

Herman v 36 Gramercy Pk. Realty Assoc., LLC

2016 NY Slip Op 30360(U)

March 3, 2016

Supreme Court, New York County

Docket Number: 652700/12

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ROSEMARIE A. HERMAN, individually, as beneficiary of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990, and ROSEMARIE A. HERMAN as Natural Guardian for GAVIN I. ESMail and JESSE A. ESMail, individually, as beneficiaries of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990,

Plaintiffs,

Index No.: 652700/12

-against-

DECISION & ORDER

36 GRAMERCY PK. REALTY ASSOCS., LLC; COSMOPOLITAN PROP. ACQUISITION CO., LLC; MANN LLC; MANN MANAGEMENT, INC., D/B/A, MANN REALTY ASSOCS.; MAURICE A. MANN; "ABC CO. # 1" through "ABC CO. #10", the last ten entities being fictitious and unknown to the Plaintiffs, the entities intended being the entities, if any, involved in the acts or omissions described in the Complaint; and "JOHN DOE # 1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiffs, the persons intended being the Persons, if any, involved in the acts or omissions described in the Complaint,

Defendants.

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36 GRAMERCY PARK REALTY ASSOCIATES, LLC; COSMOPOLITAN PROPERTY ACQUISITION COMPANY, LLC; MMANN LLC; MANN MANAGEMENT, INC. dba MANN REALTY ASSOCIATES; AND MAURICE A. MANN,

Third-Party Plaintiffs,

-against-

ARDENT INVESTMENTS, LLC; J. MAURICE HERMAN; and MICHAEL OFFIT,

Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.

Third-party defendants, Ardent Investments, LLC (Ardent), and J. Maurice Herman (Maurice, with Ardent, Movants) move (Motion Sequence 007) to sever the third-party action

and transfer its venue to Palm Beach, Florida. The ground for the motion is a forum selection clause in a 2002 contract of sale (Contract) between Movants, as sellers, and third-party plaintiff Cosmopolitan Property Acquisition Company, LLC (Cosmopolitan), as Purchaser. Third-party plaintiffs oppose.

I. Background

The facts relating to this action are set forth fully in this court's decision on defendants' motion to dismiss the main action (Dismissal Decision, dated 4/2/14 & entered 4/3/14, Dkt 109¹). They will be repeated here only as necessary. Words defined in the Dismissal Decision have the same meaning in this opinion.

Ardent is a limited liability company wholly-owned by Maurice. Pursuant to the Contract, Ardent and Maurice sold, *inter alia*, the New York limited liability company, Mayfair York, LLC (Mayfair), to Cosmopolitan. Mayfair owned the premises and building located at 36 Gramercy East in Manhattan (36 Gramercy). Mayfair was conveyed to defendant 36 Gramercy Park Realty Associates, LLC, on the day of the closing.²

The forum selection clause in the Contract is limited to actions to enforce it and to obtain contractual indemnification pursuant to its terms. It provides:

Jurisdiction and venue of any suit or action *to enforce this*

¹ References to "Dkt" filed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System.

² This case is related to several other actions pending before this court: *Herman v Herman*, Index No. 650205/2011 (Main Action); *Herman v Pound West Trading Corp.*, Index No. 652698/2012 and two accounting actions by Rosemarie's trustee, Michael Offit, both entitled *Matter of Offit*, Index Nos. 150332/2012 and 150335/2012; *Offit v Herman*, 651471/2011; *36 Gramercy Park Realty Assocs., LLC v Herman*, Index No. 654067/2012. The Main Action was brought by Maurice's sister, Rosemarie Herman, to contest the 1998 sale of her interests in six limited liability companies in six buildings, including 36 Gramercy. The 1998 sale contract was between Rosemarie's trustee, Michael Offit, and Maurice's wholly owned entity, Consolidated. Rosemarie and Maurice inherited the buildings from their father. Prior to the Contract, Consolidated conveyed its interests to third-party defendant Ardent.

Contract or for indemnification hereunder shall rest solely in any state or federal court located in the County of Palm Beach, State of Florida....

The Dismissal Decision dismissed, *inter alia*, the conspiracy claim against defendants, based on the statute of limitations, and the replevin claim for failure to state a claim. Plaintiffs' claims to quiet title to 36 Gramercy and for ejectment were not dismissed. Dkt 109.

On April 22, 2014, Maurice moved to intervene for the purpose of rearguing and appealing the Dismissal Decision, on the ground that he was adversely affected by it. Dkt 119. Specifically, Maurice argued that the Dismissal Decision might impact his warranty and indemnification obligations under the Contract. 4/22/14 Traub Aff, Dkt 120. The court granted the motion to the extent of permitting Maurice to intervene on the appeal. Dkt 147.

The appeal was decided on August 11, 2014. Dkt 165. The Appellate Division reinstated the replevin and the conspiracy claim to the extent plaintiffs alleged that defendants conspired with Offit. *Id.*

The third-party complaint was filed on October 29, 2015. Dkt 186. The third-party complaint contains three causes of action, numbered here as in the third-party complaint: 1) contractual indemnification against Movants, 2) common law indemnification against Movants and Offit, and 3) contribution against Movants and Offit.

Movants have not answered the third-party complaint. On December 18, 2015, they moved (Motion Sequence 006) to dismiss it based on documentary evidence, the statute of limitations and failure to state a claim, i.e., CPLR 3211(a) (1), (5) and (7), respectively. Dkt 188 & Dkt 193 (Dismissal MOL), p 1. On January 29, 2016, the Mann Defendants voluntarily discontinued the action, i.e., the second and third third-party claims against Offit. The instant motion was filed on February 8, 2016. Dkt 206.

Although the order to show cause bringing on the motion was styled as a motion to sever and transfer venue, pursuant to CPLR 603 and 1010,³ in reality it sought dismissal based on the Contract's forum selection clause, i.e. documentary evidence, CPLR 3211(a)(1). The Dismissal MOL argues that "the terms of the Contract of Sale require that the Third-Party Action be dismissed...." Dkt 193, Dismissal MOL, p 1. With respect to the putative severance and transfer, Movants argue "[i]f the Third-Party Complaint is not dismissed in its entirety, ... this third-party action should be severed from the Main Action and transferred to Palm Beach, Florida pursuant to the agreed upon venue provision contained within the Contract of Sale." *Id.*, p 5.

II. Discussion

The court denies the motion to dismiss the third-party action based upon the Contract's forum selection clause because it violates the single motion rule. CPLR 3211(e) provides that "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted." A motion to dismiss based on a forum selection clause is a motion based on documentary evidence. *Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 245 (2006);⁴

³ CPLR 603 provides that "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others."

CPLR 1010 provides that: "The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party."

⁴ The lower court decision makes clear that it granted dismissal based upon the forum selection clause pursuant to CPLR 3211(a)(1). *Boss v American Express Fin. Advisors, Inc.*, 2003 WL 25669392 (Sup Ct NY Co 2003) (nor).

Lowenbraun v McKeon, 98 AD3d 655, 656 (2d Dept 2012) (forum selection clause is documentary evidence proper for dismissal pursuant to CPLR 3211(a)(1) where forum selection clause provides that disputes arising under relevant agreement must be litigated outside New York). Enforcement of a forum selection clause can be waived by defending an action on the merits. *CDR Creances S.A.S. v Cohen*, 77 AD3d 489, 490 (1st Dept 2010).⁵

Here, third-party defendants previously moved to dismiss pursuant to CPLR 3211(a)(1) without raising the forum selection clause. They cannot make a second motion to dismiss based upon documentary evidence. CPLR 3211(e). They waived the right to enforce the clause by making the motion to dismiss on the merits without raising the forum selection clause. CPLR 3211(e); *CDR Creances, supra*. Movants make a specious argument that the discontinued claims against Offit somehow tricked them into not relying on the Contract's forum selection clause in their original motion. However, on their first motion, Movants could have raised dismissal of the contractual indemnification claim based on the forum selection clause, whether or not Offit was a party.

Furthermore, only dismissal of the first cause of action could be granted based upon documentary evidence. The forum selection clause does not cover the second and third causes of action against Movants for common law indemnification and contribution. Those causes of action are outside the scope of the forum selection clause, which is limited to enforcement of, or indemnification pursuant to, the Contract. Accordingly, it is

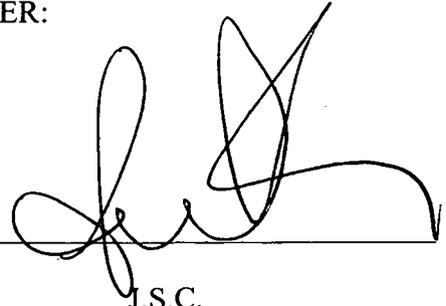
ORDERED that the motion by third-party defendants Ardent Investments, LLC, and J.

⁵ This clearly is not a motion to transfer. CPLR 510 and 511, which governs transfer of venue, permit a court to transfer an action to another county in New York State, not to another state. This court cannot transfer the action to Florida. It can only dismiss based upon the Contract's forum selection clause.

Maurice Herman (Motion Sequence 007) to sever the third-party action and transfer its venue to Palm Beach, Florida, is denied.

Dated: March 3, 2016

ENTER:



J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.