

Akeroyd v Soho 311 Dev., Inc.

2012 NY Slip Op 31974(U)

July 25, 2012

Supreme Court, New York County

Docket Number: 103925/10

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Jeffrey K. Oing
JEFFREY K. OING Justice
J.S.C.

PART 48

Index Number : 103925/2010
AKERROYD, SHANE
vs.
SOHO 311 DEVELOPMENT
SEQUENCE NUMBER : 003
COMPEL DISCLOSURE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

~~This motion is decided in accordance with~~
~~This motion is decided in accordance with~~

~~This motion is decided in accordance with the~~ annexed decision and order of the Court."

FILED

JUL 25 2012

NEW YORK
COUNTY CLERK'S OFFICE



JEFFREY K. OING, J.S.C.
J.S.C.

Dated: 7/24/12

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FILED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

JUL 25 2012

SHANE AKEROYD,

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff,

Index No.: 103925/10
Mtn Seq. No. 003

-against-

SOHO 311 DEVELOPMENT, INC.,

DECISION AND ORDER,

Defendant.

-----x
JEFFREY K. OING, J.:

Background

On or about July 11, 2007, plaintiff, Shane Akeroyd, executed a purchase option agreement and rider with defendant, Soho 311 Development, Inc. ("defendant seller"), to purchase condominium unit 5E at the Soho Mews Condominium (the "condominium"), located at 311 West Broadway in Manhattan. Thereafter, on or about April 2, 2008, plaintiff executed a purchase option agreement and a second rider with defendant seller to purchase condominium unit 5J. The second rider supplemented and incorporated both the 5E and 5J agreements (collectively the "contract") and provided for the two units to be combined by defendant seller into a single "custom" unit (the "combined 5E unit") to be sold to plaintiff.

On April 22, 2008, defendant seller issued the sixth amendment to the condominium's offering plan which amended the legal description of the condominium's property to correct what

Index No. 103925/10
Mtn Seq. No. 003

Page 2 of 7

defendant seller claims was a scrivener's error. The sixth amendment removed a 20 by 100 square foot parcel from the original property description. Thereafter, on May 26, 2009, plaintiff executed a third rider to the contract which included additional custom work to be performed on the combined 5E unit.

In connection with the contract, plaintiff deposited a total of \$1,137,250, which is currently being held in escrow. The closing of the combined 5E unit was ultimately set for August 11, 2009. On August 10, 2009, plaintiff demanded a return of his deposit for what he claims was a material change to the contract as a result of the sixth amendment. Defendant seller refused to return the deposit. This action ensued.

Plaintiff asserts two causes of action: (1) rescission based on misrepresentation; and (2) breach of contract. Defendant seller interposed an answer with counterclaims for cancellation of the contract and liquidated damages.

Plaintiff served a demand for the production of documents in which he requested "[a]ny and all documents concerning, evidencing or related to the [s]ixth amendment to the [c]ontract, including but not limited to any drawings, plans, sketches, notes, drafts, and/or correspondence" (Moving Papers, Ex. D, ¶ 4).

Defendant seller responded that plaintiff should serve a subpoena upon Herrick, Feinstein LLP ("Herrick") for production

of documents responsive to plaintiff's demand because Herrick prepared the condominium's offering plan. Plaintiff served a subpoena on Herrick demanding any and all documents concerning the sixth amendment (Moving Papers, Ex. F). In response, Herrick advised plaintiff that it had turned over all responsive documents to defendant seller's attorneys, D'Agostino, Levine, Landesman & Lederman, LLP ("D'Agostino") and that they would be produced after D'Agostino completed a privilege review. D'Agostino, in turn, provided plaintiff with a 9-page privilege log and 188 pages of documents, almost all of which have been completely redacted on the basis of attorney-client privilege and work-product privilege (Moving Papers, Ex. G).

Plaintiff argues that the documents at issue are not privileged because they appear to be e-mail communications between Herrick and defendant seller, presumably about the drafting and filing of the offering plan and the sixth amendment. Thus, under these circumstances, Herrick was acting as a real-estate and business advisor to defendant, and the documents are not protected by attorney-client privilege.

Further, plaintiff argues that none of the withheld documents are protected by work-product privilege or as material prepared in anticipation in litigation. Plaintiff contends that defendant seller retained Herrick for the business purpose of

Index No. 103925/10
Mtn Seq. No. 003

Page 4 of 7

preparing the offering plan and not in connection with litigation.

Plaintiff also argues that even if the documents were privileged any such privilege is waived because defendant seller has asserted claims and defenses that has put the subject matter of the sixth amendment, and the privileged communications concerning the sixth amendment, at issue. Plaintiff claims that defendant seller, by asserting in its counterclaims that plaintiff is in default of the contract, is essentially claiming that defendant seller's removal of a parcel from the legal description of the land was not a material breach of the contract and that plaintiff's revocation was not valid. Plaintiff maintains that in order to determine the validity of defendant seller's counterclaims he must have access to the communications discussing the removal of the land and the need for the sixth amendment.

Finally, plaintiff claims that because there may be information contained in defendant seller's communications with Herrick that is relevant to the issue of whether defendant seller acted in good faith when it decided to remove the parcel of land from the condominium's description these communications may be vital in supporting plaintiff's claims that defendant seller's breach was material.

Index No. 103925/10
Mtn Seq. No. 003

Page 5 of 7

Defendant seller maintains that the communications that were withheld from production are not discoverable because they were not rendered for business advice. Offering plans are presented for filing with, and are approved by, the Office of the Attorney General of the State of New York. As such, the filings are governed by the General Business Law and Article 9-B of the Real Property Law.

In addition, defendant seller points out that by submitting an offering plan and related documents to the Attorney General's Office the sponsor must certify that all statutes and provisions have been duly complied with. The certification is made under penalties of perjury and provides the signatory with warning that violations are subject to civil and criminal penalties of the General Business Law and Penal Law. Thus, Herrick's representation of defendant seller in the preparation and filing of these documents was not business, but legal, in nature because Herrick was to ensure that defendant seller was in compliance with all relevant statutes.

Next, defendant seller argues that it did not waive any privilege, nor did it place the subject matter of its privileged communications with its attorneys at issue when it asserted counterclaims against plaintiff. Contrary to plaintiff's argument, none of defendant seller's counterclaims address or even involve the alleged materiality issues regarding the removal

Index No. 103925/10
Mtn Seq. No. 003

Page 6 of 7

of the parcel from the legal description of the property. Defendant seller's principal counterclaim seeks to hold plaintiff responsible for his failure to appear at the scheduled closing and his failure to cure in a timely fashion his alleged default. Plaintiff raised the issue of materiality when he commenced this action seeking the return of his down payment and to justify his failure to appear at closing.

Discussion

To begin, the record demonstrates that Herrick's role was to provide legal advice and services to defendant seller in the filing of the offering plan with the Attorney General's Office. As such, any communications regarding the filings were indeed made "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (Spectrum Systems Int'l Corp. v Chemical Bank, 78 NY2d 371 [1991], quoting Rossi v Blue Cross and Blue Shield of Greater New York, 73 NY2d 588 [1989]).

In addition, plaintiff's argument that defendant seller waived the privilege by asserting counterclaims is unpersuasive. A review of defendant seller's counterclaims demonstrates that they do not involve the materiality of the removal of the parcel from the legal description of the property. Having said that, in order for the attorney-client privilege to apply to the communications at issue, they must be primarily of a legal, not

Index No. 103925/10
Mtn Seq. No. 003

Page 7 of 7

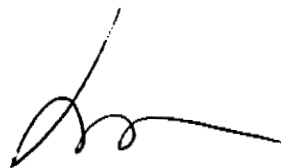
factual, character (Muriel Siebert & Co., Inc. v Intuit Inc., 32 AD3d 284 [1st Dept 2006]).

Here, both parties appear to agree that plaintiff is seeking factual information concerning the removal of the parcel of land from the legal description of the property (Def's Mem of Law, p. 6; Reply Mem of Law, p. 3). As such, this Court will conduct an in camera review of the documents at issue to determine which, if any, are of a factual nature and not protected by the attorney-client or attorney's work product privileges.

Accordingly, defendant seller shall produce to this Court for an in camera review the unredacted copies of the documents produced by Herrick in response to plaintiff's subpoena as well as defendant seller's privilege log. Such production shall be made within thirty (30) days after service of a copy of this order with notice of entry.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/24/12



HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.

FILED

JUL 25 2012

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