

9 Bleecker LLC v Yippie Holdings, LLC

2010 NY Slip Op 33907(U)

November 1, 2010

Sup Ct, New York County

Docket Number: 102710/09

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48

Justice

9 BLEECKER LLC,

Plaintiff,

- v -

YIPPIE HOLDINGS, LLC et al.,

Defendants.

INDEX NO. 102710/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: This dispute involves the plaintiff's claim that its right of first refusal has been breached by the defendants Yippie Holdings, LLC and National AIDS Brigade, Inc. ("Yippie/Brigade defendants"). The plaintiff herein, 9 Bleecker LLC, was the owner of a building located at 9 Bleecker Street in Manhattan. The Yippie/Brigade defendants were tenants in the building. In August, 2004, plaintiff sold the building to the Yippie/Brigade defendants for \$1.2 million. Under the indenture/contract of sale, the plaintiff was given a right of first refusal in the event that the property was to be sold by the Yippie/Brigade defendants. It provided that "after the event of a contract having been signed for sale of the Property to a bona fide third party purchaser," the Yippie/Brigade defendants would give the plaintiff 30 days written notice to elect to acquire the property "for a purchase price equal to the lesser of the price set forth in the third party contract or(\$1,800,000) Dollars."

In order to purchase the building and then make necessary renovations, the Yippie/Brigade defendants obtained a \$1,400,000 loan from a company named Centech LLC. Pursuant to a Correction, Consolidation and Extension Agreement ("CC&E"), the loan was secured by a mortgage in the principal amount of \$1,400,000. Thereafter, on September 12, 2006, the CC&E agreement was modified so as to provide that the outstanding principal balance of \$1,400,000, together with all other amounts due, would be paid, in full, on March 1, 2007. After the Yippie/Brigade defendants defaulted on this payment, the parties entered into another modification agreement, dated August 1, 2007, in which the time to make full payment on the loan was extended. In return for Centech's agreement to extend their due date, the Yippie/Brigade defendants agreed, pursuant to a Deed in Escrow Agreement, to deliver in escrow a Deed in Lieu of Foreclosure. The Escrow Agreement provided that in the event the Yippie/Brigade defendants failed to pay the amount due by December 1, 2007, the deed would be delivered to Centech or its designee.

Thereafter, the Yippie/Brigade defendants failed to make the required payment by December 1, 2007. Pursuant to the Deed in Escrow Agreement, the deed was delivered to and placed in the name of Centech's nominee, defendant Devan Holdings, LLC. The deed was recorded in the Office of the New York City Register on December 28, 2007.

The plaintiff has brought this action alleging that the transfer of title from the Yippie/Brigade defendants to Devan without first giving it the opportunity to purchase the property violated its right of first refusal. The complaint asserts three causes of action. The first seeks a declaratory judgment that the plaintiff's right of first refusal has been violated by the transfer of the property to Devan and that the transaction should be "unwound." The second cause of action is for specific performance and seeks an order directing the Yippie/Brigade defendants to offer the property to plaintiff pursuant to the terms

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of its contractual right of first refusal. The third cause of action is against Devan and its principal, defendant Bradley Gordon, for tortious interference with contract. In its separate answer, Yippie Holdings has asserted a cross claim against Devan and Gordon

for a declaratory judgment that the deed to the property should be transferred back to both it and the AIDS Brigade on the ground that they had been defrauded of their title to the property. Finally, the court notes that subsequent to the commencement of this action, Centech brought a foreclosure action against all of the parties herein despite the fact that its nominee, Devan, holds a Deed in Lieu of Foreclosure to the property. *See Centech LLC v. Yippie Holdings LLC et al.*, NY Co Index No 107802/09. The foreclosure action is based on a provision in the Deed in Lieu to the effect that the mortgage on the property would not merge into the fee interest being conveyed by the Deed in Lieu but would remain a good and valid mortgage.

The plaintiff has now moved for summary judgment for all of the relief sought in its complaint. Gordon and Devan have cross-moved for summary judgment dismissing the complaint.

Discussion

Although for different reasons, all parties herein agree that the transfer of title to the property to Devan should not be permitted to stand. According to the plaintiff, the conveyance was wrongful because it was made in violation of plaintiff's right of first refusal. According to the Yippie/Brigade defendants, the transfer was fraudulently made without their knowledge by two of their respective representatives. According to Devan and Gordon, the transfer is void because Devan is a nonexistent entity for whom no operating agreement has even been prepared, much less filed with the Secretary of State, and that Devan was therefore legally incapable of acquiring the deed to the property.

Under the circumstances, the court need not resolve each of these issues. Given the parties' agreement regarding the result, the court is persuaded that an order should be issued declaring that the transfer of title is null and void.

As to the primary issue of whether the plaintiff's right of first refusal was violated, the court notes that none of the parties has cited any case which is directly or even indirectly on point. However, in *Khan v. Berger*, 2005 WL 2001941 (Cal App 2 Dist), a California appellate court ruled that the existence of a right of first refusal does not prevent a property owner from obtaining a loan secured by a deed in lieu on the property. In reaching this conclusion, the court, citing a New York case, *Kowalsky v. Familia*, 71 Misc2d 287, 293 (Orange Co 1972), noted that it is "generally understood that a right of first refusal.....is triggered only when the owner of the property voluntarily seeks to sell it." *Id.* at * 4. In *Kowalsky*, the court held that the right of first refusal was not triggered where the owners gave the county an option to purchase their property after being advised by the county appraiser that if they refused to sell, the county would condemn the land and then acquire it through litigation. The *Kowalsky* decision was based on the conclusion that the option to purchase was not a voluntary transaction.

Here, too, the decision by the Yippie/Brigade defendants to enter into the Deed in Escrow Agreement with Centech was hardly voluntary. They had already defaulted on their mortgage obligations and faced an imminent foreclosure action unless they agreed to deliver in escrow a Deed in Lieu of Foreclosure. On its face, the Deed in Escrow Agreement is far from the kind of contract of sale necessary to trigger the plaintiff's right of first refusal. In fact, it is not a contract of sale. Rather, it is merely a financing mechanism which provided Centech with an alternative means of ensuring that it would recover its loan and which provided the Yippie/Brigade defendants with the opportunity to avoid foreclosure and retain title to the property. The fact that the Yippie/Brigade defendants were ultimately unable to do so and were forced to transfer title to Centech/Devan does not somehow make the transaction one which should be characterized as a sale. The court is therefore persuaded that the plaintiff's right of first refusal was not triggered by any of the agreements entered into between

Centech and the Yippie/Brigade defendants. The plaintiff's second cause of action for specific performance must therefore be dismissed.

Finally, in view of the court's conclusion in the preceding paragraph that the Yippie/Brigade defendants did not breach their obligation to offer the plaintiff a right of first refusal, the plaintiff's third cause of action against Gordon and Devan for tortious interference with contract lacks merit and must be dismissed. In any event, these defendants would not be liable for this claim since, as a matter of law, they clearly had an economic interest in the transaction by acting to protect their own financial stake in the Yippie/Brigade defendants' business. See *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 NY3d 422, 426 (2007).

Accordingly, the plaintiff's motion for summary judgment is granted to the extent that, on its first cause of action, a declaratory judgment should be issued declaring the transfer of title from the Yippie/Brigade defendants to Devan null and void. The motion is otherwise denied. The cross-motion for summary judgment by Gordon and Devan is hereby granted. A declaratory order should be issued declaring that plaintiff's right of first refusal was not violated by the transaction which is the subject of this proceeding and that plaintiff is not entitled to an order of specific performance directing the Yippie/Brigade defendants to offer it the right to purchase the property pursuant to its contractual right of first refusal. In addition, the plaintiff's third cause of action is hereby dismissed.

Settle judgment.

ENTER

Dated: 11-1-10

MOD

MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION