

Post Hill, LLC v E. Tetz & Sons, Inc.
2013 NY Slip Op 33891(U)
March 15, 2013
Supreme Court, Sullivan County
Docket Number: 2334-2012
Judge: James P. Gilpatric
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN**

POST HILL, LLC,

X

Plaintiff,

- against -

**INDEX NO.: 2334-2012
DECISION AND ORDER**

E. TETZ & SONS, INC.,

Defendant.

X

**Supreme Court, Sullivan County
R.J.I. No.: 52-33559 2012**

Present: James Gilpatric, J.S.C.

Appearances:

KALTER, KAPLAN, ZEIGER & FORMAN
Attorneys for Plaintiff
6166 State Route 42 - P.O. Box 30
Woodbourne, New York 12788
By: Ivan Kalter, Esq.

BLUSTEIN, SHAPIRO, RICH & BARONE, LLP
Attorneys for Defendant
10 Matthews Street
Goshen, New York 10924
By: Burt J. Blustein, Esq.

Gilpatric, J.:

The defendant moves, pursuant to CPLR 3211(a)(5), to dismiss the complaint on the grounds that the action cannot be maintained as it is barred by the Statutes of Frauds. The plaintiff opposes the motion and cross-moves to amend the complaint pursuant to CPLR 3025(b).

This action seeks specific performance for the sale and purchase of a 70 ± acre parcel of real property located in the Town of Thompson, County of Sullivan and State of New York. The plaintiff as the owner, placed said parcel of land with United County Absolute Auctions and

Realty, Inc. (hereinafter "Absolute Auctions") for sale by internet auction. Said auction was scheduled for June 12, 2012, and the defendant alleges that it learned of the auction on June 11, 2012. After executing and delivering the bidding package to Absolute Auction, along with a \$5,000.00 bank check, the defendant placed the highest bid at \$315, 000.00. After the closing of the bidding, Absolute Auction e-mailed a contract to the defendant for execution and delivery along with a check for 10% down payment, less the \$5,000 previous deposit, to the auction house within 24 hours after the bidding closed. After reviewing the contract, the defendant declined to sign said contract and deliver the balance of the 10% down payment.

As a result of the defendant's refusal to sign the contract and deliver down payment, the plaintiff commenced this cause of action seeking either: 1) specific performance requiring the defendant to purchase the property or, 2) that the defendant pay an unspecified amount of damages for breach of contract.

In the motion to dismiss, the defendant asserts that the plaintiff is barred from enforcing its claim for specific performance according to the Statute of Frauds because the contract for the sale of the subject real property did not meet the requirements that it be: 1) in writing; 2) signed by the parties, and 3) contain all the essential elements of the contract. Additionally, the defendant asserts that the fact that the property was sold at public auction does not alter the mandate of the Statute of Frauds that there must be a signed agreement by the parties to be charged.

The plaintiff opposes the defendant's motion to dismiss and cross-moves for leave to serve a proposed Amended Complaint. The plaintiff argues that the bidding documents, signed by the defendant, represent a written agreement that contain all the necessary requisites for an agreement to sell the subject real property.

Upon review of the bidding documents, the court must determine, as a matter of law, whether the writing on its face is sufficient to comply with the Statute of Frauds [*citing Lashway v Sorell*, 51 AD2d 97, *app dsmd* 39 NY2d 799]" (Rohrwasser v Al & Lou Construction Co., Inc., 82 AD2d 1008). The Statute of Frauds requires that certain types of agreements must be in writing and signed by the parties in order to be enforceable. Specifically, with respect to contracts involving real property, General Obligations Law 5-703(3) states:

"A contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the parties to be charged therewith, or by his lawfully authorized agent" (GOL §5-703(3)).

It is undisputed that the plaintiff submitted a contract to the defendant that did in fact contain all of the necessary elements. Nonetheless, it is also undisputed that the defendant refused to sign said contract. As such, the defendant asserts that there was no agreement to the material terms of the proposed contract. While the plaintiff submits a copy of the bidding document in an attempt to establish the defendant's agreement to the purchase of the real property, said document fails to do so. The Court's review of the bidding document discloses that the document specifically states that at the "conclusion of the auction, the high bidder and the back-up bidder "shall be provided electronically a completed purchase and sale agreement.... reflecting their respective bids, and including the 10% buyers premium". Clearly, the submission of two separate contracts to two different bidders cannot be anything more than a draft agreement for consideration. Unless there is a signed contract by the party to be charged after said auction, the mandates of the Statute of Frauds have not been met and there can be no binding contract upon the defendant (*see Tayer v City of New York*, 61 Misc.2d 612; *affd w/o opinion* 35 AD2d 690). Moreover, specific performance is not available to a contract which is incomplete and requires parol evidence to ascertain the substance of the agreement (*see O'Brien v West*, 199 AD2d 369, 370). Therefore, if there is no signed agreement there is no contract containing all the necessary elements pursuant to GOL §5-703(3). Consequently, the plaintiff's complaint must be dismissed and its cross-motion for leave to serve an amended complaint denied. The remaining arguments have been considered and determined to be without merit, or otherwise determined moot from the aforementioned reasons set forth above.

Accordingly, it is hereby

ORDERED that the defendant's motion to dismiss the plaintiff's complaint is hereby granted, and, it is further

ORDERED that the plaintiff's cross-motion to amend the complaint is denied.

This shall constitute the decision and order of the Court. The original Decision & Order and all papers are being filed by this Court with the Sullivan County Clerk's Office. The signing of this order shall not constitute entry under CPLR 2220. Counsel are not relieved from the provisions of that section regarding notice of entry.

SO ORDERED.

Dated: March 15, 2013
Kingston, New York

ENTER

JAMES P. GILPATRIC, J.S.C.

Papers considered:

- 1.) Notice of Motion, dated October 25, 2012;
- 2.) Affidavit in support of Denise Tetz, dated October 25, 2012, with attached exhibits;
- 3.) Memorandum of Law in Support by Burt J. Blustein, Esq., dated October 25, 2012;
- 4.) Notice of Cross-Motion, dated December 3, 2012;
- 5.) Affirmation of Ivan Kalter, Esq., dated December 3, 2012, with attached exhibits;
- 6.) Memorandum of Law in Opposition and in Support by Ivan Kalter, Esq., dated December 3, 2012;
- 7.) Proposed Amended Complaint, dated December 3, 2012;
- 8.) Reply Affirmation and Answer of Burt J. Blustein, Esq., dated December 10, 2012;
- 9.) Sur-Reply Affirmation of Ivan Kalter, Esq., dated December 13, 2012;
- 10.) Reply to Sur-Reply of Burt J. Blustein, Esq., dated February 22, 2013.