

<b>Glebow Realty Assoc. v Gollender</b>
2019 NY Slip Op 32296(U)
July 29, 2019
Supreme Court, New York County
Docket Number: 155259/2019
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**GLEBOW REALTY ASSOCIATES,**

**Petitioner,**

**-against-**

**ALAN GOLLENDER,**

**Respondent,**

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**159-161 ORCHARD LLC,**

**Plaintiff,**

**-against-**

**GLEBOW REALTY ASSOCIATES, LLC,  
A New York limited partnership,,**

**Defendant.**

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**O. PETER SHERWOOD, J.:**

This Decision and Order relates to two separate actions involving the same transaction. In the petition brought on by order to show cause, petitioner seeks an order granting it pre-action discovery of respondent Alan Gollender (Gollender). The petition was denied from the Bench. In this Decision and Order the court further describes the grounds for that decision. It also addresses defendants' motion to dismiss the complaint in the action, with Index Number 651322/2019.

In September 2018, petitioner and defendant Glebow Realty Associates (Glebow) entered into a contract (the Purchase Agreement) with plaintiff 159-161 Orchard LLC (Orchard or Purchaser) to sell two mixed use apartment buildings on the Lower East Side (the Property) to Orchard. Respondent Gollender is a member of Orchard.

According to the Purchase Agreement, Orchard would forfeit a \$890,000 deposit if it terminated the Purchase Agreement, except under certain limited circumstances creating a "Material Adverse Effect". Orchard terminated the Purchase Agreement and filed an action in this court to recover its deposit, claiming Con Edison turning off gas services to the Property

constituted a Material Adverse Effect. However, under the Purchase Agreement, the Material Adverse Effect had to cost at least \$250,000 and getting the gas turned back costs much less. In March 2019, the New York City Department of Housing Preservation and Development (HPD) filed an enforcement action. Petitioner contends Orchard got HPD to do so in order to run up costs and reach the threshold for return of the deposit (Complaint at 2). Petitioner seeks discovery of Gollender to determine whether he personally contacted HPD or encouraged HPD to take action relating to the Property. If he did, petitioner believes it has claims against Gollender and others for abuse of process and other torts.

**I. The Petition, *Glebow Realty v Gollender* (155259/2019)**

Petitioner seeks discovery from Gollender regarding his communications with HPD, NYC311, and the Property tenants between October 2018 and March 2019, as well as communications with third parties about communications with HPD. Plaintiff also seeks discovery from HPD regarding recent complaints about the Property and its communications with Gollender or his agents about the Property.

Gollender opposes the motion. He is effectively serving as managing member of Orchard. After the signing of the Purchase Agreement, Glebow was supposed to continue to provide essential services until the closing. A gas leak at the Property in October 2018 required gas and heat to be shut off. Gas was not restored for 4.5 months. The HPD database lists more than 20 complaints by tenants after August 2018. There were 11 complaints over the 2018-19 winter about the lack of heat before the HPD proceeding started in March 2019.

Gollender argues there is no basis for the requested pre-action discovery. Petitioner merely speculates Gollender told HPD something, but suspicion is not enough. Here, petitioner is attempting to discover if it has a cause of action against Gollender, which is not a purpose of CPLR 3102(e). Currently, there is a total lack of evidence or allegations that Gollender had anything to do with bringing about the HPD proceeding (Opp at 5). Nor is there a proper claim here. Any abuse of process claim will fail because the essence of that action is the improper use of process after it has been issued. Gollender is being accused of abusing the HPD Proceeding but has not been accused of doing anything after that action began (*id.* at 6). Nor is there a valid claim for interference with a business relationship, as the HPD proceeding was filed two months after

Orchard terminated the Purchase Agreement. There was no relationship at the time the HPD Proceeding was filed. Further, Gollender, as Orchard's agent, cannot be accused of interfering with Glebow's relationship with Orchard (*id.* at 7).

CPLR 3102(c) provides that “[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order.” There are already two other related actions before this court: *159-161 Orchard LLC v Glebow Realty Associates, LLC and Glebow Realty Associates* (651322/2019) and *Glebow Realty v 159-161 Orchard* (651978/2019). *Orchard v Glebow* is an action for declaratory judgment that Orchard is entitled to the return of the deposit and includes a claim for attorneys' fees. *Glebow v Orchard* is based on the same facts and includes a claim for breach of contract for Orchard's improperly terminating the Purchase Agreement and a claim for attorneys' fees.

The petition was denied for a number of reasons. First, pre-action disclosure pursuant to CPLR 3102 (2) may only be obtained “before an action is commenced” (*see Johnson v Union Bank of Switzerland, AG*, 150 AD 3d 436, [1st Dept 2017]). As noted there are two related actions pending before the court. Second, pre-action discovery may not be used to discover whether or not a claim exists (*see Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD 3d 32 [1st Dept 2011]). The discovery petitioner seeks from Gollender is aimed at determining whether Glebow has a claim. Third, the HPD proceeding was commenced after Orchard terminated the Purchase Agreement. Accordingly, there is no valid claim for interference with business relations. Further, Gollender is not alleged to have abused an existing process. Also, and as discussed below, the related action must be dismissed for failure to state a cause of action and based on documentary evidence.

## II. *159-161 Orchard Street v Glebow* (651322/2019)

The action is for the return of the \$890,000 deposit on the ground that Glebow breached the Purchase Agreement by failing to provide gas to the tenants at the Property. Orchard seeks a declaratory judgment stating its right to the deposit and attorneys' fees.

Glebow argues that, even if it were responsible for the cessation of gas services to the Property, plaintiff has not alleged (and cannot show) that Glebow breached the contract or that the cost of repairs or damages to the Property is over the Material Adverse Effect threshold of

\$250,000 (Memo at 2, 7). The Purchase Agreement only obligates Glebow to make capital improvements to the Property before the closing if Orchard funds those improvements (*id.* at 8, Purchase Agreement, § 6.01.3). Plaintiff has not alleged the gas service work not to be such a capital improvement. Further, the Amended Complaint fails to allege the injury was over the threshold of \$250,000. The rent abatements and fines totalled under \$10,000. The work needed has now been done, at minimal cost (*id.*).

Orchard contends that Glebow's failure to provide gas services to the tenants of the Property constitutes the required breach (Opp at 7). Plaintiff claims to have alleged that the cessation of gas services had a Material Adverse Effect on the value of the Property (*id.* at 8). Further, the plaintiff has alleged the breach caused the cost of the financing to rise. Section 6.01.3 of the Purchase Agreement requires Glebow to provide essential services. The cessation of gas services constitutes a breach of the Purchase Agreement (*id.* at 9). Glebow's interpretation of the Purchase Agreement on this point is incorrect. As to the value of the Property, plaintiff has alleged the value of the Property has dropped and the cost of financing has risen, "which is likely to have a Material Adverse Effect on the results of operations of the Property" (*id.* at 11). Plaintiff argues this is sufficient to overcome the motion to dismiss.

In reply, defendant argues that, while the Purchase Agreement requires it to provide essential services, it is not required to make capital repairs (Reply at 3, citing Purchase Agreement § 6.01.3). As far as plaintiff contends this section of the Purchase Agreement is ambiguous, under New York law installations of and improvements to gas boilers are capital improvements and defendant was not required to provide them pursuant to the Purchase Agreement (*id.* at 4, citing *Sopko v NY State Div. of Hous. & Community Renewal*, 2013 NY Slip Op 32191[U], \*2 [Sup Ct, NY County 2013] [capital improvement rent increase granted, in part due to new boiler]).

Defendant also contends that, even if the plaintiff has pled a breach of the Purchase Agreement, Orchard has not pled facts supporting the claim that the breach caused a Material Adverse Effect allowing plaintiff to recover the deposit. Plaintiff does not claim the threshold was met by expenses related to the boiler, but because the real estate market changed and financing costs rose. This is buyer's remorse, not a material adverse effect (Reply at 5).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiffs' claims (*see, 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1<sup>st</sup> Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1<sup>st</sup> Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2<sup>nd</sup> Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe I*, 73 AD3d 78, 84 [2<sup>nd</sup> Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is the Purchase Agreement.

CPLR 2311(a)(7) provides that, on a motion to dismiss a plaintiff's claim for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause

of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

Section 6.01.3 of the Purchase Agreement provides:

“While this Contract is in full force and effect, prior to the Closing, Seller will manage the Property or will cause the Property to be managed under policies substantially similar to those existing prior to the date hereof, provided that Seller shall have no obligation to make any capital improvements or replacements to the Property or any portion thereof, unless Purchaser agrees in writing to reimburse Seller for the cost of such repairs through the Closing Date, except that Seller shall continue to provide the Tenants with essential services (e.g. gas, electricity, water and heat), including making repairs in connection therewith which are not "capital" in nature and consistent with Seller's policies prior to the date hereof.”

Capital improvements are excluded from seller's responsibilities during the period before closing, unless Orchard has committed in writing to reimburse Glebow, even from the clause stating Glebow's obligation to provide essential services. The complaint does not state that defendant breached the Purchase Agreement by failing to provide a new boiler. The alleged breach is the failure to provide gas service, which is pled to have been fixed for some tenants, but not others. It is not pled that a new boiler was necessary. Although what plaintiff will be able to prove is uncertain, plaintiff has pled a breach, leaving the question of whether the breach created a Material Adverse Effect.

Section 3.01 of the Purchase Agreement states Orchard “expressly acknowledges and agrees that Purchaser's obligations hereunder are not in any way conditioned upon or qualified by Purchaser's ability to obtain financing of any type or nature whatsoever (*i.e.*, whether by way of debt financing or equity investment, or otherwise) to consummate the transaction contemplated hereby.”

Section 4.03.1 provides: “the term Material Adverse Effect shall mean any circumstance or event which reasonably would be expected to have a material and adverse effect on the business, results of operations, operations or value on the Properties taken as whole and the aggregate of the losses and damages resulting therefrom shall exceed the aggregate sum of \$250,000 (which, if the loss or damage shall be one that occurs over time rather than being in a liquidated [*sic*] at the time of Closing, shall be discounted to present value using a 8% discount rate).” At this point, in a motion to dismiss, giving plaintiff the benefit of every inference, plaintiff has failed to allege the

breach alleged caused a Material Adverse Effect, since the failure to provide gas service cannot “reasonably . . . be expected to have a material adverse effect on the business” which includes the change in the real estate market or the availability of financing, upon which plaintiff relies to meet the monetary threshold.

Accordingly, plaintiff has failed to allege facts to support the circumstances which would entitle it to the return of its deposit, and the motion to dismiss shall be granted. ✓

It is hereby

**ORDERED** that the motion to dismiss in the action entitled *159-161 Orchard LLC v Glebow Realty Assoc.*, Index No. 651322/2019 is GRANTED in its entirety and the complaint is DIMISSED; and it is further

**ORDERED** that the Clerk of the Court is directed to enter judgment and against plaintiff 159-161 Orchard LLC in favor of Defendant Glebow Realty Assoc., dismissing the complaint together with costs to be taxed against said plaintiff in an amount to be fixed by the Clerk upon presentation of a proper bill of costs; and it is further

**ORDERED** that, the petition in the matter entitled Glebow Realty Assos. been denied, said petition is hereby DIMISSED.

This constitutes the decision and order of the court.

**DATED: July 29, 2019**

ENTER,  
  
**O. PETER SHERWOOD J.S.C.**