

Gordon v Schaeffer
2018 NY Slip Op 31259(U)
June 19, 2018
Supreme Court, New York County
Docket Number: 651077/16
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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ROBERT GORDON,

Plaintiff

Index No. 651077/16

v

DECISION AND ORDER

DONNA SCHAEFFER,

Defendant.

MOT SEQ 001
-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, to recover for breach of contract, the plaintiff, Robert Gordon, moves for summary judgment on the issue of liability and for a reference to assess damages. The defendant, Donna Schaeffer, opposes the motion. The motion is granted to the extent that Gordon is awarded summary judgment on the issue of liability, and the motion is otherwise denied.

II. BACKGROUND

Schaeffer, along with Gordon's now-estranged wife, Dorie, established a corporation known as Designs By D&D, Inc., which was in the business of selling jewelry at retail. In an action entitled Schaeffer v Gordon, New York County Index No. 650800/12 (the Schaeffer action), commenced against Gordon, Dorie, several of Gordon's business entities, and Dorie's limited liability

company (LLC), Schaeffer alleged that Dorie misappropriated corporate funds and assets, and that Gordon and his business entities aided and abetted such wrongdoing. The Schaeffer action was partially settled by written stipulation dated August 13, 2013, which provided that Schaeffer's counsel, Kreisberg & Maitland, LLP (K&M), would "retain a jewel auctioneer with at least fifteen years' experience in the industry to provide a schedule of minimum selling prices of [certain] Jewelry, as determined by said auctioneer, subject to reasonable business practices, then offer all of the Jewelry at such minimum prices" to Gordon and his business entities, by sending them and their attorney "a copy of the schedule of selling prices of the Jewelry" . . . "via email." It further provided that "if the selling price of any or all of the Jewelry is not paid to K&M within ten (10) days after the aforesaid notice . . . K&M may arrange for the sale of the Jewelry in its discretion."

Dorie and her LLC settled the Schaeffer action by transferring and surrendering full right, title, and ownership in certain pieces of jewelry to Schaeffer. It is undisputed that, on December 18, 2013, Schaeffer, without notice to Gordon, auctioned off the subject jewelry, yielding \$427,455.22.

By order dated June 11, 2014, the Supreme Court in the Schaeffer action awarded Gordon and his business entities summary judgment dismissing the complaint as against them. By order

dated April 16, 2015, the same court vacated a previously issued restraining order issued against Gordon and his businesses, determined the priority of tax and other liens, and concluded that, although Gordon and his businesses "waived any claim to the jewelry in the Stipulation," they "may seek a remedy against Ms. Schaeffer arising out of any liability incurred as a result of the taxes owed or the alleged breach of the procedures set forth in the Stipulation relating to the disposal of the jewelry." (emphasis added).

Gordon alleges in his complaint here that Schaeffer breached the stipulation of settlement by failing to provide him, his business entities, or his attorney with the required notice, thus depriving him of the opportunity to purchase the jewelry at the appraised prices, and that she instead auctioned off the jewelry for only \$427,455.22. He further asserts that the actual value of the subject jewelry was approximately \$1.57 million, and that he sustained damages equal to the difference between the value he attributed to the jewelry and the "minimum selling prices" that might have been determined by a properly retained auctioneer.

In support of his motion for summary judgment on the issue of liability, he submits the pleadings, the orders in the Schaeffer action, and his own affidavit, in which he reasserts that he entered into a stipulation of settlement that obligated Schaeffer to give him notice of her intent to sell the subject

jewelry and a right of first refusal, but that she instead auctioned it off without such notice. In opposition, Schaeffer, relying primarily on the deposition transcripts of Dorie and Gordon that were taken in the Schaeffer action, asserts that summary judgment should be denied because there are triable issues of fact as to whether (a) Gordon or his businesses were ready, willing, and able to purchase the subject jewelry, (b) the promise to provide him notice and an opportunity to purchase the jewelry was not supported by any consideration, and (c) he did not actually sustain damages as a result of the December 2013 sale.

III. DISCUSSION

A. Summary Judgment Standard

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v

Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). The “[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Vega v Restani Constr. Corp., supra, at 503.

B. Breach of Contract

To successfully prosecute a cause of action to recover damages for breach of contract, the plaintiff is required to establish (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). The failure to follow the procedures set forth in a stipulation of settlement constitutes a breach of contractual obligations. See Amalfi, Inc. v 428 Co., Inc., 153 AD3d 1610 (4th Dept. 2017); Citrin v Conti, 290 AD2d 264 (1st Dept. 2002).

“Since the plaintiff’s motion was for summary judgment on the issue of liability only, [he] was not required to submit proof of the amount of damages.” 82-90 Broadway Realty Corp. v

New York Supermarket, Inc., 154 AD3d 797, 798 (2nd Dept. 2017);
see Seidman v Industrial Recycling Props., Inc., 106 AD3d 983
(2nd Dept. 2013); Northway Mall Assocs. v Bernlee Realty Corp.,
90 AD2d 739 (1st Dept. 1982).

Gordon established, prima facie, that the stipulation of settlement was a contract, that he and his businesses performed their obligations thereunder, and that Schaeffer breached her obligations under the stipulation by auctioning off the subject jewelry without providing Gordon notice and an opportunity to exercise the right of first refusal. Although Gordon was not obligated to establish the amount of his alleged damages on this motion, his affidavit establishes, prima facie, that had he been given the opportunity to purchase the jewelry at "minimum selling prices," and exercised the right of first refusal, he would have been able to resell the jewelry at a higher price. He has thus made a prima facie showing that it would be "reasonable to infer that there probably are damages" (Northway Mall Assocs. v Bernlee Realty Corp., supra, at 739) arising from the alleged breach.

In opposition to Gordon's showing, Schaeffer fails to raise a triable issue of fact, since the deposition transcripts and filings upon which she relies do not rebut Gordon's claim that the stipulation of settlement was a contract, that Gordon and his business entities performed thereunder, that Schaeffer failed to satisfy her obligations under the stipulation, or that he has not

shown the existence of any damages. Rather, she employs these submissions in an attempt to show that neither Gordon nor his business entities were ready, willing, and able to purchase the jewelry at the time she auctioned it off, and she argues that there is thus a triable issue of fact as to whether Gordon can make out a cause of action to recover for breach of contract or could have sustained any compensable damages as a consequence.

These contentions are legally unavailing, since Gordon was not obligated to show that he was ready, willing, and able to exercise a right of first refusal in order to make out a breach of contract cause of action. Moreover, as noted above, since Gordon only moves for summary judgment on the issue of liability, he is not obligated to make a prima facie showing with respect to the amount of damages. In addition, even if Schaeffer had a colorable argument that Gordon's financial inability to purchase the jewelry in December 2013 could defeat his breach of contract claim, the deposition transcripts, which reflect testimony given during the summer of 2013, do not reflect the financial condition of Gordon or his businesses at the time of the alleged breach.

C. Gordon's Financial Condition and the Right of First Refusal

With respect to Schaeffer's contention that Gordon was obligated on this motion to establish, prima facie, that he was ready, willing, and able to exercise the right of first refusal,

the Court of Appeals has explained that:

"[t]he effect of a right of first refusal, also called a preemptive right, is to bind the party who desires to sell not to sell without first giving the other party the opportunity to purchase the property at the price specified. Such right of first refusal differs from an option in significant respects. Unlike an option--in essence, an offer which by contract is to be kept open--a right of first refusal does not, at the time it is given, include an operative offer. Rather, it is a restriction on the power of one party to sell without first making an offer of purchase to the other party upon the happening of a contingency: the owner's decision to sell to a third party. Under a right of first refusal, the only offer involved is one to be made in the future, if and when the owner reaches agreement with a third-party purchaser. Also, unlike an option--which creates in the optionee a power to compel an unwilling seller to sell at the agreed price--a right of first refusal contemplates a willing seller who desires to part with the property. In sum, a right of first refusal merely provides that before an owner sells, it will first give the other party a chance to buy."

LIN Broadcasting Corp. v Metromedia, Inc., 74 NY2d 54, 60 (1989) (citations omitted). Contrary to Schaeffer's contention, a party who has the right of first refusal will only be obligated to show that he or she was ready, willing, and able to exercise that right where he or she seeks specific performance of the agreement. See Cipriano v Glen Cove Lodge #1458, B.P.O.E., 1 NY3d 53 (2003); Cho v 401-403 57th Street Realty Corp., 24 AD3d 153 (1st Dept. 2005). Damages for breach are available

regardless of the readiness of the holder of the right, provided that the wrongful deprivation of the exercise of the right actually causes injury. See Cipriano v Glen Cove Lodge #1458, B.P.O.E., supra.

D. Lack of Consideration

Contrary to Schaeffer's contention, Gordon established that he and his business entities gave consideration for the right of first refusal and performed their obligations under the stipulation by discontinuing their counterclaims. It is well settled that a written promise to discontinue a legal claim can constitute valid consideration. See Wood Realty Trust v N. Storonske Cooperage Co., Inc., 229 AD2d 821 (3rd Dept. 1996); see also Reddy v Mihos, 160 AD3d 510 (1st Dept. 2018); Korff v Corbett, 155 AD3d 405 (1st Dept. 2017); Robert V. v Bango, 146 AD3d 1101 (3rd Dept. 2017); Williamsville Central School Dist. V New York State Urban Dev. Corp., 142 AD3d2 981 (4th Dept. 1988).

E. Damages

Also without merit is Schaeffer's contention that Gordon's motion must be denied since he has not and can not demonstrate damages as a result of the breach of contract. However, while the precise amount of damages need not be demonstrated at this juncture, it is reasonable to infer here that there likely are

damages arising from the breach, leaving the amount to be determined at trial, and after completion of discovery. See Northway Mall Assocs. v Bernlee Realty Corp., supra, at 739.

IV. CONCLUSION

Accordingly, it is

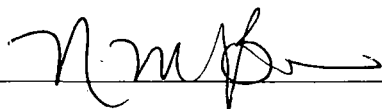
ORDERED that the plaintiff's motion for summary judgment is granted to the extent that he is awarded summary judgment on the issue of liability, and the motion is otherwise denied; and it is further,

ORDERED that the parties shall appear for a preliminary conference on August 16, 2018, at 9:30 a.m.

This constitutes the Decision and Order of the court.

Dated: June 19, 2018

ENTER: _____



J.S.C.

HON. NANCY M. BANNON