

Invesco Affiliates Ltd. v Tritec Dev. Group, LLC

2016 NY Slip Op 32846(U)

February 9, 2016

Supreme Court, Suffolk County

Docket Number: 602816/2015

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX NOS. 602816/2015 & 606864/2015

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

INVESCO AFFILIATES LIMITED, 602816/2015

Plaintiff,

-against-

TRITEC DEVELOPMENT GROUP, LLC, TRITEC
BUILDING COMPANY, INC., TRITEC REAL ESTATE
COMPANY, INC., and 201 W. BROADWAY PJ, LLC.,

Defendants.

201 W. BROADWAY PJ, LLC, 606864/2015

Plaintiff,

-against-

INVESCO AFFILIATES LIMITED.,

Defendant.

INVESCO AFFILIATES LIMITED,

Counterclaim/Third Party Plaintiff,

-against-

201 W. BROADWAY PJ, LLC,

Counterclaim Defendant,

and

TRITEC DEVELOPMENT GROUP, LLC, TRITEC
BUILDING COMPANY, INC., and TRITEC REAL ESTATE
COMPANY, INC.,

Third-Party Defendants.

INDEX NO. 602816/2015

ORIG. RETURN DATE: 9/16/15
FINAL SUBMITTED DATE: 12/9/15
MOTION SEQ#002 MotD
#003 MG

INDEX NO. 606864/2015

ORIG. RETURN DATE: 9/30/15
FINAL SUBMITTED DATE: 12/9/15
MOTION SEQ#001
MOTION: MG

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Before the Court comes the Plaintiff, Invesco Affiliates Limited, seeking an Order (index no. 602816-15 mot. seq. 002) pursuant to CPLR § 602(a) to consolidate this action with another action pending in the Supreme Court of Suffolk County (201 West Broadway PJ, LLC v. Invesco Affiliates Ltd., at index no. 606864/2015). Both cases spring from a

prospective project in the Port Jefferson area. The action sought to be consolidated seeks to prove, enforce and declare an arrangement between Invesco Affiliates, Tritec Development Group, LLC and 201 West Broadway PJ, LLC. That arrangement is alleged to be a joint venture.

The first action will be referred to as the Invesco action. Invesco is a New York Corporation owned solely by Mr. and Mrs. Samir Nizam. Invesco owns real property located at 201 West Broadway in the downtown Port Jefferson area and has owned this property for approximately twenty (20) years. In 2012, subsequent to obtaining preliminary site plan approval for a mid-sized project on the property, Invesco became acquainted with Tritec, a seasoned, stured developer. Invesco recognized Tritec as an entity which could, through its expertise, obtain permission for the development of a greater yield on the property. Invesco alleges in the action sought to be consolidated that a joint venture agreement exists between it and Tritec as concerns their relative stakes in the project. Tritec defendants deny and contest the existence of a joint venture as well as any contractually corroborated equity stake in the project.

The Court has considered the following in connection with its determination:

Index No.: 60816/2015 Motion Sequences 002 and 003

1. Plaintiff's Notice of Motion, Affirmation In Support of Motion To Consolidate inclusive of Exhibits A through J and Memorandum of Law In Support;
2. Defendants' Affirmation In Opposition of Jarrett Behar to Motion To Consolidate, inclusive of Exhibits 1 and 2 and Memorandum of Law In Opposition To Motion To Consolidate;
3. Plaintiff's Reply Memorandum of Law In Further Support;
4. Defendants' Notice of Motion for Summary Judgment on Plaintiff 201 West Broadway PJ LLC's First Cause of Action and Dismissing All of the Defendant's Counterclaims and Third-Party Complaint, Affidavit of Robert Coughlan In Support of Motion For Summary Judgment, inclusive of Exhibits A through J, Affirmation of Jarrett M. Behar inclusive of Exhibits 1 through 3, Defendants' Statement Pursuant To Commercial Division Rule 19-a In Connection with Motion For Summary Judgment and Memorandum of Law In Support;
5. Plaintiff's Affirmation In Opposition by Norman R. Cerullo, inclusive of Exhibits 1 through 32, Memorandum of Law of Invesco Affiliates in Opposition To Motion For Summary Judgment, Plaintiff's Memorandum of Law In Opposition To Motion For Summary Judgment, Plaintiff's Response

- To Defendants' Statement Pursuant To Rule 19-a; and
6. Defendants' Reply Affirmation In Further Support of Motion For Summary Judgment with Exhibits 1 and 2 and Memorandum of Law In Reply;¹

Index No. 606864/2015 Motion Sequence 001

7. Notice of Motion for Summary Judgment on Plaintiff's First Cause of Action for Specific Performance, Affidavit of Robert J. Coughlan In Support, inclusive of Exhibits A through L, Affirmation of Jarett Behar In Support with Exhibits 1 through 5 and Memorandum Of Law In Support;
8. Affirmation In Opposition by Norman R. Cerullo inclusive of Exhibits 1 through 32, Affidavit of Samir Nizam In Opposition and Memorandum of Law In Opposition; and
9. Reply Affirmation of Jarett M. Behar In Further Support, with Exhibits 1 and 2 and Memorandum of Law In Reply.²

At issue is a contract of sale between Invesco and 201 West Broadway, PJ, LLC for a sale of Invesco's Port Jefferson property. That contract is evidence in both actions. The Grantee therein (201 West Broadway) petitions the Court for summary judgment specifically enforcing that Contract.

A review of the contract shows that 201 West Broadway and Invesco are parties to a contract of sale, dated as of January 31, 2013, whereby Invesco agreed to sell the property at 201 West Broadway and that 201 West Broadway agreed to purchase the property from Invesco, for the sum of 3.9 Million Dollars. Invesco and 201 West Broadway were represented by independent counsel in connection with the negotiation and execution of that contract.

Section 11 of the contract provides that if Invesco fails to close, 201 West Broadway has the right to either cancel the contract or seek specific performance. The contract contains what is commonly known as a merger clause at section 17.3. That clause reads as follows:

This Contract embodies and constitutes the entire understanding between the parties with respect to the transaction contemplated herein, and all prior agreements, understandings, representations

1. The Court annexes hereto an inventory of all submissions considered in Index No. 602816/2015.

2. The Court annexes hereto an inventory of all submissions considered in Index No. 606864/2015

and statements, oral or written, are merged into this Contract. Neither this Contract, nor any provisions hereof may be waived, modified, amended, discharged or terminated except by an instrument signed by the party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument.

On or about June 15, 2015, 201 West Broadway, issued a time of the essence letter scheduling a closing for the property on June 30, 2015. The time of the essence letter warned Invesco "if it does not perform and close on that time and date the same shall constitute a default under the Contract."

The Court must determine the effect of the merger clause in connection with the disputed joint venture. The Court of Appeals clearly stated as far back as 1894, that a party who delivers a signed written contract to the other party may not claim that an oral condition was added at the time of delivery, precluding its effectiveness, or enforcement (*Blewitt v. Boorum*, 142 N.Y. 357, 37 N.E. 119 [1894]). As articulated by the Court of Appeals in *Blewitt*, a delivery of the signed contract to the other party itself renders a claimed condition unavailable:

The rule in this State regarding deeds conveying real estate, or an interest therein, or agreements for the sale thereof, is that a delivery cannot be made to the grantee or other party thereto conditionally or as is said in escrow, and when delivered to a party the delivery operates at once and the condition is unavailable (*id* at 363, 37 N.E. 119 citing *Gilbert v. The North American Fire Ins. Co.*, 23 Wend. 43 [1840]. See *Torres v. D'Alesso*, 80 A.D.3d 46, 910 N.Y.S.2d at 52.

General Obligations Law § 5-703 reflects important policy concerns. Real estate transactions are required to be in writing to ensure clarity and certainty, and to avoid fraud (see *Villano v. GNC Homes*, 46 A.D.2d 907, 362 N.Y.S.2d 198 [1974]). As such, the *D'Alesso* (*infra*) court noted:

Unlike other types of business transactions, real estate sales contracts are drawn up and executed only after all terms have been negotiated and finalized and the writing is complete. Any conditions precedent are normally included in those written

terms, such as mortgage contingency clauses found in standard form real estate contracts making the deal contingent on the buyer's obtaining the contemplated mortgage loan. The writing is expected to represent the final version of the parties' agreement. If we permit interference with enforcement of a written and fully executed real estate sales contract based on a claimed oral condition precedent to its effectiveness, the need for certainty and finality at the heart of the statute of frauds is undermined. Cases in the tradition of *Hicks v Bush*, 10 NY2d 488, in which parties have been allowed to prove claimed oral conditions precedent to the effectiveness of a contract, have most frequently involved an underlying contract that was not required to be in writing, or circumstances in which there was no particular reason to object to part of the agreement being oral while the rest was written. (emphasis added)

The words "joint venture" or reasonable interpretive language, do not appear in the contract. The merger clause presented in the matter at bar represents the entirety of agreement between the parties as concerns the transfer of title. Therefore, the petition seeking specific performance is **GRANTED**.

Invesco alleges that a joint venture agreement, in fact, exists between it and the Defendant Tritec. An oral agreement may be sufficient to create a joint venture, and the statute of frauds is generally inapplicable for such an agreement. As the alleged joint venture consists of an agreement to perform and share, which is incapable of being performed within one year, it violates the statute of frauds and cannot be deemed a condition of the land sale contract (see *J.R. Loftus, Inc. v. White*, 85 N.Y.2d 874, 626 N.Y.S.2d 52 and *Unicorn Enterprises, Ltd. v. Stonewall Contracting Corp.*, Supreme Court, Appellate Division, Second Department, New York, 232 A.D.2d 404).

"The essential elements [of a joint venture] are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses." *Natuzzi v. Rabady*, 177 A.D.2d 620, 622 (2d Dep't 1991); see also *Kaufman v. Torkan*, 51 A.D.3d 977, 979 (2d Dep't 2008) (same); *Tilden of New Jersey, Inc. v. Regency Leasing Sys., Inc.*, 230 A.D.2d 784, 786 (2d Dep't 1996).

The existence of a joint venture agreement is essential to a finding of a joint venture

relationship and not every agreement qualifies as a joint venture. "If there was no agreement as to the manner in which profits and losses were to be shared, the agreement between the parties [does] not create a joint venture..." *Natuzzi*, 177 A.D.2d at 622. Absent such an agreement, there is no joint venture. *Kaufman v. Torkan*, 51 A.D.3d 977, 979 (2d Dep't 2008).

Additionally, *Unicorn Enterprises, infra.*, pronounces the well-known tenet of law that any contract with an anticipated duration of more than one year must be in writing in order to create a joint venture. In the matter at bar, there is no specific document executed by the parties, which binds them to any identifiable joint venture agreement. Instead, Invesco presents a trail of arguably parol evidence that it alleges, at best, communications concerning some participation between it and Tritec. However, nothing submitted can be construed to conform to the requirements of the Statute of Frauds.

Accordingly, it is,

ORDERED ADJUDGED AND DECREED as follows:

1. 201 W. Broadway PJ, LLC's petition for specific performance is **GRANTED**. The Contract of Sale shall be consummated. The parties are directed to close the transaction within thirty (30) days of the date of this Order with Notice of Entry; and
2. All claims by Invesco asserting a joint venture agreement and all other claims by Invesco for relief are **DENIED** and the actions **DISMISSED**.
3. The consolidation petition is deemed moot.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: February 9, 2016


HON. JERRY GARGUILO, JSC