

Ocean Park Apts., Inc. v Maxem Realty LLC

2023 NY Slip Op 33996(U)

November 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 523732/2022

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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OCEAN PARK APARTMENTS, INC. and 430 OCEAN
PARKWAY TOWER LLC,

Plaintiff, Decision and order

- against - Index No. 523732/2022

MAXEM REALTY LLC, ERIC MARKEL, SHEIK SADDICK,
ALMARC REALTY CORP., ANATOLY FINGERMAN, and
GETTRY MARCUS CPA, P.C.,

Defendants, November 9, 2023

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MAXEM REALTY LLC and SHEIK SADDICK,
Counterclaim Plaintiffs,

-against-

TUREK ROTH GROSSMAN LLP, ALLEN M. TUREK,
JEREMY S. ROTH, JASON GROSSMAN, and JOHN DOES
#1 THROUGH #10, the names being fictitious and
unknown additional counterclaim defendants, being
additional persons or entities which received
transfer of the assets of TUREK ROTH GROSSMAN, LLP,
Additional Counterclaim Defendants,

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #4

The plaintiffs and counterclaim defendants Ocean Park
Apartments Inc. and 430 Ocean Parkway Tower LLC move pursuant to
CPLR §3211 seeking to dismiss the counterclaims filed by the
defendants. The defendants oppose the motion. Papers were
submitted by the parties and arguments held. After reviewing all
the arguments this court now makes the following determination.

As recorded in a prior decision and order, on June 23, 2022
the defendants Maxem Realty LLC and Sheik Saddick sold 100% of
the shares of a cooperative as well as the proprietary leases
regarding property located at 420/430 Ocean Avenue in Kings

County to the plaintiffs. The Complaint alleges the defendants failed to furnish various financial documents that were required to close and that the plaintiffs agreed to close simply to secure the agreement. Further, following the closing the plaintiffs again sought "the financial, banking, hazard and liability insurance policies, and the payroll information required to pay employees and otherwise properly manage the Building and the Cooperative's affairs" (see, Complaint, ¶31 [NYSCEF Doc. No. 2]). This request was likewise denied. Moreover, the Complaint alleges the defendants have failed to furnish various bank accounts and have withheld funds that belong to the plaintiffs. This lawsuit was filed and the plaintiffs have asserted various causes of action. The two causes of action which remain applicable are breach of contract and a declaratory judgement.

The defendants filed an answer and asserted counterclaims seeking a declaratory judgement they are not required to furnish the assets sought by the plaintiffs, unjust enrichment, reformation, breach of contract, legal malpractice and fraud. The plaintiffs have now moved seeking to dismiss those counterclaims and the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as

true, whether the party can succeed upon any reasonable view of those facts (Dauids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the counterclaims are deemed true and all reasonable inferences may be drawn in favor of the defendants (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

It is well settled that where a counterclaim is the mirror image of allegations contained in the complaint then the counterclaim serves no purpose and may properly be dismissed. (National Academy of Television Arts and Sciences, Inc., v. Multimedia System Design, Inc., 551 F.Supp3d 408 [S.D.N.Y. 2021]). Indeed, the defendants argue that the "declaratory judgment Counterclaim mirrors Plaintiffs' tenth cause of action in their complaint, which also seeks a declaratory judgment about the transaction's structure" (see, Memorandum in Opposition, page 5 [NYSCEF Doc. No. 80]). Thus, the allegations are adequately represented by the plaintiff's request seeking a declaratory judgement. The counterclaim does not serve any purpose and is consequently dismissed.

The second counterclaim asserts the defendants were not required to satisfy a mortgage on the property and indeed the existence of the mortgage did not violate the Purchase and Sale Agreement. This counterclaim seeks the return of \$2,783,341.49 that was utilized to pay the balance of that mortgage. The

counterclaim insists that "as a 'stock sale' the liability for the Signature Loan remained with the Cooperative and was not the responsibility of Counterclaim Plaintiffs" (see, Answer, ¶266 [NYSCEF Doc. No. 53]). First, the defendants do not concede a stock sale occurred. On the contrary, they consistently argued an asset sale took place. Thus, the assertion they should be entitled to a return of the mortgage satisfaction based upon questions of fact as to the precise nature of the sale is really not a basis upon which to assert counterclaims. In any event, the relevant provisions of the Purchase and Sale Agreement are necessary.

Section 4.1 of the Purchase and Sale Agreement states that "all liens against the Seller encumbering the Shares...shall be satisfied or discharged by Seller on or prior to the Closing Date" (see, Purchase and Sale Agreement, ¶4.1 [NYSCEF Doc. No. 10]).

Section 4.5 of the Purchase and Sale Agreement repeats that "all liens against the Seller encumbering the Shares shall be satisfied or discharged by Seller on or prior to the Closing Date" (id). Further, Paragraph 4.5 states, as relevant herein, that all voluntary liens would be satisfied prior to closing. The Agreement defines voluntary Liens as "liens and other encumbrances which Seller has knowingly and intentionally placed on the Shares or Apartments, or with respect to which Seller has

taken an affirmative action that directly results in the placement of same against the Shares or Apartments, including, without limitation, any and all (i) mechanics' liens relating to work performed or alleged to be performed by or on behalf of Seller at the Apartments; and (ii) mortgages recorded for money borrowed by Seller and/or the Corporation" (id).

That clause clearly required the defendants to remove all liens and encumbrances including any mortgages on the property. The defendants argue that the only voluntary liens that required satisfaction prior to closing were liens upon the shares or the apartments but not the premises. The defendants buttress this argument by noting that Paragraph 24.11 states that "at the written request of Purchaser, Seller shall request, and shall use reasonable efforts (but not litigation) to cause the existing mortgage encumbering the premises to be assigned to Purchaser's mortgage lender at Closing, at Purchaser's sole cost and expense and at no cost or expense to Seller" (id). Thus, the defendants argue, it is unmistakable the reference to "liens" in Paragraph 4.5 could not possibly include the mortgage to the premises since Paragraph 24.11 expressly contemplates that mortgage and clearly indicates such mortgage was not intended to be satisfied prior to closing.

First, the plain language of the Agreement demonstrates that voluntary liens includes the mortgage on the property. The

"mortgage" language of that paragraph could not possibly refer to shares or apartments which generally do not maintain mortgages and certainly there were no mortgages on the shares or apartments in this case. Further, Paragraph 24.11 only supports the fact the mortgage was on the property and not the shares or the apartments. However, Paragraph 24.11 does not imply that Paragraph 4.5 did not include any mortgages on the property that required satisfaction. Rather, Paragraph 24.11 is a common provision utilized to avoid any mortgage recording taxes (see, Cutrone v. Mortgage Electronic Systems Inc., 2015 WL 13931932 [E.D.N.Y. 2015]). Thus, there really is no reasonable reading of Paragraph 4.5 which supports the notion the mortgage to the property did not require satisfaction. Indeed, the defendants executed a settlement statement which delineates closing adjustments and includes a mortgage payoff of precisely \$2,783,340.49 that was "paid by Seller" (see, Settlement Statement [NYSCEF Doc. No. 69]). The defendants insist that they "did not agree in the PSAs to satisfy the Mortgage" (see, Memorandum in Opposition, page 12 [NYSCEF Doc. No. 80]). However, not only does the agreement clearly require such satisfaction the defendants in fact did so and actually satisfied the mortgage. The defendants contradictory arguments are borne of the court's decision that there are questions of fact whether the sale was an asset sale or a stock sale. Further discovery is

essential before a determination about the true nature of the sale can be made. Thus, notwithstanding whether there are questions as to the nature of the sale, there are no questions of fact the defendants knowingly satisfied the mortgage in question. Consequently, the motion seeking to dismiss the unjust enrichment counterclaim and the reformation counterclaim is granted.

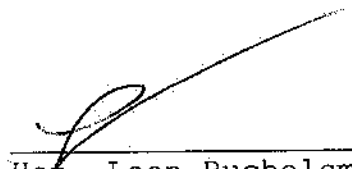
Next, the plaintiff has moved seeking to dismiss the counterclaim seeking a breach of contract due to the plaintiff's failure to remit all rents owed pursuant to Paragraphs 10.4 and 10.5 of the Purchase and Sale Agreement. Paragraph 10.4 states that if any rents are past due by the closing date then the seller is entitled to those rents and the purchaser merely holds those rents in trust for the seller. Paragraph 10.5 states the purchaser must use reasonable efforts to collect any past rents that are due and may not release or waive any of those rents that are past due. The counterclaim does not assert with any certainty that "any past due arrears are owing by a tenant on the Closing Date" (see, Purchase and Sale Agreement, ¶10.4 [NYSCEF Doc. No. 10]). Rather, Paragraph 281 of the Answer asserts that "upon information and belief, 430 Ocean and/or the Cooperative have collected delinquent rents from tenants at the Apartments which rightfully belong to Counterclaim Plaintiffs" (*id.*, [NYSCEF Doc. No. 53]). As noted, the defendants are only entitled to rents that were due and owing at the closing date. The reference

in Paragraph 10.4 concerning the order in which such payments are collected on behalf of the seller does not alter the scope of the rent to which the seller is entitled. In this regard, the breach of contract counterclaim alleges valid claims for any rental arrears. Discovery will further narrow the reach of these claims. However, at this juncture the claim is proper. Therefore, the motion seeking to dismiss the breach of contract counterclaim is denied.

So ordered.

ENTER:

DATED: November 9, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC