Chan v Shew Foo Chin

2009 NY Slip Op 03771

Decided on May 12, 2009

Appellate Division, First Department

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Decided on May 12, 2009
Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, JJ.

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[*1]Miriam Chan, et al., Plaintiffs-Appellants,

v

Shew Foo Chin, et al., Defendants-Respondents.

Hofheimer, Gartlir & Gross, LLP, New York (David L. Birch of counsel), for appellants.
Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondents.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered October 2, 2008, after a nonjury trial, awarding plaintiffs the principal sum of $450,000, with interest from August 1, 2002, which, to the extent appealed from, dismissed plaintiffs' cause of action for specific performance, unanimously affirmed, with costs.

While it is true that an agreement sufficient to satisfy the statute of frauds may be pieced together from separate writings so long as they are "connected with one another either expressly or by the internal evidence of subject matter and occasion" (*see Marks v Cowdin*, 226 NY 138, 145 [1919]); *DeRosis v Kaufman*, 219 AD2d 376, 379 [1996]), the documents relied on by plaintiffs herein are not sufficient in that they

fail to establish an essential term of the agreement, namely the purchase price. The record shows that in fact there was never a meeting of the minds on this term; indeed, negotiations continued even after a closing was concluded unsuccessfully (*see Ross v Wu*, 27 AD3d 237 [2006], *lv denied* 7 NY3d 713 [2006]).

The court properly rejected plaintiffs' claim that the matter was removed from the requirements of the statute of frauds by their part performance, since their acts were not unequivocally referable to an agreement to sell the property at a certain price, " but rather can be explained as preliminary steps which contemplate the future formulation of an agreement'" (*Raj Acquisition Corp. v Atamanuk*, 272 AD2d 164, 164-165 [2000], quoting *Francesconi v Nutter*, 125 AD2d 363, 364 [1986]). Similarly, defendants' admissions that they agreed to sell the property and eventually agreed on a price are insufficient, inasmuch as the admission did not [*2]encompass a mutually agreed upon, specific price *(see Tallini v Business Air, Inc.*, 148 AD2d 828, 829-830 [1989]; *cf. Cole v Macklowe*, 40 AD3d 396 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 12, 2009

CLERK