SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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ABRAHAM PILLER, individually and derivatively on behalf of THE NEW PINES VILLAS LLC,

Plaintiff,

-against-

TRIBECA DEVELOPMENT GROUP LLC, *et al.*,

Defendants.

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DECISION and ORDER
Index No. 0071-16
RJI No. 52-37715 2016

Motion to Dismiss

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LaBuda, J.

The above-captioned matter involves a real estate dispute. It comes before the Court by the defendants' motions to dismiss. Plaintiff opposes the motions. By Decision and Order dated January 27, 2016, this Court denied Plaintiff's motion by Order to Show Cause for a temporary restraining order prohibiting various defendants from encumbering or selling the subject property, or any portion thereof. By Decision and Order dated March 29, 2016, this Court denied Plaintiff's motion to reargue the January 27, 2016, Decision and Order.

Factual Background

The record before the Court indicates the following: Plaintiff, Abraham Piller (hereinafter, "Piller"), and Defendant Abraham Eisner (hereinafter, "Eisner"), were acquainted for many years. Eisner was, and is, in the mortgage business; Piller owned real estate in the Fallsburg (Sullivan County, New York) area and wished to obtain mortgage financing on said property. Piller and Eisner discussed the matter. Eisner indicated he could obtain the financing, but Piller could not be named as the record owner of the subject property due to a pending legal matter; Piller's credit was inadequate and Piller's father, David, had a "criminal situation" (in a federal prosecution) in the past. Therefore, the parties agreed that the subject property would be transferred to a new LLC, in which Eisner would be reflected as the only member. Plaintiff maintains that regardless of the LLC documents and the fact that a deed as conveyance to Eisner as an LLC was exchanged and recorded, Abraham Piller was always the true owner of the property. Plaintiff asserts that ancillary documents and agreements indicate that Eisner was and is merely the sole nominee and trustee for Piller. The ancillary agreements further provided that as compensation to Eisner for his acquisition of the financing and for serving as the nominee for Piller, he was to receive 10 percent of any profit ultimately realized on the subject property.[1]

After Piller and Eisner executed a Nominee Agreement, Eisner was able to secure mortgage financing on the subject property.[2] Subsequent thereto, several disputes arose between Eisner and Piller, resulting in a lawsuit filed in Kings County Supreme Court, Index No. 4587-2012. In that matter, the Court treated the arrangement between Eisner and Piller as one of mortgagee (Eisner) and mortgagor (Piller), and therefore referred the case from Kings County to

[1]Apparently in other documents, Piller encumbered other real property in Williamsburg, Brooklyn, to secure Eisner's interests.

[2]The Nominee Agreement, ¶15, indicated that should either party default under the obligations thereof, which included certain payments by Piller, the non-defaulting party could "liquidate and sell off, or otherwise encumber the premises, to satisfy obligations."

Sullivan County, the location of the subject property. The matter was assigned to Hon. Stephen G. Schick, Sullivan County Supreme Court.

Subsequently, on or about March 22, 2013, Eisner and Piller entered into a Settlement Agreement in which they agreed that Piller would discontinue the action against Eisner, with prejudice, and the matter would be submitted for arbitration.[3] Based on that agreement, the Sullivan County action was discontinued[4] and Eisner and Piller went to arbitration on several occasions before Brunner. According to the testimony of Eisner, although Eisner, Piller and Brunner had numerous discussions regarding the sale of the subject property, the arbitrator never made a final decision regarding the ultimate disposition of the subject property.

On or about October 26, 2015, in the presence of the arbitrator, Defendant Eisner indicated he made a deal with Defendant Yitzchok Brezel (hereinafter, "Brezel") to sell the property to Brezel. The arbitrator indicated he had not authorized sale of the subject property and Piller objected to any sale because he claimed to be the rightful owner of the subject property and had to agree to any sale. In fact, the deed transferring the subject property from Eisner to Brezel was dated October 26, 2015, the date Eisner informed the arbitrator and Piller of the sale; the deed was recorded approximately one month later. Plaintiff asserts that not only did Eisner deliver a deed and sell the property to Brezel without permission, but that Brezel, prior to the actual sale in October, entered onto the subject property in August of 2015 and began clearing the property and began constructing foundations.

Procedural Background

The original Order to Show Cause and supporting papers in this matter sought a declaratory judgment (1) declaring Piller is the rightful owner of the subject property, (2) that Eisner had no authority to transfer or sell the subject property, (3) enjoining all of the defendants from performing further construction on the subject property without the express consent of Piller, (4) finding that the defendants have committed a tort trespass on the subject property, (5) declaring that the defendants' actions constitute a private nuisance, (6) enjoining the defendants from further conveying or encumbering the subject property, and (7) and order directing the defendants to stop trespassing and to stop construction. The OSC for a preliminary injunction requested a temporary restraining order, to halt all construction and work on the property until the parties litigated this matter, or at least until there was a decision on the defendants' cross-motions to dismiss the underlying action. The defendants opposed the OSC and argued that when Piller signed the aforementioned settlement agreement, he agreed to have all issues connected to this case decided through arbitration. By Decision and Order dated January 27, 2016, this Court denied Plaintiff's motion by Order to Show Cause for a temporary restraining order prohibiting

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[3]The chosen arbitrator was Joseph Brunner, who knew both parties in their community and was unconditionally trusted by both, as testified to at the hearing.

[4]By Order and Judgment, dated December 9, 2013, Sullivan County Supreme Court dismissed the within action based on the parties' agreement to resolve all disputes with the arbitrator, Brunner.

various defendants from encumbering or selling the subject property, or any portion thereof.

This Court now considers the motions to dismiss and to compel arbitration. Defendants have submitted their motions to dismiss pursuant to **CPLR R.3211(a)(1), (7).**

Discussion

A pleading subject to a motion to dismiss, pursuant to **CPLR R.3211**, is to be afforded "a liberal construction." ***Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]**. A court should "accept the facts as alleged...as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* "[B]are legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference." ***Biondi v. Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept. 1999], *aff'd* 94 NY2d 659 [2000]**.

On a motion to dismiss, the Court must read the complaint liberally, accept the facts alleged as true, and determine whether the alleged facts fit any cognizable legal theory. **CPLR §3026; *Sitar v. Sitar*, 50 AD3d 1006 [2nd Dept. 2008]** (*See also, **Rowley, Forrest, O'Donnell & Beaumont, P.C. v. Beechnut Nutrition Corporation*, 55 AD3d 982, 984 [3rd Dept 2008]; *Parsippany Const. Co., Inc. v. Clark Patterson Associates, PC*, 41 AD3d 805 [2nd Dept. 2007]**). In addition, on a motion to dismiss for failure to state a cause of action, "the standard is not whether the complaint states a cause of action, but whether the plaintiff has a cause of action. ***Morales v. Copy Right, Inc.*, 28 AD3d 440 [2nd Dept. 2006]**.

Article 9 of the Real Property Law

> ...was intended to protect the rights of innocent purchasers who acquire property without knowledge of prior encumbrances and to establish a public record which could furnish potential purchasers with notice, or at least constructive notice, of previous conveyances and encumbrances that might affect their interests. **92 NY Jur2d Records and Recordings §84.**

***See also Tibby v. Fletcher*, 13 AD3d 877 [3rd Dept. 2004]**.

The New York Recording Act (**RPL §290 *et seq.***) "protects a good faith purchaser for value from an unrecorded interest in a property, provided such a purchaser's interest is first to be recorded." ***Chen v. Geranium Development Corp.*, 243 AD2d 708 [2nd Dept. 1997]**. A party is deemed to be without notice when an instrument in real property is not recorded. **RPL §§290(3), 291, 294; *see also Wild Waters limited v. Martinez*, 148 AD2d 847 [3rd Dept. 1989]**. The standard "is not whether, the purchaser could have discovered the existence of any fraud by inquiry, but it is whether, acting as an ordinary prudent person would have done, it was called upon, under the circumstances, to make inquiry." ***Johnson v. Cohen*, 39 Misc 189 [Sup Ct New**

York Co 1902] citing *Anderson v Blood*, 152 NY2d 285 [1897] (the test of good faith is whether the evidence proves that a grantee is guilty of bad faith by not making an inquiry). The existence of a dismissed action and cancellation of *lis pendens* is *not* notice of an existing claim; a subsequent purchaser is deemed a *bona fide* purchaser. ***See Malco Realty Corp. v. Westchester Condos, LLC*, 114 AD3d 413 [1st Dept. 2014]**. A purchaser's knowledge of a prior deal for the property that did not go through does not impose a duty on that purchaser to make further inquiries.

A party is bound by the clear and unambiguous terms of an agreement or contract, and a court will interpret an agreement or contact within the "four corners" of said document. ***WWW Associates, Inc. v. Gianconteri*, 77 NY2d 157 [1990]**. In the event of any ambiguity, such ambiguity is held against the party who drafted said instrument. ***Jacobsen v. Sassower*, 66 NY2d 991 [1985]**. These principles apply to all types of agreements and contracts, including those for arbitration. Regarding arbitration, it is generally favored as a matter of public policy. ***See Matter of Smith Barney Shearson v. Sacharow*, 91 NY2d 39 [1997]**. While the question of arbitrability is an issue for judicial determination, an exception exists as to that issue when the parties have clearly and unmistakably provided for and agreed to arbitration. ***Id.***

Analysis

After a review of the record before the Court, as provided by the parties, and consideration of the oral arguments and testimony had on January 26, 2016, this Court grants the defendants' motions to dismiss and to compel arbitration.

This Court finds that the Settlement Agreement between Eisner and Piller expressly indicates that the Kings County action was dismissed with prejudice and replaced by the Settlement Agreement, that the Settlement Agreement requires that the parties resolve any and all disputes involving the subject property by arbitration, that Eisner and Piller waived their rights to bring an action in Supreme Court regarding the subject property, and that the Settlement Agreement binds Eisner's and Piller's successors and assigns. ***WWW Associates, Inc. v. Gianconteri, supra.***

Plaintiff has not alleged any fraud, undue influence, or coercion with regard to the Settlement Agreement or arbitration clause. The Settlement Agreement was drafted by Plaintiff's attorney. It is clear and unambiguous; if it were not, Plaintiff would bear the burden of such ambiguity. ***Jacobsen v. Sassower, supra***. This Court rejects Plaintiff's argument that his waiver of litigation was and is against public policy because he has no remedy at law. Plaintiff's reliance on ***TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 NY2d 335 [1998]** and ***Matter of Smith Barney Shearson v. Sacharow, supra***, are misplaced. In ***TNS Holdings, Inc.***, the Court of Appeals held that the corporate veil could not be pierced to enforce an arbitration clause against a parent company. That is not relevant to the within action. Unlike the situation in the cases cited by Plaintiff, the intention of the parties to the within action, with regard to the Settlement Agreement, were very clear:

> ...each party waives the right to litigate and/or bring any cause of action and/or all such claims in a Court of appropriate jurisdiction, it being expressly agreed that each party has made its own determination that the independent arbitrator is impartial and has sufficient knowledge and expertise with respect to the facts and circumstances surround [this matter] and any disputes now or hereafter arising in connection therewith to make binding determination. **Paragraph 7.1 of Settlement Agreement.**

Section 6 of the Settlement Agreement states,

> Eisner shall have the right to submit this Agreement to the applicable Court as evidence of such action's settlement and waiver of all claims in connection therewith. It is further expressly agrees that any further disputes between the parties with respect to New Pines and/or the properties shall be determined exclusively by the independent arbitrator in accordance with Section 7 hereof.

This Court agrees with Defendants' argument that the use of "with prejudice" in the Settlement Agreement is synonymous with "on the merits," and therefore the same or similar claims cannot be filed again, which is what Plaintiff has done. ***Malco Realty Corp. v. Westchester Condos, LLC, supra***. In addition, "when a Complaint involving title...to real property has been dismissed on the merits and there is no outstanding Notice of Pendency or stay, the property owner has a right to transfer or otherwise dispose of the property unrestricted by the dismissed claim...." ***See P.A.C.W.S. Limited v. Reinke*, 175 AD2d 154 [2nd Dept. 1991]**. Also, pursuant to the Settlement Agreement, Plaintiff agreed to, and did, withdraw the Notice of Pendency. Defendants Tribeca Fallsburg and Brezel could rely upon the fact that the lawsuit was discontinued and the *lis pendens* was cancelled.

Generally, a party is not required to search outside the chain of title. ***In re Hojnoski*, 335 BR 282**. The submissions before this Court indicate that Plaintiff was not a party to the real estate deal involving the sale of Parcel A; Plaintiff has presented no evidence to suggest he was a party to that sale or should have been a party and he was not the owner of Parcel A at the time of sale. Likewise, he is currently not the title holder to or owner of Parcel B. Defendants' submissions show that Plaintiff is not the owner of the subject property–Parcel A or Parcel B. Regardless, Defendant Brezel engaged in due diligence, and upon finding that Defendant Eisner had the right to transfer the property to Defendant Tribeca Fallsburg, this Court finds that Tribeca Fallsburg was a good faith purchaser, for value, of Parcel A as a matter of law. Any other issues regarding the transfer should be properly brought before the arbitrator, not this Court.

Defendants correctly argue that there will be no irreparable injury to Piller should the parties arbitrate this matter, and that Plaintiff has remedies at law, which he can recover through arbitration, should he be successful. The defendants point out that the subject property will be worth approximately $14,800,000.00 when finished. Defendants argue that if Plaintiff ultimately prevails at arbitration, he will wind up with a property worth many millions of dollars more than

was the undeveloped, vacant property without water and sewer. Defendants have also pointed out that Piller additionally seeks damages in this action, and therefore he may ultimately receive a money judgment if successful on the merits at arbitration. ***See Riessen v. Kaye*, 4 Misc2d 371 [Sup. Ct. Erie Co. 1956]**.

Furthermore, Plaintiff has not stated a cause of action. ***Morales v. Copy Right, Inc.*, *supra***. Defendant purchasers of Parcel A were under no duty to inquire regarding possible interests in the subject property. ***Johnson v. Cohen*, *supra*; *see also Berger v. Polizzotto*, 148 AD2d 651 [2nd Dept. 1989]**. Ultimate dismissal of the Kings County action and *lis pendens* by Sullivan County Supreme Court, was not notice of any existing or possible claim. ***Malco Realty Corp. v. Westchester Condos, supra***. In fact, it is undisputed that Defendant Tribeca Fallsburg was able to obtain title insurance in the amount of $1,250,000.00 and mortgage title insurance in the amount of $2,000,000.00. Additionally, the records and submissions before this Court indicate that Defendant Eisner had the right to transfer title to the property. Defendant Eisner's affidavit before this Court, which references the Nominee Agreement signed by Piller, indicates that the "non-defaulting," in this case, Defendant Eisner, had the "sole authority to liquidate and sell off, or otherwise encumber the Premises, to satisfy obligations." **Nominee Agreement, ¶15.** Plaintiff's reliance on ***Maiorano v. Garson*, 65 AD2d 1300 [3rd Dept. 2009]**, is misplaced. In ***Maiorano***, the purchaser had knowledge that the previous owner was in actual possession of the subject property, as well as documents, all of which required further inquiry; an appraisal report indicated the prior owner was in possession, claimed to own the property, and HUD-1 settlement statement showed the prior owner's address as the same as the subject property. That case is clearly distinguishable on the facts from the instant matter.

The causes of action raised in the instant complaint are essentially the same as those raised in the Kings County action, which was dismissed with prejudice on consent of plaintiff. The subject property of the lawsuit is the same, the former Pines Hotel, and the claims raised are essentially the same; they concern the Nominee Agreement. The negotiated Settlement Agreement resulted in dismissal with prejudice of the previously filed lawsuit and requires that all of the parties involved must resolve all disputes through arbitration. Plaintiff has not shown damages or lack of remedies at law. Through the Settlement Agreement, the parties specifically waived, "irrevocably" and "to the fullest extent permitted by applicable law...any right to bring a legal suit, action or proceeding against any other party relating to the Settlement Agreement, the Nominee Agreement, new Pines and/or the properties."

This Court further denies Plaintiff's request that upon compelling arbitration, it stay the instant action pursuant to **CPLR §7503(a)**. Pursuant to **CPLR §7503(a)** this Court has determined that the Settlement Agreement and all issues involved with this matter are arbitrable, and therefore a stay, rather than dismissal, is not appropriate.

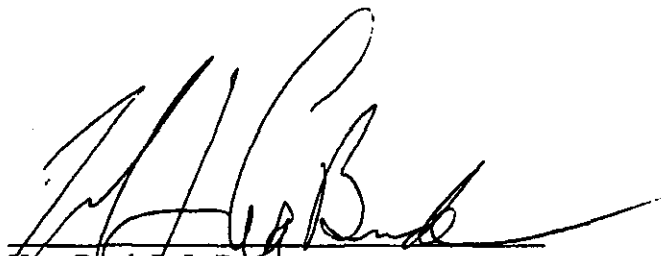
Based on the foregoing, it is

ORDERED that Defendants' motions to dismiss are granted; and it is further

ORDERED that Defendants' motions to compel arbitration is granted.

This shall constitute the Decision and Order of this Court.

DATED: April 8, 2016
Monticello, New York



Hon. Frank L. LaBuda
Acting Justice Supreme Court