

Gedula 26, LLC v Lightstone Acquisitions III LLC

2021 NY Slip Op 32799(U)

December 22, 2021

Supreme Court, New York County

Docket Number: Index No. 653977/2014

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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GEDULA 26, LLC, 485 SHUR LLC, BSD 777-26 MANAGER LLC, BSD SHEVA MANAGER LLC,	INDEX NO. <u>653977/2014</u>
Plaintiffs,	MOTION DATE <u>10/22/2021, N/A</u>
- v -	MOTION SEQ. NO. <u>017 018</u>
LIGHTSTONE ACQUISITIONS III LLC, 485 SEVENTH AVENUE ASSOCIATES LLC, THE LIGHTSTONE GROUP, LLC,	DECISION + ORDER ON MOTION
Defendants.	
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 017) 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1025, 1028, 1029, 1030, 1031

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 018) 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 970, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1032, 1033, 1034, 1035, 1036

were read on this motion for SUMMARY JUDGMENT.

This case concerns a commercial real estate transaction involving the sale and development of what is now the Moxy Hotel located in midtown Manhattan. Plaintiffs Gedula 26, LLC (“Gedula”), 485 Shur LLC (“Shur”), BSD 777-26 Manager LLC (“BSD”), and BSD Sheva Manager LLC (“BSD Manager”) (collectively, “Plaintiffs” or “Sellers”) bring the instant suit seeking to hold Defendants Lightstone Acquisitions III LLC (“Lightstone”), 485 Seventh Avenue Associates LLC (“485 Seventh Avenue”), and The Lightstone Group (“Lightstone Group”) (collectively, “Defendants” or “Purchasers”) liable for alleged and anticipatory breaches of the parties’ April 2, 2014 Purchase and Sale Agreement (“PSA”).

Both parties now move for summary judgment. For the reasons set forth below, the Court finds that triable issues of fact preclude summary judgment for either party.

FACTUAL OVERVIEW

In 2004, Sellers purchased property located at 485 Seventh Avenue in New York City, which includes a sixteen-story building erected in 1906–07 and designated as a New York City Landmark (the “Building”) (NYSCEF 977 ¶¶3–4 [Talassazan Aff.]). Sellers operated out of and occupied spaces in the basement, lobby, seventh floor, and sixteenth floor (which housed a synagogue) (the “Sellers’ Spaces”) (*id.* ¶5).

On April 2, 2014, Sellers and Purchasers entered into an Agreement for the Purchase and Sale (“PSA”) of the Property, with a purchase price of \$182,000,000, and a \$9,000,000 deposit (NYSCEF 934 ¶ 1 [Def.’s Rule 19-a Stmt. of Material Facts (“DSMF”)]; NYSCEF 797 §1. (L), (ee) [Purchase and Sale Agreement (“PSA”)]). Thereafter, the parties executed an Amended PSA, a Second Amended PSA, and a Third Amended PSA (NYSCEF 798, 799, 800). On November 19, 2014, the parties closed the transaction at the \$182,000,000 purchase price (NYSCEF 966 ¶77 [Pl.’s Rule 19-a Stmt. of Material Facts (“PSMF”)]).

A. The Post-Closing Occupancy

According to the Plaintiff-Sellers, Purchasers breached certain post-closing occupancy obligations. Attached to the PSA as Exhibit J was the Rent Roll, containing “Sellers’ Post Closing Occupancy Agreement,” which provided that Sellers “will vacate six (6) months from the anniversary of closing. Owner will pay a holdover rent in the aggregate of 10K per month, for suites 717, 777, 1626 and building storage areas” (PSA ¶12(vi), Exhibit J at pp. 75, 78).

On December 11, 2014, Purchasers served upon Sellers a Ten (10) Day Licensee Notice to Quit, demanding that they vacate the premises on or before December 31 (NYSCEF 79).

Purchasers changed the locks on certain Sellers' Spaces on December 17, 2014 (DSMF ¶49). Plaintiffs allege that they were locked out of their spaces, and left "in the lobby, subjected to humiliation as they awaited the police; all notwithstanding that the Notice to quit which promised both a 12/22/14 and 12/31/14 deadline" (PSMF ¶81). Plaintiffs further argue that Defendants were aware that the Sellers' Spaces at Suite 1626 was a Synagogue and used each and every day for prayer services (*id.* ¶82).

According to Defendant-Purchasers, they were not aware of Sellers' Post-Occupancy Agreement in the PSA, arguing that initial drafts of the PSA did not contain language entitling Plaintiffs to remain in any portion of the Building post-closing, and the first draft of the PSA's rent roll containing such language was provided via email on March 31, 2015 and did not indicate that the post-closing occupancy language had been added to the document (DSMF ¶43–46). Defendants further cite that Plaintiffs provided Defendants with an updated rent roll in October 2014, which did not contain the post-closing occupancy agreement appearing in Exhibit J to the PSA (DSMF ¶47–48). Defendant-Purchasers assert that once Sellers brought to their attention the language in the Rent Roll, Purchasers restored Sellers' ability to access the disputed spaces (DSMF ¶50; Teichman Aff. ¶105).

On the other hand, Plaintiffs point to a November 19, 2014 email from Defendant Lightstone's Director of Acquisitions (Meir Milgraum) stating, "*FYI - Eretz can stay in possession for 6 months rent free. That's the deal*" (NYSCEF 905). Further, Defendants' Tenant Stacking Charts show that Plaintiff 485 Shur LLC was to vacate by May 31, 2015 (NYSCEF 895, 896), which is consistent with the Rent Roll.

B. The Partnership Provision

Per Section 38 of the PSA, “[f]ollowing Purchaser’s delivery of the Due Diligence Waiver Notice, as applicable, Purchaser and Sellers shall negotiate in good faith for a period not to exceed seventy-five (75) days’ for Sellers to acquire up to a twenty-five percent (25%) ownership interest in the entity which will acquire title to the Property, on terms and conditions determined in Purchaser’s sole discretion” (PSA § 38).

As part of the Third Amended PSA, the parties agreed that the Amendment constituted Purchaser’s Due Diligence Waiver Notice (NYSCEF 800 § 2). The parties dispute whether the Partnership Interest was negotiated in good faith prior to the closing on November 19, 2014 (PSMF ¶¶50; DSMF ¶¶9).

On November 18, 2014, Purchaser’s counsel, Eric Landau, Esq. (“Landau”), sent an email to Purchasers containing what Sellers consider to be the terms of a Partnership Agreement (NYSCEF 755; PSMF ¶¶ 61). This email was printed out from Mr. Milgraum’s (Lightstone) email account and brought to the Closing on November 19, 2014 (NYSCEF 755; PSMF ¶¶61; DSMF ¶¶18). The parties dispute the significance of the Landau Email being brought to closing. Plaintiffs allege that Defendants verbally and physically offered the Landau Email to Plaintiffs, and Plaintiffs’ acceptance of the email created a binding partnership agreement and/or joint venture agreement between and among the parties (PSMF ¶¶69-71). Defendants argue that while the Landau Email was discussed at Closing, no writing signifying agreement to the terms of the Landau Email was prepared or executed by any person, and the parties left the Closing without memorializing any supposed oral agreement in writing (DSMF ¶¶20–21).

According to the purported terms set forth in the Landau Email, Plaintiffs were required to invest “25% of the equity ownership interest in the Property Owner that is retained by

Lightstone Group at the time of the construction loan closing (or on such earlier date as Lightstone Group elects to finalize the organizational structure of the property owner)” (NYSCEF 755). At the time of the construction loan closing, on December 31, 2015, Plaintiffs did not inquire how much was due under the purported agreement, nor did Defendants inform Plaintiffs that any payment was due (PSMF ¶¶98; DSMF ¶¶53–56).

Defendants submit that Lightstone’s invested capital as of the date of the construction loan closing was approximately \$176.5 million, consisting of approximately \$116.5 million in common equity and \$60 million in preferred equity (NYSCEF 917). Defendants argue, based on Plaintiff-Sellers’ personal bank account statements in 2014 and 2015, they did not have enough funds to contribute the 25 percent, which they assert was approximately \$44 million (DSMF ¶¶53–56). Plaintiff-Sellers argue that they needed to contribute only \$28.1 million, and that they had significantly more than \$28.1 million in cash available at that time (PSMF ¶¶99–100).

On December 24, 2015, Marriott International, Inc., as Franchisor, and 485 Seventh Avenue Associates, LLC, as Franchisee, entered into a Moxy Hotels Franchise Agreement (NYSCEF 897; PSMF ¶¶90). Purchasers secured a Mezzanine Loan (NYSCEF 907), Hotel Management Agreement (NYSCEF 904), and construction financing (NYSCEF 878, 880).

In or about March 2016, Defendants formed and established the 485 Seventh Avenue Condominium (The “Condominium”) at the Property (PSMF ¶¶102). The Moxy Hotel opened for business at the Property and began operations in September 2017 (*id.* ¶¶105). Plaintiffs submit that 485 Seventh Avenue Associates, LLC and/or its affiliates have derived and received revenue, and continue to derive and receive revenue, from the Moxy Hotel, and its various loan, mortgage, food and beverage agreements, and its rental and retail agreements (PSMF ¶¶102–13). Plaintiffs allege that Defendants have not distributed to Plaintiffs any proceeds from the various

loans or revenues to which they purportedly are entitled under the terms of the alleged partnership agreement (*id.* ¶114).

C. The Lawsuit

Plaintiffs commenced this action on December 30, 2014. The first two causes of action (Declaratory Judgment and Injunctive Relief) were dismissed by stipulation (NYSCEF 48). Defendants' motion to dismiss the remaining claims was granted in part, with the Court (Bransten, J.) dismissing Plaintiffs' fifth (Interference with Religious Worship), seventh (Fraud), and ninth (Provisional Remedies) causes of action (*see Gedula 26, LLC v Lightstone Acquisitions III LLC*, 2016 NY Slip Op 31758[U] [Sup Ct, NY County 2016], *affd in part, modified in part on other grounds* 150 AD3d 583 [1st Dept 2017]). The Court sustained Plaintiff's third (Breach of Contract), fourth (Wrongful Eviction), and eighth (Punitive Damages) causes of action.

On appeal, the First Department largely affirmed this Court's decision, modifying it only to dismiss Plaintiffs' claim for punitive damages (150 AD3d at 584). In particular, the court found that "[d]ismissal of the breach of contract claim would be premature, since discovery may reveal documents that support plaintiffs' allegation that both parties accepted the terms set forth in an internal email by defendants' counsel, which email was allegedly transmitted to plaintiffs on the date of closing" (*id.* at 583). Similarly, with respect to Plaintiffs' claim for wrongful eviction, the court found that "discovery may reveal support for plaintiffs' allegations that defendants agreed to permit them to occupy certain space in the building after the closing" (*id.*).

In July 2018, Defendants amended their answer and add nine additional affirmative defenses. Thereafter, this Court granted Plaintiffs' motion to amend their complaint on March 5, 2020. The Amended Complaint contains causes of action for breach of contract (first cause of action), special or consequential damages (second cause of action), unlawful and forceful

eviction (third cause of action), breach of the Sellers Post Closing Occupancy Agreement (fourth cause of action), and legal fees (fifth cause of action).

Discovery was completed and Note of Issue was filed on December 7, 2020.

DISCUSSION

The standards on a summary judgment motion are well-settled. “The proponent of a summary judgment motion 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], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Ostrov v Rozbruch*, 91 AD3d 147 [1st Dept 2012]). If the moving party crosses that threshold, the party opposing the motion “must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562; see *Glassman v Weinberg*, 154 AD3d 407, 408 [1st Dept 2017] [“[D]efendant’s vague and unsubstantiated allegations . . . [were] insufficient to raise an issue of fact”]).

I. Breach of Contract Claim

Defendants motion for summary judgment dismissing Plaintiffs’ breach of contract claim is denied. This Court (Bransten, J.) rejected Defendants’ merger argument in when it denied their motion to dismiss, noting that Plaintiffs’ claim for breach of contract is based on a *separate agreement* memorializing the partnership option, not a revision of the PSA (*Gedula*, 2016 NY Slip Op 31758[U], 6). The First Department affirmed that holding, which is law of the case. Defendants’ statute of frauds argument also fails. The alleged agreement asserted by Plaintiffs is

not for the purchase of real property. It is, instead, an agreement for the acquisition of an equity interest in *Property Owner*, which in turn owns real property. Such an agreement is not subject to the statute of frauds (*Livathinos v Vaughan*, 121 AD3d 485, 486 [1st Dept 2014]; *Walsh v Rechler*, 151 AD2d 473, 473 [2d Dept 1989]). The statute is inapplicable when, as here, “the Agreement does not involve an interest in real estate, but rather an interest in personal property -- i.e., interest in . . . [an] LLC” (*Lembo v Rosania*, 2019 WL 2995786 [Sup Ct, NY County 2019] [Scarpulla, J.], *affd on other grounds*, 187 AD3d 544 [1st Dept 2020]).

Plaintiffs’ motion for summary judgment with to this claim also fails because fact issues remain as to whether the parties did in fact enter into an agreement to permit Plaintiffs to acquire a 25% interest. The email communications and related evidence upon which Plaintiffs rely do not establish conclusively the existence of a binding agreement. Given this conclusion, the Court need not address the remaining arguments regarding repudiation or breach of contract under the first cause of action, nor the parties’ arguments regarding consequential damages under the second cause of action, which stem from the breach of contract claim.

II. Wrongful Eviction

Defendants’ motion for summary judgment on Plaintiffs’ third and fourth causes of action for wrongful eviction is denied. Their contention that Plaintiffs’ failure to show monetary damages is fatal to these claims was rejected by Justice Bransten at the motion to dismiss stage:

Defendants first argue that this claim should be dismissed because Plaintiffs have not alleged damages. Nonetheless, ‘[w]rongful eviction is a trespass and, therefore, even without proving actual damages,’ a plaintiff satisfying the other elements of the claim is ‘entitled to nominal damages.’ *See, e.g., Okeke v Ewool*, 106 AD3d 709, 710 (2d Dept 2013). At a minimum, Plaintiffs have alleged a right to occupancy, and have alleged that right was violated when Defendants denied them access by changing the locks

(*Gedula*, 2016 NY Slip Op 31758[U], 7). The same rationale applies here.

Further, questions of fact as to whether the “post-closing occupancy agreement” was part of the PSA, or was instead “surreptitiously” inserted into the deal documents after the terms of the PSA were agreed, preclude summary judgment for either side.

III. Legal Fees

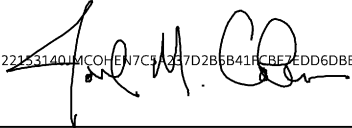
Section 17 of the PSA provides that the “prevailing party” in an action brought by either contracting party to enforce the PSA “shall be entitled to recover all reasonable costs and expenses, including, without limitation, reasonable attorneys’ fees and court costs actually incurred” As was the case when the First Department considered Defendants’ motion to dismiss, this request is premature because the litigation is still ongoing (*Gedula*, 150 AD3d at 584).

Accordingly, it is

ORDERED that Defendants’ motion for Summary Judgment (Mot. Seq. 017) is hereby **denied**; it is further

ORDERED that Plaintiffs’ motion for Summary Judgment (Mot. Seq. 018) is hereby **denied**.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

12/22/2021

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: