Mazursky Group, Inc. v 953 Realty Corp.
2017 NY Slip Op 30385(U)
February 27, 2017
Supreme Court, New York County
Docket Number: 654064/2013
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 43
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The Mazursky Group, Inc.,

Plaintiff,

Index Number:

-against-

654064/2013

953 Realty Corp. and
Melvin Stier,

Defendants.
----------X

ROBERT R. REED, J.:

Plaintiff moves, pursuant to CPLR 3212, for summary judgment in the amount of $545,000.00, plus interest.

Underlying Allegations

Plaintiff states that it is a company that provides real estate tax consulting services, including obtaining real estate tax benefits for clients (Mazursky affidavit dated May 16, 2016 [Mazursky May affidavit], ¶¶ 1-2; Mazursky EBT at 19-20). It contends that, early in 2011, it was retained by 953 Realty Corp. (953), pursuant to a written letter agreement dated January 20, 2011 (the Contract) to represent 953 to apply for real estate tax benefits (the Application) under New York City's (the City) Industrial and Commercial Incentive Program (ICIP) with respect to real property (the Property), located at 949-959 Southern Boulevard, Bronx, New York and owned by 953 (Mazursky May affidavit, ¶¶ 5-6; Mazursky EBT at 23-25, 59-60).

Plaintiff states there was discussion between the parties concerning its fee arrangement, that it sought a non-refundable fee of $5,000, with an additional fee of $10,000 if the Application for ICIP benefits was successful, but that 953's president, Melvin Stier (Stier), wanted a contingent fee arrangement (*id.* at 31-33; Mazursky May affidavit, ¶ 10). Plaintiff further states that it prepared the Contract with the contingent fee arrangement (*id.*, ¶ 11; Mazursky EBT at 30, 59-61; Mazursky affidavit dated August 12, 2016, ¶¶ 8, 10-11).

The Contract is a one page letter and it contains the following provision (the Contingency Fee Provision) related to plaintiff's fee: "[o]ur fee for services rendered will be contingent upon on our success and will be based upon 25% of the tax savings stemming from the granting of the ICIP abatement."

Plaintiff asserts that it filed the Application on 953's behalf, that it hired John Galanis (Galanis), of Astro Realty Brokerage LLC, to assist it in the preparation of the Application and that it spent approximately 10 hours on the Application and contact with Stier relating to the Application (Mazursky May affidavit, ¶¶ 12-13; Mazursky EBT at 40-43). It states that, on or about October 31, 2011, the City approved ICIP benefits for a period of 25 years, retroactive to the 1999-2000 tax year and extending until the 2023-2024 tax year, and that the City issued a refund check in the amount of $2,283,469 and granted a credit

to 953 of $144,625 for its January 2012 real estate taxes (Mazursky May affidavit, ¶¶ 14-15; Mazursky EBT at 26-27).

Plaintiff states that Stier was concerned that the City would revoke the ICIP benefits in the future and that, therefore, on March 8, 2012, the parties entered into an indemnification agreement (the Indemnification Agreement) under which, in the event the City withdrew ICIP benefits for the Property, plaintiff would indemnify 953 and would repay the portion of its contingency fee attributable to the revoked benefits (Mazursky May affidavit, ¶¶ 19-20). The Indemnification Agreement contained a provision (the Continuing Obligation Provision) that stated that 953 would "continue to be responsible for paying fees to [plaintiff] on an annual basis throughout the term of receipt of any benefits by [953], pursuant to the terms of the [Contract]" (*id.*, ¶ 22).

Plaintiff states that 953 paid it 25% of the past ICIP benefit it received, $606,873, after execution of the Indemnification Agreement (*id.*, ¶ 23; Mazursky EBT at 63). It further states that, on or about June 8, 2012, it sent an invoice to 953 for the 2012-2013 tax year and on or about June 28 2013, it sent 953 an invoice for 2013-2014 tax year, but that 953 did not pay these bills, that 953 has refused to pay for future tax years, that the value of the ICIP benefits 953 received through the 2023-2024 tax years amounts to $2,180,000 and that, under the

Contingency Fee Provision, it is entitled to 25% of that amount or $545,000.00 (*id.*, ¶¶ 26-31). Plaintiff also states that, on July 10, 2013, 953 sold the Property for $23 million and that it has disbursed the proceeds (*id.*, ¶ 32). On or about November 20, 2013, plaintiff commenced this action against 953 and Stier, asserting claims of breach of contract, unjust enrichment and fraudulent conveyance of the Property.

Defendants contend that Mazursky never offered 953 the option of a fixed fee arrangement for its fee, that Stier didn't realize how much Mazursky could obtain for its contingency fee, that it sold the Property in an arms-length transaction and then rolled over the proceeds of the sale by buying two new properties in Florida (Stier EBT at 7, 18-20, 35, 50; Stier affidavit, ¶¶ 11-12, 15, 26). They do not dispute that Stier signed the Contract and the Indemnification Agreement as 953's president or that the Contingency Fee Provision provides for a 25% fee, conditioned upon a successful result (*id.*, ¶¶ 13, 22-2; Stier EBT at 12, 21-22, 34, 30-31). They assert that, since Mazursky worked only approximately 10 hours on the Application and that Galanis did most of the work, Mazursky's fee is unreasonably large, that if Stier had realized the fee would be that large, he would not have agreed to it and that, consequently, the fee is unconscionable and plaintiff's motion for summary judgment should be denied (Stier affidavit, ¶¶ 16-18, 20, 23; Stier EBT at 10,

20, 47-48). Defendants have not disputed the amount of the ICIP benefits plaintiff obtained by filing the Application or the amount of the contingency fee sought by plaintiff.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Contract Interpretation

Generally, "when parties set down their agreement in a

clear, complete document, their writing should . . . be enforced according to its terms [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records,* 98 NY2d 562, 569 [2002]).

However "[c]ourts 'give particular scrutiny to fee arrangements between attorneys and clients,' placing the burden on attorneys to show the retainer agreement is 'fair, reasonable, and fully known and understood by their clients" (*Matter of Lawrence*, 24 NY3d 320, 336 [2014] [citation omitted]). Moreover "[a] revised fee agreement entered into after the attorney has already begun to provide legal services is reviewed with even heightened scrutiny, because a confidential relationship has been established and the opportunity for exploitation of the client is enhanced" (*id.*).

Unjust Enrichment

"[U]njust enrichment is not a catchall cause of action to be used when others fail [but] [i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]).

"Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled" (*id.; see also Markwica v Davis*, 64 NY2d 38, 41 [1984]). However, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Maor v Blu Sand Intl. Inc.*, 143 AD3d 579, 580 [1st Dept 2016]; *Robinson v Oz Master Fund, Ltd.*, 139 AD3d 639, 639 [1st Dept 2016]).

Debtor and Creditor Law (DCL)

DCL § 273 provides:

> "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

DCL § 273-a provides:

> "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

DCL § 276-a provides for attorneys' fees in an action brought by a creditor where the conveyance is found to be

fraudulent with actual intent.

A party claiming fraudulent conveyance under DCL §§ 273 or 273-a must allege insolvency and lack of fair consideration for the transfer (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]). Whether the conveyance renders a debtor insolvent and whether fair consideration was paid are "generally questions of fact which must be determined under the circumstances of the particular case" (*Joslin v Lopez*, 309 AD2d 837, 838 [2nd Dept 2003]).

Unconscionability

"In general, an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . [and] [s]uch contracts are usually voidable" (*King v Fox*, 7 NY3d 181, 191 [2006]). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]; *Simar Holding Corp. v GSC*, 87 AD3d 688, 690 [2d Dept 2011]). "Courts 'give particular scrutiny to fee arrangements between attorneys and clients,' placing the burden on attorneys to show the retainer agreement is 'fair, reasonable, and fully known and understood by their clients'" (*Matter of*

Lawrence, 24 NY3d 320, 336 [2014] [citation omitted]). However, "a hindsight analysis of contingent fee agreements not unconscionable when made is a dangerous business, especially when a determination of unconscionability is made solely on the basis that the size of the fee seems [in retrospect to be] too high to be fair" (*id.* at 340).

Discussion

Plaintiff has claims based upon breach of contract, unjust enrichment and fraudulent conveyance, and, in this motion, it seeks summary judgment on these claims against 953 and Stier.

The portion of plaintiff's motion on its claims for unjust enrichment must be denied since "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc.*, 70 NY2d at 388; *Maor*, 143 AD3d at 580). The Contract and the Indemnification Agreement are both written contracts addressing the subject of plaintiff's fee arrangement. The Contigency Fee Provision specifically deals with the subject matter of plaintiff's fee and, accordingly, plaintiff cannot establish an entitlement to judgment as a matter of law on this claim.

The portion of plaintiff's motion for summary judgment on the fraudulent conveyance claim is denied, since plaintiff has not shown that the sale of the Property was made without fair

consideration (*Wall Street Assoc.*, 257 AD2d at 528). Defendants have presented evidence that the sale was for fair consideration, and whether fair consideration was paid is "generally [a question] of fact which must be determined under the circumstances of the particular case" (*Joslin*, 309 AD2d at 838).

The breach of contract claim against Stier raises the issue of whether he, as an individual, was "a party to the [C]ontract [or whether] . . . the intended party was the corporation [953]" (*Newman v Berkowitz*, 50 AD3d 479, 479 [1st Dept 2008]; *see also Beal Sav. Bank v Sommer*, 29 AD3d 388 [1st Dept 2006], *affd* 8 NY3d 318 [2007]; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 10 [1st Dept 2004]). Both the Contract and the Indemnification Agreement were signed by Stier in his capacity as president of 953, they were both prepared by plaintiff and, therefore, reading the documents as a whole, plaintiff has not shown that Stier, as an individual, was "the intended party" (*Newman*, 50 AD3d at 479). Accordingly, the portion of plaintiff's motion that seeks summary judgment on its contract claim against Stier is denied.

Plaintiff's claim for breach of contract against 953 is a different matter. There is no dispute that 953 entered into the Contract and the Indemnification Agreement, that plaintiff filed the Application, that the Contingency Fee Provision provides for a 25% fee on "the tax savings stemming from the granting of the ICIP abatement," conditioned upon a successful result, that the

Continuing Obligation Provision reaffirmed 953's obligation to pay fees pursuant to the Contingency Fee Provision, that the City granted the ICIP abatement in the past amount of approximately $2.4 million, with a future abatement worth $2,180,000 and that, while 953 paid approximately $600,000, a 25% fee for the past abatement, it has failed to make payment for the future abatement.

953 asserts that the 25% contingency fee is unconscionable. It contends that since plaintiff performed only 10 hours of work, such a fee would be an unreasonably large fee and Stier states that, if he had realized the fee would be hundreds of thousands of dollars, he would not have agreed to it. However, "unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable *when made*" (*Gillman*, 71 NY2d at 10 [italics added]). The crucial time to view a claim of unconscionability is when the contract is made, not after a successful result has been achieved. Stated differently, "a hindsight analysis of contingent fee agreements not unconscionable when made is a dangerous business, especially when a determination of unconscionability is made solely on the basis that the size of the fee seems [in retrospect to be] too high to be fair" (*Matter of Lawrence*, 24 NY3d at 340).

The Contingency Fee Provision required a successful result for plaintiff to obtain any fee. Stier's testimony is that,

after achieving a result that produced a $2.4 million result for the past and a $2,180,000 going forward, he thought plaintiff's fee was unreasonably high (Stier EBT at 20-21, 47-48). In essence, this argument must fail since "a party may not rewrite the terms of an agreement because, in hindsight, it dislikes its terms" (*Cambridge Petroleum Holdings, Inc. v Lukoil Ams. Corp.*, 129 AD3d 501, 502 [1st Dept 2015]). The portion of plaintiff's motion that seeks summary judgment against 953 on the breach of contract claim must be granted and, since the amount of the contingency fee and the date of the failure to make payment pursuant to the Contingency Fee Provision is undisputed, the motion is granted to direct the entry of judgment in the amount of $545,000.00, with interest from June 8, 2012, the date of the first invoice upon which 953 failed to make payment.

Order

It is, therefore,

ORDERED that plaintiff's motion for summary judgment against defendants is granted to the extent of granting plaintiff summary judgment against 953 Realty Corp. on its claim for breach of contract and is otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against said defendant in the amount of $545,000.00, together with interest from June 8, 2012, at the statutory rate, together with costs and disbursement as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining defendant.

Dated: February 27, 2017

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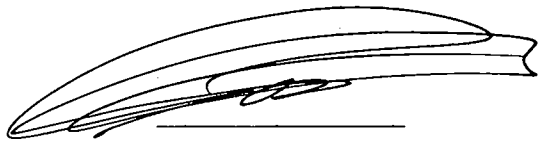

J.S.C.