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| Cohen v 112 John St., LLC |
| 2017 NY Slip Op 32388(U) |
| May 30, 2017 |
| Supreme Court, New York County |
| Docket Number: 159344/12 |
| Judge: Peter H. Moulton |
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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : PART 50

----- X

Joseph Cohen :

Plaintiff, :

Index No.:
159344/12

-v- :

112 John Street, LLC and Edward Monani, :

DECISION AFTER
TRIAL

Defendants, :

----- X

Peter H. Moulton, J.S.C.

This bench trial arising from an alleged breach of contract for the sale of real estate was tried before me on February 22, May 23, 24 and 25, 2017. The following constitutes the court's findings of fact and conclusions of law.

Defendant 112 John Street LLC is the fee owner of residential buildings located at 343 East 109th Street and 1976 Madison Avenue in Manhattan (referred to herein as "the buildings"). Defendant Edward Monani ("Monani") is the sole member of 112 John Street.

Monani's primary occupation is running a fish wholesaling operation at the Hunt's Point Market in the Bronx. However, he testified that he "dabbled" in real estate, owning approximately five multi-unit residential properties over 45 years. In 2010 or 2011 he testified that he sold two properties on 120th Street in Manhattan, using broker Yaakov "Koby" Zamir ("Zamir"). Monani was represented in these sales by his lawyer of 20 years, William Mavrelis ("Mavrelis").

Monani apparently mentioned to Zamir that he also owned the buildings that are at issue herein. Zamir took it upon himself to introduce Monani to plaintiff Joseph Cohen ("Cohen"), a real estate investor whom Zamir knew was looking to purchase investment properties. Monani testified that the buildings were not for sale, but he agreed to go to Cohen's office "to listen."

Monani and Zamir met with one of Cohen's brothers at Cohen's office in Kew Gardens, Queens to discuss the properties. Monani testified that he and Mavrelis then had three subsequent meetings with Cohen's representatives and lawyers in September 2012. Before the first meeting, Mavrelis circulated a multi-page form contract of sale that, inter alia, listed the sale price of the two properties at \$2.25 million and stated that the broker's commission would be paid by seller.

The parties were unable to agree to terms at these meetings and no contract was signed. Cohen testified that a point of contention was that Monani wanted to understate the purchase price, and somehow effect an "under the table" side payment, so that he could hide this later amount from his estranged wife, with whom he was going through a contentious divorce. Cohen testified that he told Monani that he would not do that. At trial, Monani admitted that he was going through a "wicked" divorce at that time, but he denied that he ever proposed payment terms that would hide assets from his wife. Mavrelis' proposed, unsigned form contracts of sale

both contained a purchase price of \$2.25 million, lower than the \$2.8 million figure contained in a subsequent Binder Contract of Sale signed by the parties, which is discussed below. Plaintiff asks this court to draw the inference from this discrepancy that Monani was seeking to register a sham purchase price. Monani did not address this discrepancy at trial, except to deny that it was evidence that he wanted to hide assets from his wife.

Cohen testified that Monani had complained to him that Mavrelis was getting in the way of finalizing a deal. According to Cohen, this led to a meeting on October 19 attended by Cohen, Monani and Zamir at a Subway sandwich shop at 3rd Avenue and 115th Street, a location that was on Monani's route home to New Jersey after his night shift at the Hunt's Point Market. No lawyers were present. Zamir appears to have set up this meeting, but Monani testified that he thought he was just meeting with Zamir and not with Cohen. Before the meeting, Cohen instructed his secretary to type up a "Binder Contract of Sale" containing certain terms. Cohen brought this one page document to the Subway meeting. After some discussion, both Cohen and Monani signed the Binder Contract of Sale.

The Binder Contract of Sale identifies the buyer ("Joseph Cohen"), the seller ("112 John Street LLC, Edward Monani"), the addresses of the two properties, a handwritten purchase price of \$2.8 million and a "Good Faith Deposit" of \$100, which is

handwritten over the typed \$500.

The Binder Contract of Sale states:

Buyer and Seller acknowledge that acceptance of this contract constitutes a meeting of the minds, and this contract is valid if signed in counterpart, and if faxed.

If a more formal contract is executed, buyer will forward copy to buyer's [sic] agent. Closing to take place no later than 12/13/2012 and seller must provide clear and marketable title. Other terms will be determined before a formal signing of contract of sale.

Both Cohen and Monani signed the contract.¹ Cohen testified that he thought that they had a deal. He testified that he "shook hands on it" with Monani. Plaintiff contends that the Binder Contract of Sale is a valid contract that contains all material terms. For his part, Monani testified that he thought that he had signed "a right of first refusal." According to Monani he was not given a copy of the Binder Contract of Sale that day. It is undisputed that the contract was never faxed. Cohen testified that he changed the \$500 good faith deposit to \$100 at Monani's insistence. Monani stated that he didn't want any deposit, that Cohen insisted that he take something, and that Cohen stuffed a \$100 bill in his pocket. Monani left with the \$100; he did not explain why he did not simply leave the \$100 bill.

¹The signature line for Monani does not identify his relationship to 112 John Street, the actual owner of the buildings.

Negotiations continued after October 19 over the terms of the sale, and the means that would be used to pay the contract price. For reasons that were unexplained at trial, these negotiations included using other real properties owned by Cohen as collateral for the notes to be given Monani. Cohen insisted that he had enough cash to close on the deal and that the financing options explored by the parties after signing the Binder Contract of Sale were explored at Monani's insistence. At trial, Cohen called his bookkeeper David Klonowski to review Bank Records received in evidence that appeared to show that Cohen had more than enough money in the account of his LLC, Maujer LLC, to pay in cash for the buildings. The Maujer account averaged approximately \$5-6 million for most of October through December 2012. At the end of December the balance in the account was depleted to approximately \$3,600, but the balance rebounded to \$7 million by the end of January 2013. The small balance at the end of December was unexplained.

The parties continued to bargain about payment terms. They set a meeting for December 5, 2012. On December 4, 2012, Mavrelis emailed Cohen's lawyer to cancel the closing on the instructions of the lawyer representing Monani in the divorce action.

Due to circumstances beyond my client's control, a court order in a matrimonial proceeding, the contemplated transaction cannot go forward at this time. Sorry for

the inconvenience this may have caused with your schedule. The meeting for tomorrow his hereby cancelled.

The parties never closed on the buildings. Cohen subsequently caused lis pendens to be put on the two buildings, and this litigation ensued. The complaint asserts two causes of action for specific performance and breach of contract.

DISCUSSION

Pursuant to the Statute of Frauds, (GOL § 5-703), any conveyance concerning real estate must be in writing. A real estate binder of sale "can be enforced as a contract where it identifies the parties, describes the subject property, and recites the essential terms and is signed by the parties to be charged." (Ramos v Lido Home Sales Corp., 148 AD2d 598.) That the parties contemplated a more formal contract would not impair the effectiveness of the binder if it, in fact, embodies all of the essential terms of the agreement. (160 Chambers St. Realty Corp. v Registrar of the City of New York, 226 AD2d 606.)

Here the Binder Contract of Sale did not embody all of the essential terms of the agreement. Among other items, the parties were never able to agree on how the purchase price would be paid. The Binder Contract of Sale makes no mention of means of payment. Subsequent to the signing of the Binder Contract of Sale there was much back and forth, with no resolution, concerning the possibility

of using mortgages, including mortgages collateralized by one or more of plaintiff's other properties. Additionally, there is no mention in the Binder Contract of Sale of DHCR registration, or of DOB violations, or of the leases held by renters at the property, or whether there would be adjustments for taxes or utilities, or how Mr. Zamir, the broker, would be paid. While Cohen testified that he agreed to purchase the property "As Is," the Binder Contract of Sale does not contain that phrase.

The poorly drafted binder also is ambiguous as to whether a "more formal contract of sale" will, or will not, be executed, saying at one point "[i]f a more formal contract of sale is executed buyer will forward copy to buyer's [sic] agent." This phrase on its own raises questions: Is the right meant to be reciprocal? Why would a buyer send a "more formal contract" to its own agent, rather than to the seller or its agent? Further, while the above-quoted sentence suggests that a more formal contract was optional, a later sentence makes it appear that "other terms" remained open: "Other terms will be determined before a formal signing of contract of sale." Certainly the parties' behavior after signing the Contract Binder of Sale supports the conclusion that the parties had not agreed on all material terms.

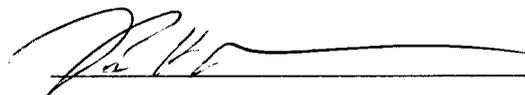
Where a writing purporting to convey real estate does not include essential terms, it is unenforceable under the Statue of Frauds. (See Argent Acquisitions, LLC v First Church of Religious

Science, 118 AD3d 441; Nesbitt v Penalver, 40 AD3d 596; 929 Flushing LLC v 33 Development Inc., 52 Misc3d 195.) I find that the October 19, 2012 Binder Contract of Sale is unenforceable.

CONCLUSION

For the reasons stated, the court finds for the defendants. The complaint is dismissed, and judgment shall be entered accordingly. Upon service of a copy of this decision and order with notice of entry, the clerk shall cancel and discharge the Lis Pendens on the two buildings, 343 East 109th Street and 1976 Madison Avenue. This constitutes the decision and order of the court.

Dated: New York, NY
May 30, 2017



Hon. Peter H. Moulton