

Alliance for Progress, Inc. v Blondell Realty Corp.

2020 NY Slip Op 32482(U)

June 24, 2020

Supreme Court, Bronx County

Docket Number: 21403/2016

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11 - DCM

Index No. 21403/2016

ALLIANCE FOR PROGRESS, INC.,

Plaintiff,

DECISION/ORDER

-against-

Present:
Hon. Laura G. Douglas
J.S.C.

BLONDELL REALTY CORP.,

Defendant.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to dismiss complaint and related relief and cross-motion for leave to serve and file amended complaint and leave to add a party and related relief:

| <u>Papers</u> | <u>Numbered</u> |
|---|-----------------|
| Defendants' Notice of Motion, Affirmation of Michael J. Gabrielli, Esq. dated March 28, 2019 in Support of Motion, and Exhibits ("A" through "F")..... | 1 |
| Affirmation of Brian C. Kochisarli, Esq. dated April 18, 2019 in Opposition to Motion and Exhibits ("1" through "6")..... | 2 |
| Plaintiff's Notice of Cross-Motion, Affirmation of Matthew R. Yogg, Esq. dated April 18, 2019 in Support of Cross-Motion, and Exhibits ("7" through "10")..... | 3 |
| Memorandum of Law by Matthew R. Yogg, Esq. dated April 18, 2019 in Support of Cross-Motion..... | 4 |
| Affirmation of Reginald A. Jacobs, Esq. dated July 16, 2019 in Reply and in Opposition to Cross-Motion..... | 5 |

This motion and cross-motion are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on this motion and cross-motion is as follows:

The defendant ("Blondell") seeks an order pursuant to CPLR Rule 3042 and § 3126 penalizing the plaintiff ("AFP") for its purported failure to provide certain disclosure by dismissing its complaint or precluding it from adducing evidence in support of its claims unless furnishes this discovery by a

date certain or compelling AFP to respond to the discovery demands pursuant to CPLR Rule 3124. AFP cross-moves for an order pursuant to CPLR Rule 3025 granting it leave to serve and file a “first amended complaint” against Blondell and Peter Mestousis (“Mestousis”) and, pursuant to CPLR Rule 305 and § 1003, granting AFP leave to add Mestousis as a party. The motion is granted solely to the extent ordered below and is denied in all other respects. The cross-motion is denied.

AFP seeks damages arising from Blondell’s alleged breach of a certain agreement. On June 26, 2012, the parties executed a “Memorandum of Understanding” (“MOU”) for the purpose of securing an approval for the rezoning of a certain parcel of land owned by Blondell. The rezoning required a Uniform Land Use Review Procedure (“ULURP”) in order to develop a multi-story, affordable housing complex that was to be known as “Blondell Commons”. AFP was to render professional services to Blondell in completing the ULURP successfully. The parties were to equally share the costs and fees associated with the ULURP procedure. AFP contends that Blondell breached the agreement by failing to equally contribute financing towards the completion of the ULURP application, failing to obtain AFP’s approval on important decisions regarding the ULURP application, and failing to share all pertinent information relating to the ULURP application.

Blondell alleges that AFP failed to properly move to secure this application, among other “blunders” which jeopardized and delayed the project. Blondell claims that it terminated the ULURP procedure in the parties’ agreement in accordance with paragraph 3 of the MOU, since ULURP approval was not secured within 2.5 years of the signing of the MOU. The parties agree that Blondell terminated the agreement.

In the discovery notices at issue, Blondell generally sought disclosure of AFP’s prior experience with ULURP approvals, as well as disclosure of AFP’s financial health. Blondell contends that such material is necessary to establish its defense that any delays in the project were attributable to AFP’s lack of funds to pay for the required studies and consultants, rather than to Blondell’s delay of the significant steps as set forth in AFP’s complaint.

Initially, the Court finds that any deficiencies in Blondell’s good faith attempts to resolve this discovery dispute prior to seeking court intervention are not fatal, since the papers make clear that the parties would not have reached an agreement (*see Carrasquillo v. Netsloh*, 279 AD2d 334 [1st Dept 2001]).

AFP’s argument that this Court’s Order dated March 27, 2019 somehow nullified Blondell’s discovery notices is unavailing. In fact, while that Order originally included language stating that all

discovery not specified in the order had been completed, this language was expressly deleted from the final order (*see* Kochisarli Affirmation in Opposition, Exh. “2”).

AFP concedes that its response to Blondell’s May 5, 2017 discovery notice was late, having been served on October 6, 2017, some five months after the deadline provided by the CPLR (*see* CPLR Rule 3122). The response provided no documents, but objected to each the demands as overbroad, unduly burdensome, and irrelevant. With respect to Blondell’s May 2, 2018 discovery notice and May 4, 2018 discovery notice, AFP concedes that it did not respond until August 28, 2018, again beyond the deadline. The failure to timely respond or seek a protective order under CPLR Rule 3122 limits the Court’s inquiry into the demands to whether they are “palpably improper” (*see PF2 Securities Evaluations, Inc. v. Fillebeen*, 168 AD3d 617 [1st Dept 2019] and *Aetna Insurance Company v. Mirisola*, 167 AD3d 270 [1st Dept 1990]). Overly broad or unnecessarily burdensome demands may be considered palpably improper (*see Haller v. North Riverside Partners*, 189 AD2d 615 [1st Dept 1993]).

The discovery notice dated May 5, 2017 is stricken in its entirety. This notice improperly requests any and all documents or correspondence related to any other ULURP applications that AFP was involved with to any degree prior to June 26, 2012. These demands are impermissibly overbroad in their scope and depth, since they include every paper related to an unlimited number of transactions with no cut-off date. The discovery notice dated May 2, 2018 is stricken, except for items numbered “2”, “10”, and “11”. The other requests made in this notice seek duplicative records and tax records. Blondell has not made the requisite “strong showing” that the information sought from the tax records cannot be obtained from less sensitive sources, such as the other financial records requested (*see Williams v. New York City Housing Authority*, 22 AD3d 315 [1st Dept 2005]). The discovery notice dated May 4, 2018 is stricken, except for items numbered “2” and “3”. The remaining item in this notice also requests tax returns.

Disclosure regarding AFP’s affiliations and transactions with Greg Kourakos, Esq. (“Kourakos”) is appropriate. Kourakos was the escrow agent for the ULURP application. Blondell alleges that Kourakos was also a “member” of the AFP corporation, rather than a “neutral” party as represented by AFP. Specifically, Blondell alleges that Kourakos was not only acting as the attorney for both AFP and Blondell in the ULURP procedure, but that he was actually a shareholder and director for AFP – a conflict of interest that was not disclosed. It appears that Blondell tendered the sum of \$100,000.00 to Kourakos to be held in escrow for the costs of the ULURP and his attorney’s

professional misconduct claim against Kourakos, but the Grievance Committee took no action since the allegations of misconduct relate to this active lawsuit. The Committee advised as follows: “However, at the conclusion of all legal proceedings, if a decision is rendered indicating a finding of misconduct on the part of the attorney, you may resubmit the complaint for further consideration” (*see* Gabrielli Affirmation, Exh. “F”). This renders some disclosure as to the ownership of the AFP corporation and its finances material and necessary to this litigation. Since there has been no showing that AFP was willful and contumacious in its disclosure obligations, the harsh penalties of dismissal or preclusion are not warranted (*see Beach v. Touradji Capital Management, LP*, 179 AD3d 474 [1st Dept 2020]).

AFP’s cross-motion is denied. Leave to amend shall be freely granted, unless it would result in undue prejudice or surprise or proposes a claim which is palpably insufficient or patently devoid of merit (*see Fulford v. Baker Perkins, Inc.*, 100 AD2d 861 [2nd Dept 1984]). The amendments sought here seek to assert a claim for fraud and to pierce the defendant’s corporate veil to hold Mestousis personally liable for the wrongful acts committed by Blondell. The basis for the proposed amendments is a contract of sale executed by Blondell for the sale of the subject property to a third-party on November 30, 2015, over three years after the MOU. The alleged fraud is that Blondell and Mestousis induced AFP to enter into the MOU under the false pretense that AFP would be entitled to a portion of the development fee. However, the MOU expressly allowed and provided for Blondell’s sale of the property prior to the ULURP approval –

“Prior to the approval of the ULURP procedure, Blondell, at its sole discretion, may elect to sell the Property in question to a third-party purchaser. In such event, Blondell agrees to reimburse Alliance for the costs and fee Alliance actually paid out for the ULURP procedure pursuant to this MOU plus a fee of 100% above said amount as a fee to terminate the ULURP procedure mentioned herein.”

(*see* Gabrielli Affirmation in Support, Exh. “A”, paragraph “4”). Since the possibility of a sale and Alliance’s ensuing damages were accounted for in the MOU, the mere fact that a sale was agreed to cannot form the basis of a fraud claim.

Mestousis’ relationship to the Blondell corporation was either known or could have been known to the plaintiff at the outset of this litigation. The contract of sale lists the seller as Blondell Realty Corporation with Mestousis simply acting as its president. The contract of sale reveals no more information regarding Mestousis’ relationship to the Blondell corporation than the earlier contract between the parties herein does, certainly not that he exercised the dominion required to pierce the


corporate veil (*see MBIA Insurance Corporation v. Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). Mestousis would be unduly surprised by having to defend these claims individually when his circumstances have not changed in the 4 years since Alliance commenced this action. No explanation is given for the inordinate delay in seeking to amend (*see Fulford v. Baker Perkins, Inc.*, 100 AD2d 861 [2nd Dept 1984]). AFP indicated that it desired no additional proceedings by filing a note of issue on May 18, 2018, affirming that there were no outstanding requests for discovery, that there has been a reasonable opportunity to complete discovery proceedings, and that this case was ready for trial.

Accordingly, it is hereby

ORDERED that the plaintiff shall provide the items requested in demands numbered “2”, “10”, and “11” in Blondell’s discovery notice dated May 2, 2018 and demands numbered “2” and “3” in Blondell’s discovery notice dated May 4, 2018 no later than 30 days following service of a copy of this Order with notice of entry.

The foregoing constitutes the Decision/Order of this Court.

DATED: June 24, 2020
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.