Joglo Realties, Inc. v Tortorella
2022 NY Slip Op 30823(U)
March 10, 2022
Supreme Court, Kings County
Docket Number: Index No. 20503/13
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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JOGLO REALTIES, INC. and ROBERT I. TOUSSIE

Plaintiff, Decision and order

- against - Index No. 20503/13

MERILYN TORTORELLA and OTTAVIO TORTORELLA
d/b/a TORTORELLA LANDSCAPING,

Defendants, March 10, 2022

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MERILYN TORTORELLA & OTTAVIO TORTORELLA
d/b/a TORTORELLA LANDSCAPING,
Counterclaim-Plaintiffs

- against -

JOGLO REALITIES, INC., & ROBERT I. TOUSSIE,
Counterclaim-Defendants

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
Counterclaim Defendant

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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved pursuant to CPLR §3212 seeking partial summary judgment the defendants are bound by the lawn maintenance provisions of the contract that is the subject of this lawsuit. The plaintiff's further move seeking to dismiss the defendant's affirmative defenses and counterclaims. The defendants have cross-moved seeking summary judgement on their counterclaims of adverse possession, quiet title, breach of contract, partition and rescission. The motions have been opposed respectively and papers were submitted by all parties and after reviewing the arguments of all parties this court now makes the following determination.

As recorded in prior orders, the defendants Merilyn and Ottavio Tortorella own property located at 4316 Ocean Avenue in Kings County. Following damage to the property caused by Hurricane Sandy, the defendants entered into a contract with plaintiffs wherein the defendants agreed to pay the plaintiffs $8,950 to clean debris upon defendant's property. The agreement further provided the defendants would perform lawn maintenance for the plaintiff's at five locations at no charge. The defendants contend they only signed that contract because they were threatened by the plaintiff who asserted ownership over an esplanade the defendants believed were publicly owned. The threats allegedly leveled by the plaintiff were economic in nature, namely that the defendants would be sued if they touched any of the concrete slabs the plaintiffs claimed they owned and that they would be further sued for trespass if anyone entered the esplanade to conduct any cleanup. The defendants assert they had no way of cleaning their property without yielding to the plaintiff's demands and were therefore forced to sign the contract. The defendants raise other reasons the contract is not valid. The plaintiffs assert there are no grounds to invalidate the contract and they should be awarded summary judgement.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York,

49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v.Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). The plaintiffs have thus presented evidence, not really disputed, that the defendants have failed to fulfill the terms of the contract.

The defendants argue that not only can the plaintiffs not be awarded summary judgement but the breach of contract claim must be dismissed for five reasons. First they argue that pursuant to CPLR §3015(e) the cause of action must be dismissed because the complaint does not allege the requisite licensing requirements. Next they argue the agreement is unenforceable because the plaintiffs did not own the esplanade, a key component of the

agreement. Next they argue the contract was the result of duress and is therefore unconscionable and unenforceable. Next they argue the contract is unenforceable since it was fraudulently induced. Lastly, they argue the contract cannot be enforced since the plaintiffs failed to satisfy conditions precedent rendering the defendant's performance impossible. The court will now address these arguments.

First, in an order dated September 5, 2018 the court considered whether the contract was illegal since it did not contain all the necessary elements of a contract pursuant to GBL §771. Although the court did note that GBL §771 concerns contracts for home improvement, the court never established as a matter of law the plaintiff's obligations were those of home improvement as defined in the Administrative Code of the City of New York §20-386(2). Thus, mere removal of debris does not constitute home improvement and the failure to include such licensing information in the complaint would not render the contract void (Great American Restoration Services Inc., v. Lenti, 94 AD3d 1053, 943 NYS2d 547 [2d Dept., 2012]). There is surely no basis to categorically deem the contract void based on this omission.

Next, the defendants argue that paragraph 2 of the contract which states that the plaintiff Joglo Realties Inc., is the owner of a disputed parcel on the east side of Ocean Avenue cannot possibly be true. Even if that paragraph is not true and Joglo Realties Inc., is not the owner, a disputed contention, it does not

render the contract void since that paragraph does not impose any obligations upon any of the parties. Mere verbiage, whether true or not, does not concern the obligations of the parties and is not a basis to void the entire contract. Likewise, allegations of fraud, which have not been proven to be true are mere allegations which are insufficient to render the contract void and unenforceable.

Further, to void a contract on the grounds of coercion or duress the complaining party must demonstrate there was an unlawful threat made which required the involuntary acceptance of contract terms where the circumstances allowed for no other alternative (Stewart M. Muller Construction Company Inc., v. New York Telephone Company, 40 NY2d 955, 390 NYS2d 817 [1976]). However, threatening the legal commencement of a lawsuit does not constitute duress (Garner v. Garner, 46 AD3d 1239, 848 NYS2d 741 [3rd Dept., 2007], see, also, Madey v. Carman, 51 AD3d 985, 858 NYS2d 784 [2d Dept., 2008]). Further, in Interpharm Inc., v. Wells Fargo Bank N.A., 2010 WL 1257300 [S.D.N.Y. 2010] the court held that "threats to enforce a party's legal rights under a contract—or even that party's interpretation of its rights—cannot constitute a wrongful threat sufficient to establish a claim of economic duress" (id., *affirmed* 655 F.3d 136 [2d. Cir. 2011]). Likewise, a party acting in pursuit of its perceived rights cannot be considered economic duress sufficient to void a contract. The lengthy recital of the plaintiff's litigious nature or the damage suffered by the

defendants as a result of the hurricane does not alter this analysis. Thus, there was no duress sufficient to void the contract.

The defendants further assert the contract was unconscionable and cannot be enforced. In King v. Fox, 7 NY3d 181, 818 NYS2d 833 [2006] the court held, quoting Black's Law Dictionary, that "at common law an unconscionable agreement was one that no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other" (id). Thus, an unconscionable contract is one that is "so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (Simar Holding Corp., v. GSC, 87 AD3d 688, 928 NYS2d 592 [2d Dept., 2011]). Further, where the facts underlying the claims of an unconscionable contract are essentially undisputed the court may decide the matter as a question of law (David v. #?1 Marketing Services Inc., 113 AD3d 810, 979 NYS2d 375 [2d Dept., 2014]).

Contracts can either be procedurally or substantively unconscionable and in New York both must be established (Gillman v. Chase Manhattan Bank, N.A., 73 NYS2d 1, 537 NYS2d 787 [1988]). "Substantive elements of unconscionability appear in the content of the contract per se; procedural elements must be identified by resort to evidence of the contract formation process and

meaningfulness of the choice" (Emigrant Mortgage Company Inc., v. Fitzpatrick, 95 AD3d 1169, 945 NYS2d 697 [2d Dept., 2012]).

The defendants have raised questions of fact whether the contract was negotiated and executed in a manner which could be deemed unconscionable. First, the defendants have presented evidence the plaintiffs, who maintained a superior bargaining position due to the desperate plight of the defendants following the hurricane, exercised uneven and imbalanced pressure tactics to insist upon the terms expressed in the agreement. Further, substantively, an agreement promising lawn maintenance at five locations in perpetuity in addition to paying approximately $9,000 for yard cleanup could be viewed as highly unfair. These contentions must be evaluated and decided by a trier of fact. Therefore, based upon this argument there cannot be a summary determination the defendants breached the contract.

Further, there are additional questions of fact regarding the extent of any lawn maintenance that was required to be performed. Likewise, there are questions of fact whether the defendants were even able to engage in lawn maintenance or were prevented by lack of access or the fact there were no lawns to maintain. While the defendants term these issues as conditions precedent, in any event they raise significant questions of fact which foreclose a summary determination at this time. Therefore, based on the foregoing, the plaintiff's motion seeking summary judgement is denied.

Turning to the cross-motion seeking summary judgement, the defendants seek to reargue the dismissal of the claim the plaintiff's complaint consisted of Strategic Lawsuit Against Public Participation [hereinafter 'SLAPP'] claims on the grounds amendments to New York Civil Rights Law §70-a permits such claim. Further, upon the reinstatement of the claim the court should award summary judgement. The court had held the complaint did not involve the petitioning by a public applicant or any communications. The recent amendments define an action involving public petition and participation to include a claim based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" and "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition" (New York Civil Rights Law §76-a(1)(a)(1)(2)). These amendments do not in any way revive the dismissed claim, primarily because as noted in the prior order, there is still no evidence at all the complaint involved the petitioning by a public applicant. Rather, the complaint concerns a breach of contract claim and nothing more. Any activity surrounding the Department of Environmental Conservation really do not concern this breach of contract lawsuit. Therefore, the motion seeking to reargue the dismissal of the first counterclaim is denied.

In order for a party to create a prima facie case of adverse possession the party must prove that the possession of the disputed parcel was in fact hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for the statutorily prescribed ten years (Asher v. Borenstein, 76 AD3d 984, 908 NYS2d 90 [2d Dept., 2010], RPAPL §521 and §311).

The defendants have presented evidence the previous owner of the property adversely possessed the property by maintaining ownership for the requisite ten years and that the defendants themselves likewise satisfied all of the requirements pursuant to adverse possession for at least ten years. However, paragraph 2 of the contract noted above as well as paragraph 4 of the contract clearly state that Joglo is the owner of this parcel of land and that "Marilyn and Otto Tortorella hereby agree they have never owned, and do not own, any part of JOGLO's property as described herein and will never claim otherwise" (Short Agreement Between Neighbors, ¶4). It is true that adverse possession can exist even if the party knows they do not possess legal title to the land since "conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessor" (Walling v. Przybylo, 7 NY3d 228, 818 NYS2d 816 [2006]). However, in the contract in this case the defendants expressly waive any ownership over the parcel. The defendants argue that the plaintiff, Robert Toussie could not explain at his deposition why the property descriptions were included within the

agreement. However, even if true that does not alter the inconsistency it raises. The defendants further assert that an owner of property cannot simply waive such ownership in an agreement. While that is true, where the ownership is based upon adverse possession the statement in the agreement essentially undermines the adverse possession claim rendering any summary determination impossible. While surely the defendants will assert the waiver provision was likewise the result of improper pressure and imbalance, there can be little doubt the waiver raises questions whether the defendants own the parcel through adverse possession. Likewise, any questions concerning the easement over the esplanade cannot be summarily determined and must be presented to a jury.

The remaining counterclaims are relate to the ownership of the disputed properties. Thus, there can be no summary determination about partition, quiet title or any injunction until the issue of ownership is resolved by a trier of fact.

Therefore, based on the foregoing all motions seeking summary judgement are denied.

Any request for sanctions is denied.

So ordered.

ENTER:

DATED: March 10, 2022
Brooklyn NY

Hon. Leon Ruchelsman
JSC