

Gopie v Henriquez

2004 NY Slip Op 30235(U)

September 15, 2004

Supreme Court, Queens County

Docket Number: 0007120/1998

Judge: Marguerite A. Grays

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Short Form Order & Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

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CHOWDHARY GOPIE,		Number <u>7120</u>	1998
Plaintiff,		Motion	
- against -		Date <u>June 29,</u>	2004
HEITUS RUB HENRIQUEZ AND GINA		Motion	
BRANDO, AS CO-EXECUTRIXES OF THE		Cal. Number <u>19</u>	
ESTATE OF YOLANDA HENRIQUEZ, DECEASED,			
HEITUS RUB HENRIQUEZ, INDIVIDUALLY			
AND GINA BRANDO, INDIVIDUALLY,			
Defendants.			
	x		

The following papers numbered 1 to 13 were read on this motion by the plaintiff, pursuant to CPLR 3212, for summary judgment on the complaint; and, cross motion by the defendants, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Answering Affidavits - Exhibits	9-11
Reply Affidavits	12-13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

I. The Relevant Facts

A. The Option Agreement

On or about November 14, 1995, a "Standard Option to Purchase Agreement" (option agreement) was executed by the plaintiff Chowdhary Gopie (Gopie) and Yolanda Henriquez (Henriquez), now deceased, in consideration of Gopie's payment of \$1,000.00. The

top of the option agreement bore the statement: "This is a legal document - consult your attorney before signing it."

The option agreement granted to Gopie the right to purchase real property identified as 123-02 through 123-06 Liberty Avenue, Richmond Hill, Block 9577, Lot 1 (the premises). The right to purchase was granted for the period anytime after November 14, 1995, and prior to November 14, 2000, upon at least 30 days' prior written notice to Henriquez. Within 10 business days of the exercise of the option, both parties were to execute a "standard NYBTU form Contract of Sale" containing certain provisions.

The purchase price was to be negotiated in good faith for a period of thirty (30) days and, if the parties were unable to agree, they were to utilize an appraisal process. Pursuant to the appraisal process, each party was to name a qualified professional to appraise the property. In the event that the two appraisers did not agree on the overall valuation, then those appraisers were to appoint a third appraiser, and the decision of the majority of the three appraisers was to be binding.

Paragraph 9 of the recorded option agreement provides, inter alia, that the option would bind the heirs, assigns, trustees and successor of Henriquez in the event of her death or incompetence. The option agreement also made time of the essence.

The signatures of Gopie and Henriquez on the option agreement were witnessed and notarized. A memorandum of option to purchase real estate (option memorandum) was also executed by Henriquez and Gopie, and notarized by John L. Russo. Both the option agreement and the option memorandum were recorded on October 21, 1996.

By letter dated January 26, 1998, Gopie notified Henriquez that he was exercising his option to purchase. In an undated letter, Henriquez, through her attorney, declined to recognize the exercise of the option asserting, inter alia, that the option agreement was fraudulent.

B. Commencement of Action and Testimony

Gopie commenced this action on or about April 1, 1998. Thereafter, on July 29, 1999, Henriquez died. The defendants Heitus Rub Henriquez (Heitus) and Gina Brando (Brando) were substituted as the executrixes and sole heirs of Henriquez'

estate.¹ In his second amended verified complaint, Gopie seeks: (1) a declaration that he validly exercised the option and that Heitus and Brando are obligated to convey the premises; and, (2) specific performance of the option agreement.

During his examination before trial (EBT), Gopie stated that he was Henriquez' tenant at the premises. At the time that they entered into the option agreement, Henriquez was not ill, and was attending school to learn English.

His attorney, John Russo, prepared the option agreement. Gopie brought it to Henriquez who read it and stated she was going to give it to her attorney. A couple of days later, Henriquez called, and asked Gopie to come over as she was ready to sign the agreement. When he met Henriquez, she executed the option agreement in the presence of a witness, and he gave Henriquez \$1,000.00. A day or two later, he took the document to his attorney Russo, who witnessed and notarized his signature.

When he went to Russo's office, Russo noted that although Henriquez had signed the document, her signature was not notarized. Russo stated that he would arrange for Henriquez to come to the office so Russo could notarize her signature. Gopie related this to Henriquez and, a few days later, she went to Russo's office. Russo asked if her signature was on the document and, when she said it was, Russo notarized it.

A couple of days later, Henriquez called stating she wanted to change paragraph 10. After Gopie consulted with Russo, who advised that Henriquez initial any changes she made, Gopie agreed to the changes. Henriquez came to the store, crossed out a portion of paragraph 10 and then initialed the change. The document bearing the cross-out of a portion of paragraph 10 was altered and initialed by Henriquez after the signatures were notarized by Russo on the option agreement. He never made any changes to the option agreement. Henriquez used a magic marker to make the change and the document was double-sided; as a result, the marker bled through to the other side, which accounted for the markings on that side.

He and Henriquez never discussed the purchase price of the premises, and he never had the premises appraised. Prior to his exercise of the option, he sent Henriquez a contract to purchase

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The procedural history of this action is set forth in the order of this court (Grays, J.), dated October 3, 2003 and entered October 8, 2003.

the property at a price of \$550,000.00 and agreed to pay an additional \$100,000.00 for fixtures. He did not have the sum of \$650,000.00 available to him from July 1997 through January 1998; however, he had intended to obtain a mortgage.

During his EBT, Russo stated that he drafted the option agreement at Gopie's request, and witnessed Gopie's signature on that document and the option memorandum. At that time, he saw that the option agreement had already been signed by Henriquez, and that her signature was witnessed by Gopie's girlfriend, but was not notarized. As a result, he met with Henriquez a few days later, and asked if it was her signature on the document. When she stated that it was, he notarized it. He also notarized her signature on the option memorandum. He and Henriquez knew one another, as he had previously negotiated four different leases with her or her attorney.

Henriquez' attorney never contacted him regarding the option agreement. There was a delay in his notarization of signatures on the option memorandum because Henriquez stated that she wanted to take that document to her attorney.

He prepared the contract to purchase for Gopie when Gopie informed him that Henriquez was ill and wanted to move the sale forward. He mailed a copy of that contract to Henriquez' attorney, at Gopie's request.

During her EBT, Brando stated that she never saw her mother execute documents with Gopie, and never discussed contracts with her mother. The first time she saw the option memorandum was after Gopie commenced this action.

During her EBT, Heitus stated that her mother acted as a real estate landlord for 15 years prior to 1995 and thereafter, until her mother's death. Generally, her mother ran that business on her own. Heitus never saw the option agreement or option memorandum prior to her EBT, and was not familiar with their contents. She never saw her mother and Gopie execute any documents. She had seen her mother and Gopie converse, but was not privy to those conversations.

II. Motion and Cross Motion

Gopie moves for summary judgment asserting that: (1) the signatures on the option agreement are presumed valid and the option agreement satisfies the statute of frauds; (2) he validly exercised his option to purchase the property; and, (3) the defendants have no defenses.

Heitus and Brando oppose the motion and cross-move for summary judgment, contending that the option agreement is indefinite and unenforceable, and violates the statute of frauds. In addition, they assert that there are numerous issues of fact relating to whether Henriquez ever signed the option agreement, whether her signature was forged, whether she was competent to execute the option agreement, and whether Gopie was ever ready, willing and able to purchase the property.

In support, Heitus and Brando annex their own sworn statements and that of a psychiatrist who treated Henriquez during 1995. In those affidavits, Heitus and Brando assert that: (1) in 1993/1994, Henriquez was diagnosed with lung cancer and underwent surgery and chemotherapy; (2) during the same time and in 1995, Henriquez was treated by a psychiatrist who prescribed various drugs; (3) Henriquez repeatedly stated that she never signed the option agreement; (4) Henriquez stated that Gopie had threatened her while he attempted to get her to sign the option agreement; (5) Henriquez repeatedly made Brando and Heitus promise not to sell the building; (6) the rental income for the building had been Henriquez' sole source of income; and, (7) Henriquez only spoke Spanish and needed a translator to speak English.

Gopie replies that: (1) the affidavits contradict the EBT testimony; (2) there is no issue of fact with respect to the genuineness of Henriquez' signature; (3) conversations with Henriquez are barred by the Dead Man's Statute; (4) assertions concerning Henriquez' mental condition fail to raise any issue of fact; and, (5) because he validly exercised the option and Henriquez failed to negotiate a price in good faith, he was not under any obligation to obtain financing.

III. Decision

The recorded option agreement did not contain a price term and provided that the parties would negotiate the price in good faith for 30 days upon the exercise of the option. Nonetheless, that document also contained a concrete appraisal methodology to establish a purchase price once that 30-day price negotiation period expired. As a result of that appraisal methodology, the option agreement is not unenforceable for indefiniteness (see Joseph Martin, Jr. Delicatessen, Inc. v Schumacher, 52 NY2d 105, 109-110 [1981]; Arcy Paint Co., Inc. v Resnick, 134 AD2d 392 [1987]; cf. McGee & Gelman v Park View Equities, Inc., 187 AD2d 1012 [1992]).

Moreover, the recorded option agreement and option memorandum were separately executed by Henriquez, whose signature was

witnessed on one document and notarized on both documents. The defendants have failed to raise any issue of fact with respect to the genuineness of Henriquez' signature and the document satisfies the statute of frauds (see Kaplan v Lippman, 75 NY2d 320, 324-325 [1990]; General Obligations Law § 5-703).

Similarly, the defendants have failed to raise any issue of fact with respect to the defenses of fraud, undue influence, duress or lack of capacity (see Pirozzolo v Dimeo, 141 AD2d 810 [1988], lv denied, 73 NY2d 704 [1989]; Pen-Mor Thoroughbred Farms, Inc. v Riccatto, 122 AD2d 201 [1986]). Finally, the defendants failed to raise any issue of fact as to whether Gopie validly exercised the option to purchase on January 26, 1998 (see e.g. Realty Corp. v Boehm, 204 AD2d 620 [1994]).

As a result, Gopie is entitled to summary judgment on both causes of action interposed in the second amended verified complaint. With respect to specific performance, the parties are to utilize the appraisal method required by the option agreement. Such appraisals shall be made as of February 27, 1998 to March 27, 1998, the approximate time period when such appraisals would have been conducted following the exercise of Gopie's option and the expiration of the 30-day price negotiation period. The defendants' cross motion is denied.

Conclusion

Based upon the papers submitted to the court and the determinations set forth above, it is

ORDERED that the motion by the plaintiff for summary judgment on the complaint is granted; and it is further


ORDERED that the cross motion by the defendants for summary judgment dismissing the complaint is denied; and it is further

ORDERED, ADJUDGED and DECLARED that the plaintiff validly exercised his option to purchase the premises known as 123-02 through 123-06 Liberty Avenue, Richmond Hill, New York, Block 9577, Lot 1 on the tax map of the County of Queens, and the estate of Yolanda Henriquez, through its co-executrixes and individual residuary beneficiaries Heitus Rub Henriquez and Gina Brando, is obligated to convey the premises to the plaintiff in accordance with the terms of the option agreement recorded in the Queens County Office of the City Register; and it is further

ORDERED and ADJUDGED that the defendants, as co-executrixes and individually, are directed to specifically perform the option

agreement and convey to the plaintiff the subject premises upon payment therefor pursuant to the terms and conditions of the option agreement, and as set forth in this order and judgment.

Dated: **SEP 15 2004**



J.S.C.