Lunger v Samet
2018 NY Slip Op 33174(U)
November 30, 2018
Supreme Court, Kings County
Docket Number: 512396/14
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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J.J. LUNGER, YOILY GRUBER & BERGEN STREET DEVELOPMENT COMPANY, LLC,,

Plaintiffs, Decision and order

- against - Index No. 512396/14

ms # 2 & 3

JOEL SAMET, BERNARD SAMET, VELVET REALTY CORP., LEMA CLOTHING CORPORATION & GREAT NECK PARTY INC., et al.,

Defendants, November 30, 2018

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to compel certain documents from the defendants. The defendants have cross moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to state a cause of action. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing the arguments this court now makes the following determination.

On March 22, 2005 the plaintiffs entered into an agreement, specifically a joint venture, with defendant Velvet Realty Corp., concerning property owned by Velvet located at 815 Bergen Street in Kings County. Velvet is solely owned by defendant Joel Samet. Pursuant to the agreement the plaintiffs agreed to develop the property, to obtain any necessary zoning variances and to utilize the property by building condominiums and retail stores. The agreement provided that following the development of the property the defendants Joel and Bernard Samet would own 42.5% of the

property and the plaintiff developers would own 57.5% of the property. The agreement required the developers to pay the Samets $1,400,000, pursuant to a schedule outlined elsewhere in the agreement before any ownership interest would be transferred to the developers. Thus, the agreement provided that when such payments were made the percentages noted would be transferred to the developers. An amendment to the agreement was executed on July 6, 2005 which changed the condition upon which the transfer to the developers would take place. The Amendment provided that "it is now agreed that the Property will be conveyed to the LLC at such time as the Developers have either obtained approval by the Community Planning Board of a zoning variance for the construction of a residential and/or combined use building on the property, or waived their entitlement to terminate the development fort failure to obtain same" (see, Amendment to Agreement, §2). Further, the Amendment stated that the "Parties have executed a Memorandum of Contract simultaneous herewith for the Developers to file against the Property hereafter, in their discretion" (see, Amendment to Agreement, §4).

On May 12, 2008 the defendants notified the developers they were exercising their right to cancel the agreement pursuant to §27 of the agreement on the grounds the developers failed to "fulfill a material obligation under the terms of the Agreement" (id). Specifically, the termination letter noted the developers

did not make payments pursuant to Article 4 and 23 of the agreement and did not secure zoning approvals pursuant to Article 7 of the agreement. Indeed, Article 8 of the agreement permitted each party to terminate the agreement upon a failure to obtain zoning variances. The agreement provided that if such termination was exercised then "it shall be Velvet's obligation and responsibility to repay to the Developers" certain payments made (id). A few days later the developers rejected the termination in a letter dated May 15, 2008 arguing that in fact the defendants had breached other portions of the agreement. Specifically, the developers noted the defendants encumbered the property, defendant Lema Clothing Corp., had not vacated the premises and defendant Great Neck Party Inc., failed to make monthly rental payments as required.

This action was commenced on December 31, 2014 alleging various causes of action against the defendants.

The developers have moved seeking to enforce an entitlement to file a memorandum of contract and the defendants have moved seeking to dismiss the complaint on the grounds the actions are barred by the applicable statute of limitations.

Conclusions of Law

It is well settled that a cause of action seeking specific performance carries a six years statute of limitations (CPLR

§213(2)), Feldman v. Teitelbaum, 160 AD2d 832, 554 NYS2d 265 [2d Dept., 1990]). Indeed, all the causes of action contained in the complaint carry a six year statute of limitations. Further, a cause of action alleging breach of contract begins to accrue at the time of the alleged breach (JP Morgan Chase Bank N.A., v. Mbanefo, _AD3d_, _NYS3d_, 2018 WL 5931480 [2d Dept., 2018]). The developers argue the contract was never validly terminated therefore there was breach and consequently the statute of limitations has not even begun. Specifically, they argue the agreement requires, as a condition precedent, the return of any monies paid to the defendants before any termination may commence. They assert that "the return of the moneys (sic) paid by the plaintiffs was clearly and unambiguously a condition precedent to the termination of the agreement between the parties, as one clause in question is unequivocal, providing that 'it shall be the developer's obligation and responsibility to repay' the moneys forwarded by the Developers" (see, Plaintiff's Memorandum of Law, page 21).

It is well settled that a condition precedent is an "act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (Oppenheimer & Company Inc., v. Oppenheim, Appel, Dixon and Co., 86 NY2d 685, 636 NYS2d 734 [1995]). Thus, a condition precedent is an act or an event that must occur

before the obligations of the parties become operative. If such condition is not fulfilled then the parties are excused from performing under the contract. For example where a broker maintains a contract for the commission of a fee upon closing of title a condition precedent to the contract requires the title actually close (Levy v. Lacey, 22 NY2d 271, 292 NYS2d 455 [1968]). Generally, it is for the court to decide whether a term of a contract is in fact a condition precedent (Rooney v. Slomowitz, 11 AD3d 864, 784 NYS2d 189 [3rd Dept., 2004]). It must be clear from the contract itself the parties intended a provision to operate as a condition precedent (Kass v. Kass, 235 AD2d 150, 663 NYS2d 581 [2d Dept., 1997]). Therefore, if there ambiguity in the language such language will not be treated as a condition precedent (id).

In this case the obligation to return funds paid by the developers was not a condition that required fulfillment before a termination was possible. On the contrary, the termination triggered the obligation to repay the money. Therefore, the failure to repay the money does not mean a condition precedent was not satisfied.

The developers alternatively argue the termination was ineffective since the impossibility of obtaining zoning variances excused the failure to perform, specifically to obtain necessary financing. However, for a party to escape liability under the

doctrine of impossibility of performance the impossibility must be an event that was not foreseeable or not guarded against in the contract (Kel Kim Corp., v. Central Markets Inc., 70 NY2d 900, 524 NYS2d 384 [1987]). In this case, clearly, the possibility zoning variances would not be granted was entertained and provisions for such eventuality, should they occur, were included within the contract's provisions. Therefore, this is an improper basis upon which to excuse the developer's failure to obtain financing.

The true issue that must be addressed is whether the termination notice sent exercising the right to terminate, in fact, terminated the contract.

The developers argue the termination notice did not actually terminate the contract because the termination notice sent was expressly based upon Article 27 of the lease which differs from Article 8 of the lease, the termination provision for the failure to obtain zoning variances. According to the developers a termination notice sent pursuant to Article 27 requires "notice of a party's breach, for cause, at which time the breaching party would likely be liable to the other for damages" (see, Plaintiff's Memorandum of Law, page 27). If true, the developers have failed to explain why such termination notice was rejected since any breaches, and likewise any breaches allegedly committed by the defendants as outlined in the developer's rejection of the

termination, could have been the subject of a damages determination. The rejection of the termination was based on four factors which the developers asserted exceeded the alleged breaches contained in the termination itself. Even if true, the developers have not presented any evidence the defendant's termination notice was somehow improper and worthy of rejection. As noted, at most, the termination should have been accepted and the amounts due each other or any applicable set-offs could have been determined at a hearing concerning the appropriate damages due each party. Moreover, to the extent the developers argued the breaches were baseless, that too is a conclusion neither party could unilaterally invoke. Thus, the developers' conclusions that all the breaches for which they were accused were in fact non-breaches were factual questions that required further adjudication. Indeed, according to the developers the termination notice could only be exercised if the other party admitted the breach, an unlikely reality.

Therefore, even if a distinction existed within the agreement concerning the manner of termination based upon other breaches and based upon the failure to obtain zoning variances that alone does not indicate no termination notice existed.

However, the defendants have presented arguments that a termination notice was served in May 2008 it was rejected a week later and then this action was commenced at the end of 2014 with

no activity in the intervening years necessitating a dismissal on statute of limitations grounds. However, Mr. Lunger stated in his affidavit that "from approximately 2007 through 2013 I spoke with Bernard Samet frequently, and met every few months to discuss how best to move forward. At no time did I indicate that we were abandoning the project, or the money that had been invested, and the defendants understood and agreed" (see, Affirmation of J.J. Lunger, ¶21). The defendants dispute that assertion. Joel Samet asserts that "at no time after their receipt of the May 12, 2008 Notice from the Defendants did the Plaintiff's demand, commence, or even seek, any dispute resolution of either the Termination or of the breach issues raised by Defendants in said Notice" (see, Affirmation of Joel Samet, ¶30). However, in Joel Samet's deposition dated March 27, 2017 he acknowledged that he had been in contact with the developers concerning the status of the agreement. Specifically, "Samet testified that he constantly went to the Developers to demand to know why they stopped making payments" (see, Defendant's Reply Affirmation, ¶43).

Therefore, there are questions of fact indeed whether the termination notice was revoked by subsequent conduct seeking further ways to revive or modify the agreement. Consequently, the motion seeking summary judgement to dismiss the complaint based upon the statute of limitations is denied. Likewise, the

plaintiff's motion seeking entitlement to file the memorandum of contract is denied. The plaintiffs have waited an unreasonably long time in which to seek this relief.

So ordered.

ENTER:

DATED: November 30, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC