

**1034 Flatbush Ave. LLC v Madd Prop. LLC**

2020 NY Slip Op 31831(U)

June 11, 2020

Supreme Court, Kings County

Docket Number: 502728/20

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

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

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1034 FLATBUSH AVENUE LLC,

Plaintiff,

Decision and order

- against -

Index No. 502728/20

MADDD PROPERTIES LLC & ROSEN LAW LLC,

Defendants,

June 11, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds no cause of action exists. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Complaint on March 12, 2018 the defendant MADDD Properties entered into a contract with an entity called Renaissance Realty Group for the sale of real property located at 1032-1038 Flatbush Avenue in Kings County. A further Letter Agreement was also entered into between the parties on the same day which required the seller to deposit \$300,000 in escrow pending the seller's securing a certificate of occupancy by June 30, 2019. The closing occurred on June 28, 2018. The Complaint further asserts the contract was assigned to the plaintiff on June 28, 2019 and has commenced this action seeking the \$300,000. The Complaint alleges the seller failed to obtain the certificate of occupancy by the time noted and that therefore they are entitled to the \$300,000 from the escrow agent. The Complaint

alleges two causes of action, one for breach of contract and one for a mandatory injunction requiring the escrow agent to furnish the funds requested.

The defendant has moved seeking to dismiss the Complaint on the grounds the plaintiff has no standing to assert any claims. Specifically, the defendant notes that any rights the plaintiff has regarding breach of contract only flow from the Letter Agreement which was never assigned to the plaintiff. Further, the Contract provides that "none of the representations, warranties, covenants, indemnities or other obligations of Seller hereunder shall survive the closing, except as expressly provided herein and then only for a period of one year from the Closing Date. Acceptance of the deed by Purchaser and delivery of possession shall be deemed full and complete performance and discharge of every agreement and obligation of Seller hereunder, except those, if any, which expressly are stated herein to survive the closing, and then such survival shall be only for a period of one year" (see, Contract, Article 13). Thus, argues the defendant, in any event the plaintiff has no right under the contract to seek enforcement of the Letter Agreement beyond one year after closing. Therefore, the plaintiff maintains no rights in the Letter Agreement and consequently, no causes of action may follow.

### Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The defendant argues that while the actual contract may have been assigned to the plaintiff the Letter Agreement was never assigned to them. However, the Letter Agreement was clearly entered into "upon and subject to all of the terms, covenants and conditions as are more particularly described in the Agreement" (see, Letter Agreement). Thus, surely, all the obligations of the seller flowed to the plaintiff. Although the Letter Agreement was not actually assigned to the plaintiff that does not prevent the plaintiff from exercising any rights contained therein since the Letter Agreement was merely an amendment to the contract which was validly assigned. Paragraph F of the Letter Agreement states "this Amendment may be assigned with the

Agreement" (id). That is not a bar for plaintiff's rights since it does not command and is not an imperative, rather, it merely states that such assignment may be effectuated, however, the plaintiff may fully assert all rights contained therein even without any formal assignment.


Moreover, Article 13 of the Contract does not bar this lawsuit. Article 13 which states that any obligations of the seller last for one year can clearly not refer to the requirement the seller obtain the certificate of occupancy. Pursuant to the Letter Agreement the certificate of occupancy had to be obtained by June 30, 2019. However, the closing took place on June 28, 2018. Thus, it was possible for the seller to secure the certificate of occupancy by June 30, 2019 and yet that date is outside the one year upon which the seller's obligations cease. Thus, pertaining to the certificate of occupancy, Article 13 is an impossibility and cannot bar this lawsuit.

Therefore, based on the foregoing the motion seeking to dismiss the Complaint is denied. The motion seeking to deposit the escrow funds into the court is denied. The funds may remain safely in the escrow account of the escrow agent.

So ordered.

ENTER:

DATED: June 11, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelisman  
JSC