Lenard v Ames

2021 NY Slip Op 32427(U)

August 20, 2021

Supreme Court, New York County

Docket Number: 657506/2017

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART 38**

Justice

---X

DENA LENARD,

Plaintiff,

- v -

SANDY AMES and 380 LENOX SA, LLC,

Defendants.

---X

INDEX NO. 657506/2017

MOTION DATE ____________

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, and 113

were read on this motion for JUDGMENT - SUMMARY.

LOUIS L. NOCK, J.

Upon the foregoing documents, and after argument, it is determined that plaintiff's motion for summary judgment is denied, per the following memorandum.

Background[1]

Plaintiff Dena Lenard and defendant Sandy Ames were married in 2005. By deed signed and acknowledged January 10, 2007 (NYSCEF Doc. No. 17), they assumed joint ownership of a condominium unit known as 380 Lenox Avenue, Unit 3D, New York, New York, establishing it as their marital residence. Lenard and Ames had each contributed $120,000 toward the purchase of the home. A mortgage in the face amount of $752,000 was secured in connection with the purchase of the home (total purchase price of $940,000). The mortgage invoice (NYSCEF Doc. No. 93) and mortgage commitment letter (NYSCEF Doc. No. 101) indicate Lenard only as the

[1] Unless otherwise indicated, the facts recited herein are undisputed.

borrower/mortgagor, although the record includes email correspondence from Lenard's real estate attorney to Ames (NYSCEF Doc. No. 98) stating that the mortgage is in both persons' names (email dated October 19, 2017, at 4:02 p.m.). Lenard submits what purports to be an agreement between herself and Ames, dated January 26, 2007, obligating Ames to bear 50% responsibility for the mortgage payments, as well as 50% responsibility for "all expenses of owning and maintaining the Apartment" (NYSCEF Doc. No. 108 ¶¶ 2-3).

Due to a deterioration in the relationship, Ames vacated the residence some time in 2007. Lenard characterizes Ames, simply, as having "moved out of the Unit" (NYSCEF Doc. No. 85 ¶ 7). Ames presents a far different portrayal, stating that "[a]lmost immediately after taking occupancy, [Lenard] ousted me from our home" (NYSCEF Doc. No. 107 ¶ 6). Ames states that in the aftermath of having been ousted from the home by Lenard (according to Ames' version of the facts), she (Ames) "had to make other living arrangements and pay additional fees" (NYSCEF Doc. No. 107 ¶ 7). Lenard and Ames ultimately divorced in 2010 (*see*, NYSCEF Doc. No. 18).

Lenard submits a document presenting as an agreement signed by her and Ames, dated March 1, 2014 (NYSCEF Doc. No. 89), setting forth the following mutual "obligations" of Lenard and Ames:

> Dena Nelson Lenard OBLIGATIONS.
>
> Dena Nelson Lenard agrees to pay Sandy Francine Ames $125,000 over a 5 year period commencing in March 1, 2014 and ending February 28, 2019. Any portion of the $125,000 that is unpaid as of February 28, 2019 will accrue a one-time premium of 3% of the amount remaining unpaid.
>
> The monies being paid to Sandy Francine Ames are to repay her for the $120,000 that she contributed to the purchase of and closing costs for 380 Lenox Avenue, Apt 3D, NY, NY 10027. These were 50% of the total costs. The other 50% were paid by Dena Nelson Lenard.

> An additional $5,000 was agreed upon, mutually, to be paid to Sandy Francine Ames for future loss of any added value of the property, if and when there is added value of the property.
>
> Sandy Francine Ames OBLIGATIONS.
>
> Upon final payment of the $125,000 (plus any interest after the 5 years has been reached) Sandy Francine Ames agrees (i) that her name shall be removed from the title and deed for 380 Lenox Avenue, Apt 3D, NY, NY 10027, (ii) that she shall promptly on demand sign any and all documents that may be required to remove her from said title and deed, and (iii) Sandy Francine Ames waives and releases any and all rights to any other consideration or future profits that may be gained from the sale of said unit. Dena Nelson Lenard shall pay all costs connected with the preparation and filing of any documents required to remove Sandy Francine Ames from the said title and deed.

(NYSCEF Doc. No. 89.) That agreement contains a merger clause, titled "ENTIRE AGREEMENT," providing as follows:

> This agreement constitutes the final agreement of the parties. It is the complete and exclusive expression of the parties' agreement with respect to the subject matter of this agreement. All prior and contemporaneous communications, negotiations, and agreements between the parties relating to the subject matter of this agreement are expressly merged into and superseded by this agreement. The provisions of this agreement may not be explained, supplemented, or qualified by evidence of trade usage or a prior course of dealings. Neither party was induced to enter this agreement by, and neither party is relying on, any statement, representation, warranty, or agreement of the other party except those set forth expressly in this agreement. Except as set forth expressly in this agreement, there are no conditions precedent to this agreement's effectiveness. This agreement may not be modified, amended or changed except in a writing signed by all parties.

(*Id.*) This agreement bears what purport to be signatures of Lenard and Ames, signed March 10 and March 3, 2014, respectively. Ames apparently disputes the validity of this agreement in stating that: "Unrepresented and unaware of my rights, I was approached by Plaintiff and an attorney of her choosing. . . . [Plaintiff] pressured me into an agreement, but she has never to this day lived up to it . . . ." (NYSCEF Doc. No. 107 ¶¶ 8-9.) Lenard, who relies on this agreement as valid, paid $70,000 of the total $125,000 required under it; but then ceased making the final $55,000 payment. No indication exists in the record as to precisely when Lenard ceased

paying. Instead, the record contains a quitclaim deed dated July 2017 whereby Ames transferred her 50% ownership interest in the condominium unit to defendant 380 Lenox SA, LLC, which Ames solely owns and controls (*see*, NYSCEF Doc. No. 99; NYSCEF Doc. No. 85 ¶ 17). After that quitclaim deed came into existence, Lenard's real estate attorney conditioned the final $55,000 payment to Ames on Ames' preparation and recordation of "a deed transferring title into Dena [Lenard] alone," and other conditions (*see*, NYSCEF Doc. No. 98).

Plaintiff commenced this action asserting a first cause of action for breach of the March 2014 agreement (which Ames contests as to validity); second and third causes of action to compel Ames to enable an immediate transfer of title to plaintiff; and a fourth cause of action for a constructive trust over Ames' (or her corporation's) interest in the condominium unit. Plaintiff moves for summary judgment on all her causes of action. Defendants counterclaim, seeking judicial partition of the condominium unit pursuant to RPAPL 901, *et seq*. Plaintiff moves for summary judgment dismissing the counterclaim.

Defendant has opposed plaintiff's motion for summary judgment in its entirety.

Discussion

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]). If the movant meets this burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see, Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). If the movant fails to meet its prima facie burden, the motion must be denied without regard to the sufficiency of the opposing papers (*see, Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

This case is replete with issues of fact.[2] To begin, Ames has characterized her exiting from the marital residence as being an ouster by Lenard – not a consensual move-out – which may constitute a material breach by Lenard of the January 26, 2007, agreement between herself and Ames, containing an obligation by Ames to share in half the costs of the condominium unit (*see*, NYSCEF Doc. No. 108 ¶¶ 2-3). Such material breach could work a discharge of any reciprocal obligations Ames may have had under that agreement (*see, e.g., Special Situations Fund III, L.P. v Versus Technology, Inc.*, 227 AD2d 321, 321 [1st Dept], *lv denied* 88 NY2d 815 [1996]). In any event, Ames' deposition testimony describes her contractual state of mind as being responsible for the apartment's costs only for as long as she enjoys the benefits of *residence* in the apartment (*see*, NYSCEF Doc. No. 95 at 22).

Second, Ames appears to be assailing the validity of the March 2014 agreement by asserting in her affidavit that she, unrepresented by counsel at the time, was "pressured" into signing it (*see*, NYSCEF Doc. No. 107 ¶¶ 8-9). Ames, in fact, explicitly maintains that although Lenard did pay her $70,000 in purported reliance on the March 2014 agreement, "to this date the balance of my investment has not been returned and I hereby deny that any agreement exists for the buyout as alleged" (*id.*, ¶ 14). Irrespective of the quality of that articulation, Ames does seem to be invoking the point that the March 2014 agreement contains no conditions to Lenard's precedential obligation to pay Ames the $55,000 balance. According to that agreement, that full payment must be made before any trigger of any reciprocal obligation by Ames to cooperate in the transfer of her ownership interest to Lenard (*see*, NYSCEF Doc. No. 109 ["Upon final payment of the $125,000 . . . Sandy Francine Ames agrees . . . ."]). That does seem to be the case notwithstanding Ames' intermittent transfer of her ownership interest to defendant 380

[2] The observation is true despite the fact that discovery has run its course, even to the extent of deposition practice.

Lenox SA, LLC, which is wholly owned and controlled by Ames. Ames remains fully capable of causing that entity to transfer title to Lenard, so this court cannot view Ames' intermittent transfer to that entity as a breach of Ames' contractual obligations to Lenard. Ames seems to be making that point in her reference to this aspect of the facts as a "red herring" (*see*, NYSCEF Doc. No. 107 ¶ 15 ["Plaintiff makes issue of the fact that I transferred the Unit to an LLC. This is a red herring as I am the sole member of the LLC and as such it makes no difference for purposes of this case."]).

In addition, Lenard's claims for enforcement of the January 2007 agreement requiring Ames to share in the apartment's costs may run up against the March 2014 agreement's merger clause, which may be subject to an interpretation that limits Ames' contractual obligations to a transfer of ownership of her interest in the apartment to Lenard (upon receiving $125,000 from Lenard), and nothing further, such as payment of apartment costs. That merger clause says that: "All prior and contemporaneous communications, negotiations, and agreements between the parties relating to the subject matter of this agreement are expressly merged into and superseded by this agreement" (NYSCEF Doc. No. 89).

Plaintiff's argument is support of her fourth cause of action for a constructive trust is solely dependent on her assertion in this case that Ames' intermittent quitclaim deed to her own wholly owned and controlled limited liability company somehow constitutes a breach of her obligations under any of the agreements between herself and plaintiff (*see*, NYSCEF Doc. No. 88 at 16-17). As stated above, though: that assertion grossly overstates the quitclaim deed aspect of this case.

Finally, plaintiff's motion to dismiss the defendants' counterclaim for judicial partition is predicated on the argument that such an equitable remedy is not available to parties who have an

enforceable contractual relationship (*see*, NYSCEF Doc. No. 88 at 22-24). But as previously observed, issues of fact exist here – specifically, regarding the circumstances leading to Ames' vacatur of the marital residence – which may bear on whether a material breach has occurred sufficient to have relieved Ames of any erstwhile contractual obligations in reciprocity with Lenard. And, as observed, Ames has raised a question as to the initial assent to contract.

The upshot of all the foregoing is that issues of fact remain in this case such that summary adjudication cannot serve as the vehicle for a final disposition in this matter.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that a pre-trial conference will be conducted via remote conferencing to be arranged by the court for October 8, 2021, at 10:00 a.m.

This will constitute the decision and order of the court.

ENTER:

8/20/2021
DATE

LOUIS NOCK, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**