

**South Bronx Overall Economic Dev. Corp. v 4521
Park Ave. Realty Corp.**

2018 NY Slip Op 33963(U)

September 27, 2018

Supreme Court, Bronx County

Docket Number: 22632/2018E

Judge: Julia I. Rodriguez

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

-----X **Index No. 22632/2018E**

South Bronx Overall Economic
Development Corp.,
Plaintiff,

-against-

DECISION & ORDER

4521 Park Ave. Realty Corp.,

Present:

Defendant.

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion to dismiss the complaint and for judgment on his counterclaim.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Memorandum of Law in Opposition	3
Reply Affirmation & Exhibits	4

In the instant action, plaintiff South Bronx Overall Economic Development Corp. ("Sobro") alleges causes of action for specific performance and breach of contract against defendant 4521 Park Ave. Realty Corp. ("4521 Park") in connection with an alleged agreement for the sale by 4521 Park to Sobro of certain real property located at 4521-4529 Park Avenue, Bronx, NY ("the Premises").

4521 Park now moves to dismiss the complaint, pursuant to CPLR 3211(a)(1), (5)¹ and (7), and for judgment on its counterclaim for damages in the amount of \$3,000,000.00 for placing a lien on its property without a valid claim and/or cause of action.

The complaint, verified by Sobro's President, alleges as follows: On or about December 3, 2014, Sobro's President, and Messrs. Carlos De Los Santos and Jose Lozano, principals of 4521 Park, executed a Memorandum Of Understanding (MOU) for the sale of the Premises by

¹The moving papers do not address defendant's basis for dismissal under CPLR 3211(a)(5) and, therefore, the court will not address this subsection and deems this claim abandoned.

4521 Park to Sobro, for a purchase price of \$1,160,000.00, for the purpose of developing veterans housing on the Premises. 4521 represented that it owned the entire Premises. The MOU is a binding and enforceable agreement for the sale and transfer of the Premises. Sobro has performed or has been prevented from performing all conditions set forth in the MOU and is not in default of same. In reliance on the MOU, Sobro spent in excess of \$65,000.00 in preparation for the development of the project, including appraisals, environmental studies, survey and architectural designs and drawings. Sobro is also contractually beholden to investors who have made commitments toward the development of the project. After the signing of the MOU, 4521 Park, without basis, notified Sobro that it would not execute a contract of sale and would not proceed to close title and failed and refused to take the actions necessary to comply with the MOU and close title. After the signing of the MOU, Sobro discovered that 4521 Park had been actively marketing the property to other potential purchasers and had received a downpayment from one such potential purchaser. After the MOU was executed, 4521 Park unjustifiably demanded a higher acquisition price of \$2,200,000.00. 4521 Park is in breach of the MOU. At all times, Sobro was and remains ready, willing and able to close on the Premises pursuant to the terms of the MOU. The Premises are unique and Sobro has no adequate remedy at law.

In support of its motion, 4521 Park contends that the MOU: (1) does not set forth a definitive purchase price, (2) does not include all the essential terms of a complete agreement, including a closing date and a risk of loss clause, and (3) is not a binding contract because certain emails demonstrate that there were negotiations for an agreement, and not an enforceable agreement. In support of its contentions, 4521 Park submitted the affidavit of Carlos De Los Santos, the MOU and certain email communications. In his affidavit, De Los Santos states as follows: In email communications dated May 24, 2017 and July 11, 2017, respectively, from Woody Victor, Sobro's Vice President, Real Estate Development to 4521 Park, Sobro "admitted that there was no binding contract" between Sobro and 4521 Park. De Los Santos points to the following statements made by Victor as indicative of the lack of an enforceable agreement between the parties: "Our funding partner may pull out if we don't have a deal soon," "I would

like us to move to contract ASAP,” and “Current offer on the table.” De Los Santos also states that the MOU indicates that the purchase price included “a fixed percentage of the development fee” but did not set forth how that fee would be calculated, what it would be or when it would be paid. Further, 4521 Park did not receive any consideration for the MOU, the MOU did not set forth a closing date and Sobro did not set a closing date at anytime thereafter.

In its “Terms” section, the MOU states that “[t]he Seller shall sell and convey and the Purchaser shall purchase the property . . . known as 4521-4529 Park Avenue, Bronx, New York, 10457, Block 3030, Tax Lot 161, 162, and 163.” The purchase price for the land is listed as “\$1,160,000 payable as follows: \$1,160,000 at a construction closing; 5,000 square feet of commercial space located at the newly constructed building; in addition to a fixed percentage of the development fee, which is to be paid through available cash flow.” In the case of default under the MOU, the MOU provides that (1) if the purchaser defaults, the seller’s sole remedy is to retain the downpayment and (2) if the seller defaults, the purchaser shall have all remedies available at law or in equity, including, but not limited to, specific performance. The MOU further states that “it completely expresses their full agreement.”

On a motion to dismiss pursuant to CPLR §3211(a)(1) and (a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” *See Maas v. Cornell*, 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716 (1999). Dismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law. *See Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270 (1st Dept. 2004). Affidavits submitted by a defendant to attack the sufficiency of a pleading “will seldom if ever warrant the relief he seeks unless . . . the affidavits establish

conclusively that plaintiff has no cause of action.” See *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314 (1976).

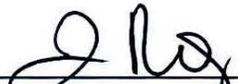
The elements of a claim for breach of contract are: (1) the existence of a contract, (2) the plaintiff’s performance thereunder, (3) the defendant’s breach thereunder, and (4) resulting damages. See *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426, 913 N.Y.S.2d 161 (1st Dept. 2010). To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. See *Express Indus. & Terminal Corp. v. New York State DOT*, 93 N.Y.2d 584, 589, 693 N.Y.S.2d 857 (1999). Here, the MOU sufficiently manifests the mutual assent of Sobro and 4521 Park to all material terms of the agreement. Indeed, it specifically states that “[a]ll prior understandings, agreements . . . between the Seller and Purchaser are merged in this MOU [sic] it completely expresses the parties full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this MOU.” As such, contrary to 4521 Park’s contention, it constitutes an enforceable contract. Further, the complaint sufficiently alleges Sobro’s performance under the contract, 4521 Park’s breach thereunder and resulting damages.

The elements of a claim for specific performance of a contract are: (1) the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, (2) the defendant was able to convey the property, and (3) there was no adequate remedy at law. See *EMF General Contracting Corp. v. Bisbee*, 6 A.D.3d 45, 51, 774 N.Y.S.2d 39 (1st Dept. 2004). The court finds that the allegations set forth in the complaint, discussed above, satisfy the pleading requirements for a cause of action for specific performance.

The court does not find that the documentary evidence submitted by 4521 Park utterly refutes Sobro’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law.

Based upon the foregoing, Defendant 4521 Park Ave. Realty Corp.'s motion to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (a)(7), and for judgment on its counterclaim is **denied in its entirety.**

Dated: Bronx, New York
September 27²⁰¹⁸



Hon. Julia I. Rodriguez, J.S.C.