

Bapaz NYC W. 46 St Group LLC v Assa Props. Inc.
2019 NY Slip Op 30356(U)
February 15, 2019
Supreme Court, New York County
Docket Number: 652456/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X BAPAZ NYC WEST 46 ST GROUP LLC, Plaintiff, - v - ASSA PROPERTIES INC., SALIM ASSA, SOLY ASSA, WEST 46TH STREET INVESTORS LLC, WEST 46TH STREET EQUITY LLC, WEST 46TH STREET MANAGEMENT CORP., NYC 46TH STREET LLC, BEN SUKY, MEITAL SUKY, ABRAHAM LAVI Defendant. -----X	INDEX NO. <u>652456/2018</u> MOTION DATE <u>08/06/2018, 08/06/2018</u> MOTION SEQ. NO. <u>001 & 002</u>
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DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 69, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75

were read on this motion to/for DISM ACTION/INCONVENIENT FORUM.

Motion sequence nos. 001 and 002 are consolidated for this decision and order.

Upon the foregoing documents and as set forth on the record (February 14, 2019, A. Armstrong, Ct. Reporter), (I) NYC 46th Street LLC (**NYC46 LLC**), Ben Suky, and Meital Suky's motion to dismiss the fourth cause of action (Mtn. Seq. No. 001) is granted without prejudice, and (II) Assa Properties Inc., Salim Assa d/b/a Soly Assa, West 46th Street Investors LLC (**Investors LLC**), West 46th Street Equity LLC (**Equity LLC**), and West 46th Street Management Corp. (**Management Corp.**; Management Corp., together with Assa Properties Inc., Salim Assa d/b/a Soly Assa, Investors LLC and Equity LLC, hereinafter collectively, the **Assa Defendants**)'s

motion to dismiss (Mtn. Seq. No. 002) is granted to the extent that the third, fourth, and fifth causes of action are dismissed and is otherwise denied in its entirety.

THE RELEVANT FACTS AND CIRCUMSTANCES

Reference is made to (i) a certain Purchase and Sale of Company Interest (the **Purchase Agreement**),¹ dated November 5, 2015, by and between Bapaz NYC West 46th Street Group LLC (**Bapaz LLC**), NYC46 LLC, and Equity LLC, (ii) an Assignment and Assumption Agreement (the **Assignment Agreement**),² dated of even date therewith, by and among NYC46 LLC, Bapaz LLC, and Equity LLC, (iii) a Joinder of Guarantor (the **Guaranty Agreement**),³ dated of even date therewith, by Salim Assa for the benefit of NYC46 LLC and Bapaz LLC, and (iv) a certain letter agreement (the **Remaining Interest Agreement**; the Purchase Agreement, the Assignment Agreement, the Guaranty Agreement and the Remaining Interest Agreement, collectively, hereinafter the **Agreements**),⁴ dated of even date therewith, by and between NYC46 LLC and Equity LLC. Pursuant to the (i) Purchase Agreement, NYC46 LLC and Bapaz LLC agreed to purchase a 49% membership interest in Investors LLC for \$1,000,000, (ii) the Assignment Agreement, Equity LLC was to assign 31.36% of its 49% interest in Investors LLC to NYC46 LLC and 17.64% of its 49% interest in Investors LLC to Bapaz LLC, (iii) the Remaining Interest Agreement, Salim Assa and Ezak Assa agreed to (x) negotiate in good faith to enter into an agreement with Bapaz and NYC46 LLC for the purchase and sale of “all of the remaining 51% interest **owned by Assa directly or indirectly**” (emphasis added) in Investors

¹ NYSCEF Doc. No. 38.

² NYSCEF Doc. No. 17.

³ NYSCEF Doc. No. 48.

⁴ NYSCEF Doc. No. 39.

LLC for an additional \$1,000,000 within 90 days and to (y) use diligent efforts to obtain lender approval for the sale,⁵ and (iv) the Guaranty Agreement, pursuant to which Mr. Assa guaranteed the payment of all claims, losses, damages, liabilities, costs, and expenses arising out of the breach of Equity LLC's representations, warranties, and covenants, and all post-closing obligations and indemnities.⁶

On or about November 5, 2015, pursuant to the Purchase Agreement, the Plaintiff, by its counsel Michael Herskowitz, paid \$1,000,000 and the 49% membership interest in Investors LLC was transferred.⁷ The Plaintiff, through its counsel Mr. Herskowitz, and pursuant to the Remaining Interest Agreement, subsequently released an additional \$700,000 as part of the payment for the remaining 51% interest to Salim Assa and/or Assa Properties.⁸ The Plaintiff has not received any additional membership interest in Investors LLC.⁹

The Plaintiff therefore brought this action against Assa Properties Inc., Salim Assa d/b/a Soly Assa, Investors LLC, Equity LLC, Management Corp., NYC46 LLC, Ben Suky, Meital Suky, and Abraham Lavi on May 17, 2019 for breach of contract (the 1st Cause of Action), breach of contract based on the Guaranty Agreement (the 2nd Cause of Action), injunctive relief (the 3rd Cause of Action), declaratory judgment (the 4th Cause of Action), and unjust enrichment (the 5th Cause of Action). The Plaintiff alleges that Equity LLC failed to make diligent efforts to

⁵ *Id.*

⁶ For the avoidance of doubt, the Remaining Interest Agreement which was signed by NYC46 LLC and Equity LLC provides that it is "made solely for the benefit of Seller and Purchaser" and Purchaser is defined in the recitals to the Remaining Interest Agreement as both 46NYC LLC and Bapaz LLC.

⁷ Complaint, ¶ 22.

⁸ *Id.*, ¶ 28.

⁹ *Id.*, ¶ 30.

negotiate for the purchase and sale of the remaining 51% interest or to obtain lender approval for the sale.¹⁰ The Plaintiff further alleges that, contrary to the representations of the Assa Defendants that Salim Assa, Assa Properties, and/or Equity LLC could deliver 100% of the membership interest in Investors LLC, in fact this was not accurate.¹¹ The Plaintiff discovered that Abraham Lavi also claimed to own a 20% interest in Investors LLC, for which he paid Salim Assa and/or Assa Properties the sum of \$1,100,000.¹²

I. Motion Sequence No. 001

During oral argument, the parties stipulated that neither Ben Suky nor Meital Suky claim a direct interest in Investors LLC and conceded that the fourth cause of action should be dismissed as against them without prejudice. With respect to the corporate Defendant, NYC46 LLC, the Agreements irrefutably demonstrate that the Plaintiff and NYC46 LLC were collectively purchasing a combined 49% interest in Investors LLC, with NYC46 LLC acquiring a 31.36% interest. To the extent that the Plaintiff argues that (i) his attorney, Michael Hershkowitz, signed the Purchase Agreement without the Plaintiff's knowledge or authority, the argument fails as he had apparent authority to enter the agreement on behalf of his client or (ii) that the transfer was without consideration, the Purchase Agreement itself acknowledges the receipt of adequate consideration. Accordingly, the fourth cause of action is dismissed and the action is dismissed in its entirety against Ben Suky and Meital Suky.

¹⁰ *Id.*, ¶ 29.

¹¹ *Id.*, ¶ 31.

¹² *Id.*, ¶ 32.

II. Motion Sequence No. 002

The First Cause of Action for Breach of Contract

The Assa Defendants' motion to dismiss the first cause of action for breach of contract is denied. To state a claim for breach of contract, a plaintiff must allege (i) the existence of a contract, (ii) plaintiff's performance of the contract, (iii) defendant's breach of the contract and (iv) resulting in damages to the plaintiff.¹³ The Complaint alleges the existence of a valid contract (re: the Agreements), breach by the Assa Defendants by (x) failing to seek lender approval and (y) breach of representation and warranty in that the Assa Defendants did not own the remaining 51% of Investors LLC in accordance with the transactions contemplated by the Agreements and damages in the amount of the additional consideration paid for which no additional interest was transferred, and also in that Bapaz LLC would not have done this deal but for the possibility of the transfer of the entire 100% interest in Investors LLC.¹⁴

The Second Cause of Action for Breach of Guaranty Agreement

Salim Assa's motion to dismiss the second cause of action for breach of contract relating to the Guaranty Agreement is denied. Salim Assa executed the Guaranty Agreement, obligating him to guarantee payment of all claims, losses, damages, liabilities, costs, and expenses resulting from the breach of the Assa Defendants' representations, warranties, and covenants, or post-closing obligations or indemnities.¹⁵ The Guaranty Agreement was executed by Salim Assa for the

¹³ *Harris v Seward Park Housing Corp.*, 913 NYS2d 161, 162 (1st Dept 2010).

¹⁴ Complaint, ¶ 23, 28.

¹⁵ *Id.*, ¶¶ 48-53.

express purpose of inducing the Plaintiff to enter into the Purchase Agreement and explicitly states that it is annexed to and made a part of the Purchase Agreement.¹⁶ The Plaintiff alleges that it was damaged by the failure of Salim Assa to comply with the Guaranty Agreement.¹⁷ In short, the Plaintiff has alleged the existence of a valid contract, performance by the Plaintiff, and a breach by Salim Assa, resulting in damages to the Plaintiff. Accordingly, the Plaintiff has stated a claim for breach of contract, and Defendant's motion to dismiss the second cause of action is denied.

The Third Cause of Action for Injunction

The Plaintiff's third cause of action seeks an order directing West 46th Street Management Corp. to issue a 100% membership interest in Investors LLC to the Plaintiff. The Purchase Agreement expressly states that the Plaintiff and NYC46 LLC were collectively agreeing to purchase a 49% share of Investors LLC. The Assignment Agreement, executed by the Plaintiff, clearly delineates the percentage interests that each party was to receive: 31.36% to NYC46 and 17.64% to the Plaintiff. The Remaining Interest Agreement likewise demonstrates that both the Plaintiff and NYC46 LLC were the purchasers of a combined 49% share under the Agreements. Thus, the documentary evidence conclusively refutes the Plaintiff's third cause of action and it is dismissed.

¹⁶ *Id.*, ¶ 48.

¹⁷ *Id.*, ¶¶ 49-53.

The Fifth Cause of Action for Unjust Enrichment

The Plaintiff's fifth cause of action for unjust enrichment asserted against Assa Properties is dismissed as duplicative of the breach of contract claims.¹⁸

Accordingly, it is

ORDERED that the motion (Mtn. Seq. No. 001) of NYC 46th Street LLC, Ben Suky, and Meital Suky to dismiss is granted and the fourth cause of action against these defendants is dismissed without prejudice; and it is further

ORDERED that the motion (Mtn. Seq. No. 002) of Assa Properties Inc., Salim Assa d/b/a Soly Assa, West 46th Street Investors LLC, West 46th Street Equity LLC, and West 46th Street Management Corp. to dismiss is granted to the extent that the third and fifth causes of action are dismissed (and, accordingly, the action against Assa Properties Inc. is dismissed) without prejudice; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that caption be amended to reflect the dismissal as follows:

BAPAZ NYC WEST 46 ST GROUP LLC,
Plaintiff,

-against-

SALIM ASSA, SOLY ASSA, WEST 46TH STREET EQUITY LLC, WEST 46TH
STREET MANAGEMENT CORP., and ABRAHAM LAVI,

¹⁸ *Mark Bruce Intern. Inc. v Blank Rome, LLP*, 876 NYS2d 19, 20 (1st Dept 2009).

Defendants.

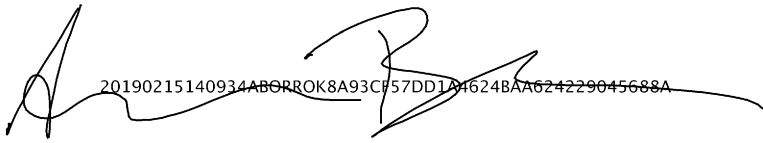
and that all future papers filed with the court bear the amended caption; and it is further,

ORDERED that counsel for movants shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Rm. 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Rm. 119), who are directed to mark the Court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the remaining defendants are directed to file an Answer within 20 days of this Decision and Order, and it is further

ORDERED that the parties appear for a preliminary conference in Part 53, 60 Centre Street, Rm. 238, on March 28, 2019 at 11:30 A.M.

<u>2/15/2019</u> DATE		 20190215140934ABORROK8A93CF57DD1A46248AA624229045688A ANDREW BORROK, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED ☐ GRANTED ☐ DENIED ☐ SETTLE ORDER ☐ INCLUDES TRANSFER/REASSIGN	☒ NON-FINAL DISPOSITION ☒ GRANTED IN PART ☐ SUBMIT ORDER ☐ FIDUCIARY APPOINTMENT	☐ OTHER ☐ REFERENCE
APPLICATION:			
CHECK IF APPROPRIATE:			

