFC, induced and caused HDFC to breach the Contract without justification or excuse. This claim is unavailing because Little Cherry alleges that HDFC is an alter ego of SHF and TBNC (Am. Compl., ¶¶ 18-19), and an alter ego of a party cannot, as a matter of law, tortiously interfere with that party (New Media Holding Company v. Kagalovsky, 118 AD3d 68, 80 [1st Dept 2014]; UBS Securities LLC v. Highland Capital Management, 86 AD3d 469 [1st Dept 2011]).

Accordingly, defendants' motion for summary judgment dismissing the sixth cause of action is granted, and it is dismissed.

II. Plaintiff's Cross-Motion to Dismiss Affirmative Defenses

Plaintiff seeks to dismiss defendants' first affirmative defense (failure to state a cause of action), fourth affirmative defense (waiver and laches), and sixth affirmative defense (impossibility) on the grounds that they are unsupported by any facts in the pleadings.

The inclusion of the defense of failure to state a cause of action in an Answer is harmless surplusage and, as such, the cross-motion to dismiss this affirmative defense is denied (Sieratzki v. Chow, 2014 WL 5364099 (Sup Ct, NY County 2014)).

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Defendants' fourth and sixth affirmative defenses, however, are pleaded in a conclusory fashion without any supporting facts. While defendants argue that the facts supporting these defenses are set forth in various affidavits submitted in support of motions made prior to the Answer, this is insufficient to satisfy CPLR 3013, which requires that pleadings "shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each ... defense" (CPLR 3103).

Accordingly, plaintiff's cross-motion to dismiss defendants' fourth and sixth affirmative defenses is granted and they are dismissed without prejudice to seek leave to replead (170 W. Vil. Assoc. v G & E Realty, Inc., 56 AD3d 372, 372-73 [1st Dept 2008]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the amended complaint is granted to the extent of dismissing the first, second, fourth and sixth causes of action and is denied as to the third and fifth causes of action; and it is further

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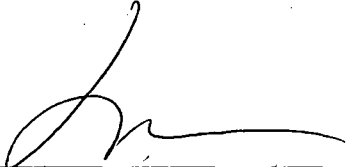
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ORDERED that plaintiff's cross-motion to dismiss defendants' first, fourth, and sixth affirmative defenses is granted to the extent of dismissing the fourth and sixth affirmative defenses without prejudice to seek leave to replead, and is denied as to the first affirmative defense; and it is further

ORDERED that counsel shall appear for a status conference in Part 48 on April 20, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/17/16


HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.