DUPLICATE ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

JOHN PIRRAGLIA,

Plaintiff,

Index No.: 23247/2015E

-against-

DECISION/ORDER

JOFSEN, INC.; JORGENSON'S LANDING, INC., JOHN P. JORGENSON; CARL D. MADSEN,

Defendants.

Recitation, as required by CLR§2219[a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits	1,2,3
Affirmation in Opposition	4
Notice of Rejection of Plaintiff's Affirmation in Opposition	5
Reply Affirmation and Exhibits	6,7

GONZALEZ, D.

Upon the foregoing cited papers, the Decision /Order on this motion is as follows:

The defendants move by Notice of Motion, by Herrick, Feinstein, LLP., by Marisa A. Leto, Esq., attorney for the defendants, dated November 20, 2015, for an order: I) compelling arbitration of the causes of action asserted against the defendants in the second Amended Complaint that are subject to a mandatory arbitration clause pursuant to CPLR §7503(a) and staying the above referenced action until these claims are arbitrated; or in the alternative, ii) compelling arbitration of the causes of action asserted against the defendants in the second

Amended Complaint that are subject to a mandatory arbitration clause pursuant to CPLR §7503(a) and dismissing with prejudice the remaining causes of action against the defendants in the Second Amended Complaint pursuant to CPLR Rules 3211(a)(1) and (a)(7); and /or (iii) awarding the defendants such other and further relief as the Court may deem just and proper.

The plaintiff opposes the motion, by Affirmation in Opposition, dated December 4, 2015, by Victor Negron, Esq. The defendants filed a Notice of Rejection of Plaintiff's Affirmation in Opposition with the Bronx County Clerk on April 7, 2016. The plaintiff filed an Affirmation in Reply to the defendant's Notice of Rejection, dated April 11, 2016.

PROCEDURAL HISTORY

This action was commenced on June 12, 2015, by Kevin E. Staudt, Esq., attorney for the plaintiff, by Verified Complaint, and an Order to Show Cause, alleging breach of contract and seeking injunctive relief. On June 26, 2015, the defendant's attorney filed an Affirmation in Opposition to plaintiff's Order to Show Cause. The Order to Show Cause was returnable July 27, 2015.

On July 24, 2015, Angel Cruz, Esq., for Maldonado and Cruz, PLLC, filed Notice of Substitution of Counsel, and a Notice of Appearance, on behalf of the plaintiff. On July 27, 2015, the plaintiff and his attorney failed to appear for the OSC, and the Court issued a short form order denying the temporary restraining order.

On September 9, 2015, the plaintiff served and filed an Amended Complaint, and on October 16, 2015, a Second Amended Complaint. No answers have been filed to date. Instead, defendants have moved for dismissal pursuant to CPLR §3211(a)(1). Issue has not been joined.

BACKGROUND

It is alleged that on February 11, 1986, the plaintiff's parents Salvatore and Theresa Pirraglia, subdivided and sold a plot of land bearing City of New York tax lot 177, block 5636, in the County of the Bronx, City and State of New York, commonly known as 701 and 703 Minnieford Avenue, to Jofsen, Inc. Simultaneously, the parties entered into an agreement describing the rights and use of the land between 701 and 703 Minnieford Avenue.

It is alleged that on May 3, 1989, the Pirraglias and Jofsen, Inc. filed a correction deed, to correct the description of the property in the deed, dated February 11, 1986. On September 21, 1991, the plaintiff purchased 703 Minnieford Avenue.

On February 11, 2001, the plaintiff as owner and defendants Jofsen, Inc., and John Jorgenson as tenants entered into a lease agreement for a term of one year. The lease agreement provided the tenant Jorgenson access across the Pirraglia parcel to use Pirraglia's dock for the boat known as Riptide III.

On February 11, 2003, the plaintiff, John Pirraglia, as owner, entered into another five year lease agreement with Jorgenson's Landing Inc., and John Jorgenson, as tenants, for access across the Pirraglia parcel. The lease provided that all disputes between the parties would be resolved in a Court of law. The lease expired on February 11, 2008, but the defendants continue with access across the Pirraglia property.

ORDER TO COMPEL ARBITRATION

The defendants move for an order compelling arbitration of the Third, Fourth and Fifth causes of action asserted against the defendants in the Second Amended Complaint. The defendants assert that said causes of action are subject to a mandatory arbitration clause of the

1986 agreement.

The plaintiff opposes the motion, and contends that the subject arbitration clause lacks consideration, and is unenforceable. The plaintiff contends that defendants, Jorgenson Landing Inc., and Carl D. Madsen have no standing to assert the contractual rights of defendant Jofsen, Inc., who was the only defendant in privity in the 1986 agreement between the Pirraglias and Josfsen, Inc.

CONFLICT OF INTEREST

Pursuant to DR 5-105 [1200.24] Conflict of Interest; Simultaneous Representation:

1. A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or its likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing **differing interests**, except to the extent permitted under **DR 5-105** [1200.24] (C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing **differing interests**, except to the extent permitted under **DR 5-105** [1200.24] (C).

C. In the situations covered by DR 5-105 [1200.24] (A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

According to the New York Lawyers Code of Professional Responsibility, a lawyer must fully disclose the implications of simultaneous representation of multiple clients with different

interests.

The court advised the attorneys for the defendants that it appeared on its face that the defendants do not have common interests in defending this action. In fact, based on the record before the court, it appears that the defendants may be adversely affected by their representation by the same attorney.

Since this matter is in the early stages of discovery and the instant motion is made pre-answer, all parties and circumstances have not been fully presented for the court's consideration. However, the court submits, that in order that each defendant is fully represented, it recommends that separate individual attorneys should represent the defendants, so it is clear that each defendant is fully represented with their differing interests.

DISCUSSION OF LAW

The law is well settled that, pursuant to CPLR § 7503, a party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. An arbitration clause in a written agreement is enforceable when it is evident that the parties intended to be bound by the contract. "A party to an agreement may not be compelled to arbitrate its' dispute with another unless the evidence establishes the parties clear, explicit and unequivocal agreement to arbitrate." *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP.*, 6 NY3d 371 (Ct. Of App. 2006).

Based on the most recent lease agreement entered by and between the parties, which supercedes any and all prior lease agreements, there is no clause in the agreement agreeing to arbitrate any matters. In fact, the lease which supercedes all other agreements clearly states that

all matters shall be resolved in a court of law.

Therefore, since the most recent lease agreement which expired is silent as to arbitration, the plaintiff is not required to arbitrate any issues arising from the lease dispute. Accordingly, the motion to compel arbitration is denied in its entirety.

ORDER TO DISMISS

A motion made pursuant to CPLR Rule 3211 (a)(1) may only be granted where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law *(see Goshen v. Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). "In order for evidence submitted in support of a CPLR Rule 3211(a)(1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case.

In support of their motion, the movants rely upon the 2003 lease agreement for the subject easement, between the plaintiff, and Jorgenson's Landing Inc., and John Jorgenson. The defendants argue that none of the parties to the 2003 lease were rightful owners of the property, and therefore the lease is invalid. The defendants contend that an invalid lease cannot be that basis for an overt act necessary to state a claim for abandonment.

Notwithstanding the defendants conclusory allegations as to the validity of the lease, the 2003 lease agreement does not refute the plaintiff's allegations as to the First Cause of Action, that the 1986 easement by grant to Jofsen, Inc., was abandoned. Further, the 2003 lease

agreement does not establish a defense to the plaintiff's factual allegations related to their Second Cause of Action, for adverse possession.

As to the Fifth Cause of Action for compensatory damages, the defendants have attached no documentary evidence in support of their application, or any legal authority to grant such relief based on the record before the court.

The law is well settled, that a motion pursuant to CPLR R 3211(a)(7), to dismiss for failure to state a cause of action, addresses the sufficiency of the pleadings. The Court will accept all the factual allegations pleaded in plaintiff's complaint as true, and give the plaintiff the benefit of every favorable inference. *Sheila C. v Povich,* 11 AD3d 120 (1st Dept. 2004). The Court must determine whether " from the [complaint's] four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept. 2005)(quoting *Guggenheimer v Ginzburg,* 43 NY2d 268(1977). Whether the plaintiff can ultimately establish its' allegations is not part of the analysis. *EBCI, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11(2005).

The plaintiff has alleged that from February 11, 1986 to February 11, 2003, Josfen, Inc. did not avail itself of the easement. Nor was Josfen, Inc. A party to the 2003 lease agreement. The plaintiff has alleged that from 1986, Josfen, Inc. did not assert any right to the property. Josfen, Inc. was not a party to the 2003 or 2001 lease agreement. Therefore, the plaintiff has alleged sufficient facts in the second amended complaint to state a cause of action for a judgement declaring that the easement by grant to Jofsen, Inc., is abandoned.

In order to state a cause of action for adverse possession, the claimant must allege that possession was: (I) hostile and under claim of right; (ii) actual; (iii) open and notorious; (iv)

exclusive; and, (v) continuous for a period of at least ten years. *Walling v Przyblo*, 7 NY3d 228 (2006). Based on the record, the plaintiff has alleged sufficient facts to state a cause of action for adverse possession. Therefore, the motion to dismiss said cause of action for an adverse possession is denied in its entirety.

As to entitlement to compensatory damages, attorney's fees and costs cannot as of yet be reflected in any of the documents submitted for this court's consideration. If in fact the plaintiff prevails in this action, the plaintiff may very well be entitled to compensatory damages and attorneys fees, based on the indemnification clause of the lease agreement (Page 10 of the 2003 Lease).

Therefore, the motion to dismiss Count Five of the complaint for compensatory damages and attorneys fees is denied in its entirety.

Accordingly, after a review of the Court file and due deliberation it is hereby

ORDERED, that the defendants' motion for an order compelling arbitration of the causes of action asserted against the defendants in the Second Amended Complaint is denied; and it is further

ORDERED, that he defendants' application for a stay of above referenced action until these claims are arbitrated is denied as moot, since arbitration is not required pursuant to the lease agreement; and it is further

ORDERED, that the defendants' motion for an order dismissing with prejudice Counts One and Two in the Second Amended Complaint is denied; and it is further

ORDERED, that the defendant's motion for an Order dismissing Count Five of the Second Amended complaint is denied in its entirety; and it is further

ORDERED, that the motion by defendants is denied in its entirety.

This constitutes the decision and order of this Court.

August, 18 2016
Bronx, New York

Hon. DORIS M. GONZALEZ, A.J.S.C.