

Burkett v Magna Contr. Corp.
2012 NY Slip Op 30904(U)
March 30, 2012
Supreme Court, New York County
Docket Number: 100520/11
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

PERRY BURKETT,
Plaintiff, INDEX NO. 100520/11

- against -

MAGNA CONTRACTING CORP. and WEST
54 TOWER LLC,
Defendants. MOTION SEQ. NO. 002

WEST 54 TOWER LLC,
Third-party Plaintiff, INDEX NO. 590206/11

- against -

HALCYON PARTNERS INC. & FRANK RAY DELORIA,
Third-party Defendants.

The following papers numbered 1 to 9 were read on this motion for summary judgment by defendant Magna Contracting Corp.

FILED
APR 05 2012
PAPERS NUMBERED
COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits (Memo)	3,4
Replying Affidavits (Reply Memo)	5,6,7,8,9

Cross-Motion: Yes No

This action arises from a real estate transaction for the sale of property owned by the defendant Magna Contracting Corporation (Magna). Before the Court is a motion by Magna for summary judgment pursuant to CPLR 3212 on its cross-claim against co-defendant West 54 Tower LLC (West 54) in the sum of \$200,000.00 plus the costs and disbursements of the cross-claim. Magna also seeks an order directing the Clerk of the Court to enter judgment in favor of Magna and against West 54 in the sum of \$200,000.00, and directing payment to Magna or its attorney the sum of \$196,560.00 previously deposited with the County Clerk by plaintiff Perry Burkett, Esq. (Burkett) pursuant to an order of this Court dated May 19, 2011. West 54 opposes this application.

BACKGROUND

This action arises from a contract of sale executed between Magna and Thomas Morrison (Morrison) on August 4, 2010, wherein Morrison agreed to purchase from Magna property located at or known as 424-426 West 54th Street, New York, New York 10019 (the premises) (Stapinski Affidavit, ¶¶ 3-4, exhibit A). Pursuant to the contract of sale, Morrison was to pay a total purchase price of \$5,200,000.00 (Stapinski Affidavit, exhibit A). There was an additional rider to the contract of sale which stated that Morrison had the right to assign the contract to a business entity or a limited liability company formed in New York provided, among other things, that the assignee assumed the obligations of the contract (*id.*).

The original closing date on the premises was scheduled for September 30, 2010, however Magna granted Morrison an extension to November 15, 2010. On November 15, 2010, Morrison requested another extension from Magna, which was granted. Magna also agreed to allow Morrison to exercise his rights under the contract rider and assign his rights under the contract of sale to West 54, which he did pursuant to an Assignment and Assumption of Contract of Sale dated November 19, 2010 (see Notice of Motion, exhibit C).

Magna was represented in this transaction by Burkett. Burkett also acted as the escrow agent for the transaction and held the \$200,000.00 down payment on the premises paid by Morrison at the time of the contract of sale's original execution. At the end of November 2010, West 54 was still unable to close on the premises. On December 3, 2010 Magna's president, Jack Stapinski, sent a letter to Burkett informing him that Magna wished to have the \$200,000.00 down payment paid out to it in the event that West 54 did not close the transaction by December 10, 2010. Burkett sent a letter to West 54's counsel which stated that if West 54 did not close the transaction and purchase the premises by December 10, 2010, the down payment would be forfeited (Burkett Affirmation, exhibit C). The sale of the property did not take place.

Burkett commenced the underlying interpleader action against Magna and West 54 by Summons and Verified Complaint dated January 11, 2011. On February 8, 2011, Magna submitted a Verified Answer and Cross-Claim against West 54. According to Magna, West 54 failed to close and complete the transaction to purchase the premises on December 10, 2010 and is in default for failure to comply with its obligations under the terms of the contract of sale, thus entitling Magna to retain the down payment. On March 3, 2011, West 54 filed a Verified Answer to the cross-claim, which included affirmative defenses, and a third-party summons and complaint. The affirmative defenses included, *inter alia*, that Magna was aware that West 54 was having difficulty getting financing, Magna unreasonably denied their request for an extension of time by which to close, West 54 continues to seek alternative financing, and that Magna would be unjustly enriched if West 54 was required to forfeit its down payment.

Pursuant to § 2.05(a) of the contract of sale which states, among other things, that the escrow agent "shall have the right at any time to deposit the escrowed proceeds and interest thereon, if any, with the clerk of the Supreme Court of the county in which the Land is located" (Stapinski Affidavit, exhibit A), Burkett made a motion for an order permitting the deposit of the down payment monies to the Clerk of the Supreme Court. Burkett's motion was granted by order of this Court dated May 19, 2011, and Burkett deposited the sum of \$200,000.00, minus \$3,350.00 for costs and disbursements for a total of \$196,650.00 with the County Clerk.

Magna now moves for an order directing the Clerk of the Court to enter judgment in its favor and against West 54 in the sum of \$200,000.00 and directing payment to Magna or its attorney the sum previously deposited by Burkett with the County Clerk.

In support of its motion Magna submits, *inter alia*, the affidavit of Jack Stapinski, a copy of the contract of sale dated August 4, 2010, a copy of assignment of the contract of sale between Morrison and West 54, affirmation of Alison Blaine, Esq., a copy of the Summons and Verified Complaint and Magna's Verified Answer and Cross-Claim, the affirmation of Burkett, a

copy of this Court's order dated May 19, 2011, and a memorandum of law.

Magna contends that there is no defense to or material issue of fact raised by its cross-claim because it is based on documentary evidence. Magna maintains that West 54 breached the contract of sale by failing to close on the premises on December 10, 2010, the alleged final closing date extension, and that said closing date was not contingent upon West 54 obtaining mortgage financing. Specifically, Magna points to paragraph 1 of the rider to the contract of sale, which reads as follows: "it is understood that this contract shall not be subject to or contingent upon the Purchaser obtaining any type of mortgage financing" (Notice of Motion, exhibit A). Magna argues that it was ready, willing, and able to close on the premises and West 54 failed to fulfill its obligations to purchase the property. Moreover, Magna proffers it is entitled to retain the \$200,000.00 down payment previously deposited with the Court, pursuant to section 13.04 of the contract of sale, which states:

"if purchaser shall default in the performance of its obligation under this contract to purchase the Premises, the sole remedy of Seller shall be to retain the down payment as liquidated damages for all loss, damage and expense suffered by Seller, including without limitation the loss of its bargain."

In opposition, West 54 submits, *inter alia*, a memorandum of law, affirmation of Jerrietta R. Hollinger, Esq., affirmation of David L. Ganz, Esq., affirmation of Rita Mica Grant, member of CFS Capital Funding LLC, and a copy of a loan commitment offered to West 54 Tower.

West 54 alleges, among other things, that Magna would be unjustly enriched if it were allowed to retain the down payment as Magna continued to collect rent and occupy space in the premises, and Magna was aware that West 54 was having difficulty obtaining financing and was assisting in the process. Moreover, West 54 asserts that Magna's motion should be denied in its entirety because Magna cannot convey clear title to the premises due to numerous encroachments.

In reply, Magna asserts that West 54's inability to obtain financing is irrelevant as the

contract states that the sale of the premises is not contingent upon the purchaser obtaining financing. Moreover, Magna argues that even if it was incapable of conveying marketable title, in order to hold a seller in default the purchaser must first tender performance and demand good title, allowing a seller time to cure any such defects, which West 54 failed to do here.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

The Court finds that Magna met its prima facie burden to establish its entitlement of summary judgment on its cross-claim against West 54. Based on the documentary evidence submitted in support of its motion, Magna has shown that it was ready, willing, and able to close on the premises and that West 54 breached the contract of sale by failing to consummate the transaction on December 10, 2010 (*see Diplomat Props., L.P. v Komar Five Assoc., LLC*, 72 AD3d 596 [1st Dept 2010]). In light of West 54's default, Magna is entitled to retain the deposit as liquidated damages in accordance with the contract of sale (*see contract of sale §13.04; see also 115-117 Nassau St., LLC v Nassau Beekman, LLC*, 74 AD3d 537 [1st Dept 2010]; *Atlantic Dev. Group, LLC v 296 E. 149th St., LLC*, 70 AD3d 528 [1st Dept 2010] [defendant granted summary judgment and entitled to retain the down payment as liquidated damages in accordance with the contract of sale]; *Diplomat Props., L.P.*, 72 AD3d at 600). The Court finds that West 54 fails to raise a triable issue of fact in opposition. Accordingly, Magna is entitled to judgment in its favor on its cross-claim against West 54 and is entitled to receive the sum previously deposited with the Clerk of the Court.

CONCLUSION

Accordingly it is,

ORDERED that the portion of defendant Magna Contracting Corp.'s motion for summary judgment on its cross-claim against defendant West 54 Tower LLC is granted; and it is further,

ORDERED that the portion of Magna Contracting Corp.'s motion directing the County Clerk to enter judgment in favor of Magna Contracting Corp. and against West 54 Tower LLC in the sum of \$200,000.00 is granted; and it is further,

ORDERED that Magna is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court, who is directed to enter judgment accordingly; and it

is further,

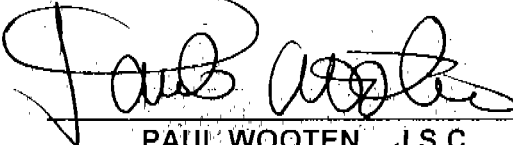
ORDERED that upon receipt of a copy of this order, the Clerk of the Court is directed to pay to counsel for Magna Contracting Corp. the sum of \$196,560.00 previously deposited with the Clerk of the Court; and it is further,

ORDERED that the remaining parties are directed to appear for a compliance conference in Part 7, 60 Centre Street, Room 341 on June 13, 2012 at 11:00 A.M.

This constitutes the Decision and Order of the Court.

Dated: 3-30-12

Enter:


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

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