

West 125th St. Realty LLC v Chosen Realty Corp.

2023 NY Slip Op 31624(U)

May 15, 2023

Supreme Court, New York County

Docket Number: Index No. 152859/2021

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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WEST 125TH STREET REALTY LLC,

Plaintiff,

- v -

CHOSEN REALTY CORP, ONYX REALTY
LLC, LANDMARK INFRASTRUCTURE HOLDING
COMPANY LLC, METROPCS NEW YORK, LLC, NEW
CINGULAR WIRELESS PCS, LLC,

Defendant.

INDEX NO. 152859/2021

MOTION DATE N/A

MOTION SEQ. NO. 012

**DECISION + ORDER ON
MOTION**

-----X

CHOSEN REALTY CORP

Plaintiff,

-against-

RIVERSIDE ABSTRACT LLC, OLD REPUBLIC NATIONAL
TITLE INSURANCE COMPANY

Defendant.

Third-Party
Index No. 595602/2022

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302

were read on this motion to/for JUDGMENT - SUMMARY.

Chosen Realty Corp.'s (the **Seller**) motion for summary judgment (i) dismissing all claims as against the Seller, and (ii) granting default judgment as against Riverside Abstract LLC (the **Abstractor**) must be denied, and the Abstractor's cross-motion to (i) deem their motion to dismiss timely, and (ii) dismiss the third-party complaint (the **Third-Party Complaint**; NYSCEF Doc. No. 182) must be granted.

The Seller's motion is predicated on the argument that a certain First Amendment to Agreement for Assignment and Assumption of Contract of Sale (the **Amendment**; NYSCEF Doc. No. 240) dated August 21, 2020 between Onyx Realty LLC (**Onyx**) as assignor and PH Realty Capital LLC as assignee, demonstrates a waiver by West 125th Street Realty LLC (the **Purchaser**) of the rooftop of the property and the assignments of the telecom antennas subject to the Telecom Easement for consideration paid.

As discussed below, this argument fails because (i) the Amendment does not demonstrate an intentional waiver, and (ii) the Telecom Easement was not discoverable based on the telecom leases.

The Abstractor argues that the Court should deem its motion timely because it can demonstrate both a reasonable excuse for the delay due to a clerical error and a meritorious defense because the Abstractor is not in privity with the Seller and therefore can not be liable to indemnify the Seller. As discussed below, the Abstractor's motion to dismiss must be granted because the Abstractor is not in privity with the Seller and can not otherwise be liable to indemnify the Seller.

Reference is made to a Decision and Order of this Court dated May 9, 2022 (the **May 9 Decision**; NYSCEF Doc. No. 120) and a Decision and Order of this Court dated April 10, 2023 (the **April 10 Decision**; NYSCEF Doc. No. 306). The facts are set forth in the May 9 Decision. Familiarity is presumed.

After the Court issued the May 9 Decision, the Seller filed the Third-Party Complaint as against both Old Republic National Title Insurance Company (the **Insurer**) and the Abstractor, seeking indemnification for any claims the Purchaser has as against the Seller. To wit, the Seller alleges (i) that the Abstractor acted as agent for the Purchaser, (ii) the Telecom Easement and the Deed were delivered to the Abstractor, (iii) the Abstractor had an obligation to advise the Purchaser of the existence of the Easement, (iv) the Seller reasonably and justifiably relied on the Abstractor to fulfill its obligations, and (v) by failing to inform the Purchaser of the Easement, the Abstractor has caused the Seller to face liability with respect to the Purchaser's claims, such that the Abstractor should be required to indemnify the Seller (NYSCEF Doc. No. 182, ¶¶ 30-40).

The Seller also alleges that the Amendment, of which it was not aware until it was produced in discovery, demonstrates that the Purchaser waived its right to the rooftop, including the Telecom Easement and the antennas subject to the Telecom Easement. Pursuant to the Amendment:

Assignee expressly acknowledges and agrees that the Agreement (*i.e.*, the sale of the property from the Seller to Onyx) does not include an assignment to Assignee of the antenna leases currently in affect at the Premises. At Closing, Assignee shall cooperate with Assignor and cause all such antenna leases to be assigned to Assignor or to such entity as directed by Assignor

(NYSCEF Doc. No. 240, ¶ 5). The Seller alleges that this demonstrates that the Purchaser waived its right to the rooftop as embodied in the Telecom Easement. The Purchaser argues that the antenna leases and the Telecom Easement are not synonymous and that nothing in the Amendment indicates a knowing, intentional relinquishment of a known right.

Discussion

The Seller's motion for summary judgment must be denied

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposition papers (*id.*). Once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish the existence of material issues of fact requiring trial (*id.*).

The Seller's motion must be denied. Other than conclusory self-serving statements made in certain Affidavits, the Seller demonstrates no evidence in support of its motion. The Purchaser, for its part, correctly argues that the Amendment does not establish waiver because it does not demonstrate a clear manifestation of intent to relinquish a known right pursuant to a contract (*Stassa v Stassa*, 123 AD3d 804, 805 [2d Dept 2014]). To demonstrate waiver, a defendant must demonstrate that the plaintiff voluntarily and intentionally relinquished a known right with both knowledge of its existence and an intention to relinquish it" (*Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 741 [2d Dept 2015]). This is simply not the case here. As discussed in the May 9 Decision, the Telecom Easement was not disclosed to the Purchaser and was not discoverable by the Purchaser (NYSCEF Doc. No. 120, at 2). Thus, the Seller's motion must be denied.

The Abstractor's motion to dismiss is deemed timely and must be granted

Pursuant to CPLR 3012(d), the Court may compel the acceptance of a pleading untimely serviced upon a showing of reasonable excuse for delay. To compel acceptance of an untimely

pleading, the movant must (i) provide a reasonable excuse for the delay and (ii) demonstrate a potentially meritorious defense (*Mannino Dev., Inc. v Linares*, 117 AD3d 995, 995 [2d Dept 2014]). Although the determination is left to the sound discretion of the trial court, the strong public policy in New York is to dispose of cases on their merits (*HSBC USA v Lugo*, 127 AD3d 502, 503 [1st Dept 2015]).

On a motion to dismiss, the Court must afford the pleading a liberal construction and accept the facts as alleged as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

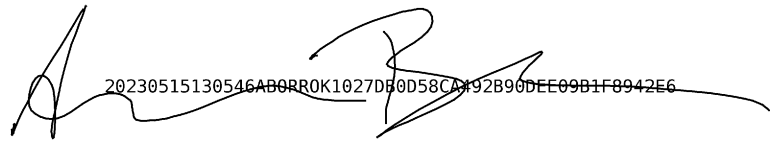
The Abstractor argues that it has a reasonable excuse for its delay because (i) although the Third-Party Complaint was served on the Secretary of State in August 2022, it was not delivered to the Abstractor by the Secretary of State until November 2022, and (ii) due to a clerical error, the Third-Party Complaint was not received by the Abstractor's legal department until this motion was filed in February 2023. Law office failure is a reasonable excuse warranting consideration of their motion on the merits (*Triangle Transp., Inc. v Markel Ins. Co.*, 18 AD3d 229, 229 [1st Dept 2005]; *Sound Shore Med. Ctr. v Lumbermens Mut. Cas. Co.*, 31 AD3d 743, 743 [2d Dept 2006]).

Additionally, the Abstractor demonstrates a meritorious defense requiring dismissal of the Third-Party Complaint. To wit, the claim for indemnification fails because the Abstractor can not be required to indemnify the Seller because there is no privity between the Abstractor and the

Seller. As the Seller acknowledges, the Abstractor was retained to provide services to the Purchaser and to Onyx (NYSCEF Doc. No. 182, ¶ 123; *Sabo v Alan B. Brill, P.C.*, 25 AD3d 194, 194 [1st Dept 2006]). Thus, the cross-motion to dismiss must be granted and the Third-Party Complaint must be dismissed in its entirety.

It is hereby ORDERED that the Seller’s motion to summary judgment is denied; and it is further

ORDERED that the Abstractor’s cross-motion to dismiss is granted.



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5/15/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: