

249-251 Brighton Beach Ave. LLC v 249 Brighton Corp.

2020 NY Slip Op 30404(U)

January 2, 2020

Supreme Court, Kings County

Docket Number: 516627/2016

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 516627/2016

SEQ# 006 & 007

Part 91

249-251 BRIGHTON BEACH AVE. LLC,

Plaintiff,

against

249 BRIGHTON CORP., BOBBY RAKHMAN, AS
ADMINISTRATOR OF THE ESTATE OF MARA RAKHMAN
A/K/A MARK RAKHMAN, FIRA ROYTKOV, BIANCA
VINOKUROV, AS ADMINISTRATOR OF THE ESTATE OF
SOFIA VINOKUROV, AND BRIGHTON PLAZA, LLC.

Defendants,

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	2
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2
Replying Affidavits.....	2
Exhibits.....	
Other	

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Upon review of the foregoing papers, the motion for summary judgment by defendants 249 Brighton Corp., Bobby Rakhman, as administrator of the estate of Mara Rakhman a/k/a Mark Rakhman, Fira Roytkov, and Bianca Vinokurov, as administrator of the estate of Sofia Vinokurov, and plaintiff's cross-motion for summary judgment, are decided as follows:

Factual Background:

Plaintiff brought this action against defendants to enforce a stock purchase agreement (hereinafter "SPA") between plaintiff and defendants Mark Rakhman, Fira Roytkov and Sofia Vinokurov (hereinafter "individual defendants"). Under the SPA dated August 14, 2012, the individual defendants agreed to sell 100% of the issued and outstanding stock of 249 Brighton Corp., which owned certain properties. Specifically, plaintiff alleges causes of action for specific performance, breach of contract, and constructive trust. Defendants interposed three counterclaims against plaintiff for breach of contract, slander of title, and destruction and waste to property.

On September 21, 2016, plaintiff filed a notice of pendency. Defendants provide the notice of pendency in support of their motion. The notice of pendency is for the premises located at: 249-251 Brighton Beach Avenue, Brooklyn, New York 11235; 247 Brighton Beach Avenue, Brooklyn, New York 11235; 88 Brighton 1st Lane, Brooklyn, New York 11235; 89 Brighton 1st Lane, Brooklyn, New York 11235; and 3064 Brighton 2nd Street, Brooklyn, New York 11235 (hereinafter “subject properties”). Defendants also provide two separate certified deeds indicating that 88 Brighton 1st Lane and 89 Brighton 1st Lane were sold to a third party as a result of a tax foreclosure.

Defendants provide the affidavit of Bobby Rakhman. Mr. Rakhman is the administrator of the estate of Mara Rakhman a/k/a Mark Rakhman. Mr. Rakhman states that, prior to August 14, 2012, Eugene Straschnow, a member of plaintiff, expressed an interest in purchasing 100% of the issued and outstanding stock in 249 Brighton Corp. owned by the individual defendants. According to Mr. Rakhman’s affidavit, none of the individual defendants nor defendant 249 Brighton Corp. had any prior business, personal, or familial relationship with Mr. Straschnow or plaintiff.

Defendants also provide a copy of the SPA and amendment thereto. Plaintiff, in support of its cross-motion, also provides a copy of the same SPA and amendment thereto¹. According to the SPA, 100% of the shares of 249 Brighton Corp., owned by the individual defendants, were to be purchased by plaintiff. On July 11, 2013, the SPA was amended to change the closing date from September 17, 2012 to October 15, 2013². Mr. Rakhman states in his affidavit that, at the

¹The SPA and amendment submitted by defendants and plaintiff are identical.

²To date, the closing still has not occurred.

time the SPA, and amendment thereto, were executed, 249 Brighton Corp. owned the subject properties. Additionally, Section 2 of the SPA, as amended, provides that “[b]uyer agrees to commence remitting payments due under the Note as follows: \$25,000 simultaneously with the execution of this amendment, and \$25,000 each on August 1, 2013, September 1, 2013 and October 1, 2013.”

Section 3 of the SPA, as amended, specifically provides that the plaintiff “shall be responsible for the payment of (I) all real estate taxes in connection with the premises as of [sic] commencing as of August 1, 2012, (ii) all interest and penalty associated with the real estate taxes on the premises from the date of this agreement”.

Section 5.4 of the SPA, states “[u]ntil such time, if any, as this Agreement is terminated pursuant to Section 9, Sellers will not, and will cause the Corporation and each of their Representatives not to, directly or indirectly, solicit, initiate, or encourage any inquiries or proposals from, any [p]erson (other than buyer) relating to any transaction involving the sale of the premises, or any of the capital stock of the Corporation, or any merger, consolidation, business combination, or similar transaction involving the corporation.”

Section 8 of the SPA, states “[s]ellers’ obligation to sell the shares and to take the other actions required to be taken by Sellers at the closing is subject to the satisfaction, at or prior to closing, of each of the following conditions: accuracy of representations and buyers performance.” Specifically, Section 8.2 states “Buyer’s Performance. All of the covenants and obligations that buyer is required to perform or to comply with pursuant to this agreement at or prior to the closing must have been performed and complied with in all material respects.”

Section 9.1(c) of the SPA, provides “[t]his Agreement may, by notice given prior to or at

the Closing, be terminated: it may, by notice given prior to or at Closing, be terminated by Sellers, if any of the conditions in Section 8 have not been satisfied of the Closing Date or if satisfaction of such condition is or becomes impossible (other than through the failure of Sellers to comply with their obligations under this Agreement) and Sellers have not waived such condition or before the Closing Date [sic]”.

Defendants provide the default letter sent to plaintiff. The letter dated December 4, 2014 informed plaintiff that it had defaulted in complying with its contractual obligations under the SPA and amendment thereto. Specifically, the letter notes that plaintiff defaulted because it failed to remit the payments required under the agreement; it had failed to provide proof of insurance in which the sellers are named as additional insureds; it had failed to pay real estate taxes on the underlying premises; and it had demolished the building at the premises without permission from defendants.

Defendants also provide the termination letter sent to plaintiff, dated August 1, 2016. This letter informed plaintiff that the individual defendants terminated the SPA, and amendment thereto, because plaintiff defaulted on its obligations under the SPA and failed to cure said default. The letter also points out that a foreclosure tax lien sale was scheduled for September 8, 2016 for 3064 Brighton 1st Street. According to the termination letter, in order to save the property from tax foreclosure, the individual defendants, personally, had to pay the sum of \$27,932.64. Defendants provide the tax payoff quote, attorney cover letter, and a copy of a check from the attorney's IOLA account for the amount of \$27,932.64 as proof that the individual defendants paid to prevent the tax foreclosure of 3064 Brighton 1st Street.

The termination letter also states that, because plaintiff failed to pay real estate taxes as

required under the SPA and amendment thereto, a tax lien foreclosure action was commenced which caused both 88 and 89 1st Brighton Lane, Brooklyn New York 11235 to be sold at a tax lien foreclosure sale, as evidenced by the certified deed issued to third-party purchasers. The defendants also provide copies of checks from plaintiff to the individual defendants. The memo section of some of plaintiff's checks indicate that those were payments for interest due under the note. The rest of the checks plaintiff provided do not indicate anything on the memo line, or otherwise indicate that they were for the payment of real estate taxes as required by Section 3 of the SPA, as amended.

In opposition, plaintiff relies on an affidavit from Eugene Straschnow, a member of plaintiff. According to his affidavit, Mr. Straschnow states that the SPA, and amendment thereto, were subsequently modified pursuant to oral communications between the parties. Specifically, Mr. Straschnow contends that the parties orally agreed to enter into an installment agreement for outstanding real estate taxes after the closing of the SPA, and amendment thereto.³

Analysis:

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Breach of Contract & Specific Performance (First through Fourth Causes of Action)

Defendants argue that the causes of action for breach of contract and specific performance

³ Section 16.5 of the SPA states that the agreement can be modified only in writing.

should be dismissed upon the grounds that the SPA, as amended, was properly terminated prior to closing for plaintiff's failure to comply with its obligations under the SPA and amendment thereto. It is fundamental that one of the essential elements of a cause of action for breach of contract is the existence of a contract (*Reznick v Bluegreen Resorts Mgmt., Inc.*, 154 AD3d 891 [2d Dept 2017]). Therefore, "[w]ithout an agreement...there can be no contract [and] [w]ithout a contract there can be no breach of the agreement" (*Schaffe v SimmsParris*, 82 AD3d 867, 868 [2d Dept 2011] quoting *Franklin v Carpinello Oil Co.*, 84 AD2d 613, 613 [2d Dept 1981]).

In this case, the individual defendants have met their prima facie burden of showing that there are no questions of fact that they terminated the SPA, as amended, due to plaintiff's default thereunder. The December 4, 2014 letter from defendants informed plaintiff of its default under the SPA and amendment thereto because plaintiff demolished a building at the premises without defendants' permission, plaintiff failed to remit payments required under the agreement, plaintiff failed to provide proof of insurance in which the sellers were named as additional insureds, and plaintiff failed to pay real estate taxes from August 1, 2012 to present. Indeed, the checks provided by plaintiff specify they were for interest and not for taxes. The August 1, 2016 termination letter informed plaintiff of defendants' termination of the SPA, as amended, because plaintiff had breached its obligations under Section 8 of the SPA and Section 3 of the SPA, as amended.

In opposition, plaintiff argues that Bobby Rakhman's affidavit is insufficient because Mr. Rakhman does not have personal knowledge of the underlying facts. However, plaintiff fails to dispute the documentation annexed to Mr. Rakhman's affidavit, including the SPA, certified referee's deeds, and plaintiff's own checks (*Gihon, LLC v 501 Second St., LLC*, 103 AD3d 840,

842 [2d Dept 2013]). In any event, Mr. Rakhman states in his affidavit that he has personal knowledge of the underlying facts because he was personally involved with his late father, Mark Rakhman, and aunt, Sofia Vinokurov's, negotiations and execution of the SPA, as amended.

Additionally, plaintiff contends that under the SPA, as amended, it was only required to enter into an installment agreement, at the time of closing, for the payment of any outstanding real estate taxes. However, according to Section 3 of the SPA, as amended, plaintiff was obligated to pay real estate taxes in connection with the subject properties beginning on August 1, 2012. Section 3 of the SPA, as amended, makes no mention of an installment agreement for payment of outstanding real estate taxes. Therefore, defendants properly terminated the SPA, as amended, because of plaintiff's noncompliance with Section 3 therein. Thus, the claims for breach of contract and specific performance are hereby dismissed.

Constructive Trust (Fifth Cause of Action)

In its fifth cause of action, plaintiff alleges that Section 5.4 of the SPA prevented defendants from selling the subject properties until the agreement was terminated pursuant to Section 9. Plaintiff alleges that, in reliance on that promise, plaintiff began making payments to defendants. Plaintiff further alleges that, despite their promise, defendants have attempted to sell the subject properties. Consequently, plaintiff asks this court to impose a constructive trust on the properties for plaintiff's benefit.

“[A] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee” (*Simonds v Simonds*, 45 NY2d 233, 241 [1978], quoting *Beatty v Guggenheim Exploration Co.*,

225 NY 380, 386 [1919]). The elements of a constructive trust are: “(1) a confidential or fiduciary relationship, (2) [an express or implied] promise, (3) a transfer in reliance thereon, and (4) unjust enrichment flowing from the breach of the promise” (*Sanxhaku v Margetis*, 151 AD3d 778, 779 [2d Dept 2017]).

Although the parties vigorously debate these elements, the elements “serve only as a guideline, [and] a constructive trust may still be imposed even if all of the elements are not established” (*Marini v Lombardo*, 79 AD3d 932, 933 [2d Dept 2010]). Specifically, the parties debate the presence of a confidential relationship and whether defendant has been unjustly enriched. These arguments are moot in light of the court’s determination that defendants properly terminated the SPA. As Section 5.4 states, once the agreement is terminated, defendants are no longer held to the restraints on the subject properties that are outlined in Section 5.4. Because defendants are free to sell the subject properties following termination, there is no basis in equity to impose an constructive trust or otherwise restrain the subject properties. Accordingly, plaintiff’s fifth cause of action is dismissed.⁴

Vacate Notice of Pendency:

CPLR 6514 (b) states that “[T]he court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency if the plaintiff has not commenced or prosecuted the action in good faith.” When the court entertains a motion to cancel a notice of pendency, the only analysis required is a determination of whether

⁴ The court takes no position on whether defendant has been unjustly enriched by any payments plaintiff made to defendants, as plaintiff asserts no such claim in its pleadings. Additionally, plaintiff’s contentions regarding the amount it paid defendants is not supported by an affidavit of a person with personal knowledge of those payments.


the pleadings comply with CPLR 6501 and “the court’s analysis is limited to the pleading’s face” (5303 Realty Corp. v O & Y Equity Corp., 64 NY2d 313, 321 [1984]). As the complaint in this action has been dismissed, the notice of pendency is likewise dismissed (*Bierman v Limoncelli*, 109 AD3d 858, 859 [2d Dept 2013]).

Conclusion

For the reasons stated above, defendants’ motion is granted and plaintiff’s cross-motion is denied. This action and the notice of pendency are dismissed.

This constitutes the decision and order of the court.

January 2, 2020
DATE



DEVIN P. COHEN
Justice of the Supreme Court

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