

520 9th Ave LLC v Mice LLC
2021 NY Slip Op 31596(U)
May 11, 2021
Supreme Court, New York County
Docket Number: 151513/2021
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK, PART IV

-----X
 520 9TH AVE LLC,

Plaintiff,

-against-

THE MICE LLC,

Defendant.
 -----X

DECISION AND ORDER

Index Number

151513/2021

NERVO, J.:

Defendant moves to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (a)(7) contending that no cause of action lies as the real estate contract was never signed and the documentary evidence establishes a defense as a matter of law. Plaintiff opposes, contending that it has pled a valid cause of action sufficient to survive the instant motion to dismiss and the documentary evidence supports finding an agreement of the minds sufficient to defeat the instant motion.

On a motion to dismiss pursuant to CPLR 3211(a)(1), the court may grant dismissal when the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). A complaint should not be dismissed so long as, “when the plaintiff’s allegations are given the benefit of every possible inference, a

cause of action exists” (*R.H. Sanbar Proj., Inc. v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). A plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*id.*).

Dismissal under CPLR § 3211(a)(1) is “warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v. Martinez*, 84 NY2d 83 [1994]). “The evidence submitted in support of such motion must be ‘documentary’ or the motion must be denied” (*Cives Corp. v. George A. Fuller Co., Inc.*, 97 AD3d 713 [2d Dept 2012]). Documentary evidence is unambiguous, authentic, and undeniable; however, affidavits, deposition testimony, and letters are not considered documentary evidence for the purpose of motions to dismiss (*Granada Condominium III Assn. v. Palomino*, 78 AD3d 996, 997 [2d Dept 2010]; *see also GEM Holdco, LLC v. Changing World Technologies, L.P.*, 127 AD3d 598 [1st Dept 2015]). “Dismissal ... is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action” (*Kolchins v. Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015, Renwick, J.]

Likewise, on a motion to dismiss pursuant to CPLR § 3211(a)(7), the allegations are presumed true, provided every favorable inference, and the

motion must be denied if from the four corners of the pleadings “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]). On the other hand, this Court is not “required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]; see also *MøE 73-75, LLC v. 57 Fusion LLC*, 189 AD3d 1 [1st Dept 2020]).

The parties’ instant dispute arises out of a real estate transaction. Plaintiff contends that it signed the contract for the sale of the instant property and the emails between the parties’ counsel evince a meeting of the minds sufficient to find a valid contract between the parties despite the contract being unsigned as to defendant (NYSCEF Doc. No. 2, 22, 24). Defendant contends that no meeting of the minds occurred, it did not sign the contract, and provision 39 of the contract’s rider provides the contract will not be effective unless signed by both parties.

As an initial matter, the parties’ papers do not address the statute of frauds. However, General Obligations Law § 5-703, in pertinent part, requires

conveyances of real property by signed writing (*see also Adrian Family Partners I, L.P. v. ExxonMobil Corp.*, 61 AD3d 901, 903 [2d Dept 2009]). There is no dispute that the instant contract is unsigned as to defendant. Consequently, as a matter of law, enforcement of the unsigned contract is barred by the statute of frauds (*id.*).¹ Defendant is entitled to dismissal on this basis.

Assuming, *arguendo*, that the statute of frauds does not bar the instant action, considering the emails proffered as documentary evidence in support/opposition, the Court finds as follows.

Emails are properly considered as documentary evidence on a dismissal motion (*see e.g. Langer v. Dadabhoy*, 44 AD3d 425, 426 [1st Dept 2007]). It is beyond cavil that “to establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound” (22 NY Jur 2d, Contracts § 9). Such meeting of the minds is required on all essential terms of the agreement (*Kowalchuk v. Stroup*, 61 AD3d 118 [1st Dept 2009]).

¹ The parties have not claimed, not submitted, any evidence of part performance which would compel the equitable specific performance of the contract (General Obligations Law § 5-703(4)). In any event, even a down payment in relation to real property is insufficient part performance to require specific performance (*see e.g. Tikvah Realty, LLC v. Schwartz*, 43 AD3d 909 [2d Dept 2007]).

The emails submitted on this motion do not evince a meeting of the minds on the essential terms of the agreement. On February 3, 2021, defense counsel emailed plaintiff's counsel:

Hey Mitch and Lisa – see the info below. My client is not happy and is asking for another \$50K since your client was supposed to close before end of the new year. I hope we can get this done asap.
(NYSCEF Doc. No. 21).

On February 5, 2021, plaintiff's counsel responded:

Jason – client has approved the \$50,000 price increase. I will be forwarding execution versions of the contract shortly. Do you think you can get your client to sign today?

(*id.*).

Thereafter, plaintiff's counsel sent a “partially executed contract of sale.”

That same day, defense counsel responded with further changes:

Hey Lisa – few last things:

In par 30(xxx) my client believes there may be a shared sewer on this building so this has to come out and also, I don't believe they filed the RPIE although not sure they have to file for a building of this size.

Second Rider 4 9(a) ii – you need to clarify that the she has orally accepted less rent from subway

4 (a) xviii – cant make a representation from before she purchased.

ii (j) – they do not have anything to give you

(NYSCEF Doc. No. 13).

The following day, February 9, 2021, plaintiff's counsel emailed defense counsel:

Jason – here are the changes. Please confirm and I will finalize and insert.

On the subway lease – the copy I have is dated September 22, 2009. I am not sure what the October 12th date is that is reflected in the amendment. Correct name of tenant on attached estoppel
Please call me to discuss.

(*id.*).

Approximately two hours later, plaintiff's counsel emailed:

Jason – are the issues resolved? Please advise.

(*id.*).

The following day, plaintiff's counsel again emailed:

Jason ???????

(*id.*).

Defense counsel responded:

So my client has done some soul searching and does not like or trust your client and will not continue the deal with him. I am really sorry and know you put a lot of time into this, but they have instructed me not to continue with them.

(*id.*).

These emails establish that there was no meeting of the minds as to material aspects of the contract related to the instant property, including disclosures and the applicability of and compliance with the Real Property Income and Expense Statements (RPIE). As such, defendant's motion to dismiss is granted.

The Court finds that counsel have been afforded an opportunity to be heard on the issue of sanctions under 22 NYCRR § 130 for frivolous conduct. Plaintiff's bringing of this action, requiring the instant motion, is entirely frivolous, as defined by 22 NYCRR § 130 and resulted in the waste of judicial resources. There is no colorable argument by which plaintiff may maintain its position. Accordingly, the Court finds that costs should be awarded defendant in bringing this motion and defending this action.

Accordingly, it is

ORDERED that plaintiff has engaged in frivolous conduct as defined in Section 130-1.1 (c) of the Rules of the Chief Administrator as set forth above, and having set out above the reasons why the conduct has been found frivolous and that costs should be awarded, it is now therefore

ORDERED that plaintiff shall reimburse defendant for actual expenses reasonably incurred and reasonable counsel fees, incurred in the defense of this action, in an amount to be stipulated to by the parties; and it is further

ORDERED that should the parties fail to reach agreement on the actual expenses incurred and reasonable counsel fees, as above, the Court shall determine same at inquest on July 22, 2021 at 11:30am via Microsoft Teams; and it is further

ORDERED that payment of these costs shall be delivered to counsel for defendant and written proof of such payment shall be provided to the Clerk of Part IV within 30 days after execution of a stipulation or within 30 days of notice of entry of a copy of the order following inquest; and it is further

ORDERED that, in the event that timely payment is not made, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the defendant and against plaintiff in the sum determined at inquest or otherwise stipulated to; and it is further

ORDERED that proof of payment shall be provided to the Clerk of the Part and such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk*

Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the motion is granted to the extent of dismissing the action against defendants.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: May 11, 2021

ENTER:



Hon. Frank P. Nervo, J.S.C.