

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

PRESENT: KAREN SMITH
Justice

PART 44

Yenom Corp.

INDEX NO.

108563/04

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

155 Wooster Street
Inc.

The following papers, numbered 1 to 3 were read on this motion to/for

DISMISS & CANCEL
NOTICE OF PENDENCY
PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits

2

Replying Affidavits

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 14 2004

NEW YORK
COUNTY CLERK'S OFFICE

Defendants' motion is decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/14/04

KSS

KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

-----X
YENOM CORP.,

Plaintiff,

Index No.: 108563/04
Mot. Seq.: 001 and 002
Motion Date: July 8, 2004

-against-

155 WOOSTER STREET INC.,
PAULA COOPER, JAMES L. SEAWRIGHT,
MABELLE G. SEAWRIGHT and
155 WOOSTER STREET ASSOCIATES

DECISION AND ORDER

Defendants.
-----X

PRESENT: KAREN S. SMITH, J.:

Motion sequence 001 and 002 are consolidated for disposition in this decision.

In motion sequence 001, defendants James L. Seawright and Mabelle G. Seawright ("Seawright defendants") move, by order to show cause, for an order, pursuant to (1) CPLR § 3211(a)(7) dismissing the complaint for failure to state a cause of action, (2) CPLR §§ 6501 and 6514 cancelling the notice of pendency filed by plaintiff Yenom Corp as against the premises known as and located at 155 Wooster Street, New York, New York and (3) Rule 130-1.1 of the Rules of the Chief Administrator awarding sanctions in the form of attorneys' fees, costs and disbursements against plaintiff and/or its attorneys as a result of their frivolous conduct in commencing this action.

In motion sequence 002, defendants Paula Cooper, 155 Wooster Street Inc. and 155 Wooster Street Associates ("Cooper defendants") move, by order to show cause, for an order, pursuant to (1) CPLR § 3211(a)(7) dismissing the complaint for failure to state a cause of action, (2) CPLR § 3211(a)(1) dismissing the complaint based on documentary evidence, (3) CPLR § 3211(a)(3) dismissing the complaint as plaintiff lacks the legal capacity to sue, (4) CPLR §§ 6501 and 6514

cancelling the notice of pendency filed by plaintiff Yenom Corp as against the premises known as and located at 155 Wooster Street, New York, New York and awarding defendants costs and expenses caused by the filing of the notice of pendency, and, (5) Rule 130-1.1 of the Rules of the Chief Administrator awarding sanctions in the form of attorneys' fees, costs and disbursements against plaintiff and/or its attorneys as a result of their frivolous conduct in commencing this action.

According to the complaint, defendant Wooster Inc. is the owner of real property known as 155 Wooster Street, New York New York. Defendant Paula Cooper is the owner of two shares of the issued and outstanding common stock of 155 Wooster Inc. which represents sixty-six and two-thirds percent of the issued and outstanding shares of stock in the corporation. The Seawright defendants jointly own one share of the issued and outstanding common stock of 155 Wooster Inc. which represents thirty three and one third percent of the issued and outstanding shares of stock in the corporation. Pursuant to a net lease between the corporate defendant and Wooster Street Associates, the corporation leased the entire premises to 155 Wooster Street Associates.

The complaint alleges that (1) plaintiff Yenom Corp. agreed to purchase, and defendant Paula Cooper and defendants James Seawright and Mabelle Seawright agreed to sell, defendants' respective shares in the corporate defendant and their interest in the net lease and (2) plaintiff agreed to purchase and defendant Cooper and defendant 155 Wooster Street Associates agreed to sell convey assign and otherwise transfer all rights in and to the net lease for the premises. The complaint avers that these agreements are valid, binding and fully enforceable contracts. The complaint further avers that notwithstanding those agreements, defendants have entered into contracts with third parties for the sale of the premises, shares and the net lease, thereby breaching the valid, binding and fully enforceable contracts.

Plaintiff sues for damages for breach of contract and for specific performance. In addition, plaintiff has filed a notice of pendency against the premises known as and located at 155 Wooster Street, New York, New York.

The Seawright defendants move to dismiss the complaint and to cancel the notice of pendency on the grounds that the complaint fails to state a cause of action as no written agreement for the purchase of stock exists and the parties never reached agreement as to the terms of the purchase and sale.

The Seawright defendants claim that the action must be dismissed as void under the statute of frauds which is applicable here as this action is one to enforce the transfer of stock of a corporation whose sole asset is real property. It is their position that they negotiated with an entity named Centaur Properties for the purchase of their share in the corporate defendant to the point of drafting a stock purchase contract, but that there was no meeting of the minds as to the terms of the agreement and no written executed contract of sale. Moreover, these defendants assert that they never agreed to sell their one third interest in the net lease. The Seawright defendants submit a copy of their proposed stock purchase agreement sent by their attorney to plaintiff's counsel on April 29, 2004 via electronic mail. The contract names James L. Seawright Jr and Mabelle G. Seawright as the seller and Centaur Properties LLC as the buyer. Section 26 of the contract provides:

Contract Not Binding Until Executed By Seller

This Contract shall not be binding upon the Seller until such time as Seller has executed the Contract and delivered a fully executed copy of the Contract to Buyer or Buyer's attorney.

The Cooper defendants move for an order dismissing the complaint and cancel the notice of pendency on the grounds that (1) documentary evidence conclusively establishes that there is no

contract between plaintiff and the Cooper defendants, (2) plaintiff lacks the legal capacity to sue as Centaur Properties was the entity with whom defendant Paula Cooper negotiated, and (3) the complaint fails to state a cause of action as there was no agreement as to the material terms of the contract, no written contract was executed and plaintiff never tendered a down payment.

The Cooper defendants argue that there was never any agreement to sell the net lease to plaintiff. By letter dated April 27, 2004, the Cooper defendants' attorney forwarded a draft purchase agreement to counsel for Centaur Inc. The letter stated that "[t]he forwarding of this contract shall not be deemed an offer and until such time as there is a contract executed by Ms Cooper, there will be no contract between the parties. The draft agreement named the parties to the transaction as Paula Cooper as seller and Centaur Properties LLC as buyer. In addition, defendant Cooper's draft agreement contained the same language as that in the Seawright defendants' agreement which provided that the contract would not be binding unless executed by the seller.

The Cooper defendants further argue that the draft stock agreement states that (1) the contemplated transaction was for the sale of the Cooper stock interest in 155 Wooster Street Inc. and not for the sale of the property or for the sale of the leasehold, (2) the net lease was to be cancelled at the time of the closing of any transaction, (in complete contradiction to plaintiff's claim that the parties agreed plaintiff would purchase it) and (3) the draft contract expressly acknowledged that ownership of the property would remain in 155 Wooster Street Inc.

The Cooper defendants request that the notice of pendency be cancelled on the basis that, as plaintiff expressly acknowledges in the complaint, 155 Wooster Street Inc. is the actual owner of real property and the complaint is devoid of any allegation that the owner of the real property entered into a contract for the sale of the property to plaintiff. Accordingly, it is their position that the filing of the

notice of pendency is improper.

In support of their motions, defendants submit a copy of the counter proposal to the Cooper draft agreement sent on May 10, 2004, by Centaur to defendants. While plaintiff did not respond to the Seawright's draft agreement, it is undisputed that plaintiff's response was meant to cover the common provisions of both drafts of the contracts. The counter proposal contains modifications including (1) changing the buyer from Centaur to Yenom, (2) lowering the down payment from 10% to 5%, (3) adding the assignment of the net lease as part of the transaction, (4) changing the sale from one that is "AS IS" to one with multiple conditions, and (5) changing the seller's representations from "to the best of the seller's knowledge" to an absolute representation. Plaintiff also submitted a twelve page rider to the contract. By letter dated May 12, 2004, plaintiff's counsel requested a meeting the purpose of which was to "revise the agreements" and "hopefully, execute the agreements." Thereafter, the parties never met or submitted any other proposed draft documents.

On June 8, 2004, plaintiff commenced this action by the filing of a summons and complaint and notice of pendency.

In opposition to the motions to dismiss, plaintiff claims that the relevant inquiry at this juncture is whether the complaint sets forth any cognizable legal theory. Plaintiff contends, as set forth in its attorney's affirmation, that there were valid and binding contracts between and among the parties. It is plaintiff's position that the two draft agreements sent by defendants to plaintiff which each provide that the contract would not be binding until executed by the seller, were accepted by plaintiff and that acceptance was "relayed" to defendants at some unspecified time creating enforceable contracts between the parties. Plaintiff admits that it did propose that the deal include the sale of the net lease but nevertheless advised defendants that plaintiff would abide by the terms for

the purchase contained in their drafts.

Plaintiff states that as the agreements involved the purchase of shares, the statute of frauds does not apply. Plaintiff argues that even if the statute of frauds did apply, plaintiff's part performance in obtaining a change in zoning for the premises, is an exception to the statute. Plaintiff further argues that the filing the notice of pendency was proper as one of the contracts involved the purchase of the net lease. Plaintiff states that its actions have merit and sanctions are inappropriate. Finally, plaintiff seeks leave to amend the complaint. However, plaintiff does not inform the court what amendment it seeks to make, does not annex a proposed amended pleading, nor has it made a cross-motion for said relief.

Generally, on a motion to dismiss pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 N.Y.2d 83, 87-88 [1994]). However, "in those circumstances where the bare legal conclusions and factual allegations are inherently incredible or flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference, (*Biondi v Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 [1999], *aff'd* 94 N.Y.2d 659 [2000]), "and the criterion becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275." (*Morgenthau & Latham v. Bank of NY Co.*, 305 A.D.2d 74, 78 1st Dept 2003). A cause of action for breach of contract will be dismissed where it fails to allege, in nonconclusory language, the essential terms of the parties' purported contract, including those specific provisions of the contract upon which liability is predicated, whether the alleged agreement was written or oral, and the rate of compensation. (*Caniglia v. Chicago Tribune-New York*

News Syndicate, 204 A.D.2d 233, 233-234 [1st Dept 1994]).

Here, plaintiff's complaint fails to allege, in nonconclusory language, the essential terms of the agreement including whether it was oral or written. That basis alone supports the grant of the motions. Plaintiff's assertion that the parties consummated valid, binding and fully enforceable contracts and that it is entitled to damages for the breach thereof and the specific performance of them is inherently incredible and flatly contradicted by the documentary evidence. The extrinsic evidence considered by the court demonstrates that there was never a meeting of the minds. Thus, plaintiff has no cause of action for breach of contract or specific performance.

Moreover, plaintiff's assertion, in opposition to the motion, that the terms in defendants' draft agreements were somehow accepted by plaintiff and that acceptance was relayed to defendants, flies in the face of the evidence submitted and the fact that (1) the drafts required defendants' signatures in order to be binding, (2) plaintiff never responded to the Seawright defendants' draft, and (3) plaintiff altered defendant Cooper's draft drastically (a) to include the purchase of the net lease, (b) to cut the down payment in half, (c) to change the identity of the buyer from Centaur to Yenom, (d) to change seller's representations, and (e) to add a twelve page rider. If plaintiff believed its own claim, i.e. that a valid contract was made based on the terms of defendants' drafts, then Centaur would be the plaintiff, the sale of the net lease would not have been part of the agreement and a notice of pendency would not have been filed.

Even if plaintiff's claim of the existence of an oral contract, given the benefit of every favorable inference, was accepted as true, the claim would nevertheless be dismissed as void under the statute of frauds. (GOL § 5-703). Since this matter involves the sale of stock of a corporation whose only asset is an interest in realty, the statute of frauds is applicable to any transfer of the stock.

(*Pritsker v. Kazan*, 132 A.D.2d 507 (1st Dept 1987)).

Plaintiff's notice of pendency is likewise meritless. Civil Practice Law and Rules § 6501 authorizes the filing of a notice of pendency in those actions in which the judgment demanded would affect the title to, or the possession, use, or enjoyment of real property. The drastic impact of a notice of pendency requires a strict application of CPLR § 6501 (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313 [1984]). Thus, in an action for specific performance of a contract for the transfer of stock in a corporation that owned real property or one involving a shareholder's rights in a corporation whose sole asset is the property described in the notice of pendency, a notice of pendency is improper because the action is to direct the transfer of stock not one that affects the title to, or the possession, use, or enjoyment of real property. (*Id*; see also, *Piccirillo v Ravenal*, 161 AD2d 253, 253-254 [1st Dept 1990]).

Plaintiff's claim of part performance is also rejected.

The filing of the notice of pendency and the commencement of this action by plaintiff and plaintiff's attorneys with full knowledge of the immanent closing between defendants and a third-party, without the existence of a contract and which are devoid of merit in law or fact, constitute frivolous conduct. Defendants' request for sanctions in the form of attorneys' fees, costs and disbursements, pursuant to Rule 130-1.1 of the Rules of the Chief Administrator, and defendants' request for costs and expenses pursuant to CPLR § 6514(c) occasioned by the filing of the notice of pendency, in addition to any costs in this action, against plaintiff and plaintiff's attorneys, are granted.

Accordingly, it is

ORDERED that the Clerk is directed to cancel the notice of pendency; and it is further

ORDERED that defendants' motions to dismiss are granted and the Clerk is directed to enter

judgment in favor of defendants dismissing the complaint in its entirety; and it is further

ORDERED that defendants are awarded sanctions against plaintiff and plaintiff's attorneys in the form of costs for actual expenses reasonably incurred and reasonable attorney's fees resulting from the commencement of this action and resulting from the filing the notice of pendency; and it is further

ORDERED that the parties are to appear in Part 44, Room 581 on September 2, 2004 at 9:30AM for a hearing on said costs and attorney's fees.

This constitutes the decision and order of the court.

Dated: July 14, 2004

ENTER:

KS S

J.S.C.

FILED

JUL 14 2004

NEW YORK
COUNTY CLERK'S OFFICE