

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

PRESENT: Hon. SHEILA ABDUS-SALAAM
Justice

PART 13

Classic Elevator Co., Inc.

-v-

Cooper Square Realty, Inc. and
David Kuperberg

INDEX NO. 12/440/02
MOTION DATE 1/17/03
MOTION SEQ. NO. 01
MOTION CAL. NO. 27

NYS SUPREME COURT
RECEIVED
APR 10 2003
I.A.S. MOTION
SUPPORT OFFICE

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits... _____

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Papers Numbered
FILED
APR 14 2003
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3211 (a) (1) and (7), is granted.

This is a breach of contract action alleging that plaintiff is owed the outstanding balance of \$61,392.25 for work performed on an elevator in a building located at 27 East 62nd Street. Defendants assert that they are not parties to the contract. Defendant Kuperberg avers that he is the President of Cooper Square Realty, Inc., ("CSR") a real estate management firm, and that CSR is the managing agent for the building which is owned by three limited liability companies: Sixty Second Street II, Browndale Properties and Browndale Sub.

The contract, annexed to the motion papers, is on the letter head of Classic Elevator. The first page of the contract has the typewritten notation "Cooper Square Realty". Above that typewritten language is a handwritten notation listing the three limited liability companies mentioned above, and a "c/o" notation right

CASE

next to the Cooper Square name. Mr. Kuperberg states he signed the contract on the line indicating "Accepted by Purchaser" His title is noted as "Agent".

Based upon the foregoing, defendants move to dismiss the action for failure to state a cause of action. In opposition, plaintiff's counsel (no affidavit from a principal of Classic Elevator is submitted in opposition to the motion) argues that defendants should be held liable for the contract because they are agents of undisclosed principals. Plaintiff's counsel asserts that plaintiff was never aware of the principal-agent relationship between defendants and the three limited liability corporations. Counsel also claims that although the proposal was originally drafted by plaintiff in April 1997, "[i]t was not until on or about October 22, 1997, when the proposal was actually executed, that the unilateral changes were made. And by then, plaintiff was all but certain it was contracting directly with Cooper Square Realty, Inc." (Rosenthal affirmation, ¶ 18).

As is explained by defendant Kuperberg, who executed the contract, and therefore has personal knowledge of the facts surrounding the execution, he made the handwritten changes to the front page by writing the names of the three limited liability corporations above the name Cooper Square Realty, c/o Cooper Square, prior to the execution of the contract. Even plaintiff's counsel appears to be conceding this when he notes that the changes were made when the proposal was executed. In the face of the documentary evidence, and the affidavit of defendant Kuperberg, counsel's argument that plaintiff was "all but certain it was contracting directly with Cooper Square Realty" is insufficient to demonstrate that plaintiff has a cause of action against these defendants. Defendant Kuperberg clearly signed as an agent and the complaint actually alleges that he signed as an authorized officer of CSR. Defendants have shown that CSR signed the contract as agent for the three companies that are listed on the front page of the contract. Thus, as a matter of law, defendants cannot be liable for breach of this contract (see Mastropieri v. Solmar Construction Co., Inc., 159 AD2d 698).

Finally, regarding the second cause of action for fraud, plaintiff has not opposed that portion of the motion seeking to dismiss that claim for failure to state a cause of action.

Based upon the foregoing, it is

ORDERED that the Clerk enter judgment dismissing the complaint.

Dated 4/4/03

ENTER: JA-A
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
APR 14 2003
COUNTY CLERK'S OFFICE
NEW YORK