Eastern Consol. Props., Inc. v Baram
2018 NY Slip Op 32330(U)
September 13, 2018
Supreme Court, New York County
Docket Number: 656666/2017
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN, *Justice* — PART IAS MOTION 58EFM

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EASTERN CONSOLIDATED PROPERTIES, INC.,

Plaintiff,

- v -

NOAM BARAM, WEST 23RD STREET HOSPITALITY, LLC,AUDTHAN LLC

Defendant.

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INDEX NO. 656666/2017

MOTION DATE 02/28/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52
were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Upon the foregoing documents, it is

The motion for summary judgment is denied and the cross-motion to amend the Complaint is granted. The parties had engaged in a previous litigation which was settled pursuant to an agreement dated January 5, 2012 (the "Agreement") entered into by plaintiff and defendants West 23rd Street Hospitality, LLC and Audthan LLC (collectively "West23rd/Audthan"). Section 1 of the Agreement required a payment of $318,000 to be made by West23rd/Audthan to plaintiff upon the earlier of (a) the closing of sale of any or all of' West 23/Audthan's lease hold interest in the Properties to any party (the "Property Sale"), or (b)(i) the date on which West 23/Audthan receives an advance of $1,000,000 or more from the purchaser of the properties and (ii) $159,000 on January 2, 2013. Initially, (b)(i) provided $159,000 on April 15, 2012, but that amount was crossed out and in its place, was the handwritten change as detailed above. Section 4 of the Agreement provides that "A closing of the Property Sale shall be defined to include transfer to any person or entity of fee title, transfer of leasehold title, net lease of the Properties,

transfer of ownership in the entity holding title to the Properties, or any other transfer of ownership or control of the Properties, in each instance in part or in whole, including a joint venture covering the Properties. "Closing" shall be deemed to occur upon the full execution and delivery of the instrument(s) of transfer of ownership or control (e.g., without limitation, as applicable, the deed or the joint venture agreement) to any person or entity." Defendant Noam Baram signed the Agreement as managing member of West23rd/Audthan and acknowledged the Agreement as the principal of the West 23/Audthan. He also unconditionally and expressly personally guaranteed the payment to plaintiff.

Plaintiff brought this action and alleged that recorded documents on NY Acris show that on or about October 9, 2012 and June 7, 2013, Baram conveyed his interest in Audthan to Skybox/Chelsea LLC. The recorded documents showed that Skybox/Chelsea paid a total of $2,374,780 for this interest in Audthan. Plaintiff argues that these transactions constitute a closing under the Agreement and that no payments have been made in breach of the Agreement. Specifically, plaintiff argues that a closing took place due to the transfer of ownership in the entity holding title to the Properties, and due to the transfer of ownership or control of the Properties. In the instant motion, plaintiff moves for summary judgment and in support, attach the Agreement, the NY Acris records and the affidavit of Peter Takiff, the CFO of plaintiff.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320

324 [1986]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Here, it is not argued that West 23/Audthan received an advance and there was a breach of the second condition. Nor is it argued that there was a transfer to any person or entity of fee title, transfer of leasehold title, net lease of the Properties. Rather, plaintiff argues that there was either a "transfer of ownership in the entity holding title to the Properties, or any other transfer of ownership or control of the Properties" and that no payment was thereafter made. In the Agreement, "Properties" is not defined as the leasehold but defined as 182-188 11th Avenue (Block 695 Lots 1, 3 and 4) New York, New York.

Plaintiff has not met its *prima facie* burden that there was a transfer in the ownership of 182-188 11th Avenue (Block 695 Lots 1, 3 and 4) New York, New York, nor has it met its *prima facie* burden that there was a transfer of ownership or *control* of the Properties. Although it isn't disputed that Baram sold an equity interest portion of Audthan, there is no evidence put forth that said sale resulted in a change in control of the Properties or Audthan. In fact, as opposed to other document signed on behalf of Audthan by Baram as managing member, the new lease between the landlord and Audthan was signed by the purchasing entity only as authorized signatory.

Further, the affidavits of George Cooper and Noam Baram specifically dispute that the conditions required under the Agreement occurred. Specifically, George Cooper stated that despite the NY Acris filed documents there was no transfer, conveyance, or assignment of the

Property, its title, or the lease subsequent to the Agreement, only the sale of an equity interest in Audthan from Baram's interest. Baram's affidavit disputes that $1,000,000 was received in connection with the purchase of an interest in Audthan.

Defendant Audthan also cross-moved to amend the Answer and add a counterclaim for reformation. In the Baram affidavit, Baram states that after being handed a draft agreement where either of the occurrences required a payment to plaintiff, a negotiation ensued and that the parties agreed to a change that would require both a sale and that at least $1,000,000 would need to be paid. Baram contends that after agreeing, the parties handwrote the $1,000,000 correction but forgot to change the "or" to "and," that he relied on plaintiff's counsel assurances that the handwritten changes took care of the situation and that any ambiguity as to whether both conditions were required was due to error by both sides at that time.

A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake (*Chimart Assocs. v. Paul,* 66 NY2d 570 [1986]). In the case of mutual mistake, it must be alleged that "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*id.* at 573; *Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441 [1st Dept 2007]), whereas in the case of unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement (*Greater New York Mut. Ins. Co at 443; Rosen Auto Leasing, Inc. v. Jacobs,* 9 A.D.3d 798 [3d Dept 2004]). Leave to amend pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is palpably insufficient or devoid of merit (*Seidman v. Indus. Recycling Properties, Inc.*, 83 AD3d 1040 (2nd Dept. 2011).

Although, plaintiff argues that where the proposed amendment would be futile denial is appropriate, here, the claim is properly pled and supported by an affidavit (*247 E. 32nd LLC v Gasparich*, 95 AD3d 790 [1st Dept 2012]). Specifically, the allegations state that both sides agreed to the changed requirements, handwrote them with the intention on reducing the changes to writing, assumed that the handwritten changes were sufficient and mistakenly forgot a change to other portions of the clause. To the extent that plaintiff disputes these allegations, that is best pled as a defense and does not bear on whether defendant has properly alleged a claim. Further, plaintiff's argument that a claim for reformation is beyond the statute of limitations is without merit as the counterclaim arose from the same "transactions, occurrences, or series of transactions and occurrences" as the claims in the complaint (CPLR 203, *Mintz & Fraade, P.C. v Docuport, Inc.*, 110 AD3d 496 [1st Dept 2013]). Accordingly, it is therefore

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

OREDERED that defendant Audthan's motion to Amend the Answer is granted and the proposed First Amended Answer, Cross-Claim, and Counterclaim is deemed filed and served.

Parties to appear for a preliminary conference on December 12, 2018 at 9:30 am in Part 58 in Room 574, at 111 Centre Street, New York, New York.

This constitutes the decision and order of the Court

9/13/2018
~~8/31/2018~~
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[X] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE