LMEG Wireless LLC v 237 42nd St. Corp.
2020 NY Slip Op 34116(U)
December 4, 2020
Supreme Court, Kings County
Docket Number: 507913/2019
Judge: Pamela L. Fisher
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At Part 94, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on this 4 day of Dec. 2020

PRESENT:
HON. PAMELA L. FISHER, J.S.C.

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LMEG WIRELESS LLC

Plaintiffs,

-and-

237 42ND STREET CORP, et al

Defendants.

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DECISION/ORDER

Index No. 507913/2019

MS #5 #8

Defendant's motion to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted. Defendant's motion to cancel and discharge the notice of pendency is granted.

Plaintiff commenced this action by filing a summons and complaint on April 9, 2019. The instant action seeks specific performance and damages arising out of an Option to Purchase certain property ("subject premises") contained in a ten-year commercial lease dated February 1, 2013 between plaintiff ("tenant") and defendant ("landlord") regarding the subject premises. The complaint alleges the following salient facts:

According to the complaint, the parties negotiated an Option to Purchase into the Lease, which would enable tenant to purchase the subject premises located at 303 Louisiana Avenue a/k/a, 1 Wortman Avenue, Brooklyn, New York 11207 for $9.5 million. The Option to Purchase had to be exercised by February 1, 2015 unless an earlier bona fide third-party offer was made, which nullified the exercise of the Option to Purchase under the terms of the Lease but would permit the tenant to exercise an independent right of first refusal to purchase the premises. The complaint further alleges that the tenant negotiated the Right of First Refusal into the Lease, which gave the tenant the right to purchase the subject premises in the event a bona fide third-party purchaser made an offer, on the "same terms" offered by that bona fide third-party purchaser. Complaint further alleges that landlord believed the subject premises was worth more than $9.5 million (purchase price under the Option to Purchase) and that landlord therefore came

up with a scheme to create a bogus offer prior to February 1, 2015 so as to preclude the tenant from being able to exercise the Option to Purchase set to expire in February 2015.

Specifically, the complaint alleges that in November 2014, the landlord notified the tenant that an offer was made for $11.5 million, that the offer was a non-binding offer, cancellable at the landlord's discretion and was to remain open for nine (9) months. Additionally, the complaint alleges that an additional offer was made in May 2015. Complaint alleges that the tenant was precluded from exercising its Option to Purchase while the alleged offers were pending.

MOTION TO DISMISS PURSUANT TO CPLR 3211(A)(1)(7)

Defendants now move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint as against the defendants. In support of their motion, defendants submitted multiple documents including pleadings, attorney affirmation, memorandum of law in support, and cited to the exhibits attached to the summons and verified complaint.

"In considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. The sole criterion is whether from the complaint's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Gershon v. Goldberg, 30 A.D.3d 372, 373, 817 N.Y.S.2d 322; see Morone v. Morone, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154; 219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205). However, while the allegations in the complaint are to be accepted as true when considering a motion to dismiss (see Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511), "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (Garber v. Board of Trustees of State Univ. of N.Y., 38 A.D.3d 833, 834, 834 N.Y.S.2d 203, quoting Maas v. Cornell Univ., 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716, 721 N.E.2d 966).

Likewise, to succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Morris v. Morris, 306 A.D.2d 449, 451, 763 N.Y.S.2d 622).

"A contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself" (MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d 640, 645, 884 N.Y.S.2d 211, 912 N.E.2d 43). Accordingly, "'when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms'" (Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 807 N.E.2d 876, quoting W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639). Furthermore, "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 & Co. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 690, 636 N.Y.S.2d 734, 660 N.E.2d 415). "Express conditions are those agreed to and imposed by the parties themselves," and they "must be literally performed" (Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d at 690, 636 N.Y.S.2d 734, 660 N.E.2d 415; see MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d at 645, 884 N.Y.S.2d 211, 912 N.E.2d 43).

Defendants argue the complaint must be dismissed pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7). Defendants argue that the documentary evidence submitted shows that the parties entered in a Lease and Rider on or about February 1, 2013 which included an Option Provision. The Option Provision gave the tenant the right to exercise an option to purchase the subject premises for $9.5 million. Defendants argue that the Lease required the tenant to execute four (4) copies of the contract of sale and send to the landlord said contracts with a bank or certified check in the sum of four hundred and seventy- five thousand dollars ($475,000) but that the tenant failed to comply with the terms of the Lease by executing the copies of the contract as directed.

Defendants note that the parties negotiated a Right of First Refusal Provision into the Lease which required the landlord to notify the tenant in writing upon receiving an offer from a bona-fide purchaser to buy the premises and that upon notice, tenant had 21 days to match the offer. Defendant argues that the plaintiff's complaint fails to allege any claims under the Right of First Refusal Provision and that plaintiff acknowledges in paragraph one hundred and sixteen (116) of the complaint that the action is brought under the Option Provision and not the Right of First Refusal, and therefore the Court must only consider the Option Provision of the Lease.

Defendants argue that plaintiff's first cause of action for breach of the Option Provision must be dismissed as the plaintiff failed to allege that plaintiff performed the conditions precedent necessary to exercise the Option, as expressly set forth in the Lease. Defendants further argue that plaintiff failed to allege a specific contract provision that the defendants breached. As to the second cause of action, defendants argue that plaintiff's claim for breach of the implied covenant of good faith and fair dealing must also be dismissed as the claim is duplicative of the breach of contact claim. Defendants argue that plaintiff does not properly allege that any act by defendants injured the plaintiff's right to exercise the Option Provision, as the law requires. Specifically, that the Courts do not imply an obligation that is inconsistent with other terms of the contract, such as the Option Provision, which expired five (5) years ago. Lastly, as to the third cause of action, defendants argue that plaintiff's claim for specific performance must be dismissed as the complaint fails to allege that plaintiff satisfied the condition precedent required to timely exercise the Option or that the plaintiff was "ready, willing and able to do so" at the time the Option Provision was available to the tenant.

In opposition, plaintiff argues that they sufficiently pled a breach of contract claim and are entitled to specific performance and or damages. Plaintiff argues that landlord deliberately thwarted the tenant's ability to perform the conditions precedent under the Option Provision by notifying the tenant of an alleged bogus offer, which prevented the tenant from moving forward with their Option. However, plaintiff acknowledges in their opposition that they did not exercise their Option to Purchase by performing any of the terms of the Lease Agreement at any point in the last seven and a half (7.5) years.

The Court notes that the tenant has not executed four (4) copies of the contract of sale, nor have they sent those executed copies to the landlord with a bank or certified check in the sum of four hundred and seventy- five thousand dollars ($475,000) at any point since the Lease Agreement of February 1, 2013. Further, plaintiff fails to properly plead or argue that at any point in the last seven (7) years they were prepared to or intended to exercise their Option Provision. Likewise, plaintiff has failed to plead that the parties extended the terms of the Option Provision, permitting the tenant to exercise the Option after it expired on February 1, 2015. It is "a settled principle of law that a notice exercising an option is ineffective if it is not given within the time specified" (J.N.A. Realty Corp. v. Cross Bay Chelsea, 42 N.Y.2d 392, 396, 397 N.Y.S.2d 958, 366 N.E.2d 1313 [1977]).

Therefore, defendants' motion to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(1) and (7) is granted.

MOTION TO CANCEL AND DISCHARGE THE NOTICE OF PENDENCY

Defendant's motion to cancel and discharge the notice of pendency filed by plaintiff in this action and to award defendants' costs, expenses, disbursements, and attorneys' fees against plaintiff, sanctioning plaintiff in the form of attorney's fees, costs and expenses pursuant to CPLR 6514(b), 6501 and 6514(c), 22 NYCRR 130-1.1 is granted in part.

The notice of pendency filed on April 9, 2019 should be cancelled. The NOP allegedly derives from the Option Provision in the Lease Agreement between the parties. While the parties negotiated the terms of the Option Provision, plaintiff never exercised this Option, which expired on February 1, 2015. As noted, the plaintiff has not pled that the parties extended the Option Provision nor that the plaintiff took any steps to exercise the Option in the last seven (7) years.

Accordingly, the Notice of Pendency is canceled and discharged.

ORDERED that defendants' motion to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(1) and (7) is granted; and it is further

ORDERED that defendants' motion to cancel and discharge the Notice of Pendency filed on April 9, 2019 is granted; and it is further

ORDERED that defendants' motion for sanctions under 22 NYCRR 130-1.1 is denied; and it is further

ORDERED that defendants' motion for costs, expenses and attorney's fees pursuant to CPLR 6514(c) is denied.

Parties to settle on notice.

The foregoing constitutes the decision and order of this Court.

ENTER:

J.S.C.

HON. PAMELA L. FISHER