

957 Park Ave., LLC v 955 Tenant Stockholders, Inc.
2019 NY Slip Op 30867(U)
April 3, 2019
Supreme Court, New York County
Docket Number: 650774/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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957 PARK AVENUE, LLC,	INDEX NO. <u>650774/2017</u>
Plaintiff,	MOTION
	DATE <u>01/16/2019</u>
- v -	
955 TENANT STOCKHOLDERS, INC.,	MOTION
	SEQ. NO. <u>001, 002</u>
Defendant.	

DECISION AND ORDER

-----X

HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 001)
 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 43,
 44, 45, 46, 47, 48, 49, 50, 58

were read on this motion PARTIAL SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 002)
 34, 35, 36, 37, 38, 39, 40, 41, 42, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61

were read on this motion SUMMARY JUDGMENT(AFTER JOINDER) .

In this breach of contract action, plaintiff 957 Park Avenue, LLC, the current owner of the building located at 957 Park Avenue in Manhattan, is seeking a money judgment against defendant 955 Tenant Stockholders, Inc., the current owner of the building located at 955 Park Avenue in Manhattan and the previous owner of 957 Park Avenue, alleging that defendant failed to fulfill its ongoing obligation to provide superintendent services to plaintiff after plaintiff purchased 957 Park Avenue. Plaintiff

now moves for partial summary judgment on the issue of liability and for an inquest on damages. Defendant separately moves for summary judgment dismissing the complaint and for sanctions. These motions, sequence numbers 001 and 002, are consolidated for decision herein.

In 1978, the estate of Manny E. Duell, which previously owned both the 955 Park Avenue and the 957 Park Avenue buildings, converted 955 Park Avenue to a cooperative corporation, and placed the superintendent for 955 Park Avenue in an apartment in 957 Park Ave with a 99-year lease. At the same time, the estate executed an agreement pursuant to which the estate, as the owner of 955 Park Avenue was to provide 20 hours of superintendent services per month to 957 Park Avenue in exchange for certain pay. It is undisputed that since the 1980s and through 2015, neither party performed on or sought to enforce the superintendent services agreement.

Both buildings went through a series of sales until, most recently, plaintiff purchased 957 Park Avenue from defendant in 2015. After that purchase, plaintiff alleged that it was entitled to superintendent services from defendant pursuant to the 1978 superintendent services agreement. Defendant denied the validity of that agreement, and plaintiff commenced this action arguing that the superintendent services agreement was a covenant which ran with the land and that, as the successor owner of the premises, plaintiff is entitled to the benefits of that agreement. Plaintiff further argues that the superintendent services agreement is still in effect because it was filed with the County Clerk's Office, whereas no termination of the agreement was ever recorded.

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to “show facts

sufficient to require a trial of any issue of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When there are no triable material issues of fact, it is incumbent upon a court, in the interests of judicial economy, to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 557 [1980]).

“The age-old essentials of a real covenant, aside from the form of the covenant, may be summarily formulated as follows: (1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one touching or concerning the land with which it runs; (3) it must appear that there is privity of estate between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant” (*Neponsit Prop. Owners’ Assn. v Emigrant Indus. Sav. Bank*, 278 NY 248, 254–55 [1938] [internal quotation marks and citations omitted]). The question of what covenants touch and concern land is one for the court to determine in the exercise of its best judgment upon the facts in each case (*id.*). “The finding of an affirmative covenant is disfavored in the law because of the fear that this type of obligation imposes an ‘undue restriction on alienation or an onerous burden in perpetuity’” (*Eagle Enters., Inc. v Gross*, 39 NY2d 505, 510 [1976] quoting *Nicholson v 300 Broadway Realty Corp.*, 7 NY2d 240, 246 [1959]).

As a preliminary matter, it does not appear to this Court that the superintendent services agreement was a covenant which would have run with the land. The superintendent services agreement more closely resembles a personal services agreement rather than a significant interest attaching to property (*see Eagle Enters., Inc.*, 39 NY2d at 510). In any event, regardless of the nature of the agreement, defendant has

submitted a copy of a 1993 decision from a Justice of this Court in support of its motion, which demonstrates that the superintendent services agreement was terminated by the previous owners of the buildings. In that decision the Court observed that “[it] is undisputed that [plaintiff’s predecessor] terminated the superintendent’s employment agreement effective April 30, 1985.” Plaintiff’s right to benefit from the superintendent services agreement can be no greater than the right of its predecessor owner, and the 1993 decision makes clear that the agreement, whatever its nature, was undisputedly terminated by the previous owner of 957 Park Avenue.

Plaintiff’s argument that the termination was ineffective because no termination was recorded at the County Clerk’s Office is unpersuasive. To effect termination, the agreement itself only required “thirty (30) days prior written notice sent by registered or certified mail to 955 Tenant Stockholders.” There is no mention of a requirement that a termination agreement be recorded to make a termination effective. Further, as the 1993 decision indicates, it was then undisputed that the agreement was, in fact, terminated. Thorough due diligence by plaintiff should have revealed that the agreement was no longer in effect, and there has been no evidence presented on this motion indicating that plaintiff negotiated for, or was expecting, defendant to include superintendent services with plaintiff’s purchase of the building.

The Court has considered plaintiff’s remaining arguments and finds them to be unpersuasive. Even so, defendant’s request for sanctions pursuant to 22 NYCRR § 130-1.1 must be denied as plaintiff’s claims in this case, although ultimately unavailing, were not frivolous.

Accordingly, it is

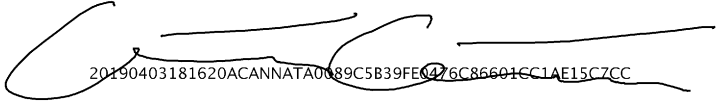
ORDERED that plaintiff’s motion for partial summary judgment is denied;
and it is further

ORDERED that the branch of defendant's motion seeking sanctions pursuant to 22 NYCRR § 130-1.1 is denied; and it is further

ORDERED that the branch of defendant's motion seeking summary judgment dismissing the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

4/3/2019
DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE