

291 E. 3rd St. Assoc. LLC v Monte Hermon Christian Church

2019 NY Slip Op 33203(U)

October 25, 2019

Supreme Court, New York County

Docket Number: 652119/2018

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

291 EAST 3RD STREET ASSOCIATES LLC,

Plaintiff,

- v -

MONTE HERMON CHRISTIAN CHURCH and THE
ATTORNEY GENERAL FOR THE STATE OF NEW YORK,

Defendants.

-----X

INDEX NO. 652119/2018
MOTION DATE 12/11/2018
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 51, 97

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for MISCELLANEOUS

ORDER

Upon the foregoing documents, it is

ORDERED, in motion sequence number 002, that the
defendant's motion to dismiss the complaint and cancel the
notice of pendency is denied, and it is further

ORDERED in motion sequence number 003, that plaintiff's
motion (a) requiring defendant to file a petition, forthwith,
with the Attorney General for approval of the sale to plaintiff
of the property located at 289 East 3rd Street, New York, New
York, and (b) prohibiting defendant from submitting or referring

to any appraisal showing the value of the property in 2017, is denied in its entirety.

DECISION

Motion sequence numbers 002 and 003 are consolidated for disposition.

In motion sequence number 002, defendant Monte Hermon Christian Church (Monte Hermon) moves for an order: a) pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint; and b) cancelling the Notice of Pendency filed by plaintiff 291 East 3rd Street Associates LLC (291 East 3rd).

In motion sequence number 003, plaintiff 291 East 3rd moves, by order to show cause, for an order: a) requiring Monte Hermon to file a petition with the Attorney General or with this court, pursuant to the New York Religious Corporation Law and Not-for-Profit Corporation Law (N-PCL) for approval of the sale of the property located at 289 East 3rd Street, New York, New York, pursuant to the terms of the contract between 291 East 3rd and Monte Hermon dated February 20, 2014; and b) prohibiting Monte Hermon from submitting or referring to any appraisal showing the value of that property in 2017 in connection with that petition.

The amended complaint¹ alleges that on February 20, 2014, 291 East 3rd and Monte Hermon entered into an agreement pursuant to which 291 East 3rd would purchase property owned by Monte Hermon, located at 289 East 3rd Street (the Property), for a purchase price of \$2,100,000. 291 East 3rd paid a deposit of \$105,000, which was to be held in escrow.

The deed conveying the property to Monte Hermon, in 1977, by one or more churches, contained a reverter clause. Under the purchase agreement, 291 East 3rd required that the reverter clause be eliminated so that plaintiff would obtain an unencumbered title to the Property.

The agreement also contained a requirement that Monte Hermon would use its best efforts to obtain required approvals from the Attorney General and/or the court in order to sell the Property to 291 East 3rd.

On April 4, 2014, Monte Hermon commenced an action against the various church entities that had conveyed the Property to Monte Hermon in 1977 subject to the reverter clause. Monte Hermon Christian Church v General Assembly of the Christian Church (Disciples of Christ), Inc., et al., Sup Ct, NY County, Index No. 153251/2014 (the Quiet Title Action).

¹ Hereinafter, the complaint refers to the amended complaint.

The complaint in this action alleges that in December 2016, because the Quiet Title Action had not been resolved, 291 East 3rd contacted Monte Hermon to see if it could assist Monte Hermon in resolving the matter. The complaint further alleges that Monte Hermon's counsel informed 291 East 3rd that if the latter paid \$400,000 to the defendants in the Quiet Title Action, that action could be settled. In response, 291 East 3rd offered to contribute \$250,000 to the settlement of the action. The complaint alleges that "[t]he offer by plaintiff of the \$250,000 was unrelated to the value of the Property, but rather the offer was made solely to assist Monte Hermon to settle the Prior Action (in which plaintiff was not a party)."

The complaint alleges that on June 30, 2016, the parties to the Quiet Title Action filed a stipulation indicating that the parties had reached a settlement of the action and that they were "'awaiting approval of the Attorney General of the sale of the subject property that is contemplated by the settlement.'" Amended complaint, ¶ 14. According to the complaint, the contemplated sale was the ultimate sale of the Property to 291 East 3rd. The Quiet Title Action agreement provided that the defendants in that action would give Monte Hermon a new quitclaim deed which did not contain a reverter clause, and in return, Monte Hermon would pay them 25% of the excess above \$2.1 million that Monte Hermon received from the sale of the

property. If the sale did not go through, Monte Hermon would still receive the quitclaim deed but the defendants in Quiet Title Action would receive no payment.

The complaint alleges that, nonetheless, Monte Hermon had taken no steps to file the requisite petition, pursuant to the Religious Corporation Law and N-PCL with either the Attorney General or the court for approval of the Quiet Title Action agreement.

The complaint further alleges that Monte Hermon has informed 291 East 3rd that, based upon a 2017 appraisal, the Property is now worth nearly \$2 million more than it was in February 2014 when the parties entered into their agreement for sale of the Property. The complaint alleges, on information and belief, that Monte Hermon intends to submit the 2017 appraisal in connection with the petition for approval of the sale of the Property to 291 East 3rd to induce the Attorney General or the court to refuse to approve the sale to plaintiff, thereby sabotaging the sale. Monte Hermon could then sell the property to another party at a much higher price, and Monte Hermon would be relieved of paying anything to the defendants in the Quiet Title Action.

The complaint alleges that such conduct constitutes a breach of contract, an anticipatory breach of contract, and a breach of the implied covenant of good faith and fair dealing.

The complaint further alleges that the originally agreed-upon sale price of \$2.1 million was fair and reasonable at the time the agreement was made.

In its complaint, 291 East 3rd requests that the Attorney General, who is named as a nominal defendant in the case, not object to the sale of the property to plaintiff, and asks the court to direct Monte Hermon to convey the property to plaintiff at the originally agreed-upon sale price.

The sale of property owned by a religious corporation is governed by section 12 of the Religious Corporation Law which requires that the religious corporation must obtain the approval of the Attorney General or the court prior to the sale. Section 12 states as follows:

"A religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court or the attorney general therefor pursuant to section five hundred eleven of the not-for-profit corporation law as that section is modified by paragraph (d-1) of subdivision one of section two-b of this chapter or section five hundred eleven-a of the not-for-profit corporation law, except that a religious corporation may execute a purchase money mortgage or a purchase money security agreement creating a security interest in personal property purchased by it without obtaining leave of the court therefor."

Religious Corporation Law § 12 (1).

Motion Sequence Number 002

In moving to dismiss the complaint, Monte Hermon first argues that 291 East 3rd has no cause of action for specific

performance, because as a condition precedent to selling the property to plaintiff, certain steps must occur. First, Monte Hermon must obtain approval of the settlement of the Quiet Title Action from the Attorney General or the court to obtain clear title to the property. As Monte Hermon argues, it cannot transfer title on the Property until the reverter clause has been removed from the title, and the title to the property is clear. Then Monte must submit a petition, pursuant to the N-PCL, to the Attorney General or the court, however, as the Rider to the sale agreement states “[i]t is understood by the parties that the application for approval pursuant to Not-for-Profit law shall not be made until forty-five (45) days after Seller obtains a judgment of clear title [in the Quiet Title Action].”

At the time Monte Hermon’s motion was filed, approval of the settlement of the Quiet Title Action by the court had not yet been obtained. When Monte Hermon filed its reply brief, the requisite 45 days had not yet passed, enabling Monte Hermon to file its petition for approval of the sale pursuant to the N-PCL. Since then, however, the settlement of the Quiet Title Action has been approved by the court (see Monte Hermon Christian Church v General Assembly of the Christian Church (Disciples of Christ), Inc., et al., Sup Ct, NY County, September 10, 2018, Bannon, J., Index No. 153251/2014) and the requisite 45 days have passed. During the oral argument of this

motion, however, according to counsel for Monte Hermon, the deed indicating that Monte Hermon has clear title to the property as a result of the litigation had not yet been delivered to Monte Hermon, and, therefore, Monte Hermon was not yet in a position to file its petition with the Attorney General.

Monte Hermon argues that plaintiff is, therefore, not entitled to specific performance of the contract, and its motion to dismiss should be granted.

In response, 291 East 3rd submits the affidavits of its principals, Gerald Platt (Gerald) and Gideon Platt (Gideon), who state both that the additional \$250,000, offered by 291 East 3rd and accepted by Monte Hermon, was to be used to facilitate the settlement of the Quiet Title Action, and was not intended to alter the purchase price of the property. Gerald and Gideon further assert that in June 30, 2017, Gideon met with Pastor Rafael Gonzalez, a licensed real estate broker and the authorized representative of Monte Hermon, who presented Gideon with the 2017 appraisal which valued the Property at \$4.5 million as of May 3, 2017 and indicated that if 219 East 3rd wished to proceed with the sale it would have to do so at an increased price. Finally, Gideon states that in August 2017, Gonzalez assured him that the petition to the Attorney General was finished and that it would be forwarded to counsel for 291

East 3rd, but that no draft of the petition was ever provided to 291 East 3rd.

291 East 3rd contends that Monte Hermon is ignoring the major thrust of its complaint, which is that, because of the increase in value of the Property, Monte Hermon does not intend to comply with the contract. According to 291 East 3rd, when and if Monte Hermon submits its petition to the Attorney General for approval of the sale of the Property, it intends to submit the 2017 appraisal to ensure that the Attorney General will reject the petition. Alternatively, Monte Hermon does not intend to submit the petition to the Attorney General at all. 219 East 3rd asserts that Monte Hermon intends to sabotage the contract by submitting the 2017 appraisal to the Attorney General, which, according to 219 East 3rd, constitutes an anticipatory breach of contract.

Monte Hermon does not submit affidavits from persons with knowledge of the facts to counter the affidavits of Gerald and Gideon but rather contends that 219 East 3rd's assertions are mere speculation.

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory." Goldman v Metropolitan Life Ins. Co.,

5 NY3d 561, 570-571 (2005) [internal quotation marks and citation omitted]; Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 (2002). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 88 (1994). However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true. Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), affd 94 NY2d 659 (2000). Also, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

Here, Monte Hermon contends that both the statutes governing the sale of church property and the contract recognized that Monte Hermon could not sell the Property until it received approval from the Attorney General and it could not submit the petition for approval until the Quiet Title Action was settled, and it obtained the quitclaim deed to present to the Attorney General with its petition. For these reasons, Monte Hermon argues that plaintiff is not entitled to specific performance of the contract and the action must be dismissed.

To the extent that Monte Hermon initially argued that while the Quiet Title Action was pending specific performance was not available to plaintiff, that litigation has been settled and the motion to dismiss on that basis is moot and must be denied.

It is not clear to the court whether Monte Hermon now has the unencumbered deed for the Property and whether the petition has now been submitted to the Attorney General. Clearly the passage of time has altered the facts alleged in the complaint, and as the court indicated in the oral argument, the court is prepared to grant plaintiff leave to further amend the complaint to allege that the judgment in the Quiet Title Action has been entered and indicate whether Monte Hermon has submitted the petition to the Attorney General. Regardless of whether specific performance is available in a contract for property owned by a religious corporation as 291 East 3rd argues, if Monte Hermon is now in possession of the deed showing clear title to the Property, but still has not submitted the petition to the Attorney General for approval of the sale of the Property to plaintiff, 291 East 3rd may well be able to prove its cause of action for anticipatory breach of contract. Monte Hermon's motion to dismiss the complaint is, therefore, denied.

Motion Sequence Number 003

In motion sequence number 003, 291 East 3rd moves, by order to show cause, for an order requiring Monte Hermon to file

forthwith, a petition with the Attorney General or the court, pursuant to the Religious Corporation Law and the N-PCL, for approval of the sale of the Property to plaintiff, and prohibiting defendant from submitting or referring to the 2017 appraisal for property in those papers.

Monte Hermon opposes 291 East 3rd's request arguing first, that because filing the petition is required under the contract as part of Monte Hermon's contractual agreement to sell the Property to plaintiff, plaintiff is seeking, by way of a motion for preliminary relief, to obtain the ultimate relief it seeks in the complaint, specific performance of the contract between the parties. Essentially, according to Monte Hermon, 291 East 3rd is seeking a mandatory preliminary injunction to require it to begin the sale process. Moreover, Monte Hermon argues that plaintiff's contention that Monte Hermon does not intend to file the petition for approval of the sale with the Attorney General is mere speculation.

Monte Hermon is correct that normally, a preliminary injunction is granted where the relief is necessary to maintain the status quo pending trial and not to obtain a portion of the final relief. "[A] mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in 'unusual' situations, 'where the granting of the

relief is essential to maintain the status quo pending trial of the action.'" Jones v Park Front Apts., LLC, 73 AD3d 612, 612 (1st Dept 2010) (citations omitted). Here, such extraordinary preliminary relief is not necessary to maintain the status quo. Furthermore, it is well established, as a general matter, that relief in the form of a preliminary injunction is only available where the movant can establish "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." Doe v Axelrod, 73 NY2d 748, 750 (1988), citing W. T. Grant Co. v Srogi, 52 NY2d 496, 517 (1981).

Plaintiff's motion for preliminary injunctive relief was filed by order to show cause on November 26, 2018. As noted above, at that time, although the 45 days had passed since the court's order approving the settlement of the Quiet Title Action, Monte Hermon had not yet received a copy of the deed to the property with the reverter clause removed, therefore, Monte Hermon was not yet able to file the petition for approval of sale with the Attorney General. Thus, plaintiff has neither established that it will be irreparably harmed if the preliminary relief is not granted at this point, nor has it shown why it should be entitled to such a mandatory injunction to disrupt, rather than maintain the status quo. For these

reasons, plaintiff's motion for a preliminary injunction requiring Monte Hermon to submit its application to the Attorney General for approval of the sale of the Property to plaintiff is denied. Therefore the court need not reach Monte Hermon's argument that specific performance of a contract for sale of property of a nonprofit corporation is not available if the seller refuses to perform.

Petitioner also seeks to prohibit Monte Hermon from submitting the 2017 appraisal for the Property as part of its petition to the Attorney General. Quoting Scher v Yeshivath Makowa Corp. (54 AD3d 839, 839 [2d Dept 2008]), plaintiff argues that "[w]hen considering whether the terms and conditions of a proposed sale are fair and reasonable to the corporation, the court views the conditions prevailing at the time the contract was made." Therefore, according to plaintiff, the original 2014 appraisal, not the appraisal from 2017, should be submitted to the Attorney General.

Monte Hermon argues that the Attorney General's Guide for submitting such petitions requires that it "must secure an independent appraisal of the property that is the subject of the transaction." Affirmation of Scott D. Woller (mot. sequence 3) exhibit A (Religious Corporations: Sales and Other Disposition of Assets, at 9 [emphasis in original]).

In Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn (76 AD2d 712, 716 [2d 1980], affd 54 NY2d 742 [1981]), the Appellate Division noted that the court must determine both whether “the terms and consideration of the transaction are fair and reasonable and [whether] the purposes of the corporation or interests of its members will be promoted by the sale.” As the court stated in Church of God of Prospect Plaza, in deciding whether to approve the sale of church property,

“[i]t ... appears that the Legislature intended the test to have two prongs. First, the court must determine that the terms and consideration of the transaction were not unwise. In assessing the prudence of the bargain, it is our view that the court should look to the conditions prevailing at the time it was struck. Measured in that light, we agree with the Referee that the contract between plaintiff and defendant was fair and reasonable when made. However, the second prong of the test requires the court to determine that the sale would benefit the corporation or that the best interests of its members would be promoted thereby. We hold that in applying this second prong of the test the court may consider whether corporate purposes would have been served or the best interests of the membership promoted at the time the contract was made, but it should be guided primarily by whether those ends would be realized in light of conditions prevailing at the time the issue is presented to the court.”

Id. at 717, see also Matter of Church of St. Francis De Sales of N.Y. City (110 Misc 2d 511, 512 (Sup Ct, NY County 1981), citing Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn (76 AD2d at 718)).

Thus, under the first prong of the test, the original appraisal conducted in 2014, when the contract was entered into, is appropriate for determining whether the contract was fair and

reasonable when made. However, in determining the second prong, whether the corporate purposes would be realized in light of conditions prevailing at the time the petition is presented for approval, it is appropriate for the Attorney General to consider the 2017 appraisal and/or information regarding the present status of the Property. For that reason, plaintiff's motion for an order prohibiting Monte Hermon from submitting or referring to the 2017 appraisal is denied.

10/25/2019
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE