SUPREME COURT OF THE STATE OF NEW YORK
TRIAL TERM PART XXI - COUNTY OF SUFFOLK

GENDOT ASSOCIATES INC.,

Plaintiff

- against -

FLORENCE E. KAUFOLD As Executor Of The Estate Of EDMUND L. KAUFOLD, FLORENCE E. HAUFOLD and JOHN DOE 1-10,

Defendants

Index No.: **2005-05562**

Calendar No.: **2006-02246-CO**

Decision After Trial

PLAINTIFF'S ATTORNEY
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HON. JEFFREY ARLEN SPINNER, Justice Of The Supreme Court:

This action arises from a contract of sale for certain real property located in the Town of Riverhead, under which Plaintiff was the vendee and Defendants were the vendors. In essence, Plaintiff sued for a decree of specific performance and money damages while Defendants counterclaimed, alleging mutual mistake, no meeting of the minds and unconscionability. Following discovery and motion practice, this Court, on April 3, 2007 (Spinner, J.) issued an Order granting Defendants' motion to dismiss the within proceeding and finding the contract to be null and void, which Order was reversed and the matter remitted by the Appellate Division, 2nd Department [56 AD 3d 421]. Under the settled doctrine of "law of the case," the determination of the Appellate Division is binding upon this Court. Following a series of unsuccessful settlement discussions, the matter was tried to the Court, sitting without a jury. Both parties were represented by capable and professional counsel who were well prepared for trial.

During the course of the trial, the Court received more than 180 exhibits, coupled with testimony from Gerald Simone (plaintiff's principal), Charles R. Cuddy Esq., Michael Given, Richard W. Hanley Jr., Florence Kaufold and Peter S. Danowski Jr. Esq. From all of the foregoing, the Court finds the following facts to have been demonstrated by a fair preponderance of the credible, material and admissible evidence.

On February 28, 2002, Edmund and Florence Kaufold, as sellers, entered into a Contract of Sale with Gendot Associates Inc. as purchaser (the "Contract"). The subject matter thereof was a certain 27.1 acre parcel of vacant land located at Roanoke in the Town of Riverhead, described as District 0600 Section 017.00 Block 01.00 Lot 016.000 (the "Property"). The contract price was $ 1,800,000.00 and Plaintiff deposited the sum of $ 94,500.00 as and for earnest money thereon. There was no financing contingency, the purchaser intending to pay cash, as it were. The Contract was drafted by Peter S. Danowski Jr. Esq.,

counsel for the Kaufolds. At some time prior to this transaction, Mr. Danowski had represented Gendot's principal, Gerald Simone, on certain unrelated subdivision and zoning matters before the Riverhead Town Board to which the Kaufolds were not parties. However, with respect to this particular transaction, Gendot was represented by Dennis Reiss Esq. and not by Mr. Danowski. It is worthy of mention here that the essential terms of the transaction were negotiated directly between Gerald Simone and Florence Kaufold; counsel was retained to draft the Contract *after* agreement had been reached on the terms thereof.

The purchaser's express intention, as stated in the Contract, was to develop the parcel by subdividing it into not less than 24 one acre lots suitable for erection of single family residences. The Contract contained a Rider which, among other things, provided that purchaser would pay sellers the added sum of $ 55,000.00 for each lot in excess of 24 as might be approved by the Town of Riverhead. Understanding that subdivision approval was a process that could take considerable time, the closing date was scheduled, in Paragraph 7 of the Contract, as *"...on or about March 18, 2004 or within thirty days of final map approval."* Following the imposition by the Town of Riverhead of several moratoria on development, the closing date was subsequently extended, by agreement, to February 15, 2005.

An additional Rider provided, among other things, that closing of the transaction was contingent upon the purchaser obtaining preliminary subdivision approval within 18 months from the date of execution of the Contract. It further provided that notwithstanding any stated contingencies in the Contract or Riders (including the one relating to subdivision approval), the purchaser could elect to close the purchase "as is" simply by providing written notice of such intent. The Rider also imposed an express obligation of good faith upon the sellers, by stating verbatim that *"Seller shall fully cooperate with Purchaser in all reasonable respects to facilitate the procurement of the Project Approvals..."* During her cross-examination, Florence Kaufold somewhat reluctantly conceded that she was aware of the foregoing terms but that she did not know whether she read and understood it before signing the Contract.

At some time subsequent to the execution of the Contract, the Town of Riverhead enacted a long term moratorium upon development, which affected the Property herein. This moratorium was subsequently extended for successive periods by the Riverhead Town Board.

Thereafter, Gendot, having not yet received subdivision approval, invoked the provisions of the Rider, elected to waive all contingencies and opted to close the transaction "as is" on February 15, 2005. Gendot thereupon had bank checks drawn for the balance of the purchase price ($ 1,705,500.00) as well as title charges ($ 40,949.00) and caused all of the conveyance documents to be drafted. As of February 10, 2005, counsel for the Kaufolds stated that they were prepared to close. However, on February 14, 2005, Mr. Danowski telecopied a letter to Mr. Reiss advising that the Kaufolds now refused to close the transaction (Florence Kaufold testified, on cross-examination, that she refused to close because Gendot would not sign an amendment that would assure the Kaufolds substantially more money for additional lots, which was propounded on by Mr. Danowski on January 25, 2005; it is critical to note that the proposed amendment would have substantially and materially altered the terms of the Contract). On February 15, 2005, Mr. Reiss countered with a letter advising that Gendot was ready, willing and able to close and further scheduling February 25, 2005 at 10:30 a.m. at Mr. Reiss' office as the time and place for tender of the funds in exchange for the deed. At the appointed time and place, Mr. Simone appeared along with Mr. Reiss, a title company representative and the required funds, prepared to close the transaction. The Kaufolds failed and refused to appear, thereby defaulting under the terms of the Contract.

On March 18, 2005 Plaintiff commenced this action by filing a summons, complaint and notice of pendency with the Clerk of Suffolk County. On March 25, 2005, Defendants, who had ceased all communication and cooperation with Mr. Danowski, retained new counsel who thereupon issued what purported to be a Notice of Cancellation of the Contract of Sale. Even so, Gendot and its zoning counsel Charles R. Cuddy Esq. continued to vigorously pursue the pending subdivision application, efforts about which the Kaufolds were made fully aware. On November 3, 2005 a public hearing was held before the Planning Board on the application. The Kaufolds appeared at that hearing and stated on the public record as follows: *"Good evening. Our names are Florence and Edmund Kaufold, the owners of this property that is being presented to you tonight for consideration. We advise this Board that this property is currently in litigation and therefore we object. Thank you."* Based upon this arbitrary public assertion by the Kaufolds, the Planning Board declined to issue preliminary approval and the application was tabled indefinitely.

Gendot now demands an equitable decree of specific performance together with an award of money damages. The Kaufolds counter with the demand that the Contract be deemed void based upon fraudulent inducement, find anticipatory repudiation on Gendot's part and award them counsel fees, the down payment and other ancillary relief.

The remittal by the Appellate Division [56 AD 3d 421 at 423] directs, in pertinent part, that *"...there must be a hearing where the parties have an opportunity to present evidence with regard to the circumstances of the signing of the contract, and the disputed terms' setting, purpose and effect"* quoting *Davidowits v. De Jesus Realty Corp. 100 AD 2d 924.* Defendants' main counterclaim posits that the Contract was unconscionable and hence null and void. Defendants make this assertion based upon the perceived simultaneous representation of both Gendot and the Kaufolds by Mr. Danowski. It is axiomatic that in order to demonstrate unconscionability, the proponent must prove the existence of both a clear absence of any meaningful choice on the part of one party, coupled with terms that are unreasonably favorable to the adverse party, *Gilman v. Chase Manhattan Bank 73 NY 2d 1 (1988).* The determination as to whether or not a contract is unconscionable cannot be decided in a vacuum but instead must be considered after careful examination and review of the commercial setting and the contract's purpose and effect, *Emigrant Mortgage Company Inc. v. Fitzpatrick 133 Misc 2d 746 (Sup. Ct. Suffolk County, 2010)* citing *Wilson Trading Corp. v. David Ferguson Ltd. 23 NY 2d 398 (1968).* A contract is said to be unconscionable when it is "...so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms," *Gillman v. Chase Manhattan Bank 73 NY 2d 1 (1988).*

Defendants have adduced no evidence, aside from self-serving assertions, that there was any absence of meaningful choice, either on their part or on the part of Plaintiff. Indeed they have not demonstrated any unreasonableness at all nor have they shown the presence of anything sufficiently egregious to deem the Contract unenforceable. Moreover, testimony adduced from Peter S. Danowski Jr. Esq., Charles R. Cuddy Esq. and Gerald Simone amply demonstrates, beyond any doubt, that there was no simultaneous representation of these parties by Mr. Danowski. It is apparent to this Court that the Kaufolds knowingly and willfully defaulted upon the Contract of Sale, likely due to Mr. Simone's refusal to execute an additional Rider only thirty days prior to the scheduled closing. In addition, evidence adduced revealed that at the time of the Kaufolds' refusal to close, Florence Kaufold was actively dealing with other potential purchasers including Select Realty Advisors (see Exhibit 175) and Universal Land Sales (see Exhibits 176 and 177), believing that she could sell the Property for almost twice the contract price herein. This finding is buttressed by Florence Kaufold's testimony that she was rather angry that Gendot would be purchasing the Property

for $ 1,800,000.00 and thereafter intending to immediately resell it for $ 4,600,000.00 (see Exhibit J). Moreover, it is clear from the evidence adduced that the Kaufolds knowingly and deliberately acted in an arbitrary, improper and inequitable manner, by appearing before the Planning Board in what was an obvious attempt to scuttle Gendot's subdivision application. This conduct clearly flies in the face of their obligations under the Contract of Sale. Furthermore, the testimony of Florence Kaufold established, to the Court's satisfaction, that Defendants were dissatisfied with the situation that they found themselves in as of February 2005, to wit., property values had increased markedly from the time they executed the Contract of Sale, the Kaufolds had other potential buyers for the Property and had been actively negotiating with others and they were upset with Gendot for trying to "flip" the Property. In short, they acted in bad faith when they chose to breach the Contract of Sale.

In New York, it is settled law that every contract contains an implied covenant of good faith and fair dealing which requires each party thereto to act in such a manner as to ensure that neither will suffer nor do any act which may prevent the other from receiving the intended benefits of the contract, *Wilson v. The Mechanical Orguinette Company 170 NY 542 (1902)*. Additionally, our law also mandates that the parties to a contract shall not act in a manner which is either arbitrary or irrational, *Maddaloni Jewelers Inc. v. Rolex Watch U.S.A. Inc. 41 AD 3d 269 (1st Dept., 2007)*. The law in New York is clear that where one acts in a manner that is unlawful, inequitable or unconscionable, that person will be denied equitable relief, *Eastman Kodak Co. v. Schwartz 133 NYS 2d 908 (Sup. Ct., NY County, 1954)*.

In addition, the fact that the affirmative conduct of the Kaufolds was obviously intended to hinder and delay and in fact, did hinder and delay the subdivision process and approval for the Property should and will effectively operate as both an estoppel and waiver against them as well as against all of their claims in this matter, *Whitney v. Perry 208 AD 2d 1025 (3rd Dept. 1994)*. In effect, the affirmative actions of the Kaufolds function as a bar to their claims, both at law and in equity. The Kaufolds, knowing and understanding the terms of the Contract of Sale which was prepared by their attorney and at their direction, willfully and consciously chose to breach the same, presumably because they were dissatisfied by Plaintiff's refusal to execute an additional Rider for their benefit as well as the possibility of obtaining considerably more money from the sale of the Property. They are, therefore, chargeable with all of the consequences arising as a result of their affirmative choices.

In a matter such as the case at bar, it is the province, and indeed the obligation, of the trial court to both assess and determine the issues of credibility, *Morgan v. McCaffrey, 14 AD 3d 670, 789 NYS 2d 274 (2nd Dept. 2005)*, *Matter of Liccione v. Michael A. 65 NY 2d 826, 482 NE 2d 917, 493 NYS 2d 121 (1985)*. In a civil matter the burden of proof rests upon the proponent of a claim/counterclaim to plead and prove all of the elements of such claim by a fair preponderance of the credible, relevant, material and admissible evidence, *Prince-Richardson On Evidence ,§ 3-210*; *Torem v. 564 Central Avenue Restaurant Inc. 133 AD 2d 25, 518 NYS 2d 620 (1st Dept. 1987)*. In the matter before the Court, the Plaintiff has sustained its burden of proof while Defendants wholly have failed to do so. The Court finds that the testimony offered by Florence Kaufold was not credible and further, that insufficient evidence was adduced in support of the Affirmative Defenses and Counterclaims. Accordingly, the Court is compelled to decree judgment in favor of Plaintiff.

In order for the equitable remedy of specific performance to lie, the proponent (in this case, the Purchaser) must plead and prove that it is not in breach of the agreement sought to be enforced, that it has substantially and materially performed all of its obligations mandated by the contract at issue, that it is ready, willing and able to perform its obligations thereunder to conclusion, that the adverse party (in this case, the Seller) has refused to convey though legally able to do so and that Purchaser has no adequate remedy at law, *ADC Orange Inc. v. Coyote Acres Inc. 7 NY 3d 484 (2006)*. Moreover, claims for both legal and equitable relief may lie in such situations as the case at bar, *Miles v. Dover Furnace Iron Co. 125 NY 294 (1891)*. It is clear to this Court that Plaintiff has amply demonstrated its right to both specific performance of the Contract of Sale as well as monetary damages arising from the breach by the Kaufolds.

In a situation such as the matter *sub judice*, where the seller of real property acts in a manner that evinces a willful disregard for the express provisions of the contract or otherwise acts in bad faith, the purchaser is entitled to recover damages, to be computed by awarding the difference between the contract price and the fair market value as of the date of the breach together with related and incidental damages that reasonably flow from the breach, *Bailey v. Morgan 95 AD 2d 883 (3rd Dept. 1983), aff'd 62 NY 2d 844 (1984), BSL Development Corp. v. Broad Cove Inc. 178 AD 2d 394 (2nd Dept. 1991)*. Such incidental damages can include and are not limited to counsel fees, interest and costs associated with the transaction and the litigation. Such incidental damages will be recoverable so long as they are reasonably foreseeable, *Hadley v. Baxendale 9 Exch 341, 156 Eng Rep 145 (Court of the Exchequer, 1854)*. Under the authority of *Oswego Falls Pulp & Paper Co. v. Stecker Lithographic Co. 215 NY 98 (1915)*, the purchaser is entitled to recover interest at the statutory rate (see *CPLR § 5004*).

As to the issue of monetary damages, Plaintiff adduced evidence in the form of testimony of Michael Given, a licensed real estate appraiser together with his written appraisal report (Exhibit 182), which established the fair market value of the Property at $ 3,326,000.00 as of February 25, 2005 (the date of the breach). From this figure, the sum of $ 1,800,000.00 (the contract price) must be subtracted, thereby leaving $ 1,526,000.00 as the damages amount for the breach. To this sum, the Court will award interest at the statutory rate from February 25, 2005 together with disbursements, a Bill of Costs and counsel fees to abide the event. An Affirmation of Legal Services detailing the amounts claimed, including disbursements, shall be submitted to the Court from which the Court shall determine and award appropriate and reasonable fees.

It is, therefore,

ORDERED that Plaintiff be awarded a decree of specific performance as to the Property located at Roanoke, Town of Riverhead, New York, known and designated on the Suffolk County Land and Tax Map as District 0600, Section 017.00, Block 01.00, Lot 016.000 for the sum of $ 1,800,000.00 with the conveyance to be consummated within forty five (45) days from the date of entry of this Order; and it is further

ORDERED that Plaintiff shall recover of Defendants, jointly and severally, the principal amount of $ 1,526,000.00 with interest thereon at the statutory rate, computed from February 25, 2005, together with disbursements, attorney's fees and a Bill of Costs; and it is further

ORDERED that the Affirmative Defenses and Counterclaims interposed by Defendants shall be and are hereby stricken and dismissed; and it is further

ORDERED that any relief not expressly granted herein shall be and the same is hereby denied; and it is further

ORDERED that Plaintiff's counsel shall, within twenty one (21) days from the date of entry hereof, submit, on notice, an Affirmation of Legal Services together with a judgment consistent with the provisions hereinabove set forth.

This shall constitute the decision and order of this Court.

Dated: March 7, 2012
Riverhead, New York

HON. JEFFREY ARLEN SPINNER, J.S.C

X FINAL DISPOSITION

X SCAN

__ NON-FINAL DISPOSITION

__ DO NOT SCAN