

St. Stephen Community A.M.E. Church v 2131 8th Ave. LLC

2012 NY Slip Op 31124(U)

April 19, 2012

Supreme Court, New York County

Docket Number: 650558/11

Judge: Joan A. Madden

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

PRESENT: Madden
Justice

PART 11

St. Stephen Community

INDEX NO. 650558/11

MOTION DATE 11/17/11

MOTION SEQ. NO. 83

MOTION CAL. NO. _____

- v -

2131 8th Ave. LLC

The following papers, numbered 1 to _____ were read on this motion to/for Turnover Discovery

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

APR 26 2012

Dated: April 19, 2010

[Signature]
NEW YORK COUNTY CLERK'S OFFICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

-----X
ST. STEPHEN COMMUNITY A.M.E. CHURCH,

Plaintiff,

Index No. 650558/11

-against-

FILED

2131 8th AVENUE LLC and
JOY CONSTRUCTION, INC.,

APR 26 2012

Defendants.

-----X
Joan A. Madden, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves, by order to show cause, for an order (1) directing defendants' law firm to turn over to plaintiff \$1.3 million that it is holding in escrow or, in the alternative, voiding the parties' contract of sale for the property known as 2131-2141 Fredrick Douglass Boulevard, New York, NY (hereinafter "the Property"), (2) voiding the contract of sale based on defendants' alleged fraud and breach of fiduciary duty or, in the alternative, directing defendants to pay over to plaintiffs the \$1,275 million that defendant 2138 8th Avenue Associates ("2131 Associates") paid to defendant Joy Construction, Inc. ("Joy"), and (3) ordering the defendants to comply with the court's previous order directing defendants to file with plaintiff and this Court a complete accounting of all monies received and paid out from the sale of all condominium units. Defendants oppose the motion.

Background

Plaintiff is a not-for-profit religious corporation formed

pursuant to the laws of the State of New York. Defendants are New York corporations.

By Site Development Agreement dated April 26, 2005 ("the Contract"), plaintiff, as seller, and 2131 Associates, as buyer, agreed to purchase the Property for \$6 million.¹ Under the Contract, 2131 Associates agreed to develop a mixed use condominium project at the Property, including a church unit and a retail unit, and thereafter to convey such units to plaintiff. Joy was hired by 2131 Associates to perform the construction called for under the Contract.

2131 Associates built the condominium building which includes 73 residential units, retail units and the church unit. The church unit and retail units comprise the street level of the building with the residential units above.

The Contract did not provide for full payment of the \$6 million on closing but, rather, established that the cash portion of the purchase price would be paid in installments at various points. Section 4.9 of the Contract provides that:

A final payment of \$1,300,000 will be made to [Plaintiff] immediately following full satisfaction of the construction loan in the following manner; 90% gross proceeds from the sale of the residential units shall go to [Plaintiff] until [Plaintiff] receives the balance of consideration 1,300,000.

¹Although neither party submits a copy of the Contract, there are no material disputes concerning its terms which would preclude the court's consideration of this motion.

The parties entered into three amendments of the Contract. At issue here is the third amendment dated December 24, 2008, a copy of which is submitted by plaintiff. Under paragraph 8 of the third amendment, the parties agreed that \$1.275 million of the purchase price would not be paid directly to plaintiff but would be used by defendants for construction of the Church and related Church components. The work contemplated to be performed with these funds was set forth in Exhibit A of the amendment. Paragraph 8 further provides that "all payments from the [\$1.275 million] shall be subject to [plaintiff's] prior written approval, which approval shall not be unreasonably withheld or delayed."

Paragraph 9 of the third amendment provides that "[2131 Associates] is not responsible for construction of the Church component or the Retail Component, except as expressly set forth on Exhibit A.... [Plaintiff] shall perform all other work necessary or desirable to the Church Component and the Retail Component, including, without limitation, the interior work, interior electrical wiring, fixtures, kitchen appliances, ...ceiling tiles , furniture sheetrock, partitions....

Under paragraph 10 of the third amendment, 2131 Associates agreed to spend up to \$1,975,000 to complete the construction of the interior component of the Church, upon submission of the proper requisites from plaintiff's contractors. According to the

affidavit of the President of the managing member of 2131 Associates, as of June 2011, 2131 Associates had paid more than \$1.8 million to plaintiff's contractors in accordance with paragraph 10.

On March 3, 2011, plaintiff commenced this action. The first cause of action, for breach of contract, seeks \$1.3 million due under the Contract upon satisfaction of the construction loan. The second cause of action alleges that defendants breached their fiduciary duty by failing to pay the construction loan and using the money obtained from the sale of the condominiums to pay off other obligations and expenses. The third cause of action alleges that defendants diverted moneys intended to be used to pay off the construction loan to pay off other loans and thus breached the Contract. The fourth cause of action alleges that defendants breached the Contract by performing the work and construction on the church component in a negligent manner and not in compliance with construction standards.

Defendants answered the complaint and asserted counterclaims for breach of contract in connection with plaintiff's breach of its obligations to install a ceiling and soundproofing in the church unit, to construct walls in the church unit in accordance with the plans and report prepared ^{by} plaintiff's acoustical expert, and to take title to the church unit.

Plaintiff subsequently moved, by order to show cause, for certain injunctive relief. That motion was resolved pursuant to a so-ordered stipulation dated June 9, 2011, in which it was agreed that defendants would transfer the disputed \$1.3 million to its counsel to be held in escrow until an agreement between the parties or further order of the court.²

The Instant Motion

On October 6, 2011, the court signed the instant order to show cause in which plaintiff seeks various relief, including requiring counsel for defendants to turn over the \$1.3 million held in counsel's escrow account and voiding the third amendment or requiring defendants to turn over the \$1.275 million that plaintiff alleges was paid to Joy, without its consent instead of being used to construct the church as agreed to by the parties.

Defendants oppose the motion and submit the affidavit of Phillip Morrow, the President of its managing member. Mr. Morrow asserts that under ¶4.9 of the Contract, once the contract loans have been satisfied, plaintiff does not automatically get its \$1.3 million payment but, rather, plaintiff is entitled to "90% of the gross proceeds from the sale of the units" thereafter until the balance of \$1.3 million is paid. Notably, however, Mr. Morrow does not deny that 90% of the gross proceeds from the sale

²It was also agreed that defendants would transfer \$192,122, to counsel for plaintiff to be used in the on-going construction of the church.

of the units would satisfy the \$1.3 million balance.

Mr. Morrow also asserts that \$1.3 million should be offset by damages incurred by 2131 Associates as alleged in its counterclaims including more than \$500,000 in construction costs incurred as a consequence of correcting or performing work that plaintiff agreed to perform under paragraph 9 of the third amendment, and expenses paid by 2131 Associates as a result of plaintiff's refusal to take title to the church in violation of the Contract.

As for plaintiff's assertion that \$1.275 million was wrongfully paid to Joy, Morrow points out that this assertion is unsupported by any evidence and is based solely on statements made "upon information and belief" in the affirmation of plaintiff's counsel. In addition, Mr. Morrow states that "[n]ot a single dollar was paid to Joy or any other party that was not appropriate and, where required, with plaintiff's knowledge and consent (Morrow Aff. ¶ 20). Furthermore, Morrow states that plaintiff's allegations that defendants have not performed any work at the church since last spring is "misleading" as they have "no further work to do until plaintiff completes the work it is required to do" (Id., ¶ 22).

In reply, plaintiff submits the affidavit of Reverend C. Carlton Woodward, who is a pastor for plaintiff. Reverend Woodward states that an affidavit was not submitted in support of

the motion as the status of the pay-off of the construction loan and the amount received for the sale of the condominium units is solely within the knowledge of 2131 Associates, and that defendants have refused to turn over such information despite a service of a demand to produce and a court order directing them to do so. He also points out that defendants did not produce the information in opposition to the motion. As for the assertion by defendants regarding damages incurred by 2131 Associates as a result of plaintiff's purported delay in performing certain construction work, Rev. Woodward states that "the majority if not all delays were caused by defendants who made sure all of their construction projects were done ahead of the construction work that was to be done for the Church" (Woodward Aff., ¶ 17).

With respect to the \$1.275 million, Rev. Woodward notes that Mr. Morrow does not state that defendants obtained the required approval of plaintiff for the release of such funds, which belong to plaintiff as they were part of the \$6 million purchase price.

While this motion was pending, the parties entered into a so-ordered stipulation dated February 2, 2012, to resolve certain aspects of the motion. Specifically, it was agreed, *inter alia*, that defendant's attorney would wire from his escrow account to that of plaintiff's attorney \$850,000 of the \$1.3 million balance, with \$425,000 to be wired on or before February 6, 2012, and another \$425,000 to be wired upon the plaintiff taking title

to the church unit.³

Upon plaintiff taking title to the church, plaintiff agreed to be responsible for utilities, taxes and carrying charges; however, defendants agreed to be responsible for these expenses until the plaintiff took title to the church unit, with all rights reserved.⁴ Defendants also agreed to supply plaintiff with the information requested in plaintiff's demand to produce dated October 22, 2011, as well as all documentation requested in paragraph 4 of plaintiff's notice to produce that substantiated defendant's damages.

In light of the above stipulation, the remaining issues on this motion are whether plaintiff is entitled, as a matter of law, to the \$450,000 remaining to be paid on the \$1.3 million balance, and whether 2131 Associates is obligated to pay to plaintiffs the \$1.275 million that it alleges 2131 Associates paid to Joy.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material

³Plaintiff agreed to take title to the church unit upon the completion by both plaintiff and defendants of the church stage and sound proofing, which was to occur by March 15, 2012.

⁴Plaintiff also agreed to take title to the commercial unit when it was in "vanilla box condition" i.e. with a cement floors, plain ready-to-paint walls and working lights, and at that time, to be responsible for all insurance, utilities and carrying charges for the unit.

issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

As for the \$450,000 remaining to be paid on plaintiff's first cause of action for breach of contract based on defendants' failure to pay the \$1.3 balance on the Contract, the court finds that plaintiff is entitled to such amount as a matter of law. The relevant provision states that plaintiff shall be paid the \$1.3 million "immediately following full satisfaction of the construction loan in the following manner; 90% gross proceeds from the sale of the residential units shall go to [Plaintiff] until [Plaintiff] receives the balance of consideration 1,300,000."

Plaintiff has met its prima facie burden by demonstrating that sold the Property to 2131 Associates and has not been paid under the Contract, and defendants have failed to controvert this showing with any evidence that the construction loan has not been paid or that it has received a least \$1.3 million from 90% of the gross proceeds of the sale of the condominium units.

Next, contrary to defendants' position, issues of fact related to the counterclaims do not preclude a grant of summary

judgment of plaintiff's first cause of action. In general, unless a counterclaim is "inextricable interwoven" with the plaintiff's claims, the existence of a counterclaim does prevent a grant of summary judgment in plaintiff's favor. See Jovee Contracting Corp. v. AIA Environmental Corp., 283 AD2d 398 (2d Dept 2001). Here, although the counterclaims arise out of the same contract as plaintiff's claim, 2131 Associates' obligation to pay \$1.3 million to plaintiff under the Contract is not conditioned on plaintiff's performance of the contractual obligations that provide the basis for the counterclaims.

Thus, as the issues related to the counterclaims do not impact on plaintiff's entitlement to be paid the \$1.3 million due and owing under the Contract, summary judgment is warranted in plaintiff's favor. See e.g., Boro Lumber Co., Inc. v. S&S Corrugated Paper Machinery Co., Inc., 85 AD2d 675, 676 (2d Dept 1981) (trial court should have granted summary judgment on plaintiff's claim against defendant to recover agreed price for building materials delivered to defendant and for which plaintiff was never paid where issues involved in defendant's counterclaims for allegedly undelivered building materials were "dissimilar and separable" from plaintiff's claim); Sunbeam Corporation v. Morris Distributing Co., Inc., 55 AD2d 722 (3d Dept 1976), appeal denied, 41 NY2d 802 (1977) (while counterclaims interposed by defendants were not "totally unrelated" to plaintiff's claim for

goods sold and delivered, summary judgment on plaintiff's claim was nonetheless warranted as the counterclaims were "plainly distinct and separate from [plaintiff's claim]").

Accordingly, plaintiff is entitled to summary judgment in the amount of \$450,000 on its first cause action for breach of contract, plus interest from a date to be determined following discovery.

In contrast, summary judgment is not appropriately granted with respect to plaintiff's request for relief based on defendants' alleged misuse of \$1.275 million portion of the purchase price which, under the third amendment, was to be used by 2131 Associates, upon obtaining plaintiff's written consent, for costs of constructing the Church and related components. While plaintiff asserts that \$1.275 million was used by 2131 Associates to pay Joy and that this payment was made without obtaining plaintiff's consent, it provides no evidence to support this assertion. Moreover, in opposition to the motion, defendants submit an affidavit from the President of 2131 Associate's managing member who denies that the money was paid to Joy or that the \$1.275 million was used without obtaining plaintiff's prior written consent.

Next, although defendants have failed to produce the discovery sought by plaintiff regarding the use of the \$1.275 million, defendants have agreed to produce such discovery in the

stipulation dated February 2, 2012. Finally, the denial of the plaintiff's motion with respect to the defendants' alleged failure to use the \$1.275 million in accordance with third amendment is without prejudice to renewal upon completion of discovery.⁵

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion is granted to the extent of granting summary judgment on its first cause of action for breach of contract is granted, and counsel for defendants is directed to pay from its escrow account to counsel for plaintiff the remaining \$450,000 in such account, with the amount of interest due and owing to be determined upon completion of discovery; and it is further


ORDERED that plaintiff's motion is denied insofar as it seeks relief in connection with defendants' alleged failure to use the \$1.275 million of the purchase price in accordance with the third amendment, and this denial is without prejudice to plaintiff renewing its request for such relief upon completion of discovery; and it is further

⁵Notably, the complaint does not include a claim based on 2131 Associates' alleged failure to comply with the paragraph in the third amendment regarding 2131 Associate's use of the \$1.275 million, and plaintiff presumably would be required to seek leave to amend the complaint to include such a claim before renewing its motion for summary judgment.

ORDERED that the status conference to be held on April 10, 2012 in Part 11, room 351, 60 Centre Street, New York, NY is hereby adjourned to April 27, 2012 at 11:30 am.

A copy of this order is being mailed by my chambers to counsel for the parties.

Dated: April 19, 2012


J.S.C. **FILED**
APR 26 2012
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COUNTY CLERK'S OFFICE