

Ivy Hall Dev., LLC v 3059 Astoria Realty Corp.
2023 NY Slip Op 35165(U)
February 21, 2023
Supreme Court, Queens County
Docket Number: Index No. 703149/19
Judge: Leonard Livote
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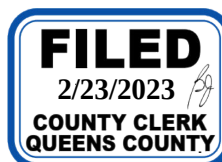
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE IA Part 33
JusticeX
IVY HALL DEVELOPMENT, LL
And DOMINIC MAHER,

Plaintiffs

- Against -

3059 ASTORIA REALTY CORP. and
GARY LEONARDODefendant.
XIndex Number 703149/19Motion Date 8/9/22Motion Seq. No. 2

The following numbered papers read on the motion by defendants 3059 Astoria Realty, Corp., and Gary Leonardo's (collectively referred to as defendants), for an order pursuant to CPLR § 1003, dismissing plaintiff Dominic Maher (Maher) and defendant Gary Leonardo (Leonardo), as parties to this action, pursuant to CPLR § 3212, granting defendants summary judgment and dismissing plaintiffs Ivy Hall Development, LLC's, and Maher's (collectively referred to as plaintiffs) complaint in its entirety, pursuant to CPLR § 3212, granting defendants summary judgment on the first counterclaim and directing that the down payment of \$100,000.00, be released to defendants, and awarding defendants costs and disbursements related to this motion.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	EF 69-84
Answering Affidavits - Exhibits.....	EF 87-89
Reply Affirmation.....	EF 91-92

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action for breach of contract. Maher was a property developer who was the managing member of the alleged purchaser of the real property at issue, Ivy Hall Development, LLC (Ivy Hall). Leonardo was the sole shareholder of 3059 Astoria Realty Corp. (3059 Astoria), the alleged seller of the real property. Plaintiffs have alleged that on or about September 13, 2018, defendants entered into an agreement to sell certain real

property located at 30-59 38 Street, in the County of Queens, to plaintiffs for the agreed-upon purchase price of \$1,825,000.00. Plaintiffs allegedly paid to defendants a down payment of \$100,000.00. Plaintiffs have further alleged that defendants breached the contract by, among other things, filing plans that reduced the value of the subject real property. Plaintiffs subsequently commenced the instant action.

In an order dated September 27, 2019, the court vacated the Notice of Pendency and dismissed plaintiffs' causes of action for fraud and reformation of contract. In their answer, defendants asserted various affirmative defenses and alleged counterclaims for: 1) breach of contract, and 2) declaratory judgment.

Defendants have now moved for an order pursuant to CPLR § 1003, dismissing Maher and Leonardo, as parties to the action. In support of this branch of their motion, defendants have argued that Maher and Leonardo are, individually, not parties to the contract at issue and that neither Maher, nor Leonardo, have acted outside of the corporate forms regarding the contract, or disregarded their corporate forms, such that it would permit the imposition of individual liability under the circumstances.

CPLR § 1003, entitled "Nonjoinder and misjoinder of parties," provides that

"Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section. Misjoinder of parties is not a ground for dismissal of an action. Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it. Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may order any claim against a party severed and proceeded with separately."

The record contains Maher's and Leonard's deposition testimony, in which Maher and Leonardo have both stated that they were not individual parties to the contract. Inasmuch as no allegations have been made that either Maher or Leonardo have acted outside of the corporate forms regarding the contract (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 126 [2d Dept 2009], *affd*, 16 NY3d 775 [2011]), and plaintiffs have not opposed this branch of defendants' motion, defendants are entitled to have both Maher and Leonardo dismissed as named parties to the action.

Next, defendants have moved pursuant to CPLR § 3212, for summary judgment dismissing plaintiffs' complaint in its entirety. In support of this branch of their motion, defendants have argued that 3059 Astoria did not breach the contract of sale, and that the terms of the contract are unambiguous and should be enforced according to their plain meaning.

In order “[t]o grant summary judgment, it must clearly appear that no material and triable issue of fact is presented” (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019], quoting *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). “Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On summary judgment, “facts must be viewed in the light most favorable to the non-moving party” (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25 [internal quotes omitted]), and “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*id.*, at 25-26, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

“It is well settled that a contract is to be construed in accordance with the parties’ intent, which is generally discerned from the four corners of the document itself” (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]; see *Riesenburg Properties, LLLP v Pi Assoc., LLC*, 192 AD3d 835 [2d Dept 2021]). A “written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; see *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 493 [2015]; *Friedman v Goldstein*, 189 AD3d 1183, 1187 [2d Dept 2020]; *Dysal, Inc. v Hub Props. Trust*, 92 AD3d 826, 827 [2d Dept 2012]).

“Whether an agreement is ambiguous is a question of law for the courts ... Ambiguity is determined by looking within the four corners of the document, not to outside sources” (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009], quoting *Kass v Kass*, 91 NY2d 554, 566 [1998]; see *Gristede’s Operating Corp. v Scarsdale Shopping Ctr. Assoc., LLC*, 176 AD3d 1185, 1188 [2d Dept 2019]). “The test for determining whether contract language is ambiguous is ‘whether the agreement on its face is reasonably susceptible of more than one interpretation’” (*McCabe v Witteveen*, 34 AD3d 652, 654 [2d Dept 2006], quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). “Where a contract is ambiguous, extrinsic evidence may be considered to determine the parties’ intent” (*Yarom v Poliform S.P.A.*, 153 AD3d 760, 761 [2d Dept 2017], quoting *Fattorusso v. RJR Mech., Inc.*, 131 AD3d 1098 [2d Dept 2015]; see *Vil. of Spring Val. v Post Off. Sq., LLC*, 211 AD3d 885, 888 [2d Dept 2022]; *Goodale v Cent. Suffolk Hosp.*, 210 AD3d 956, 957 [2d Dept 2022]).

Along with the evidence set forth above, the record in this matter contains, among other things, copies of the pleadings, Maher's affidavit, and a copy of the contract of sale executed by the parties, dated September 13, 2018. As is relevant on the instant motion, the contract of sale between 3059 Astoria, as the seller, and Ivy Hall, as the purchaser, for real property known as 30-59 38 Street (Block: 660, Lot: 19), with a purchase price of \$1,825,000.00, provided, among other things, the following:

At section 4.15, that the "Premises is sold in 'As is' condition." It further provided, at section 7, of which large portions have been "intentionally omitted," that "Purchaser is fully aware of the present state of the building and that it is a work in progress and accepts same in as is condition." In schedule B of the agreement, entitled "Permitted Exceptions," at paragraph 10, the agreement states that "This property is being sold as a work in progress and seller shall transfer all permits, applications, and supporting data on the premises at the time of closing."

In the rider, at paragraph 10, the agreement states that "Purchaser shall accept the premises in AS IS condition. The existence of open permits or violations shall not be an impediment to closing. No Certificate of Occupancy exists for this premises." Also in the rider, at paragraph 24, the agreement states that "Purchaser accepts the Premises in AS IS condition with full knowledge of open permits/violations." At paragraph 36 of the rider, the agreements states that "Seller shall be responsible for any violations at the premises until closing."

Based upon a careful review of the terms of the contract of sale dated September 13, 2018, the court has determined that the language, terms, and provisions set forth in the agreement were, at best, ambiguous. An ambiguity in the contract exists, at the very least, as to what the agreement between the parties was regarding the condition of the real property. Additionally, given the allegations of a breach of contract in this matter, and the contract's failure to define the terms "work in progress" and "as is" contained therein, in particular, when section seven intentionally omitted certain language in lieu of utilizing the specific terms "work in progress" and "as is," when this language is read together, the contract is ambiguous as to what the responsibilities and obligations of the parties were.

As a consequence of the ambiguities, the court has thoroughly reviewed Maher's affidavit, Maher's deposition testimony, and Leonardo's conflicting deposition testimony (*see generally Yarom v Poliform S.P.A.*, 153 AD3d at 761). Based upon the conflicts in the evidence, the court has determined that material issues of fact exist as to the parties' intent. Genuine issues of material fact exist as to what the parties' understanding was regarding the condition of the real property, what the parties' understanding was regarding their respective responsibilities and obligations under the contract of sale, as well as what the meaning of the terms "work in progress" and "as is" were in relation to the condition of the real property, as they have been set forth in the contract of sale. Therefore, defendants have failed to meet their prima facie burden of demonstrating the absence of any material

issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324), and are not entitled to the relief sought on this branch of their motion.

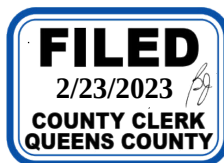
Lastly, defendants have moved for summary judgment on the first counterclaim for breach of contract, for an order directing that the down payment of \$100,000.00, be released to defendants, and for an award of costs and disbursements related to this motion. However, given the court's above determinations and the genuine issues of material fact that remain in this matter (*see id.*), defendants are not entitled to the relief sought on this branch of their motion.

The parties' remaining contentions have been considered and found to be unavailing.

Accordingly, the motion is granted only to the limited extent, as discussed above, that Plaintiff Maher and Defendant Leonardo are dismissed as parties to the action, and the motion is denied in all other respects.

The foregoing constitutes the Decision and Order of the court.

Dated: February 21, 2023



J.S.C.

A handwritten signature in black ink, consisting of a stylized "J" and "S" followed by a vertical line.