

Nugent v Hubbard

2013 NY Slip Op 32070(U)

August 22, 2013

Supreme Court, Suffolk County

Docket Number: 027731-2012

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NO.: 027731-2012

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:

HON. EMILY PINES
J. S. C.

Motion Date: 06-04-2013
Submit Date: 06-04-2013
Motion No.: 003 MOTD

_____ X
**MICHAEL T. NUGENT, FRANK BUSTAMANTE, and
52 PHOENIX MGMT. CORP.,**

Plaintiffs,

- against -

**JOSEPH HUBBARD, ASHLEIGH SASSER, THOMAS
B. LICARDI, DANIEL O'DONNELL, BABYLON
POINT INC., GOLDLIC LLC., and JODI GIRL
ENTERPRISES, INC.,**

Defendants.
_____ X

DANIEL O'DONNELL,

**Third Party Plaintiff,
Third Party Index 32-303**

- against -

**LAURIE L. NUGENT, DOREEN TURNBULL and
FRANCIS TURNBULL,**

Third Party Defendants.
_____ X

Attorney for Plaintiffs & Third Party
Defendant L. Nugent
Peter R. Ginsberg, Esq.
Christopher R. Deubert, Esq.
Peter R. Ginsberg Law, LLC.
12 East 49th Street, 30th Floor
New York, New York 10017

Attorney for Defendant/Third Party
Plaintiff D. O'Donnell, and Defendant
Jodi Girl Enterprises
Gerald Glass, Esq.
Glass & Glass
72 East Main Street, Suite 3
Babylon, New York 11702

Attorney for Defendant Hubbard
Joseph Hubbard, Esq.
619 Deer Park Avenue
Babylon, New York 11702

Doreen Turnbull, PRO SE
121 Alicia Drive
North Babylon, New York 11703

Francis Turnbull, PRO SE
121 Alicia Drive
North Babylon, New York 11703

Plaintiffs Michael T. Nugent ("Nugent"), Frank Bustamante ("Bustamante") and 52 Phoenix Corp. ("Phoenix") (collectively "Plaintiffs") commenced this action against defendants Joseph C. Hubbard ("Hubbard"), Ashleigh Sasser ("Sasser"), Thomas

B. Licari (“Licari”), Daniel O’Donnell (“O’Donnell”), Babylon Point Inc. (“Babylon Point”), Goldlic LLC (“Goldlic”) and Jodi Girl Enterprises, Inc. (“Jodi Girl”) for breach of contract, conversion, unjust enrichment, an equitable lien, and declaratory relief. Currently before the Court is Hubbard’s pre-answer motion to dismiss pursuant to CPLR 3211.

The Complaint alleges, among other things, that pursuant to a “Purchase Agreement” dated March 1, 2011, Hubbard and Sasser agreed to buy Babylon Point and all of its assets and liabilities, including a restaurant known as The Hook. Significantly, the Purchase Agreement, a copy of which is annexed as an exhibit to Hubbard’s moving papers, is a single-page, handwritten document that does not identify any of the Plaintiffs as the seller, nor is it signed by anyone as seller or on behalf of the seller. The Purchase Agreement does state “subject to buyers attorneys approval as to substance + form” under which Hubbard initialed.

The Complaint further alleges that the terms of the Purchase Agreement were detailed in a document entitled “Stock Purchase Agreement With Seller Representations,” (“Stock Purchase Agreement”) dated March 2011. The Stock Purchase Agreement, a copy of which is annexed as an exhibit to Hubbard’s motion papers, is between Bustamante, as seller, and Sasser as buyer. The Stock Purchase Agreement recites that Bustamante is the sole stock holder of Babylon Point, that Babylon Point does business under the name THE HOOK, and that the seller desires to sell all of the outstanding shares in Babylon Point to the buyer. The Stock Purchase Agreement is signed only by Bustamante and Sasser. It is not signed by Hubbard.

Plaintiffs allege that Hubbard and Sasser defaulted on their obligations under the Purchase Agreement and Stock Purchase Agreement by failing to pay the entire amount agreed upon for the sale of Babylon Point and The Hook. The first cause of action is asserted against Hubbard and Sasser for breach of contract. The second and third causes of action are not asserted against Hubbard. The fourth cause of action seeks an equitable lien on certain restaurant equipment and fixtures and an injunction prohibiting the

disposition of same. As asserted against Hubbard, the fifth cause of action seeks a judgment declaring that Hubbard is an owner of Babylon Point as of March 1, 2011, and that he is responsible for all of Babylon Point's assets and liabilities as of that date. As asserted against Hubbard, the sixth cause of action seeks a judgment declaring that Hubbard is responsible for all amounts owed on a note, the payment of which was allegedly assumed pursuant to the Purchase Agreement. As asserted against Hubbard, the seventh cause of action seeks a judgment declaring that Hubbard is responsible for any and all amounts owed on leases related to The Hook, which he allegedly assumed pursuant to the Purchase Agreement.

In support of his motion to dismiss, Hubbard contends, among other things, that the documentary evidence establishes that he never agreed to purchase Babylon Point and all of its assets, including The Hook, and that the Purchase Agreement is not an enforceable contract. Hubbard argues that the Purchase Agreement is indefinite as it does not identify the parties to the contract and fails to identify the time and method of performance. In opposition, the Plaintiffs contend, among other things, that Hubbard entered into both the Purchase Agreement and Stock Purchase Agreement to purchase Babylon Point and all of its assets and liabilities. Plaintiffs argue that the terms of the Purchase Agreement are set forth in the Stock Purchase Agreement, which Plaintiffs contends Sasser executed on behalf of herself and Hubbard. Plaintiffs assert that the Purchase Agreement and Stock Purchase Agreement collectively identify the parties to the agreements, the assets being transferred and the sale price. Thus, Plaintiffs contend that the Purchase Agreement and Stock Purchase Agreement are sufficiently definite to be enforced against Hubbard.

Discussion

“A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence submitted by the movant utterly refutes the plaintiff's allegations against it and conclusively establishes a defense as a matter of law” (*Cog-Net Bldg. Corp. v. Travelers Indem. Co.*, 86 AD3d 585 [2d Dept 2011]). “Few

principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract” (*Cobble Hill Nursing Home, Inc. v Henry and Warren Corp.*, 74 NY2d 475, 482 [1989], citing *Martin Delicatessen v Schumacher*, 52 NY2d 105, 109; Restatement (Second) of Contracts § 33 [1981]). A mere agreement to agree, in which a material term is left for future negotiations, is unenforceable (*166 Mamaroneck Ave. Corp. v 151 East Post Road Corp.*, 78 NY2d 88, 91 [1991]).

Here, the Purchase Agreement is vague and indefinite. First, the Purchase Agreement is not signed by all of the purported parties thereto as it does not identify any of the Plaintiffs, or anyone else, as the seller, nor is it signed by any of the Plaintiffs. Thus, it is unclear whether any of the Plaintiffs have standing to seek to enforce the purported contract as it does not identify any of them as parties. Moreover, contrary to the Plaintiffs’ contention, the Purchase Agreement does not identify Babylon Point as the entity being sold or list its assets and liabilities. The word “Hook” in the Purchase Agreement in no way refers to Babylon Point. Most significant is the provision in the Purchase Agreement that subjects it to the approval of the buyer’s attorney. When the language of a contract makes the agreement subject to the approval of attorneys, the contract is not binding and enforceable until approved (*Jericho 99 Partners, LLC v Concord Mortgage Corp.*, 8 Misc3d 1018[A], 2005 NY Slip Op 51184[U][Sup Ct, Nassau County 2005]).

Additionally, the Stock Purchase Agreement is not an enforceable contract against Hubbard as he is not a party to that agreement. It was signed only by Bustamante and Sasser. There is no support for the Plaintiffs’ contention that Sasser signed the Stock Purchase Agreement on behalf of Hubbard.

Finally, because the documentary evidence establishes that neither the Purchase Agreement or the Stock Purchase Agreement are enforceable contracts between Plaintiffs and Hubbard, it follows that Plaintiffs’ claims as asserted against Hubbard for a judgment declaring Hubbard’s obligations under those agreements and for an equitable lien on certain assets pursuant to those agreements must also be dismissed. Accordingly,

it is

ORDERED that the motion (Mot. Seq. 001) by Defendant Joseph C. Hubbard to dismiss the Complaint as asserted against him is granted.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 22, 2013
Riverhead, New York



EMILY PINES
J. S. C.

Final
 Non Final