Olden Group, LLC v 2890 Review Equity LLC
2020 NY Slip Op 32478(U)
June 1, 2020
Supreme Court, Queens County
Docket Number: 705889/2018
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

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OLDEN GROUP, LLC,

Plaintiff(s),

-against-

2890 REVIEW EQUITY LLC, 2890 REVIEW TIC OWNER, LLC, DELBELLO DONNELLAN WEINGARTEN WISE & WEIDERKEHR, LLP

Defendant(s).

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Index No.: 705889/2018

Motion Date: January 21, 2020

Motion Cal. No.:

Motion Seq. No.: 3

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QUEENS COUNTY

The following papers numbered EF46-68, EF71, EF77-EF101, EF105 read on this motion by plaintiff for an Order: (1) to restore the case and allow plaintiff to replead pursuant to CPLR §3211(e) or, in the alternative; (2) restoring the case and allowing plaintiff to amend the pleadings pursuant to CPLR §3025, and (3) for a temporary restraining order barring the sale, encumbrance or transfer of the property at issue pending the resolution of this motion and action.

	PAPERS NUMBERED
Order to Show Cause- Affid.-Exhibits.....	EF8-EF68
Appellate Division Order - Affid-Exhibits.....	EFF71
Answering Affidavits - Exhibits	EF77-EF101
Reply Affidavits - Exhibits	EF105

Upon the foregoing papers it is ordered that this motion plaintiff is denied.

The instant Order to Show Cause by plaintiff was filed by emergency application on July 21, 2019. This Court heard arguments by counsel for plaintiff and defendant on the record on July 22, 2019. On that date, this Court denied the Order to Show Cause in its entirety "as per decision on the record". In that decision, the Court found that defendant would be unduly prejudiced by the injunctive relief sought, and that plaintiff failed to demonstrate a likelihood of success on the merits. Plaintiff thereafter appealed.

Prior thereto, by Order dated March 29, 2019 [NYSCEF Doc. No. 41], this Court had granted defendants' motion to dismiss the original complaint pursuant to CPLR §3211(a)(5) and CPLR §3211(a)(7) [motion sequence number "1"]. In that Order, the Court found that plaintiff submitted only an un-executed copy of an alleged Option Agreement. This Court found that:

"GOL 5-1103 provides in relevant part that an agreement or promise to change or modify any contract, obligation, or security interest in personal or real property is not invalid because of a lack of consideration provided that the agreement or promise is in writing and signed by the party against whom it is sought to enforce the change or modification (*see, In re Fishman*, 134 AD3d 1110). There is no such writing in this case. While GOL 5-1103 can be overcome by a partial performance unequivocally referable to the alleged oral modification (*see, Eujoy Realty Corp. v. Van Wagner Communications, LLC*, 22 NY3d 413), there was no such partial performance in this case."

In addition, by Order that same date [NYSCEF Doc. No. 42, motion sequence number"2"], this Court cancelled the Notice of Pendency that plaintiff had filed against the premises. Plaintiff did not move to renew or reargue this decision and did not cross-move to amend its pleading at that time.

After this Court's determination of July 22, 2019, in determination of plaintiff's appeal, on October 9, 2019, the Appellate Division, Second Department issued an order remitting the case to this Court for a determination of plaintiffs motion to restore the case and to allow it to replead pursuant to CPLR §3211(e) or, in the alternative, to amend the pleadings pursuant to CPLR §3025, and for a preliminary injunction. Accordingly, notwithstanding this Court's prior decisions on March 29, 2019, and on July 22, 2019, the Court will now make a determination as directed above. This Court shall so restore the matter for purposes of such a determination.

Plaintiff, Olden Group, LLC (Olden Group), commenced the instant action by filing a Summons and Complaint and Notice of Pendency on April 16, 2018. The original Complaint alleged causes of action for breach of contract, fraud, constructive trust, and declaratory judgment. Plaintiff's claims are based upon defendants' claimed breach of an alleged Purchase Option Agreement ("Option Agreement") which purportedly granted plaintiff an option to purchase the premises located at 28-90 Review Avenue, Long Island City, New York ("the premises"). Plaintiff contends that on or about August 20, 2016, Sam Sprei (Sprei), the principal of Olden Group, and the defendant corporations met in plaintiff's office wherein they allegedly entered into the Option Agreement. Sprei alleges that defendants' principal, Jacob Khotoveli, took the signed Option Agreement and indicated that he would give it to his attorneys to hold in escrow until after the closing. Sprei contends that either the defendant law firm, Delbello, Donnellan, Weingarten, Wise & Wiederkehr, LLP,

is concealing the existence of the executed Option Agreement, or Khotoveli never delivered it to his attorneys, the defendant law firm, to hold in escrow. Defendants maintain that they did not enter into an Option Agreement, and that no such agreement was ever executed by the parties.

Subsequent to this Court's decision of March 29, 2019, wherein the Complaint was dismissed pursuant to CPLR §3211(a)(5) and CPLR §3211(a)(7), plaintiff obtained new counsel and, on July 21, 2019, brought the instant motion pursuant to CPLR§ 3211(e) and CPLR §3025(c), seeking leave to replead or amend its complaint, as well as for injunctive relief. In its proposed Amended Complaint, plaintiff now interposes claims of fraud, promissory estoppel, specific performance, breach of fiduciary duty, rescission, unjust enrichment, breach of contract and declaratory judgment.

Initially, the court will address defendants' assertion that, so as to resolve a prior court proceeding brought in Kings County Supreme Court, *Beased Group LLC v. Jacob Khotoveli, Eric Gleit, and 2890 Review Equity LLC* (Index Number 513202/2016), which involved the very same premises, Sprei executed a Stipulation of Settlement on August 22, 2016 , which was followed by a Stipulation of Discontinuance. This Court reviewed a copy of the Stipulation of Settlement at the hearing on July 22, 2020. By its terms, the stipulation recites the following:

"Each Plaintiff [including Sprei] hereby acknowledges and confirms that they do not have any interest or claim whatsoever in or to the Property or to the ownership or management thereof, 2890 Review… or other transaction in connection therewith..."

"The Parties hereby (a) represent and warrant that there are no other transactions between the Parties relating to the Property, (b) covenant and agree that there shall be no other transactions between the Parties in the future relating to the property..."

"This Stipulation is not contingent on the occurrence or future performance of any party or event, except as provided in this Stipulation. Subject only to enforcement as aforesaid, this Stipulation is intended to settle, discharge and terminate any and all differences, claims or disputes between the parties."

Finally, the Stipulation recites that Sprei, (as releasor) "unconditionally and forever, fully, and finally release, acquit, and discharge the Defendants ... and the Property, from any and all claims, rights, demands, charges, damages, complaints, actions, suits and causes of action, fees, costs, interest and expenses, whether fixed or contingent, asserted or unasserted, known or· unknown, at law or in equity, that the Releasers ever had, now has, or hereafter can, shall, or may have against the Releases in connection with the ….Property...".

It is clear from its terms, that there is no mention of any option to purchase the premises in the Stipulation of Settlement, rather the Stipulation recites that "The Parties hereby (a) represent and warrant that there *are no other transactions* between the Parties relating to the Property, (b) covenant and agree that there *shall be no other transactions between the Parties in the future* relating to the property." [Emphasis added]

The standard to be applied on a motion for leave to replead pursuant to CPLR §3211(e) is consistent with the standard governing motions for leave to amend pursuant to CPLR §3025. Namely, "motions for leave to amend pleadings should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient." (*Janssen v Incorporated Village of Rockville Centre*, 59 AD3d 15 [2008]).

Initially, it is already the law of this case that "there is no such writing" to support the very existence of the alleged Option Agreement and "no such partial performance" to support its existence (see Order of March 29, 2019). In the Amended Complaint, each allegation is premised upon the already judicially-rejected existence of such an agreement. It follows that any claims premised upon it, including but not limited to, breach of contract and specific performance, must fail. Plaintiff's claims that defendants "fraudulently deny" the agreement are of no avail insofar as this Court has made the very determination that it does not exist. Accordingly, every claim premised on this purported option agreement is devoid of merit.

In the proposed Amended Complaint, plaintiff also seeks rescission of the Stipulation of Settlement arguing, in effect, that Sprei entered into that stipulation based upon a promise allegedly made at the time that Sprei would have an option to purchase the premises in exchange for dropping his suit[1] (in the Kings County matter, Sprei claimed to be the principal of Beased Group, LLC). This claim is also devoid of merit. It is a "well-settled principle that stipulations of settlement that put an end to litigation meet with Judicial favor," and the exercise of the court's power to release a party therefrom should be used sparingly (*Ianelli v North River Ins. Co.*, 119 AD2d 317, 321 [1986]). As such, a judicial settlement should only be set aside for good cause shown, such as fraud, collusion, mistake or other factors as would undo a contract (*Ianelli v North River Ins. Co. supra*).

In *Long v O'Niell* (126 AD23 404, 407 [2015]), the Court, in granting a motion to dismiss, found that the settlement contained "broad language" that showed no ambiguity in its intended scope. In this case, the Stipulation of Settlement recites that Sprei did:

"*unconditionally* and forever, fully, and finally release, acquit, and discharge the Defendants and the Property, from *any and all claims*, rights, demands, charges, damages,

[1] The alleged promise also included the sum of $400,000 that was to be held in escrow, but there is no reference to it in the Stipulation of Settlement. Sprei received a $100,000 payment as part of the settlement.

complaints, actions, suits and causes of action, fees, costs, interest and expenses, whether fixed or contingent, asserted or unasserted, known or· unknown, at law or in equity, that the Releasers *ever had, now has, or hereafter can, shall, or may* have against the Releases in connection with the ….Property" [Emphasis added].

Such language will "bar fraud claims even where the parties did not refer to such claims before executing the release" (*Long v O'Neill, supra*; and *see Swig Equities, LLC v Kruger*, 165 AD3d 404 [2018]). Indeed, had the parties intended to include, in this case, an option to purchase the premises, they could have done so (*Long v O'Neill, supra*).

Plaintiff, through Sprei, seeks rescission based on alleged fraud. Rescission of a contract is an equitable remedy only to be invoked where the status quo may reasonably be restored or is otherwise, not available (*Lantau Holdings, LLP v General Pacific Group*, 163 AD3d 407 [2018]). Plaintiff does not seek such relief in his rescission claim. Insofar as plaintiff seeks rescission based upon claimed fraud stemming from the allegedly promised option agreement, such fraud claims have been already rejected herein.

Accordingly, this court finds the application to amend or replead to be based on claims that are palpably improper and devoid of merit. For all of the foregoing reasons, this court adheres to its determination of July 22, 2019, denying the application to replead or amend, and denying the application for injunctive relief.

The stay set forth in the Order of the Appellate Division was, by its term, pending determination of this remitted motion, and is thus, now, automatically lifted.

Dated: 6/1/20

MARGUERITE A. GRAYS
J.S.C

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