

Yeats Contr., Inc. v 320 E 82nd Owner LLC
2020 NY Slip Op 33781(U)
November 12, 2020
Supreme Court, New York County
Docket Number: 652435/2020
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: <u>HON. ARLENE P. BLUTH</u> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> YEATS CONTRACTING, INC. <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> 320 E 82ND OWNER LLC, <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<table border="0"> <tr> <td style="width: 50%;">PART</td> <td>IAS MOTION 14</td> </tr> <tr> <td>INDEX NO.</td> <td><u>652435/2020</u></td> </tr> <tr> <td>MOTION DATE</td> <td><u>11/10/2020</u></td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td><u>001</u></td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	PART	IAS MOTION 14	INDEX NO.	<u>652435/2020</u>	MOTION DATE	<u>11/10/2020</u>	MOTION SEQ. NO.	<u>001</u>
PART	IAS MOTION 14								
INDEX NO.	<u>652435/2020</u>								
MOTION DATE	<u>11/10/2020</u>								
MOTION SEQ. NO.	<u>001</u>								

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 were read on this motion to/for DISMISSAL.

The motion to dismiss and for sanctions by defendant is granted in part.

Background

In this action, plaintiff claims it entered into a construction contract with defendant to do work on defendant’s building and was not paid what it was owed. Plaintiff contends that it started a case in August 2018 against defendant that settled for \$250,000 but that defendant refuses to pay the last \$50,000. Under the terms of the contract, defendant was to pay an initial \$100,000 payment followed by three \$50,000 payments when the next three units closed. At the time of the agreement, five of the six units were available for sale.

Defendant moves to dismiss on the ground that only two units have been sold since the agreement and it has paid the requisite amounts. Defendant explains that the unit upon which plaintiff relies for its claim that three units were sold was sold weeks prior to the entry of the agreement and is therefore excluded from the agreement. Defendant argues that plaintiff was

fully aware that the specific unit (unit 3) was not applicable to the settlement agreement and seeks sanctions.

In opposition, plaintiff claims that defendant has breached the settlement agreement by renting units instead of trying to sell them. It insists it has stated a valid cause of action and there is an issue of fact with respect to what the defendant has done to sell the units. Plaintiff also claims there is no evidence that certain units are being marketed for sale.

In reply, defendant emphasizes that the triggering event in the settlement agreement necessitating payment of the last \$50,000 has indisputably not occurred and the case should be dismissed.

Discussion

A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*Fontanetta v Doe*, 73 AD3d 78, 86, 898 NYS2d 569 [2d Dept 2010] [observing that affidavits and deposition testimony are not documentary evidence under CPLR 3211(a)(1)]).

The settlement agreement attached to the complaint clearly states that defendant owned units Maisonette, 2, 4, 5 and PH (for a total of five units) (NYSCEF Doc. No. 3, ¶ 8). The agreement contemplates that plaintiff would be paid \$50,000 upon the closing of each of the *next* three units that were sold (*id.* ¶ 1[b]). Plaintiff’s complaint asserts that the three units that were

sold (and that requires the payment of the additional \$50,000) includes unit 3 and plaintiff attaches a deed for that unit (NYSCEF Doc. No. 4). However, unit 3 was clearly not part of the settlement agreement and its sale prior to the date of the settlement does not require defendant to pay the additional \$50,000. It was sold prior to the settlement agreement and is completely excluded from that document. Based on these documents, the Court is unable to find that plaintiff has a viable cause of action based on the sale of unit 3. The Court observes that the parties do not dispute that two units were, in fact, sold after the settlement or that defendant made the required \$50,000 payment for each unit.

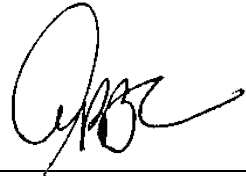
Plaintiff's assertion that defendant's attempt to rent a unit somehow violates the settlement agreement is not supported by the documentation. The agreement contains no prohibition on renting; it simply contains a representation that the units are being actively marketed for sale. Moreover, the allegation is that *one* of the remaining units is being offered for rent. There is no basis to find a breach of the settlement agreement particularly because there are two other units available for sale.

The Court declines to award sanctions. The fact is that one of the units is being offered for rent which, although not a technical breach of the settlement, certainly contradicts the spirit of the agreement. The point was to sell the units, not to rent them and avoid making the last payment. Although the Court does not find that plaintiff has a viable cause of action, these circumstances do not warrant the imposition of sanctions.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant is granted to the extent that the complaint is dismissed and denied to the extent it sought sanctions, and the Clerk is directed to

enter judgment in favor of defendant and against plaintiff along with costs and disbursements after presentation of proper papers therefor.



11/12/2020
DATE

ARLENE P. BLUTH, 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