

**600-602 10th Ave. Realty Corp. v Estate of Hy
Nusimow**

2017 NY Slip Op 32720(U)

December 20, 2017

Supreme Court, New York County

Docket Number: 650120/17

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

NYSCEF DOC NO 53
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

RECEIVED NYSCEF: 12/26/2017

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600-602 10th Avenue Realty Corp.,
Plaintiff,

Index No. 650120/17
Justice Andrea Masley

- against -

The Estate of Hy Nusimow, and Larissa Okun
Nusimow, individually, and Avi Nusimow, individually,
Defendants.
-----x

Hon. Andrea Masley:

Plaintiff 600-602 10th Avenue Realty Corporation (ARC) moves for summary judgment on all three of its claims against defendants the Estate of Hy Nusimow, Larissa Okun Nusimow, individually, and Avi Nusimow, individually. Defendants cross-move, pursuant to CPLR 3025 (b), to serve a second amended answer with counterclaims and, pursuant to CPLR 1001 (a), to join Esther Pinchevsky, sister of Hy Nusimow, and Arnold S. Warwick & Company Ltd. (Warwick Ltd), the managing agent of the building at issue.

According to the October 30, 2017 affidavit of Ms. Pinchevsky, an ARC officer and 50% shareholder, ARC was formed on May 22, 1979. Pursuant to the August 18, 1980 shareholder agreement (the Agreement), the shareholders were Sol Lieberman, uncle of Ms. Pinchevsky and Hy Nusimow, who held 52%, Ms. Pinchevsky who held 24% and Hy Nusimow who held 24%. Defendant Larissa Okun Nusimow is the widow of Hy Nusimow, and Avi Nusimow is their son. ARC currently owns a building with residential units and commercial space located in Hells Kitchen, New York City. Initially, ARC owned two buildings.

In its amended complaint, ARC seeks a declaratory judgment finding that the Agreement is valid and enforceable. In its second cause of action, ARC alleges a breach of contract based on defendants' failure to tender Hy Nusimow's 50 shares back to ARC in violation of the Agreement. The Agreement provides that each share is

valued at \$2,000 per share. Without any stated legal basis, ARC's third cause of action seeks attorneys' fees.

In their August 17, 2017 joint amended answer, defendants assert eight affirmative defenses, including their assertion that Mr. Lieberman terminated the Agreement on August 6, 1984 (the Termination Notice). As evidence of the termination, defendants submit a stipulation of settlement in the matter of *Hy Nusimow v. Esther Pinchevsky and ARC*, Index No. 101648/2008, on the record before Justice Cahn on December 2, 2008, wherein the remaining shareholders, Hy Nusimow and Ms. Pinchevsky, agreed that each sibling owns 50% of the shares of ARC and to execute a new shareholder agreement. A new shareholder agreement was never executed and Hy Nusimow passed away on May 25, 2016.

The court finds issues of fact preclude summary judgment. Indeed, movant raises the most critical issue of fact: whether the Termination Notice is invalid or defective. ARC complains that for a variety of reasons the Termination Notice is invalid or defective. For example, as ARC contends that the Termination Notice is invalid because, in 1984, Mr. Lieberman, majority shareholder of ARC at the time, breached his fiduciary duty to the minority shareholders when he terminated the Agreement pursuant to paragraph 8 of the Agreement. However, defendants present evidence raising an issue of fact as to whether the Termination Notice was valid. Specifically, they present the transcript from the settlement before Judge Cahn and Termination Notice. ARC claims that defendants failed to submit evidence in admissible form. However, ARC fails to address the ancient document rule which allows admission of a document that is more than 30 years old without further authentication which is another

issue of fact that precludes summary judgment. See *Essig v 50670 58 Street Holding Corp.*, 50 AD3d 948 (2d Dept 2008) (stock certificates that are more than 30 years old are self-authenticating).

ARC's claim of having no knowledge of the Termination Notice is undermined by a 1984 action by Hy Nusimow and Ms. Pinchevsky against Mr. Lieberman challenging his July 27, 1984 notice of a special shareholder meeting to sell the property, remove Pinchevsky and Nusimow as directors and terminate the corporation (emphasis added). When Mr. Lieberman attempted to sell the property in 1984 for \$850,000, Hy Nusimow and Ms. Pinchevsky challenged the transaction. In action 18057/84, Justice Felice Shea denied their motion for a preliminary injunction to stop the sale. The siblings had failed to establish likelihood of success. Significantly, she also noted that the Agreement allowed for a majority shareholder to dissolve ARC. However, in a November 27, 1984 decision, Justice Elliot Wilk found that Hy Nusimow and Ms. Pinchevsky had clearly alleged fraud against Mr. Lieberman in the purchase of the property and allowed a *lis pendens*. When the building was purchased in 1979 for \$15,000, the deed was in Mr. Lieberman's name, not ARC. Further, there was an issue of fact as to whether the parties owned shares of ARC 40/30/30 or 52/24/24. While that action settled with Mr. Lieberman taking one building and the siblings taking the other building, ARC insists that the Agreement continued without Mr. Lieberman, with one building instead of two, and the siblings continued to follow it. For all of these reasons, the court is compelled to deny plaintiff's motion for summary judgment.

Defendants' motion pursuant to CPLR 1001 to amend their answer is granted as to Ms. Pinchevsky and otherwise denied. Ms. Pinchevsky is a signatory to the Agreement at issue in this action. If ARC is successful, then Ms. Pinchevsky may

become the owner of 100% of the shares. Ms. Pinchevsky is the real party in interest. See *Schwartz v Helmsley-Spear, Inc.*, 8 Misc. 3d 1010(A)(Sup Ct, Nassau County 2005)(50% shareholder necessary party to action seeking interpretation of shareholder agreement). The corporation is a nominal plaintiff.

Defendants' motion is denied as to the Warwick, the managing agent, which is engaged by the corporation and paid for its services. Defendants' claim lacks any factual allegations against Warwick. Indeed, in their reply, defendants fail to mention ARC's opposition to the motion to amend and join.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' motion to amend their answer is granted consistent with this decision; and it is further

ORDERED defendants' motion to join is granted to the extent that Esther Pinchevsky shall be joined as a counterclaim defendant and served with a supplemental summons and amended answer with counterclaims consistent with this decision within 20 days and otherwise denied; and it is further

ORDERED that defendants shall modify the amended answer in the proposed form annexed to the moving papers consistent with this decision and shall serve the amended answer upon all parties; and it is further

ORDERED, that defendants shall serve plaintiff with a copy of this order with notice of entry electronically; it is further

ORDERED, that the parties shall appear before Hon. Renee Roth on January 22, 2018 at 2 pm. for a settlement conference; and it is further

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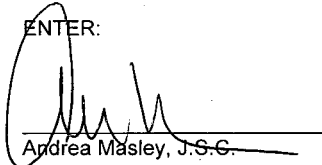
ORDERED that the defendants are directed to serve a copy of this order with

Notice of Entry upon the Clerk of the Trial Support Office, Room 158 at 60 Centre Street, New York, NY 10007 and the County Clerk's Office Room 141B at 60 Centre Street, New York, NY 10007, within 20 days of entry and the clerks are directed to modify their records accordingly.

DATE

12/20/17

ENTER:



Andrea Masley, J.S.C.

HON. ANDREA MASLEY