

734-6 Broadway LLC v UD 736 Broadway LLC

2017 NY Slip Op 30617(U)

March 24, 2017

Supreme Court, New York County

Docket Number: 157683/2016

Judge: David B. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----X
734-6 BROADWAY LLC, 736 BROADWAY OWNER LLC

Plaintiffs,

DECISION/ORDER
Index No. 157683/2016

-against-

UD 736 BROADWAY LLC,

Defendant.

-----X
HON. DAVID B. COHEN, J.:

On May 9, 2013, plaintiff 734-6 Broadway LLC (“seller”) and defendant UD 736 Broadway LLC (“buyer”) entered into a contract of sale for property located at 734-6 Broadway, New York NY. In connection with the sale, seller was granted a life estate for the entire third floor. Paragraph 7(j) of the contract of sale permits Seller to place a life tenant in the entire third floor of the property “pursuant to [a] life estate contract, which tenant Seller may move in rent-free before or anytime after Closing at its option.” Similarly, paragraph 32 provides that the entire third floor shall be delivered subject to Seller’s right to vacate the tenant currently in possession and place the life estate tenant in possession “before or any time after Closing, at Seller’s option.”

Further memorializing the terms of the life estate, on June 28, 2013, the parties entered into a letter agreement that set forth the details of the life estate. The letter, which is entitled “Life Estate for the Entire Third Floor of building located at 736 Broadway, New York, New York (the “Building”))” provides, in pertinent part

This letter reflects our agreement with respect to the rights of [Seller] with respect to a life estate at the third floor of the referenced Building, which rights are irrevocably granted to Seller by [Buyer]....

Buyer has executed three originals of the Life Estate Lease . . . as the Landlord thereunder, and hereby irrevocably grant[s] to Seller or to Seller’s successors and assigns the full irrevocable right and authority to complete such Lease . . . The rights granted to Seller and its successors and assigns hereunder may not be revoked by Buyer and shall not expire or terminate in any event . . .

From and after the date of this Letter, Buyer acknowledges and agrees that it may, in no event, (a) amend, modify renew or extend the existing lease (unless required by law or terms of such lease) or (b) enter into any new lease for any portion of the third floor at the Property. At Seller’s option, Seller may at any time from and after the date of this letter, at Seller’s sole cost an[d] expense, negotiate with and cause the current tenant in the front unit on the Third Floor of the Property (the “Current Tenant”)

to terminate its current lease and vacate possession of its leased premises pursuant thereto. Buyer hereby agrees that after the Current Tenant has vacated the Third Floor of the Property, it shall give the Seller and its representatives notice of such vacatur within three days of such vacatur.

The letter also required Buyer to execute documents requested by Seller in order to memorialize the life estate and permit Seller to record the life estate in the appropriate public records.

The lease of the tenant in possession of the third floor of the Building terminated on its own terms of December 31, 2013. Seller did not negotiate an early termination of the lease and Buyer never sent any communication to Seller whether the tenant vacated. Neither side contends that between January 1, 2014 and August 2016, that there was any communication regarding the life estate. During this time period, on July 27, 2015, Seller and 736 Broadway Owner LLC ("Owner LLC" together with Seller the "plaintiffs"), executed an assignment and assumption agreement, whereupon Seller assigned its rights to the life estate to Owner LLC. On August 12, 2016, plaintiffs sent a letter to Buyer's attorney seeking information regarding whether the tenant had ever vacated. In addition, plaintiffs sought that Buyer execute documents necessary to record the life estate. After not receiving any response from Buyer, on August 19, 2016, plaintiffs sent a follow-up letter to Buyer's attorney requesting the same. Buyer's Attorney thereafter contacted plaintiff and stated that he was no longer counsel for Buyer. Plaintiffs then sent another letter to Buyer's new counsel on August 22, 2016. The next day, Buyer's counsel allegedly confirmed that Buyer would execute the documents upon the return of Buyer's principal from Boston. However, three days later, Buyer sent an email stating that its counsel just left the employ of Buyer and that only the front portion of the third floor was part of the life estate and the other half belonged to Buyer. After Buyer failed to execute the requested documents, this action ensued.

The Complaint seeks (a) declaratory judgment that plaintiffs have a valid and enforceable life estate and should Buyer convey the property to someone else, such conveyance would be subject to the life estate, (b) specific performance that Buyer should execute the necessary documents, (c) injunctive relief prohibiting Buyer from taking actions that may impact the life estate prior to compliance with the life estate and (d) damages from Buyer's failure to perform under the parties' agreement. Buyer filed its Answer and

asserted 17 affirmative defenses. On November 3, 2016, plaintiffs moved for summary judgment and on December 5, 2016, Buyer opposed and cross-moved to compel discovery.

Buyer's opposition and basis for the cross-motion and affirmative defenses is that the life estate granted to Seller was only a life estate option that needed to be exercised by January 1, 2014. When Seller did not communicate its intention to execute the "option" it lost the life estate and Buyer moved forward with owning the entire building free and clear of any life estate. Although it is undisputed that Seller or its assign never communicated an intention to exercise a life estate "option," plaintiffs argue that no such option ever existed. They were simply granted a life estate as part of the sale of the Building.

Buyer's belief that the life estate was only an option is based upon the word option being in paragraphs 7(j) and 32 of the contract of sale and in the June 28, 2013 letter. However, Buyer's tortured reading cannot overcome the plain meaning of the sentences that contain the word option. Additionally, even if those sentences were not clear, a plain reading of the June 28, 2013 letter clearly demonstrates that the life estate was not an "option." First, all three of the sentences that state the word option clearly are talking about permitting Seller at its option to move into the third floor at a date earlier than January 1, 2014 if Seller can successfully negotiate an early lease termination by the then current tenant. The option clearly referred to the ability for Seller to move in early. Additionally, the June 28, 2013 letter states, in no uncertain terms, that in consideration for the sale, a life estate is irrevocable granted by Buyer to Seller for the entire third floor. There are no other requirements. The letter goes on to say that the "rights granted to Seller and its successors and assigns hereunder may not be revoked by Buyer and shall not expire or terminate in any event." In fact, the letter agreement prohibits Buyer from extending the lease or entering into a new lease following the termination of the then current lease, clearly demonstrating that the parties contemplated that Buyer would not have the right to impinge on Seller's rights to the third floor. Any claim by Buyer that the life estate was only option that needed to be exercised, is contrary to the plain language of the parties' contract and letter agreement.

This case is very similar to *1523 Real Estate, Inc. v E. Atl. Properties, LLC* (7 Misc 3d 1012(A) [Sup Ct 2005]). In *1523 Real Estate*, the Court wrote

Whether or not to award specific performance is a decision that rests in the sound discretion of the trial court (*see Van Wagner Advertising Corp. v S & M Enterprises*, 67 NY2d 186, 191-192 [1986]). Specific performance is available, in appropriate circumstances, for breach of a commercial or residential lease (*id.* at 192; *see Papa Gino's of America, Inc. v Plaza at Latham*, 135 AD2d 74 [1988][commercial lessee was entitled to specific performance of lease provision prohibiting leasing to other tenants who operated competing businesses.].... Where the terms of a written contract are clear and unambiguous, the courts will enforce it according to its terms (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 [1990]; *Automotive Mgt. Group v SRB Mgt. Co.*, 239 AD2d 450[1997]). The contract clearly and unequivocally requires that a memorandum of lease be executed by plaintiff and defendant “[s]imultaneously with the execution and delivery of” the lease.

Id. at 2-3.

Having established a *prima facie* entitlement to summary judgment, the burden shifts to Buyer to demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Quest Commercial, LLC v Rovner*, 35 AD3d 576 [2d Dept 2006]; *Hestnar v Schetter*, 284 AD2d 499 [2d Dept 2001]). Although the defendant alleged that there were valid affirmative defenses, including fraud, misrepresentation and mistake, those allegations amounted to no more than unsupported, conclusory assertions which were not sufficient to defeat the motion (*Bank Leumi Trust Co. of New York v Rattet & Liebman*, 182 AD2d 541 [1st Dept 1992]). Similarly, the affirmative defenses and cross-motion for discovery relating to Owner LLC, are without merit. The June 28, 2013 letter agreement clearly permits the assignment of the life estate and Seller has established that it assigned the life estate to Owner LLC.

For the above reasons, it is hereby

ORDERED, that the Seller’s motion for summary judgment on the first and second causes of action are granted; and it is further

ORDERED, ADJUDGED and DECREED, that pursuant to the parties’ agreement, a valid and enforceable life estate was granted to Seller for the entire third floor that remains in full force and effect; and it is further

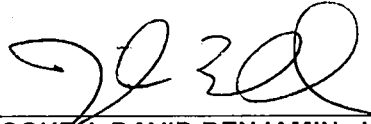
ORDERED, ADJUDGED and DECREED, that Buyer shall execute the documents necessary to comply with the June 28, 2013 letter agreement; and it is further

ORDERED, ADJUDGED and DECREED, that summary judgment on the third cause of action is granted and Buyer is enjoined from taking any action that may adversely impact the life estate until such time that Buyer has executed the documents necessary to comply with the June 28, 2013 letter agreement; and it is further

ORDERED, that the fourth cause of action is severed and continued and the parties are to proceed with discovery on the issue of damages due to plaintiffs as a result of Buyer's breach. A preliminary conference is hereby scheduled for June 7, 2017 at 9:30 a.m.

This constitutes the decision and order of the Court.

DATE : 3/24/2017


COHEN, DAVID BENJAMIN, JSC