

Baldwin Rte. 6, LLC v Bernad Creations Ltd.

2018 NY Slip Op 33574(U)

September 17, 2018

Supreme Court, Putnam County

Docket Number: 2503/2014

Judge: Janet C. Malone

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This opinion is uncorrected and not selected for official publication.

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PUTNAM COUNTY
CLERK

2018 SEP 19 AM 9:05

To commence the statutory period for appeals as of right under CPLR § 5513[a], you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

-----X
BALDWIN ROUTE 6, LLC,

Plaintiff,

-against-

BERNAD CREATIONS LTD.,

Defendant.

-----X
MALONE, J.

Index No. 2503/2014

DECISION AND ORDER
Date: November 16, 2015¹
Motion Seq. No. 3
(Summary Judgment)

The following papers numbered 1-8 were read on Plaintiff's Notice of Motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Affidavit of Paul Camarda/Exhibits 1-7	1
Memorandum of Law in Support of Plaintiff Baldwin Route 6, LLC's Motion for Summary Judgment and Other Relief	2
Affidavit of Barney Zipkin in Opposition to Plaintiff's Motion for Summary Judgment/Affidavit of Baba Zipkin in Opposition to Plaintiff's Motion for a Default Judgment/Affirmation of Robert Lillienstein, Esq. in Opposition to Plaintiff's Motion for Summary Judgment/Exhibits A-N	3
Affidavit of Richard Cebel a/k/a/ Ekrem Cebel/ Exhibits A-E	4
Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment	5
Affidavit of Paul Camarda in Reply/ Affidavit of John Culmone/ Exhibits 1-7	6
Reply Memorandum of Law	7
Decision and Order (Malone, J.) dated March 16, 2018	8

¹Defendant appealed the Decision and Order (Lubell, J.) dated June 16, 2015, which was decided by the Appellate Division, Second Judicial Department's Decision and Order dated February 14, 2018.

In 2007, a thirty-one and one-half (31.5) acre parcel of property located at 4-50 Baldwin Place Road, Mahopac, New York and 104 Route 6, Mahopac, New York (the "Subject Property") was jointly and equally owned by Bernard² and Florence Zipkin (the "Zipkins"), principals in Bernad Creations Ltd. ("Bernad"). *See*, Affidavit of Barney Zipkin at paragraphs 2 and 8.

On February 12, 2007, Paul Camarda, as the manager of Baldwin Route 6, LLC ("Baldwin") and Zipkin's children Barney and Baba Zipkin, as officers, directors and shareholders of Bernad, entered into a Contract of Sale³ for Baldwin to purchase the Subject Property at the purchase price of \$4,250,000.00⁴ setting the Closing Date for August 15, 2010. On June 30, 2009, the Parties executed an Addendum to the Contract of Sale (the "Addendum") that changed among other terms, the Closing Date to December 31, 2013. *See*, Contract of Sale at paragraphs 2 and 12 and Addendum at paragraph 5 at Exhibit 1 to Notice of Motion.

Unable to close on December 31, 2013, Baldwin continued to make payments to Bernad through to August 28, 2014. When the parties could not come to terms Bernad gave Baldwin a Notice to Terminate the Contract of Sale dated November 21, 2104 prompting Baldwin to commence this contract action against Bernad on December 17, 2014 seeking: 1) declaration that on November 21, 2014, Bernad committed a breach and/or anticipatory breach of the Contract of Sale, 2) rescission of the Contract of Sale, and 3) restitution in the amount of \$1,052,711.05 for payments made under the Contract of Sale. *See*, Affidavit of Paul Camarda at paragraphs 7-8,

² When Bernard Zipkin passed away in January of 2016 he left his 50% ownership share of the Subject Property equally to the Zipkins' five children including Barney Zipkin and Baba Zipkin. *See*, Affidavit of Barney Zipkin at paragraph 8.

³ Although it is not disputed that the Parties entered into the Contract of Sale, neither copy of the Contract of Sale provided by the parties contains the signature of a representative on behalf of Bernad. *See*, Exhibit 1 to Affidavit of Paul Camarda on Notice of Motion and Exhibit C to Affidavit of Barney Zipkin.

⁴ If the closing took place before November 1, 2010, the purchase price would be \$3,450,000.00. From November 1, 2010 through December 31, 2010 the purchase price would be \$3,300,000.00, however, from January 1, 2011 through October 31, 2013 the purchase price would increase to \$3,650,000.00 and then reduce to \$3,500,000.00 during the period November 1, 2013 through 2013. *See*, Addendum to Contract of Sale at paragraph 1.

Summons and Verified Complaint at Exhibit 1, Notice to Terminate the Contract of Sale as Exhibit 6 and Baldwin's spreadsheet of payments as Exhibit 5 to Notice of Motion.

Bernad counterclaims for: 1) dismissal of the Verified Complaint with prejudice, 2) retention of all payments made by Baldwin under the Contract of Sale (without specifying the amount being sought), 3) declaration that Baldwin breached the Contract of Sale, and 4) that the Contract of Sale remains in full force and effect (going against its assertion in the Notice to Terminate the Contract of Sale that the contract had expired.) *See*, Amended Verified Answer and Counterclaims at paragraphs 23, 35 and "WHEREAS", as Exhibit 3 to Notice of Motion.

At present, Baldwin moves for summary judgment against Bernad seeking the relief sought in the Verified Complaint; striking the Counterclaims; and for a money judgment in the principal sum of \$1,052,711.05 with interest, together with attorneys' fees, and such other and further relief as this Court may deem just and proper. *See*, Notice of Motion filed April 25, 2018⁵. Bernad opposes summary judgment arguing that there are questions of fact and law to decide and that summary judgment should not be granted without the completion of discovery. *See*, Memorandum of Law in Opposition.

In this action for breach and /or anticipatory breach of the Contract of Sale, Baldwin has to make a prima facie showing of entitlement to summary judgment as a matter of law by establishing that there was a valid Contract of Sale after December 31 2013, that Baldwin performed under and that Bernad breached the Contract of Sale damaging Baldwin. *See*, *Zuckerman v. City of New York*, 49 N.Y. 2d 557, 562 (1980); *see also*, *Delfasco, LLC v. Webb-Stiles Co.*, 2017 N.Y. Slip Op 50244

⁵ While Bernad's appeal was pending, the Court denied Plaintiff's Order to Show Cause filed on October 7, 2015 to the extent that the request for a default judgment against Bernad was moot with the filing of Bernad's Amended Verified Answer and Counterclaims. However, the Court continued the temporary restraint against Bernad enjoining it from transferring, selling or encumbering the Subject Property except by Court order on notice to Plaintiff. *See*, Decision and Order (Malone, J.) dated March 16, 2018 and Order to Show Cause (Lubell, J.) dated June 16, 2015.

(citing *Dee v. Rakower*, 112 A.D. 3d 204, 208-209 (2d Dept. 2013) and Memorandum of Law in Support.

Here, when Baldwin was unable to close on the Subject Property by December 31, 2013, Baldwin sought a three (3) year extension of the Contract of Sale until December 31, 2016⁶ and sought to apply the \$200,000.00⁷ in down payments at the rate of \$6,000.00 per month towards Baldwin's monthly installment payments. *See*, Addendum at paragraph 3 (a) (ii), December 9, 2013 email from Paul Camarda to Bernie, Florence, Baba and Barney Zipkin as Exhibit F to Barney Zipkin's Affidavit.

Although Baldwin's terms were rejected by Bernad, on or about December 17, 2013, Baldwin apparently paid Bernad \$11,536.89 for property taxes (\$5,536.89) and for a monthly installment payment (\$6,000.00) and requested that the \$200,000.00 downpayment being held in escrow be returned to Baldwin in the event the parties were unable to reach a timely extension agreement. *See*, Memorandum from Paul Camarda to Baba Zipkin dated December 17, 2013 as Exhibit G to Barney Zipkin's Affidavit.

In an email from Baba Zipkin to Paul Camarda, dated January 15, 2014, Baba Zipkin wrote that Bernad agreed not to schedule a closing while the parties were negotiating an extension of the Contract of Sale and that "if we are not able to come to agreement, we will then schedule a closing date." *See*, January 15, 2014 email as Exhibit 2 to Paul Camarda's Affidavit in Reply.

In an email dated March 25, 2014 from Paul Camarda to Baba, Barney, Florence and Bernie Zipkin, he indicated in substance that Baldwin was being forced to reassess all of its plans and

⁶If the terms of the extension proposed by Baldwin could not be performed within one year, Statute of Frauds would require that the Parties enter into a writing. *See*, General Obligations Law 5-701 (a) (1); *Hamburg v. Westchester Hills Golf Club, Inc.* 96 A.D. 2d 802 (2d Dep't 2012)

⁷ On top of the initial downpayment in the amount of \$100,000.00, if Baldwin did not terminate the Contract of Sale then Baldwin was to pay to Bernad a non-refundable additional downpayment in the amount of \$100,000.00, which would be credited towards the Purchase Price or retained by Bernad if Baldwin failed to close. *See*, the Contract of Sale at paragraph (2) (a) (iii) and (iv).

options due to the retail industry in the area of Route 6 and Taconic Parkway, and in a May 21, 2014 email told Baba Zipkin that it was difficult to justify continuing the Subject Property in Baldwin's development plans. *See*, E-mails dated March 25, 2014 and May 21, 2014 as Exhibits I and J to Notice of Motion.

Despite the emails of March and May, Baldwin paid Bernad monthly through to August 28, 2014, laying the basis for its claim that the Contract of Sale was kept in full force and effect during the negotiations and past the December 31, 2013 Closing Date under the Contract of Sale. *See*, Paul Camarda Affidavit in Reply at paragraph 10. By November of 2014, Bernad gave Baldwin notice that the Contract of Sale had terminated because Baldwin ceased making payments in August of 2014, that the Contract of Sale had expired and that Bernad was no longer willing to continue to extend the opportunity to purchase the Subject Property to Baldwin and requested that the Escrowee release the downpayments from escrow to Bernad⁸ without specifying the amount that was being held in escrow. Bernad also placed a "For Sale/For Rent" sign on the Subject Property, which Baldwin viewed as a clear and unequivocal renunciation of the Contract of Sale in all respects. *See*, Notice to Terminate Contract of Sale as Exhibit 6, copy of photograph of For Sale/Space for Rent Sign at Exhibit 1, paragraph 14 of Verified Answer and Amended Verified Answer and Counterclaims as Exhibits 2 and 3 and Affidavit of John Culmone dated sworn to on December 10, 2015 as Exhibit 7 and John Culmone's affidavit sworn to on June 25, 2018 on Notice of Motion; *see also*, Barney Zipkin's Affidavit at paragraphs 37-38 and Notice to Terminate Contract of Sale as Exhibit L.

⁸The Contract of Sale provides that if for any reason the Closing did not occur, either party could give demand for payment of the Initial Downpayment on notice to the Escrowee, and the Escrowee shall give the other party prompt notice of the demand. *See*, Contract of Sale at paragraph 3 (a).

As Baldwin and Bernard have raised issues of fact and law as to whether a valid Contract of Sale existed beyond the December 31, 2013 Closing Date, Baldwin's motion for summary judgment is **denied in its entirety**. The Parties are to appear on **October 29, 2018 at 9:30 a.m.** for a preliminary conference having filled out a Preliminary Conference Stipulation/Order.

To the extent relief is not addressed herein, it is deemed denied.

This constitutes the Decision and Order of the Court.

Dated: September 17, 2018
Carmel, New York

ENTER:


HON. JANET C. MALONE, J.S.C.

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