

Kohanoff v First Capital Real Estate Trust Inc.
2020 NY Slip Op 31442(U)
May 1, 2020
Supreme Court, New York County
Docket Number: 654537/2017
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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SIAMAK KOHANOFF,

Plaintiff,

- v -

FIRST CAPITAL REAL ESTATE TRUST INC.,FIRST
CAPITAL REAL ESTATE OPERATING PARTNERSHIP,
LP

Defendants.

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INDEX NO. 654537/2017

MOTION DATE 10/28/2019

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 63, 64, 65, 66, 67, 68, 69, 70, 71 were read on this motion for SUMMARY JUDGMENT.

This dispute arises out of a real estate investment transaction. Plaintiff Siamak Kohanoff (Kohanoff) entered into an Interest Contribution Agreement with Defendants First Capital Real Estate Trust Inc. (FCRE Trust) and First Capital Real Estate Operating Partnership (FCRE OP) (collectively, Defendants) dated September 13, 2016 (the Agreement). Under the Agreement, Kohanoff contributed his interest in a corporate entity, which in turned owned a piece of property in Brooklyn, to Defendants in exchange for: (1) a \$1 million upfront payment, (2) 430,443 units of limited partnership interest in FCRE OP (the OP Units), and (3) a Guaranteed Monthly Distribution payment “in an amount equal to seven percent (7%) per annum yield on each outstanding [OP Unit]” based on the Issuance Price (NYSCEF 58, ¶¶2-6 [Pl. Statement of Undisputed Material Facts]).

Kohanoff’s OP Units are valued at a total of \$6,900,001.00 (*id.*, ¶5), but he has been unable to redeem them. When Kohanoff sought to redeem the first tranche – a set of 107,611 OP Units – he was told that Defendants would not be providing the \$1,725,004.33 in cash

redemption for those units (*id.* ¶11). On April 28, 2017, Suneet Singal, CEO and Chairman of the Board of the REIT, which is the general partner of the OP, admitted that “the original terms [of the Agreement] are in default” and that the Defendants were “working as fast as we can to get this rectified” (*id.* ¶¶12-13).¹ To date, the money has not been paid. Similarly, Kohanoff sought to redeem additional tranches of OP Units in July 2017 and September 2019, to no avail (*id.* ¶¶16-22). Kohanoff still owns all 430,443 OP Units, valued at \$16.03 per unit (*id.* ¶23).

The Guaranteed Monthly Distribution, too, has ceased. Initially, Defendants made the Guaranteed Monthly Distribution payment of \$40,250.01 each month to Kohanoff until June 1, 2017. But since then, Defendants have failed to make a single payment (*id.* ¶¶24-26).

Kohanoff brought this action on June 27, 2017, by filing a Summons and Complaint (NYSCEF 1-2). The Complaint asserted six causes of action, including breach of contract and declaratory judgment (*see* NYSCEF 2).

DISCUSSION

A party moving for summary judgment pursuant to CPLR 3212 must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once a prima facie showing has been made, the burden then shifts to the opposing party to produce admissible evidence “sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562; *see Leumi Fin. Corp. v Richter*, 24 AD2d 855, 855 [1st Dept 1965] [“To require a trial such fact

¹ Later, at his deposition, Singal confirmed that he meant “[t]he REIT was in default to the original redemption agreement requirements to Mr. Kohanoff” (*id.* ¶13).

issue must be genuine, bona fide and substantial.”] [affirming summary judgment in plaintiff’s favor], *affd*, 17 NY2d 166 [1966]).

A. Kohanoff is Entitled to Summary Judgment on the Breach of Contract Claim

Kohanoff has made a prima facie showing of entitlement to summary judgment in his favor on the breach of contract claim against Defendants (*see, e.g., Nevco Contracting Inc. v R.P. Brennan Gen. Contractors & Builders, Inc.*, 139 AD3d 515, 515 [1st Dept 2016] [granting plaintiff’s motion for summary judgment where plaintiff “made a prima facie showing of the existence of the parties’ agreement, its performance thereunder, and defendant[’s] . . . failure to perform, resulting in harm to plaintiff”]). It is undisputed that Kohanoff entered into the Agreement with Defendants, that the Agreement entitles Kohanoff to receive redemption rights in the OP Units upon proper notice as well as Guaranteed Monthly Distributions, that proper notice was provided for three tranches of OP Units, and that Defendants have failed to pay Kohanoff.

In opposition, Defendants’ sole argument is that Kohanoff “admits he breached” one of the representations and warranties in the Agreement, thus nullifying Defendants’ obligations to him (*see* NYSCEF 63 [Defs. Opp. to S.J.]). Article III of the Agreement sets forth the “Representations and Warranties of the Contributor,” *i.e.*, Kohanoff, “[t]he truth, accuracy and completeness” of which “constitute[d] a condition precedent to [Defendants’] obligations” (Agreement, Art. III.1[h]). Kohanoff represents in the Agreement that he “is acquiring the Securities solely for [his] own account for the purpose of investment and not as a nominee or agent for any other Person and not with a view to, or for offer or sale in connection with, any distribution of any thereof in violation of the federal securities Law” (Agreement, Art. III.2[j][i][2]). According to Defendants, Kohanoff admitted in his deposition testimony to

breaching this representation. When asked if he “did not purchase these [securities] for investment,” Kohanoff answered, “For investment? No” (NYSCEF 67 at 61 [Kohanoff Dep. Tr.]). That three-word response now represents the entirety of Defendants’ argument in opposition to summary judgment.

This argument fails to establish the existence of a “genuine, bona fide and substantial” fact issue (*Leumi Fin. Corp.*, 24 AD2d at 855). Kohanoff did not “admit he breached” the Agreement. At his deposition, Kohanoff testified that he was not “currently in the stock market” (NYSCEF 67 at 58). Defendants’ counsel then asked Kohanoff if he understood that the FCRE transaction was “buying stock” (*id.* at 59-60). Kohanoff, who admitted he was “getting confused” by the questions, stated that he “got those units [*i.e.*, the OP Units] as a fixed price” – likely referring to the fact that the value of the OP Units were pegged to the fixed Issuance Price. That is when Kohanoff stated that he did not purchase the OP Units “[f]or investment” (*id.* at 61). Defendants make no showing that this muddled exchange bears any relationship to the conditions precedent in the Agreement, or that Kohanoff actually breached them. And Kohanoff himself avers that his testimony meant “it was never [his] intention to hold on to the OP Units long term,” not “that [he] had acquired the OP Units for some purpose that was contrary to what I represented in the Interest Contribution Agreement” (NYSCEF 69 at ¶6 [Kohanoff Aff.]).

Therefore, the branch of Kohanoff’s motion for summary judgment addressed to the breach of contract claim is Granted.

B. Kohanoff is Entitled to Summary Judgment on the Declaratory Judgment Claim

Additionally, Kohanoff seeks a declaratory judgment that “the fourth and final tranche of OP Units is redeemable, and that upon their tender, Defendants must pay him \$1,725,000.00 in cash” (NYSCEF 59). Defendants state no opposition to this claim, other than the failed

argument about Kohanoff's investor status, *supra*. Therefore, this branch of Kohanoff's motion for summary judgment is also Granted.

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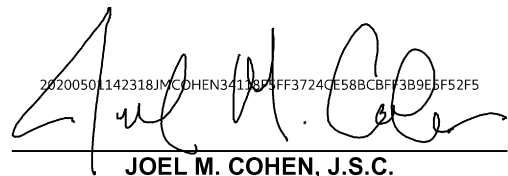
Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is Granted; and it is further

ORDERED that Plaintiff is directed to submit a proposed judgment to the Court within 30 days of this Decision and Order, specifying the total relief sought, including the full redemption amount for the OP Units, all unpaid Guaranteed Monthly Distributions, and the period of applicable interest. Defendants may submit objections to the terms of the proposed judgment within five business days of filing.

This constitutes the Decision and Order of the Court.

5/1/2020
DATE


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JOEL M. COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE