Fox v 12 E. 88th LLC
2017 NY Slip Op 31707(U)
August 11, 2017
Supreme Court, New York County
Docket Number: 651786/2017
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

BARRY FOX and MBE, LTD.,

Plaintiffs,

-against-

12 EAST 88th LLC,

Defendant.

Index No.: 651786/2017
DECISION/ORDER
Motion Seq. Nos. 001 & 002

Emery Celli Brinckerhoff & Abady LLP, New York City (Richard D. Emery, Matthew D. Brinckerhoff, and Zoe Salzman of counsel), for plaintiffs.
Rose & Rose, New York City (Paul Coppe of counsel), for defendant.

Gerald Lebovits, J.

Co-plaintiff Barry Fox has lived in Unit PH of an apartment building at 12 East 88th St since 1996. (Plaintiffs' Affirmation, Exhibit A ¶ 19.) He is the sole shareholder of his co-plaintiff, MBE, Ltd., a corporation. MBE is the tenant of record of Unit PH, having signed the unit's lease since 2008. (Plaintiffs' Affirmation, Exhibit C, Exhibit 3 at 3.) Fox is the guarantor of the lease and was listed as tenant on a tenant information sheet. (*Id.* at 7.) Defendant 12 East 88th LLC bought the building in 2014. It has since begun the process of converting it into a luxury condominium. (Plaintiffs' Affirmation, Exhibit A ¶ 21.)

After defendant advised plaintiffs that it would not renew MBE's market-rate lease when it expired in May 2014, (*Id.* ¶ 22.), plaintiffs brought an action in Supreme Court, New York County, against defendant, alleging that the Unit PH is rent stabilized and that MBE is eligible to recoup rent overcharge damages. (*Id.* ¶¶ 25-26.) Plaintiffs have not paid rent since October 2014. (Defendant's Affirmation in Opposition at 2.) Defendants moved for summary judgment in their favor on their counterclaims and to dismiss the complaint. Plaintiff cross-moved for partial summary judgment on their first and fourth causes of action.

In a written opinion dated October 13, 2016, Justice Paul Wooten found that (1) the 1996 non-rent-stabilization provision agreeing that Unit PH was no longer rent stabilized is invalid; (2) the 2008 lease did not create new tenancy because Fox was named as a guarantor and was listed as tenant on a tenant information sheet, without vacating the apartment; (3) the fiction of 2008 lease benefited Fox, MBE's sole shareholder, and Fox continued living in the apartment as Fox's primary residence; and (4) Fox should not be penalized for failing to include his name on the lease as a tenant because he did not know that the apartment was rent stabilized. (*See Fox v 12 E. 88th LLC*, 2016 NY Slip Op 31953 [U] [Sup Ct, NY County 2016].)

Justice Wooten also found that Unit PH is a rent-stabilized unit with a monthly rent of $27,500 and that "the issue regarding the amount of rent overcharges, if any, after calculating the permissible rent increases from the base date of May 16, 2010 shall be referred to a Special Referee to hear and determine." (*Id.*)

Both parties moved to reargue. Pending the determination of the motions to reargue, Justice Wooten, on November 10, 2016, granted a temporary restraining order staying the reference to a Special Referee. (Plaintiffs' Affirmation, Exhibit C, Exhibit 4.) On some date unknown to this court, Justice Wooten orally directed defendant not to commerce a nonpayment proceeding. (Defendant's Affirmation in Opposition to Plaintiffs' Motion for A Preliminary Injunction at 3.) Justice Wooten denied both parties' motion to reargue on July 8, 2017.

While the litigation between plaintiffs and defendant was continuing, defendant filed an Offering Plan to sell the building's apartments on December 2, 2015. (Defendant's Affirmation in Opposition at ¶ 4.) The initial offering price for Unit PH was $25 million, listed in the First Amendment to the Offering Plan in December 2015. (*Id.* ¶ 4.) The Second Amendment to the Offering Plan reduced the price to $15.5 million in July 2016. (*Id.* ¶ 4.) The Third Amendment did not change the price. (Defendant's Affirmation in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Exhibit F.) In February 2017, defendant issued a Fourth Amendment, which offered any tenant in occupancy not in default under the terms of their respective lease a price equal to 40% less than the purchase price indicated on Schedule A to buy the apartment. (Defendant's Affirmation in Opposition for Summary Judgment, Exhibit A.) The price for Unit PH in Schedule A attached to the Fourth Amendment was $9.3 million. (*Id.*)

Based on the discounted price listed in the Fourth Amendment, which Fox contended was $5.58 million, 40% less than $9.3 million, Fox applied for mortgages at different banks and obtained a commitment letter from Citibank. (Plaintiffs' Memorandum of Law in Support for Summary Judgment at 3.) Plaintiffs delivered both the signed Purchase Agreement with $5.58 million purchase price and a check of $558,000 for down payment to defendant's attorneys on March 24, 2017, within the 45 days of the exclusive-purchase period listed in the Fourth Amendment. (*Id.* at 4.)

Defendant's attorneys rejected and returned the Purchase Agreement, signed only by Fox, and down payment check, arguing that the discounted purchase price is $9.3 million and that plaintiffs were in default of rent arrears. (*Id.* at 3.)

Plaintiffs now moves for summary judgment under CPLR 3212 (motion sequence no. 002) and a preliminary injunction under CPLR 6301 (motion sequence no. 001). Defendant cross-moves in motion sequence number 002 for summary judgment to dismiss plaintiffs' complaint under CPLR 3211 (a) (7), which seeks in its three causes of action (1) specific performance directing defendant to execute Fox's Purchase Agreement, accept Fox's down payment of $558,000 and promptly close the sale of Unit PH for $5,580,000; (2) breach of the Offering Plan and Fourth Amendment; and (3) declaratory judgment that the Fourth Amendment means that tenants in occupancy and not in default may purchase the apartment in which they live for 40% less than the Purchase Price indicated on Schedule A, that Fox is a tenant in occupancy who is not in default, and that Fox may buy Unit PH for $5,580,000.

This court consolidates motion sequence numbers 001 and 002 for disposition.

I. Summary Judgment

Summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court, as a matter of law, in directing judgment in favor of any party." (CPLR 3212 [b].) The movant must make a prima facie showing of entitlement to judgment as a matter of law and show sufficient evidence to demonstrate the absence of any material issue of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

To decide whether plaintiffs are eligible to summary judgment on their claims for specific performance, breach of contract, and declaratory judgment, the court must first determine whether a valid contract between the parties exists.

A. Plaintiffs' Motion for Summary Judgment

Defendant first argues that there was no contract between Fox and 12 East 88th LLC because the discounted price defendant offered for Unit PH was $9.3 million, not $5.58 million. (Defendant's Affirmation in Opposition for Summary Judgment at ¶ 19.) Whether a contract exists must be determined by "the objective manifestations of the parties' intent as gathered by their expressed words and deeds" without giving disproportionate emphasis to "any single act, phrase or other expression" but instead looking at "the totality of all these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain." (*Zheng v City of New York*, 19 NY3d 556, 572 [2012].)

Defendant argues that it did not denominate the temporary discount in the Fourth Amendment a Price Change Amendment — meaning that, according to defendant, the permanent offering price remained at $15.5 million and that the discounted price is $9.3 million. Defendant rejected on March 29, 2017, Fox's attempt to give it a down payment of $558,000 and the signed Purchase Agreement. (*Id.* ¶ 19.) But the existence of a binding contract does not depend on the parties' subjective intent. (*Brown Bro. Elec. Contractors, Inc. v Beam Const. Corp.*, 41 NY2d 397, 399 [1977].) Here, defendant prepared the Fourth Amendment, and the plain reading of the Fourth Amendment shows that the discounted price is $5.58 million, 40% less than the price listed in the Schedule A attached to the Fourth Amendment. Taking into consideration the totality of circumstances, and not relying on the single phrase of "Price Change Amendment" or the parties' subjective intent, defendant's argument is unavailing.

Defendant also argues that because the language of the Fourth Amendment is ambiguous and the parties interpreted the language differently, there cannot be a contract. (Defendant's Affirmation in Opposition for Summary Judgment at ¶ 20.) Clear contractual language does not become ambiguous simply because the parties to litigation have different interpretations of contractual language. (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008].) A plain reading of the Fourth Amendment shows that the price offered to Unit PH is $9.3 million and that the discounted price offered to a tenant in occupancy who was not in default under the terms of their respective lease is $5.58 million.

Based on plaintiffs' and defendants' papers, this court finds no issue of fact on whether the discounted price of Unit PH offered to a tenant in occupancy who was not in default was $5.58 million.

Defendant further argues that a Purchase Agreement signed only by Fox did not become binding on defendant until defendant duly executed it and delivered it to plaintiffs. (Defendant's Affirmation in Opposition for Summary Judgment at ¶ 21.) The Offering Plan states that no Purchase Agreement shall be binding on the sponsor until the sponsor executed a duplicate and delivered it to the purchaser and that a Purchase Agreement shall be deemed rejected and canceled unless the sponsor executed and delivered it to the purchaser within 20 days after the sponsor received the Purchase Agreement. (Plaintiffs' Affidavit in Opposition, Exhibit C at 71.) Although defendant, the sponsor, states in the Offering Plan that it shall have the right to reject any Purchase Agreement without cause or explanation to a purchaser, it also states in the Offering Plan that the right does not apply to a tenant in occupancy during any exclusive-purchase period. (*Id.* at 72.)

Justice Wooten found that Fox has been using Unit PH as his primary residency and that the 2008 lease did not create new tenancy; plaintiffs sent back the signed Purchase Agreement within the Fourth Amendment's exclusive 45-day-purchase period that defendant offered for tenants in occupancy to purchase their apartment. (Defendant's Affirmation in Opposition at ¶ 9.) The exception for a tenant in occupancy applies here, and defendant did not have the right to reject a tenant in occupancy's Purchase Agreement.

Defendant next argues that if this court were to find that the price for Unit PH is $5.58 million and that plaintiffs were not in default, plaintiffs would be unjustly enriched based on defendant's supposed unilateral mistake in drafting the Fourth Amendment. (Defendant's Affirmation in Opposition for Summary Judgment at ¶¶ 23-24.) Defendant claims that plaintiffs would be unjustly enriched because Unit 8A of the building, which is 500 square feet smaller than Unit PH, is selling for almost $2 million more than what plaintiffs wanted to pay for their penthouse. Plaintiffs claim that Unit 8A was a vacant, renovated apartment, and, unlike Unit PH, that Unit 8A is not rent stabilized. Plaintiffs further claim that an outsider who is not a tenant in occupancy will not purchase a rent-stabilized apartment for the vacant market value and that defendant would save a 5%-6% broker's fee by selling Unit PH to Fox instead of to an outsider. Defendant has not sufficiently shown that plaintiffs would be unjustly enriched by defendant's supposed unilateral mistake.

Defendant further argues that defendant was eligible for rescission of the contract based on its supposed unilateral mistake. A unilateral mistake induced by fraud will support a claim for rescission, but a unilateral mistake alone does not suffice as a predicate for relief. (*Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 370 [1st Dept 2007].) Mistake based on a party's own negligence cannot serve as basis for rescission. (*Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 179 [1st Dept 1998].) Defendant did not show that fraud induced the unilateral mistake it claims occurred. It does not show that its supposed mistake was not due to its own negligence. There is no triable issue of fact on whether defendant made a unilateral mistake that would give defendant the right to rescind the contract.

Defendant additionally contends that plaintiffs were not eligible for the discounted price because they were in default for not paying $27,500 monthly rent since October 2014. (Defendant's Affirmation in Opposition for Summary Judgment at ¶ 22.) In his decision of October 13, 2016, Justice Wooten directed a Special Referee to hear and determine whether any rent overcharge or arrears existed from May 16, 2010. (Plaintiffs' Affirmation, Exhibit C, Exhibit 3 at 17.) Defendant makes a plausibly meritorious argument that MBE owes $852,500 in arrears since October 2014. (Defendant's Affirmation in Opposition for Summary Judgment at ¶ 4.) Plaintiffs also make a plausibly meritorious argument that no rent arrears exist because, they insist, the overcharge damages far exceed plaintiffs' rent. (Plaintiffs' Affirmation, Exhibit A ¶ 62.) Without the Special Referee's calculation, the court is unable to ascertain whether plaintiffs were in default.

Plaintiffs rely on *Wissner v 15 W. 72nd St. Assocs.* (87 AD2d 120, 120 [1st Dept 1989]) to argue that defendant, by summarily declaring plaintiffs in default, may not retroactively seek to deprive plaintiffs from the Fourth Amendment's benefits. (Plaintiffs' Memorandum of Law in Opposition at 9.) In *Wissner*, defendant challenged plaintiff's non-primary-residency status. The First Department found that the plaintiff was entitled to the insider price because the plaintiff's residency status remained unchallenged when a formal offering plan was accepted for filling. (*See* 87 AD2d at 124-125.) The instant case is different; defendant did not challenge summary judgment on the basis that plaintiffs were not tenants in occupancy. Rather, it urges that plaintiffs were in default when defendant issued the Fourth Amendment and therefore that plaintiffs are not eligible for the discounted price. Defendant raises a triable issue of fact.

Because it is impossible to decide whether a valid contract between the parties existed without knowing whether plaintiffs were in default, plaintiffs' summary judgment motion is premature and denied without prejudice.

Plaintiffs move to dismiss defendant's two counterclaims for the first time in their reply papers. Defendant's amended answer raises the following two counterclaims: (1) defendant is eligible for rescission of the contract because the offer was a unilateral mistake and that MBE would be unjustly enriched; and (2) defendant is eligible to reform the contract to reflect the proper purchase price of $9.3 million. A party who brings "a claim for reformation of a written agreement must ground the claim upon either mutual mistake or fraudulently induced unilateral mistake." (*Greater N.Y. Mut. Ins. Co v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007].) As noted above, defendant does not show that fraud induced the claimed unilateral mistake or that the claimed mistake was not due to its own negligence. But the court may not dismiss the counterclaims based on a motion made only in reply papers.

B. Defendant's Motion for Summary Judgment to Dismiss Plaintiffs' Complaint

A pleading should not be dismissed so long as it sets forth a cause of action. (*Mclaughlin v Thaima Realty* Corp, 161 AD2d 383, 384 [1st Dept 1990].) Plaintiffs have set forth sufficient facts for their three cause of actions: (1) specific performance directing defendant to execute Fox's Purchase Agreement, accept Fox's down payment of $558,000 and promptly close the sale of Unit PH for $5,580,000; (2) breach of the Offering Plan and Fourth Amendment; and (3)

declaratory judgment that the Fourth Amendment means that tenants in occupancy who are not in default may purchase the apartment in which they live with 40% less than the Purchase Price indicated on Schedule A, that Fox is a tenant in occupancy who is not in default, and that Fox may buy Unit PH for $5,580,000. Defendant's motion for summary judgment to dismiss the complaint is denied.

Assuming that plaintiffs were not in default and that a valid contract exists between the parties, the parties must give the court more evidence on whether plaintiffs were ready, willing, and able to perform the remaining obligations of the contract — paying the remaining $5.022 million and other required fees. The elements of a cause of action for specific performance of a contract are that (1) the plaintiffs substantially performed its contractual obligations; (2) plaintiffs were willing and able to perform its remaining obligations; (3) defendant was able to convey the property; and (4) no remedy at law can adequately compensate plaintiffs. (*EMF Gen. Contracting Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004].) Plaintiffs have shown that Fox was eligible for the $4.2 million mortgage issued by Citibank and that he collected the $558,000 for a down payment to buy the condominium unit. (Plaintiffs' Affirmation, Exhibit A ¶¶ 50-54.) $4.2 million plus $558,000, the number that plaintiffs have proved they can provide to close the sale, is less than the $5.58 million discounted price. To prevail, plaintiffs have the burden to prove that plaintiffs were ready, willing, and able to perform the contract's remaining obligations.

The elements of a breach of contract claim are (1) formation of a contract between the parties; (2) performance by the plaintiff; (3) the defendant's failure to perform; and (4) the resulting damages. (*Flomenbaum v N.Y. Univ.*, 71 AD3d 80, 91 [1st Dept 2009].) Assuming that the parties had a valid contract, the court finds that plaintiffs have sufficiently proven that by sending the signed Purchase Agreement and down payment to defendant, plaintiffs have performed its obligations, that defendant failed to perform, and that resulting damages are due to plaintiffs.

Therefore, plaintiffs have set forth sufficient facts for their three cause of actions: (1) specific performance directing defendant to execute Fox's Purchase Agreement, accept Fox's down payment of $558,000 and promptly close the sale of Unit PH for $5,580,000; (2) breach of the Offering Plan and Fourth Amendment; and (3) a declaratory judgment that the Fourth Amendment means that tenants in occupancy who are not in default can purchase the apartment they live with 40% less than the Purchase Price indicated on Schedule A, that Fox is a tenant in occupancy who is not in default, and that Fox may buy Unit PH for $5,580,000. Defendant's motion for summary judgment to dismiss the complaint is denied as premature.

II. Preliminary Injunction

Under CPLR 6301, a court must grant preliminary injunctive relief when the moving party shows (1) a likelihood of success on the merits; (3) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor. Without the Special Referee's calculation, this court is unable to ascertain whether plaintiffs were in default for allegedly owing rent. Although plaintiffs have sufficiently shown that plaintiffs will suffer irreparable injury absent this court's granting the preliminary injunction, the court cannot decide,

without knowing whether plaintiffs were in default, whether plaintiffs will likely succeed on its specific-performance and breach-of-contract claims.

Plaintiffs' motion for a preliminary injunction is granted only to the extent that defendant may not sell Unit PH to anyone but plaintiffs until the Special Referee hears and determines the amount of rent overcharges or arrears.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment are denied as premature but without prejudice to renew it after the Special Referee hears and determines the amount of rent overcharges or arrears; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction is granted only to the extent that defendant may not sell Unit PH to anyone but plaintiffs until the Special Referee hears and determines the amount of rent overcharges or arrears.

Dated: August 11, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.