600-602 10th Ave. Realty Corp. v Estate of Nusimow

2023 NY Slip Op 32340(U)

July 12, 2023

Supreme Court, New York County

Docket Number: Index No. 650120/2017

Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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600-602 10TH AVENUE REALTY CORPORATION,

Plaintiff,

- v -

ESTATE OF HY NUSIMOW, LARISSA OKUN NUSIMOW, and AVI NUSIMOW,

Defendants.

INDEX NO. 650120/2017

MOTION DATE _____

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222

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

In motion sequence number 008, plaintiff 600-602 10th Avenue Realty Corporation (ARC) moves for summary judgment, pursuant to CPLR 3212, on its first and second causes of action in the first amended complaint (FAC). (NYSCEF Doc. No. [NYSCEF] 194, FAC.) ARC's first cause of action seeks a declaration against defendants Estate of Hy Nusimow (Estate), Larissa Okun Nusimow (Larissa), and Avi Nusimow (Avi) (collectively, Nusimow Defendants) that the August 18, 1980 shareholder agreement (Agreement) is valid and enforceable. The second cause of action is for breach of the Agreement. In essence, ARC alleges that the Nusimow Defendants have refused to sell the Estate's shares back to ARC in breach of the Agreement's buyout clause and that ARC is entitled to specific performance, i.e., redemption of Hy Nusimow's (Hy) shares at the price specified in the Agreement. The Nusimow Defendants request reverse summary judgment.

Background

The court presumes familiarity with the action. A recitation of the factual background of this action is available in the court's decision and order dated December 20, 2017 which denied ARC's motion for summary judgment. (*See* NYSCEF 53, Decision and Order [mot. seq. no. 002].) Unless otherwise indicated, the court adopts the defined terms as used in its prior summary judgment decision.

ARC's Motion for Summary Judgment

ARC's motion for summary judgment is denied with prejudice. Although the Nusimow Defendants failed to raise this argument, ARC fails to offer any reason why it should be permitted to bring successive summary judgment motions. Generally, successive motions for summary judgment should not be entertained unless there is newly discovered evidence since the prior motion or when there is sufficient cause for making a second motion. (*Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526, 527 [1st Dept 2013].) Sufficient cause has been found to exist where there is new case law since the prior summary judgment decision that could alter the prior decision. (*Varsity Transit, Inc. v Board of Educ. of City of New York*, 300 AD2d 38, 39-40 [1st Dept 2002].) Neither is the case here.

ARC's first summary judgment motion is filed on the docket as motion sequence number 002. (NYSCEF 17, Notice of Motion [mot. seq. no. 002].) In motion sequence number 002, ARC moved for summary judgment on its declaratory judgment and breach of contract causes of action, the first and second causes of action in the FAC, respectively. On December 20, 2017, this court denied, in its entirety, ARC's motion as issues of fact precluded summary judgment. (NYSCEF 53, Decision and Order [mot.

seq. no. 002].) Upon denial of ARC's summary judgment motion, ARC filed a notice of appeal to the Appellate Division, First Department (NYSCEF 57, Notice of Appeal); however, there is no indication that an appeal was actually filed or perfected with the Appellate Division.[1] If there was a properly filed appeal, there is no decision from the First Department that has been submitted on this record or that the court is aware of. Thus, the court's decision on ARC's first summary judgment motion (motion sequence number 002), which denied summary judgment as issues of fact exist, stands. ARC filed a motion to renew its motion for summary judgment (NYSCEF 65, Notice of Motion [mot. seq. no. 004]) but ultimately withdrew that motion. (NYSCEF 82, So-Ordered Stipulation.)

In this second motion for summary judgment, ARC moves on the same causes of action in the same FAC. ARC does not show "new factual assertions and evidence . . . or other sufficient cause shown for . . . making the second motion" (*11 Essex St. Corp. v Tower Ins. Co. of New York*, 81 AD3d 516, 516 [1st Dept 2011] [citations omitted] [affirming denial of second summary judgment motion]), let alone mention the fact that it filed an earlier summary judgment motion in which a decision was rendered by the court six years ago. In fact, ARC's briefs (and the Nusimow Defendants' brief) are completely silent with regard to the fact that this court denied the first motion on the ground that issues of fact exist. ARC's second motion would be denied in any event.

[1] A search through NYSCEF did not yield an index number for the appeal.

No Newly Discovered Evidence Warranting Consideration of Second Summary Judgment Motion

Not only did ARC fail to mention or attempt to demonstrate new factual assertions and evidence to warrant a second summary judgment motion, upon the court's review of ARC's prior affirmation in support of summary judgment (Prior Memo)[2] and the memorandum in support of this motion, ARC's legal theories and relied-upon evidence is substantially the same. In essence, ARC argued in its prior motion that the Nusimow Defendants breached the Agreement's buyout provision by refusing to sell Hy's shares back to ARC upon his death. ARC's main legal theory in its Prior Memo was that the Agreement has never been revoked, disavowed, rescinded, amended, or altered in any way so that the Agreement, and specifically the buyout provision, remained valid and in effect. (NYSCEF 18, Prior Memo ¶ 10.) Additionally, as clarified and corrected by ARC's reply memo,[3] ARC argued that Sol Lieberman's[4] purported Termination Notice in 1984 was invalid as Lieberman would have violated his fiduciary duties to the minority shareholders by doing so. (*See Id.* ¶ 15; NYSCEF 37, ARC's Reply Memo at 4[5].) ARC also argued that the 2008 Settlement Agreement[6] between Hy

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[2] The court notes that, in support of its prior motion, ARC submitted a mere five-page attorney affirmation (NYSCEF 18, aff in support of motion for summary judgment) and not a memorandum.

[3] It appears that the affidavit erroneously references Hy's revocation instead of Lieberman's alleged revocation of the Agreement. It is clarified, or corrected, in ARC's reply memo that the revocation refers to the Lieberman's purported revocation of the Agreement in 1984.

[4] Lieberman, Hy's uncle, was an original majority shareholder in ARC.

[5] Pages refer to NYSCEF generated pagination.

[6] The 2008 Settlement Agreement is in reference to the action before Justice Cahn (ret.) where a settlement between Hy and Pinchevsky was read into the record. (NYSCEF 53, decision and order [mot. seq. no. 002] at 3; NYSCEF 191, tr [Dec. 2, 2008].)

and Ester Pinchevsky[7] did not void or terminate the Agreement and, moreover, insisted that Pinchevsky "adhered" to the Agreement. ARC's new motion bears a striking resemblance to its prior motion: here, it contends that Lieberman's Termination Notice in 1984 did not terminate the Agreement and neither did the Settlement Agreement, and in any event, that there was continued performance of the Agreement following these events. There is no reason why the court should waste its limited resources in reconsidering a repeat motion.

The court notes that the first summary judgment motion was made pre-discovery, yet that does not compel a different result. (*See Hirschfeld ex rel. Cal v Carpinello*, 12 Misc 3d 749, 752 [Sup Ct, Orange County 2006] ["Merely because discovery was incomplete at the time defendants moved for summary judgment twice previously does not entitle them to move after the completion of discovery."].) Furthermore, ARC's new memo appends and relies on the same documents as the Prior Memo. For example, the Prior Memo and the new memo appended and chiefly rely on the Agreement and the transcript in the 2008 Settlement Agreement. Further, evidence that was not available at the time of the first motion does not necessarily constitute new evidence, so as to warrant consideration of the second motion, if either the evidence does not yield anything new or was available at the time of the first motion. (*Brown Harris Stevens Westhampton*, 107 AD3d at 527 [citation omitted].)

Here, the evidence submitted by ARC in this motion, previously not submitted in the prior motion, fails to yield anything new and was available at the time the first motion was made.

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[7] Ester Pinchevsky is Hy's sister and an original shareholder.

The following documents submitted in this motion have been in the possession of Pinchevsky and/or ARC long before the first summary judgment motion: The August 6, 1984 meeting minutes, wherein Lieberman allegedly terminated the Agreement, noted that Pinchevsky, Lieberman, and Hy were present (NYSCEF 184); the complaint from the action in 1984 where Hy and Pinchevsky sued Lieberman for, inter alia, breach of fiduciary duty (1984 Action) (NYSCEF 185); the memorandum of agreement between Hy, Pinchevsky and Liberman following the 1984 Action (NYSCEF 186); Hy and Pinchevsky's 1990 demand letter to Liberman's estate[8] (NYSCEF 187); a copy of Pinchevsky's counterclaims filed in relation to the subsequent litigation as a result of the 1990 demand letter (NYSCEF 188); Hy and Pinchevsky's 1993 settlement with regard to the 1990 demand letter (NYSCEF 189); Hy's complaint against Pinchevsky and ARC (NYSCEF 190); the transcript of an argument in Hy's lawsuit against Pinchevsky and ARC (NYSCEF 191); Pinchevsky's demand to Avi to tender shares to ARC (NYSCEF 192); NYSCEF 194-199 are pleadings, decisions of this court, and decision(s) of the First Department; and NYSCEF 205-207 are the deposition transcripts of Larissa, Avi, and Pinchevsky, respectively, taken during discovery of this action. With the exception of the pleadings, decisions from this court and from the appellate court in this action, and the depositions taken during discovery, all of the evidence appended to the new motion existed at the time of the prior motion. (*Brown Harris Stevens Westhampton LLC*, 107 AD3d at 527.)

[8] Pinchevksy admits in her affidavit that she and Hy sent this demand letter. (NYSCEF 182, Pinchevsky aff ¶ 15.)

"[E]vidence that was not submitted in support of the previous summary judgment must be used to establish facts that were not available at the time it made its initial motion for summary judgment, and which could not have been established through alternative evidentiary means." (*MLCFC 2007-9 ACR Master SPE, LLC v Camp Waubeeka, LLC*, 123 AD3d 1269, 1271 [3d Dept 2014].) The deposition transcripts do not establish facts that were not available at the time of the Prior Memo and could not have been established through alternative means. For example, ARC argues that Avi admitted he knew about Hy and Pinchevsky's 1990 demand letter to compel Liberman to tender his shares under the Agreement, and that Pinchevsky testified during her deposition that her, Hy, and Lieberman entered into a resolution instead of pressing their claims in the 1984 Action (as evidenced by the 1986 memorandum of agreement). The 1986 memorandum of agreement certainly existed at the time of the prior motion, as did the 1990 demand letter. Avi and Pinchevsky's depositions fail to establish facts that were not available at the time of the Prior Memo that could not have been establish through alternative evidentiary means.

No Sufficient Cause Warranting Consideration of Second Summary Judgment Motion

In the new memo, plaintiff argues that continued performance following the Termination Notice suffices to show that the parties intended the Agreement to live on, though as an implied contract under the terms of the terminated contract. ARC cites to a "recent" 2018 Appellate Division, Third Department case for the proposition that continued performance of a terminated contract may demonstrate that the parties to the contract intended to create an implied contract governed by the terms of the expired contract. (*Harris v Reagan*, 161 AD3d 1346, 1384 [3d Dept 2018].) Assuming, without

deciding, that *Harris* supports ARC's position, this continued performance argument could have been raised in the prior motion, and thus, the second motion must be denied because parties must assert "all available grounds when moving for summary judgment." (*Amill v Lawrence Ruben Co., Inc*, 117 AD3d 433, 434 [1st Dept 2014] [internal quotation marks and citation omitted].) *Harris* is not a case of first impression, and in fact, *Harris* cites to at least two cases dealing with whether parties to a terminated or expired contract remain bound to the obligations set forth under the contract where the parties continued to perform after the expiration or termination of the contract. (*See, e.g., Richmor Aviation, Inc. v Sportsflight Air, Inc*., 82 AD3d 1423, 1424 [3d Dept 2011], *citing New York Tel. Co. v Jamestown Tel. Corp*., 282 NY 365 [1940].) Furthermore, *Harris* was decided in 2018, five years ago; even if ARC had stated sufficient cause to bring another summary judgment motion based on *Harris*, there is a good argument that waiting five years to bring the second summary judgment motion effects a waiver.

Thus, in light of the above, ARC's second and unexplained motion for summary judgment is denied with prejudice.

The Nusimow Defendants' Request for Reverse Summary Judgment

The Nusimow Defendants argue that the court should exercise its authority under CPLR 3212(b) to grant summary judgment for defendants. Even though the Nusimow Defendants did not move for summary judgment in the first motion, as detailed above, the court found that issues of fact as to the validity of the Termination Notice precluded the granting of summary judgment in either party's favor in the first summary judgment.

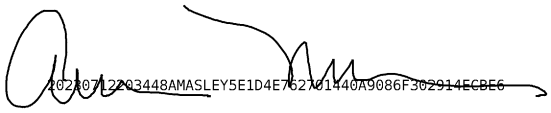
(*See* NYSCEF 53, Decision and Order [mot. seq. no. 002].) Again, there has been no decision reversing this court's decision and order six years ago.

Accordingly, it is

ORDERED that motion sequence number 008 is denied in its entirety with prejudice; and it is further

ORDERED that counsel for plaintiff and counsel for defendants shall serve a copy of this decision and order upon their respective clients within 10 days of the date of this order; and it is further

ORDERED that the parties shall review the court's Part 48 trial procedures and shall appear for a trial scheduling conference on July 20, 2023 at 12 noon.



7/12/2023
DATE

ANDREA MASLEY, 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