Piroozian v Homapour
2020 NY Slip Op 35445(U)
January 3, 2020
Supreme Court, Nassau County
Docket Number: Index No. 617286/2018
Judge: Vito M. DeStefano

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,

Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

IMANUEL PIROOZIAN,

Plaintiff,

-against-

SHAHRIAR HOMAPOUR,

Defendant.

Decision and Order

MOTION SEQUENCE: 01
INDEX NO.:617286/2018

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Support	2
Affirmation in Opposition	3
Reply Affirmation	4

In an action for specific performance, the Defendant moves for an order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing the complaint.

Imanuel Piroozian and Shahriar Homapour are both members of Higgins Ave LLC (the "Company"), a limited liability company formed in May 2004 for the sole purpose of acquiring and managing property At the time of formation, they each possessed a 50% membership interest in the company.

In June 2004, the Company purchased 133-01/05 Higgins Street in Flushing, New York (the "Property") from its prior owner for approximately $4 million. The purchase required the Company to assume a mortgage on the Property held by Chinatrust Bank. The Property is the sole asset of the Company.

In January 2006, the prior owner commenced an action in Queens County challenging the sale (the "Queens action").

On February 2, 2010, while the Queens action was pending, Piroozian and Homapour executed the "Queens Warehouse Agreement" which set forth the following terms:

> Whereas Charlie [Homapour] and Manny [Piroozian] own a warehouse in Queens, New York located at 133-05 32nd Street (hereinafter "the Property") through a New York limited liability company know as Higgins Ave LLC (hereinafter the "Company"); and
>
> Whereas there currently exists litigation between Charlie and Manny as the current owner and the prior owner as to Charlie and Manny ownership rights in the Property (hereinafter "Litigation"); and
>
> Whereas the title insurance company is defending Charlie and Manny in the litigation; and
>
> Whereas Charlie and Manny wish to restructure their ownership of the Property so that they are no longer partners.
>
> NOW THEREFORE IN CONSIDERATION OF TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION THE PARTIES AGREE AS FOLLOWS:
>
> 1. In the event that Charlie and Manny lose the Litigation, the proceeds of the title insurance policy shall be split equally between Manny and Charlie and in the event it is determined that the Property is still owned in part by the prior owners, the title policy proceeds will be divided equally between Charlie and Manny and the balance of the property will be owned equally by Charlie and Manny.
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> 2. After exhaustion of all available appellate remedies from any judgment resolving the Litigation, the Property will be sold as follows:
>
> a. Manny will have thirty-five days (Marketing Period) to market the Property with brokers and/or potential buyers.
>
> b. No later than 5 days after the conclusion of the Marketing Period, Manny shall present either a term sheet or proposed contract of sale from a third party or from Manny as Purchaser accompanied by a certified or bank check

representing ten percent of the down payment ("Term Sheet") which shall include the

i. Price - which price shall be an all cash price with no financing contingencies.

ii. Closing Date - no more than ninety days from the commencement of the Marketing Period.

3. Charlie will cooperate with Manny in marketing the property by granting access to the Property and opportunities to perform due diligence inspections. Fred Ohebshalom and Nader Ohebshalom shall determine reasonable access in the event of a dispute.

4. In the event Manny fails to act in accordance with Paragraph 2, Charlie may within ten (10) days after the conclusion of the Marketing Period submit a term sheet in a manner similar to (b)(i) and (ii) setting forth the terms under which he agrees to purchase Manny's 37 ½ percent interest in the property.

5. In either case, Charlie will have the right to purchase the Property on the same terms and conditions as set forth in the term sheet set by Manny or his Purchaser. Charlie shall have 5 days to notify Manny of his intention to purchase the Property.

6. Upon sale the sale proceeds shall be divided by and between Charlie and Manny with Charlie receiving 62.5% of the net sale proceeds and Manny receiving 37.5 percent of the net sales proceeds. In the event Charlie purchases Manny's 37 ½ interest, Charlie shall pay Manny the net sale proceeds after deducting expenses of transfer taxes, real estate tax, water and rent adjustments and brokerage commissions, all to the extent payable.

7. In the event of a default by Manny or Manny's purchaser, then in said event the down-payment deposit shall be divided by 62.5% and 37.5% between Charlie and Manny.

8. Operating distributions shall be 62.5% Charlie and 37.5% Manny from the date of the date hereof.

9. From the date hereof in the event of any litigation from third parties occurring prior to this date shall be the responsibility of Charlie and Manny equally.

10. Charlie shall earn a management fee of 2% of gross rentals from the date hereof.

11. Charlie shall be appointed Managing Member and shall have authority to manage the Property and the Company. Other than as provided in paragraph 2, both members consent shall be required for a sale of refinancing of the Property.

12. All transfer documents and stock certificates will be issued Wednesday February 9th 2010.

13. On February 9th all other agreements dealing with the Queens properties which are subject to a separate agreement shall also close.

On February 18, 2010, the parties executed the First Amendment to the Operating Agreement for the Company where, subject to certain conditions, Piroozian relinquished 12.5% interest in the Company to Homapour, who also became the managing member of the Company ("First Amendment").[1] The 12.5% interest was placed in escrow and was to be transferred to Homapour only upon those certain conditions being satisfied. Specifically, the First Amendment provided:

AGREEMENT, made as of the 18th day of February 2010, by, between and among Shahriar Homapour, having an address at 173 West Shore Road, Kings Point, New York 11024, and Imanuel Piroozian, having an address at 4 Soundview Lane, Kings Point, New York 11024 (hereinafter referred to as "Members").

WITNESSETH :

WHEREAS, the Limited Liability Company known as Higgins Ave LLC was previously formed on May 26, 2004 (the "Company") and a Company Operating Agreement dated as of May 26, 2004 was entered into (the "Agreement"), and

WHEREAS, the Members of the Company desire to modify and amend the Agreement.

NOW THEREFORE, in consideration of the mutual promises herein contained and

[1] Piroozian is of the view that, pursuant to the Queens Warehouse Agreement and the Company having lost the prior Queens litigation with the former owner, that he once again holds a 50% ownership in the Company.

other good and valuable consideration exchanged by and between the parties hereto,

IT IS AGREED AS FOLLOWS:

1. The Members have agreed that all distributions made in the ordinary course of business, other than distributions arising from events contemplated in that certain Queens Warehouse Division Agreement entered into by and between the Members of the Company herein made as of February 2, 2010, shall be distributed to the members as follows:

Shahriar Homapour	62 ½%
Imanuel Piroozian	37 ½%

2. The terms and conditions of that certain Queens Warehouse Division Agreement entered into by and between the Members of the Company herein made as of February 2, 2010, shall control, where applicable as to the sale of the property identified in the Queens Warehouse Division Agreement.

3. The Company shall issue Membership unit certificates as follows:

Shahriar Homapour	50 units
Imanuel Piroozian	37 ½ units
Shahriar Homapour	12 ½ units

4. The 12 ½ units issued to Shahriar Homapour are subject to the terms of the Company Agreement and also subject to the terms of the Queens Warehouse Division Agreement above mentioned.

5. The 12 ½ units issued to Shahriar Homapour shall contain the following legend thereon: Subject to the terms of the Operating Agreement of Higgins Ave LLC and the February 2, 2010, Queens Warehouse Division Agreement.

6. The 12 ½ units issued to Shahriar Homapour shall be deposited into escrow with Seligson, Rothman & Rothman, Esq., of 29 West 30th Street, New York, New York 10001, and are to be held by Seligson, Rothman & Rothman until such time as all appellate remedies from any judgment resolving the litigation or payment to the Company of any litigation proceeds pursuant to the Queens Warehouse Division Agreement.

7. The parties agree that the capital contributions of each Member are:

Shahriar Homapour	$260,261.51
Imanuel Piroozian	$260,261.51

and that upon any capital event, capital contribution shall be repaid before any profits are distributed.

8. Imanuel Piroozian hereby resigns as a Managing Member of the Company.

9. Except as herein specifically modified, all of the other terms, provisions and conditions of the Agreement remain in full force and effect.

On January 12, 2018, the Queens court granted an unopposed application by the plaintiff therein (32nd Avenue LLC) to discontinue the Queens action against Piroozian, in its entirety, with prejudice which, according to Judge Marguerite Grays, "means there is no action pending against [Piroozian] anymore as relates to this matter" (Ex. "E" to Motion).

That same day, the Queens action was settled, on the record, as follows:[2]

There is a stipulation, your Honor, that I am handing up on behalf of Plaintiff [32nd Avenue LLC] and remaining defendants in this action [including Higgins Ave LLC and Homapour] that would resolve the action in its entirety as it currently stands, and we're requesting that it be - we're requesting as Plaintiffs, and I believe Higgins is joining in that application, that it be so ordered by your Honor.

* * *

The court hereby grants judgment to Plaintiff [32nd Avenue LLC] and against Higgins [the Company] in the amount of $5,800,000.00 which judgment shall be entered immediately and without further notice to any party to the extent necessary to effectuate this paragraph.

Counsel shall prepare the judgment or any further documents that may be necessary.

Interest on the judgment is waived and will not accrue until October 1, 2018 (Ex. "E" to Motion).

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[2] According to Piroozian, this was a fundamentally flawed settlement agreement to which only Defendant agreed and which, on its face, reflects a breach of Homapour's fiduciary duties.

Also that day, the Queens court granted 32nd Ave LLC (the Queens plaintiff), the Company, Homapour, and Piroozian's respective applications for a default judgment against defendants Angelo Holding Corp. and Evangelos Gerasimou ("Angelo defendants").[3]

On February 2, 2018, a judgment was signed and entered (Ex. "G" to Motion).

On February 22, 2018, plaintiff in the Queens action filed a Notice of Entry of the judgment.

On March 22, 2018, Piroozian filed a notice of appeal with the Second Judicial Department ("Appellate Division") appealing the clerk's judgment in the Queens action.

The plaintiff in the Queens action moved to dismiss Piroozian's appeal on the ground that Piroozian, as the appellant, was "not aggrieved." On July 17, 2018, the Appellate Division held the motion "in abeyance and referred to the panel of justices hearing the appeal for determination upon the argument or submissions thereof" (Ex. "E" to Motion).

On August 16, 2018, Homapour commenced a specific performance action against Piroozian seeking a judgment directing Piroozian to specifically perform under the Queens Warehouse Agreement by selling his interest in the Property to Homapour for $1 million pursuant to the Homapour Term Sheet ("Homapour Specific Performance Action").[4]

In an order dated September 13, 2018, the Appellate Division set November 26, 2018 as the date in which the appeal the Queens action was to be perfected. Piroozian withdrew his appeal on November 26, 2018.

In December 2018, the Angelo defendants moved to vacate the default judgment. The motion to vacate was subsequently withdrawn and the case was ultimately "disposed" of on January 22, 2019.

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[3] In their answer, the Company, Homapour and Piroozian, asserted cross claims, against Angelo Holding Corp. and Evangelos Gerasimou: pursuant to Article 15 of the Real Property and Procedure Law, unjust enrichment, indemnification and contribution, and fraud and misrepresentation.

[4] Four days later, on February 26, 2018, Homapour sent Piroozian a term sheet seeking to invoke the sale provision of the Queens Warehouse Agreement by purchasing Piroozian's interest in the Company for $1 million (the "Homapour Term Sheet"). On February 28, 2018, Piroozian rejected the Homapour Term Sheet.

On December 19, 2018, Piroozian presented to Homapour his term sheet setting forth the terms upon which he would "purchase Higgins, the interest of all its members, and its assets" which included an "all cash" purchase price of $21 million with no financing contingencies. A $210,000 down payment cashier's check accompanied Piroozian's Term Sheet (Ex. "B" to Complaint).

On December 21, 2018, Homapour rejected Piroozian's Term Sheet given his specific performance action entitled *Shahriar Homapour v Imanuel Piroozian* (Index No. 611064/2018).[5]

The Instant Action

On December 27, 2018, Piroozian commenced the instant action seeking an order directing Homapour to "specifically perform under the [Queens Warehouse Agreement] in accordance with the Piroozian Term Sheet," and, more specifically, to enforce his contractual right to purchase the Property for $21 million pursuant to the Piroozian Term Sheet.

Homapour moves to dismiss the action on the basis that Piroozian failed to "timely present his Term Sheet as required by the terms of the Queens Warehouse Agreement."

For the reasons that follow, the motion is granted.

The Court's Determination

To state a cause of action for specific performance, a plaintiff is required to plead sufficient facts to demonstrate that it substantially performed its contractual obligations under the option agreement and was ready, willing and able to fulfill its remaining obligations with respect thereto, that defendant is able but unwilling to convey the property and that plaintiff had no adequate remedy at law (*Finkelstein v Lynda*, 166 AD3d 948 [2d Dept 2018]; *E & D Group, LLC v Vialet*, 134 AD3d 981 [2d Dept 2015]; *Ouimet v Fitzsimmons*, 68 AD3d 1507 [3d Dept 2009]). As a general proposition, a party "attempting to validly exercise an option to purchase real property must strictly adhere to the terms and conditions of the option agreement" (*O'Rourke v Carlton*, 286 AD2d 427 [2d Dept 2001]; *Matter of Lamberti v Angiolillo*, 73 AD3d 463 [1st Dept 2010] ["General principles governing option agreements require strict compliance with the terms setting forth the time and manner of the option's exercise]).

[5] In Homapour's specific performance action, Homapour seeks judgment directing Piroozian to specifically perform under the Queens Warehouse Agreement by selling his interest in the Property to Homapour in accordance with Homapour's Term Sheet presented to Piroozian on February 26, 2018.

Homapour argues that Piroozian's action for specific performance should be dismissed because Piroozian's window in which to present his term sheet to purchase the Property was late inasmuch as it had to be presented within 40 days (35 days to market + 5 days) after the exhaustion of all appellate remedies (*see* Queens Warehouse Agreement *supra*).

Specifically,

> Because the clerk's judgment recites that it was made upon the so ordered Queens Stipulation, it was not appealable by any of the parties thereto, including 32nd Avenue LLC, the Company and Homapour, since a party who consents to an order or judgment is not aggrieved thereby.
>
> Moreover, where a party is released from an action prior to its settlement by stipulation, that party is not an "aggrieved party" within the meaning of CPLR 5511, and cannot appeal from the stipulation, or a judgment later entered upon the stipulation.
>
> As stated above, 32nd Avenue LLC discontinued the prior Queens action, in its entirety, with prejudice, against Piroozian before the Queens court signed the Queens Stipulation (so ordering same) granting immediate judgment to 32nd Avenue LLC. Thus, Piroozian could not appeal from the Queens Stipulation, or from the clerk's judgment entered upon it, because he is not "aggrieved" by either in accordance with CPLR 5511. He is not a party to the Queens Stipulation and the clerk's judgment is not against him (it's only against the Company) (Affirmation in Support at ¶¶ 31-33).

Because neither the Queens stipulation nor the clerk's judgment is an "appealable judgment or order", Piroozian (and Homapour and the Queens plaintiff) did not have "appellate rights or remedies available to them" (Affidavit in Support at ¶¶ 36-37).

Further:

> With no appellate remedies available to him as of January 12, 2018, the thirty-five day Marketing Period under paragraph 2(a) of the Queens Warehouse Agreement for Piroozian "to market the Property with brokers and/or potential buyers" commenced.
>
> That 35-day window closed on February 16, 2018.
>
> Piroozian did not present a Term Sheet to Homapour by "[n]o later than 5 days after the conclusion of the Marketing Period" (by February 21, 2018) pursuant to paragraph 2(b).

Nor does Piroozian state that he did. Piroozian's Complaint states that he presented a Term Sheet to Homapour on December 19, 2018. ("On December 19, 2018 . . . Piroozian presented a term sheet to Homapour. . .").

Ergo, Piroozian presented his Term Sheet ten (10) months too late.

Piroozian's mere filing of a notice of appeal from the clerk's judgment when he was not aggrieved by it (or by the so ordered Queens Stipulation upon which it was entered) did not provide him with legal standing to appeal, and, accordingly, does not save his specific performance claim in this action. His illusory appeal cannot render his untimely Term Sheet timely.

Piroozian's clear cut failure to timely present his Term Sheet as required by the terms of the Queens Warehouse Agreement necessitates dismissal of his Complaint.

Piroozian's Complaint also should be dismissed because his Term Sheet unilaterally imposes numerous additional terms, conditions, and obligations not required by the Queens Warehouse Agreement (Affirmation in Support at ¶¶ 31-33, 38-45).

With respect to the "appeal issue," Piroozian asserts that the withdrawal of his appeal on November 26, 2018 meant that "all available appellate remedies from any judgment" resolving the Queens action "were now exhausted", thereby "triggering" his 40-day period to market the Property and submit a term sheet (Affirmation in Opposition at ¶ 11).

Contrary to Piroozian's contention, the mere filing of a "notice of appeal" does not render an otherwise frivolous appeal non-frivolous. Nor does an order by the Appellate Division holding in abeyance a motion to dismiss an appeal. In this regard, the court notes that no appeal lies from a stipulation of settlement nor does an appeal lie from a judgment entered upon that stipulation (*Baecher v Baecher, Jr.*, 95 AD2d 841 [2d Dept 1983]; *Rinaldi v Faiella*, 172 AD3d 871 [2d Dept 2019] [where an "order recites that it is made on consent, it is not appealable, since a party who consents to an order is not aggrieved thereby"]). Moreover, inasmuch as the underlying Queens action was discontinued against Piroozian prior to its settlement by stipulation, Piroozian is not an aggrieved party within the meaning of CPLR 5511.[6] Thus, because the stipulation/judgment was not appealable, there were no "available appellate remedies

[6] Piroozian's remedy was to move to vacate the stipulation of settlement (*Baecher v Baecher, Jr.*, 95 AD2d at 841, *supra*; *Hubbard v Copcutt*, 9 Abb.Pr.N.S. 289 [1870] [where order was not the subject of an appeal, the only remedy was by motion in the supreme court to set aside the order and all proceedings under it]) which, pursuant to CPLR 5015, must be made within a reasonable time (*Bank of N.Y. v Attia*, 172 AD3d 666 [2d Dept 2019]; *Matter of McLaughlin*, 111 AD3d 1185 [2d Dept 2013]).

from any judgment resolving the Litigation."

Accordingly, inasmuch as Piroozian failed to establish that he exercised the option to purchase the Property in accordance with the terms of the Queens Warehouse Agreement (within 40 days from the conclusion of the marketing period), Homapour's motion to dismiss the complaint, which consists of a sole cause of action seeking specific performance of the option to purchase the Property, is dismissed (*Zafarani v Gluck*, 40 AD3d 1082 [2d Dept 2007] [defendants failed to establish that they exercised their option to purchase the property in accordance with the terms of the lease which contained the option. In this regard, in purporting to exercise the option, defendants placed a condition upon the exercise of the option which constituted a rejection of the option and effected a counteroffer, which was never accepted. Therefore, no valid bilateral contract was created and, thus, defendants' motion for summary judgment to compel specific performance of a contract for the sale of the property was denied]; *O'Rourke v Carlton*, 286 AD2d 427 [2d Dept 2001] [defendant established his prima facie entitlement to judgment as a matter of law dismissing the complaint where plaintiff failed to comply with the time limitations specified in the option agreement, failed to tender the specified amount for the down payment, and altered the terms of the contract]).

Conclusion

Based on the foregoing, it is hereby

Ordered that the Defendant's motion is granted and the complaint is dismissed.

Dated: January 3, 2020

ENTERED
JAN 0 8 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Hon. Vito M. DeStefano, J.S.C.