

<b>South Bronx Overall Economic Dev. Corp. v Vitale</b>
2018 NY Slip Op 33968(U)
September 27, 2018
Supreme Court, Bronx County
Docket Number: 22630/2018E
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

-----X **Index No. 22630/2018E**

South Bronx Overall Economic  
Development Corp.,  
Plaintiff,

-against-

DECISION & ORDER

John E. Vitale,

Defendant.

Present:  
Hon. Julia I. Rodriguez  
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion to dismiss the complaint and for judgment on his counterclaim.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Memorandum of Law in Opposition	3
Reply Affirmation & Exhibits	4

In the instant action, plaintiff South Bronx Overall Economic Development Corp. ("Sobro") alleges causes of action for specific performance and breach of contract against defendant John E. Vitale in connection with an alleged agreement for the sale by Vitale to Sobro of certain real property located at 4515 Park Avenue, Bronx, NY ("the Premises").

Vitale now moves to dismiss the complaint, pursuant to CPLR 3211(a)(1), (5)<sup>1</sup> and (7), and for judgment on his counterclaim for damages in the amount of \$3,000,000.00 for placing a lien on his property without a valid claim and/or cause of action.

The complaint, verified by Sobro's President, alleges as follows: On or about December 3, 2014, Sobro's President and Vitale executed a Memorandum Of Understanding (MOU) for the sale of the Premises by Vitale to Sobro, for a purchase price of \$460,000.00, for the purpose of developing veterans housing on the Premises. The MOU is a binding and enforceable

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<sup>1</sup>The moving papers do not address defendant's basis for dismissal under CPLR 3211(a)(5) and, therefore, the court will not address this subsection and deems this claim abandoned.

agreement for the sale and transfer of the Premises. Sobro has performed or has been prevented from performing all conditions set forth in the MOU and is not in default of same. In reliance on the MOU, Sobro spent in excess of \$65,000.00 in preparation for the development of the project, including appraisals, environmental studies, survey and architectural designs and drawings. Sobro is also contractually beholden to investors who have made commitments toward the development of the project. In June 2017, Sobro provided a copy of the appraisal of the Premises to Vitale and requested finalization of the transaction by entering into a formal contract. Vitale failed to respond and, soon thereafter, Sobro discovered that Vitale had been actively marketing the property to other potential purchasers and had received a downpayment from one such potential purchaser. After the signing of the MOU, Vitale unjustifiably demanded additional acquisition costs in excess of the agreed-upon \$460,000.00. After execution of the MOU, Vitale without basis, failed to execute a contract of sale and would not proceed to close title and failed and refused to take the actions necessary to comply with the MOU and close title.

As such, Vitale is in breach of the MOU. At all times, Sobro was and remains ready, willing and able to close on the Premises pursuant to the terms of the MOU. The Premises are unique and Sobro has no adequate remedy at law.

In support of his motion, Vitale contends that the MOU omitted the essential terms of a complete agreement, including a closing date and a risk of loss clause, and that the MOU is not a binding contract because certain emails demonstrate that there were negotiations for an agreement, and not an enforceable agreement. In support of his contentions, Vitale submitted the affidavit of John E. Vitale, the MOU and certain email communications. In his affidavit, Vitale discusses the emails, which concern a different transaction between other parties and other property, which are irrelevant here. Vitale also states that he did not receive any consideration for the MOU, the MOU did not set forth a closing date and Sobro did not set a closing date at anytime thereafter.

In its "Terms" section, the MOU states that "[t]he Seller shall sell and convey and the Purchaser shall purchase the property . . . known as 4515 Park Avenue, Bronx, New York, 10457, Block 3030, Tax Lot 165." The Purchase Price is listed as \$460,000.00, to be paid at a

construction closing. In the case of default under the MOU, the MOU provides that (1) if the purchaser defaults, the seller's sole remedy is to retain the downpayment and (2) if the seller defaults, the purchaser shall have all remedies available at law or in equity, including, but not limited to, specific performance. The MOU further states that "it completely expresses their full agreement."

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On a motion to dismiss pursuant to CPLR §3211(a)(1) and (a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *See Maas v. Cornell*, 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716 (1999). Dismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law. *See Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270 (1<sup>st</sup> Dept. 2004). Affidavits submitted by a defendant to attack the sufficiency of a pleading "will seldom if ever warrant the relief he seeks unless . . . the affidavits establish conclusively that plaintiff has no cause of action." *See Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314 (1976).

The elements of a claim for breach of contract are: (1) the existence of a contract, (2) the plaintiff's performance thereunder, (3) the defendant's breach thereunder, and (4) resulting damages. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426, 913 N.Y.S.2d 161 (1<sup>st</sup> Dept. 2010). To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. *See Express Indus. & Terminal Corp. v. New York State DOT*, 93 N.Y.2d 584, 589, 693 N.Y.S.2d 857 (1999). Here, the MOU manifests the mutual assent of Sobro and Vitale to all material terms of the agreement. Indeed, it specifically states that "[a]ll prior understandings,

agreements . . . between the Seller and Purchaser are merged in this MOU [sic] it completely expresses the parties full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this MOU.” As such, contrary to Vitale’s contention, it constitutes an enforceable contract. Further, the complaint sufficiently alleges Sobro’s performance under the contract, Vitale’s breach thereunder and resulting damages.

The elements of a claim for specific performance of a contract are: (1) the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, (2) the defendant was able to convey the property, and (3) there was no adequate remedy at law. *See EMF General Contracting Corp. v. Bisbee*, 6 A.D.3d 45, 51, 774 N.Y.S.2d 39 (1<sup>st</sup> Dept. 2004). The court finds that the allegations set forth in the complaint, discussed above, satisfy the pleading requirements for a cause of action for specific performance.

The court does not find that the documentary evidence submitted by Vitale utterly and flatly contradicts Sobro’s factual allegations and conclusively establishes a defense as a matter of law.

Based upon the foregoing, Defendant John E. Vitale’s motion to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (a)(7), and for judgment on his counterclaim is **denied in its entirety**.

Dated: Bronx, New York  
September 27 2018

  
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Hon. Julia I. Rodriguez, J.S.C.