

**P.N.S. LLC v 521 Bruckner Blvd. Corp.**

2012 NY Slip Op 33368(U)

July 3, 2012

Supreme Court, Bronx County

Docket Number: 20289/06

Judge: Mark Friedlander

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This opinion is uncorrected and not selected for official publication.

7/6/12

PART 25

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF BRONX:

- Case Disposed
- Settle Order
- Schedule Appearance

P.N.S.,LLC

Index No. 0020289/2006

-against-

Hon. MARK FRIEDLANDER

521 BRUCKNER BLVD CORP

Justice.

The following papers numbered 1 to 9 Read on this motion, SUMMARY JUDGMENT  
 Noticed on September 27 2011 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 12/29/2011

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-2, 3-4,	5-6
Answering Affidavit and Exhibits	7, 8	
Replying Affidavit and Exhibits	9	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

AND CROSS-MOTIONS  
 MOTION IS DECIDED IN ACCORDANCE WITH  
 MEMORANDUM DECISION FILED HEREWITH.

Motion is Respectfully Referred to:

Justice:

Dated:

Dated: 7 / 3 / 12

Hon. MARK FRIEDLANDER, J.S.C.

NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART IA-25

P.N.S. LLC,

Plaintiff,

MEMORANDUM DECISION/ORDER

Index No.: 20289/06

-against-

521 BRUCKNER BLVD. CORP. and  
CARIBBEAN PRODUCE, INC.,

Defendants.

CARIBBEAN PRODUCE, INC.,

Third-Party Plaintiff,

Index No.: 85797/07

-against-

KWAK IMPORT CO., INC., a/k/a and f/k/a  
KWAK TRADING CO., INC.,

Third-Party Defendant,

KWAK IMPORT CO., INC.,

Plaintiff,

Manhattan Civil Court

Index No.: 75079/06

-against-

CARIBBEAN PRODUCE, INC.,

Defendant,

KWAK IMPORT CO., INC.,

Plaintiff,

Index No.: 308937/09

-against-

CARIBBEAN PRODUCE, INC., and PYONG H. YUN,

Defendants,

HON. MARK FRIEDLANDER

Plaintiff, P.N.S. LLC ("PNS"), moves for an order: (1) declaring that PNS has entered

into a valid written contract of sale ("the Contract") with defendant, 521 Bruckner Blvd. Corp. (Bruckner"), for the sale of the real property known as and located at 1360 Lafayette Avenue, Bronx, New York ("the Property"); (2) declaring that the third-party defendant, Kwak Import Co., Inc a/k/a and f/k/a Kwak Trading Co., Inc. ("KIC"), declined to exercise its right of first refusal with respect to the purchase of the Property under its lease with Bruckner, thereby extinguishing the same; (3) declaring that the third-party plaintiff, Caribbean Produce, Inc. ("CPI"), became an assignee of the lease agreement between Bruckner and KIC subject to KIC's waiver of the right of first refusal with respect to the purchase of the Property; (4) granting summary judgment in favor of PNS, pursuant to CPLR§3212, directing defendant Bruckner to specifically perform the Contract according to its terms; and (5) scheduling an inquest to determine the amount of PNS' damages.

Defendant CPI cross-moves for an order: (1) declaring any sale of the Property to plaintiff PNS to be null and void; (2) declaring CPI to be the beneficial owner in fee of the Property; (3) directing Bruckner to proceed with the closing of the sale of the Property to CPI on the same terms and conditions as the April 26, 2006 agreement between Bruckner and PNS; and (4) directing vacatur of any lien or notice of pendency which has been filed with respect to the Property in connection with this litigation.

Third-party defendant (and plaintiff in the second action) KIC cross-moves for an order: (1) granting summary judgment in favor of KIC against third-party plaintiff CPI, dismissing CPI's third-party complaint; (2) dismissing the answer and counterclaims of defendant CPI in the second action and all cross-claims; and (3) entering judgment in favor of KIC and against CPI

and Pyong H. Yun ("Yun") in the sum of \$350,000.00 with interest from April 7, 2006, and in the sum of \$23,139.74 with interest from May 16, 2006; on the grounds that: (a) CPI and YUN have no defense to this action; (b) there are no material issues of fact, since defendants cannot sustain their burden of proof as to their alleged defenses nor refute KIC's proof that these defendants failed to pay the balance due on the April 7, 2006 contract of sale of a business and for merchandise sold and delivered by KIC, to CPI and Yun, on May 16, 2006.

These are three separate actions, begun in two separate courts, and now combined for joint trial. The first action contains a third-party action. The second action was begun in Civil Court to recover payment allegedly due for goods sold and delivered. The third action was begun to recover payment allegedly due for the sale of a business. This Court, in 2007, ordered a joint trial of all these actions. Thereafter, in an order dated June 3, 2011, the Hon. John Barone ordered consolidation of the actions. However, it appears that: (1) Justice Barone was not made aware of this Court's previous order; (2) That, because of the appearance of certain parties in the actions as both plaintiff and defendant, the more appropriate path would be joint trial, and not consolidation; and (3) That the wording of Justice Barone's order reflected the request (for consolidation) by the parties making application at that time, and that the parties' request was not intended to specify "consolidation" in contra-distinction to "joint trial."

Therefore, this Court concludes that the order of Justice Barone was not intended to alter the earlier order of this Court, but was merely re-enforcing the need for joint trial of all the claims herein. It should be noted that, as a result of ruling made herein, the caption reflected at the beginning of this decision, including the designations of the parties, will be subject to change.

The facts are as follows: By a lease agreement (the "Lease"), dated June 25, 1984, Bruckner leased the Property to KIC for a term of June 25, 1984 through February 28, 2010. With respect to a subsequent sale of the Property by Bruckner, the Lease provides KIC with a right of first refusal, as follows:

"48. In the event of a bona fide sale of the premises the landlord shall give tenant 30 days written notice, by Certified Mail, Return Receipt Requested, of the time of the proposed sale and the lessee shall have the option to be exercised in writing in the same manner, of the acceptance within such period, to purchase on the same terms."

In mid-February and/or early March of 2006, Bruckner and PNS came to a verbal agreement pertaining to a sale of the Property. By letter dated March 15, 2006, pursuant to paragraph 48 of the Lease, Bruckner gave written notice to KIC of the proposed sale of the Property. The letter contained a representation that the offer from a third party did not contain a mortgage contingency clause. The letter also contained a request that, if KIC did not intend to exercise its right to purchase, it sign the bottom of the enclosed copy and return it to Bruckner. On or about March 16, 2006, KIC, by its president, Do Sup Kwak, declined to exercise KIC's right of first refusal by executing a written waiver, stating "I DO NOT INTEND TO PURCHASE:" and returned it to Bruckner. On or about March 22, 2006, KIC, without the knowledge of Bruckner, entered into an agreement to assign the Lease to CPI. On or about April 5, 2006, Bruckner gave written consent to the Assignment of Lease, stating:

"Landlord hereby consents to the Assignment and Assumption of Lease acknowledging that Original Lease dated 6/25/84 is in full force and effect and all the rents and additional rents have been paid current."

On or about April 7, 2006, CPI contracted with KIC to purchase all of the assets of KIC, including KIC's 25-year lease of the Property with Bruckner.

On or about April 26, 2006, PNS and Bruckner executed the Contract. A down payment of \$85,000.00 was made by PNS to Bruckner with the balance to be paid by PNS on closing of title.

In late June of 2006, counsel for CPI advised both PNS and Bruckner that CPI never received written notice pertaining to the proposed sale of the Property, and was asserting CPI's entitlement to purchase the Property, as the assignee of KIC, pursuant to paragraph "48" of the Lease, warning that CPI would seek a restraining order to stop any scheduled closing and would sue Bruckner as well as any purchaser of the Property, seeking treble damages. No closing was held, in significant part, as the result of CPI claim to a right of first refusal.

CPI's claim of the right of first refusal pertaining to the sale of the Property is predicated on three grounds. First, CPI asserts that, pursuant to paragraph 48 of the Lease, the right of first refusal did not become operative until a "bona fide sale" of the Property occurred.

This Court finds: that there was a bona fide offer by PNS to purchase the property, which was acceptable to Bruckner; that Bruckner notified KIC of the PNS offer and its terms; and that KIC waived or declined to exercise its right of first refusal. The Court finds that KIC's waiver and declination of KIC's right of first refusal was effective, notwithstanding that a formal contract of sale was not executed prior thereto, as the Contract executed by PNS and Bruckner did not vary the terms and/or conditions of the offer which KIC waived. Any Court decisions requiring a fully executed contract as a pre-condition for the exercise of a right of first refusal

result from specific circumstances not present here. Any right of first refusal that is not completely negated by a fully executed contract would require that such contract contain a clause conditioning its force and effect on the subsequent procuring of a waiver (from the holder of the right of first refusal). There is no indication that the parties to this lease contemplated the necessity of so labyrinthine a process.

Second, CPI asserts it was unaware of KIC's waiver or declination of KIC's right of first refusal to purchase the Property, and CPI further claims that it would not have purchased KIC's assets had it known of KIC's waiver or declination. CPI asserts, in essence, that Bruckner's Consent to the Assignment of Lease from KIC to CPI, which acknowledged "that Original Lease dated 6/25/84 is in full force and effect ..." negated KIC's waiver or declination.

The Court finds that KIC's signing of the waiver or declination of its right of first refusal extinguished any right KIC, or any subsequent assignee of KIC's lease, had or would have had, to purchase the Property on the terms and conditions contained in PNS's offer. The Court finds no factual or legal basis for CPI's contention and does not construe Bruckner's Consent to the Assignment of Lease as a negation of the waiver. The Court does not address at this time any claim for damages, if any, by CPI against Bruckner, based upon Bruckner's Consent to the Assignment of Lease.

Third, CPI asserts that the Contract between PNS and Bruckner contains a contract term that is materially different from the one specified to KIC. More specifically, CPI cites the following language in the Contract:

"7. Due Diligence



- (b) Notwithstanding anything to the contrary contained herein, Seller agrees that Purchaser shall have the right to perform any due diligence Purchaser deems appropriate on the Premises during the period (the "Due Diligence Period") commencing as of the date the fully executed Contract and all addenda is received by the Purchaser's attorney and ending sixty (60) days after such date (the "due Diligence Expiration Dated") which due diligence may include, but shall not be limited to, securing a firm mortgage commitment of up to \$1,400,000.00 for the purchase of the premises ....
- (c) If Purchaser, in its sole discretion, determines that it is not satisfied with the Premises during the Due Diligence Period for any reason, at Purchaser's discretion, Purchaser shall have the right to elect to cancel the Contract ...."

CPI contends that the "Due Diligence" clause is, in effect, a mortgage contingency clause, and, as such, it vitiates KIC's waiver or declination of the right of first refusal, thus permitting CPI, as assignee, to exercise the right of first refusal under paragraph "48" of the Lease. The Court finds, after review of the "Due Diligence" clause of the Contract, that such language cannot be construed as a mortgage contingency clause. PNS' right to cancel is conditioned on a subjective dissatisfaction with the Property, not on an inability to obtain a mortgage commitment.

Based upon the foregoing, the Court finds the following:

- (1) That PNS and Brucker entered into a valid written Contract for the sale and purchase of the Property;
- (2) That KIC executed a valid waiver or declination of its right of first refusal, which extinguished the right of KIC or any assignee thereof, to purchase the Property on the same terms and conditions contained in PNS's offer;
- (3) That CPI's counterclaim against PNS for monetary damages, based upon a claim that PNS induced CPI to purchase KIC's business and assume KIC's lease, is dismissed as there is not a scintilla of evidence submitted that PNS induced CPI or had an agreement with Bruckner

or KIC to do so;

(4) That CPI's affirmative defenses and counterclaims against PNS, based upon a claim of the right of first refusal, are stricken and/or dismissed;

(5) That the branch of PNS's motion for summary judgment seeking specific performance of the Contract is denied. PNS asserts that it "was ready, willing and able to carry out and perform the contract of sale by tendering the balance of the purchase price" However, the motion papers do not indicate that "a time is of the essence date" was ever set. Furthermore, PNS has failed to submit evidence, in admissible form, that it was "ready, willing and able" to perform, which is required in an action for specific performance. *Pesa v. Yoma Development Group, Inc.*, 18 N.Y.3d 527 (2012); *DiBartolo v. Battery Place Assocs*, 84 A.D.3d 474 (1<sup>st</sup> Dept. 2011);

(5) That the written Contract between PNS and Bruckner for the sale and purchase of the property is still valid and PNS and Bruckner are authorized to set a closing date.

For the reasons set forth above, CPI'S cross-motion is denied in its entirety.

KIC's cross-motion for summary judgment against CPI and Yun is granted solely to the extent hereinafter indicated. KIC is entitled to judgment in its favor against CPI and Yun in the sum of \$350,000.00 with interest from April 7, 2006, and against CPI, only, in the sum of \$23,139.74 with interest from May 16, 2006. Neither CPI nor Yun raise any triable issue of fact pertaining to the promissory note given in connection with CPI's purchase of KIC's business and Yun's guaranty, or merchandise sold and delivered by KIC to CPI. However, entry of judgment by KIC against CPI and Yun is stayed pending a resolution of CPI's affirmative defenses against KIC and its claims against KIC in the third-party action. The Agreement of Sale between KIC

and CPI, dated April 7, 2006, contains a representation and warranty by KIC (¶8[g]), which states:

“The Lease is in full force and effect without any default by Seller thereunder. All copies of the Lease provided by Seller to Purchaser are true and complete copies of the original Lease.”

Bruckner's written consent to the Assignment of Lease, *supra*, also contains language that the Lease is in full force and effect. Notwithstanding KIC's assertions that CPI was fully aware that KIC had signed a waiver and declination of KIC's right of first refusal pertaining to the Property, CPI's denial of knowledge of KIC's waiver and declination raised a triable issue of fact regarding CPI's affirmative defenses and claims for monetary damages against Bruckner and KIC.

Accordingly, the caption of this action is hereby amended to delete PNS as a party plaintiff in the first action, substituting CPI as the plaintiff in the first action, CPI's cross-claims against Bruckner are therefore re-cast as a complaint against Bruckner. Because CPI is no longer a defendant in the first action, its claims against KIC are re-designated as direct claims, rather than third-party claims, and the former third-party action becomes a separate, second action, albeit to be tried jointly with the first. In other words, instead of CPI seeking re-imburement from KIC, in the event it loses to PNS in its quest to purchase the Property, it now, having lost the right to purchase the Property by consequence of this Decision, seeks direct damages from KIC as compensation for KIC's alleged fault for such loss. The resulting four separate actions (two brought by CPI, and two brought by KIC) contain considerable overlap, but that will be resolved by the joint trial.

The caption shall now read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

CARIBBEAN PRODUCE, INC.,

Plaintiff,

-against-

Index No.: 20289/06

521 BRUCKNER BLVD. CORP.

Defendant.

CARIBBEAN PRODUCE, INC.,

Plaintiff,

Index No.: 85797/07

-against-

KWAK IMPORT CO., INC., a/k/a and f/k/a  
KWAK TRADING CO., INC.,

Defendant,

KWAK IMPORT CO., INC.,

Plaintiff,

-against-

Manhattan Civil Court  
Index No.: 75079/06

CARIBBEAN PRODUCE, INC.,

Defendant,

KWAK IMPORT CO., INC.,

Plaintiff,

-against-

Index No.: 308937/09

CARIBBEAN PRODUCE, INC., and  
PYONG H. YUN,

Defendants,

The foregoing constitutes the Decision and Order of the Court.

Dated: July 3, 2012

  
\_\_\_\_\_  
MARK FRIEDLANDER, J.S.C.