

Moller v West 128th St. L.P.

2023 NY Slip Op 32732(U)

August 7, 2023

Supreme Court, New York County

Docket Number: Index No. 655336/2021

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK P. NERVO PART 04

Justice

-----X

ELIZABETH A MOLLER, ROBERT LEMONS

Plaintiff,

- v -

WEST 128TH STREET L.P., N.Y. RESIDENTIAL
PROPERTY WORKS, LLC A/K/A NY RESIDENTIAL
WORKS, INC.,

Defendant.

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INDEX NO. 655336/2021

MOTION DATE 12/02/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

This matter was recently transferred to Part IV. Upon transfer, in accordance with the Part Rules, previously scheduled oral argument was vacated. The Court has received a request to reschedule oral argument on this motion; however, upon review of the papers, argument is unnecessary. This Decision and Order results.

As relevant here, the parties entered into an agreement which provided, inter alia, defendants with limited access to plaintiffs' property to perform construction work. The agreement contemplated initial access for a period of 30 days, with a per diem charge of \$100.00 for every day of access thereafter. It is

undisputed that the work necessitating access was not completed in 30 days, and indeed access has been necessary for a period of years. Plaintiffs seek to enforce the agreement, and for summary judgment on same. Defendants do not dispute that they have had access during this period, but instead seek to be relieved from their contractual obligations, claiming same are unconscionable.

The standard by which this Court evaluates the instant motion is well established. On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer Lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]).

Here, as discussed *supra*, there is no genuine dispute of material fact. Instead, defendants contend that the contract they entered into with plaintiffs is unconscionable and that, in hindsight, completion of the underlying construction work could not reasonably be completed within the initial 30 days contemplated by the agreement. An unconscionable contract is “so grossly

unreasonable as to be unenforceable because of an absence of meaningful choice” with “terms which are unreasonably favorable to the other” (*Emigrant Mtge. Co., Inc. v. Fitzpatrick*, 95 AD3d 1169 [2d Dept 2012]). A contract is substantively unconscionable based upon the content of the agreement, whereas procedural unconscionability is based upon evidence of factors surrounding the agreement’s formation (*id.*; *Matter of Friedman*, 64 AD2d 70 [2d Dept 1978]).

Defendants’ complaints do not rise to level of unconscionability. The contract’s terms do not unreasonably favor plaintiffs; a daily access of fee of \$100.00 is not, on its face, unreasonable. Nor were defendants deprived of meaningful choice when negotiating the contract’s terms. Having chosen not to seek legal representation during the contract formation process, defendants claim to have entered into a bad bargain. However, the Courts have long recognized a party’s freedom to enter into an unfavorable contract. “When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it, because he promised it, and did not shield himself by proper conditions or qualifications (*Cameron-Hawn Realty Co. v. City of Albany*, 207 NY 377 [1913]).


Likewise, to the extent that defendants contend the COVID pandemic and concomitant governmental regulations increased the costs associated with their performance under the parties' agreement, same does not form a basis to be excused from their performance under the doctrine of impossibility (*see e.g. Baker v. Johnson*, 42 NY 126 [1870]; *see generally, Valentino USA Inc. v. 693 Fifth Owner LLC*, 203 AD3d 480 [1st Dept 2022]; *Gap, Inc. v. 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503 [1st Dept 2022]; *Bremen House, Inc. v. LoBosco*, 214 AD3d 557 [1st Dept 2023]).

Accordingly, it is

ORDERED that the motion is granted; and it is further

ORDERED that plaintiff shall submit order and judgment to chambers within 10 days of notice of entry of this order. The failure to timely submit order may constitute waiver of the relief granted herein.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

<u>8/7/2023</u> DATE			 _____ HON. FRANK P. NERVO
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> J.S.C.
	<input type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE