Jannetti v. Whelan FINAL Copy"

SHORT FORM ORDER

Index No: 44564/2010

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ: 003 MD
005 MD
006 MD

***PRESENT:***

Hon. RALPH T. GAZZILLO
A.J.S.C.

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| DAVID JANNETTI, | : | MELTZER, LIPPE, GOLDSTEIN |
| | : | & BREITSTONE, LLP |
| Plaintiff(s), | : | Attorneys for Plaintiff |
| - against - | : | 190 Willis Avenue |
| | : | Mineola, NY 11501 |
| MARY M. WHELAN and DAVID J. WHELAN, | : | |
| | : | DAVID LEE HELLER |
| Defendant(s). | : | Attorneys for Defendants |
| | | 3334 Noyac Road, Suite 1 |
| | | Sag Harbor, NY 11963 |

Upon the following papers numbered 1-57; Notice of Motion for injunctive relief (#003 ) and supporting papers numbered 1-11 ; Affirmation in Opposition and supporting papers numbered 12-15; Reply Affirmation and supporting papers numbered 16-20 Plaintiff's Notice of Motion to Dismiss (#005) and supporting papers numbered 20--36; Affirmation in Opposition and supporting papers numbered 37-39; Reply Affirmation and supporting papers numbered 40-42; Plaintiff's motion for injunctive relief and supporting papers numbered 43-54, Affirmation in opposition and supporting papers numbered 55-57; it is

***ORDERED*** that the defendants' motions (motion sequence #003 and #005) and the plaintiff's motion (motion sequence #6) are consolidated for the purposes of this Short Form Order; and it is further

***ORDERED*** that the defendants' (mot seq 003) to preclude the plaintiff from filing a second Lis Pendens against the subject premises is denied as moot, and it is further

***ORDERED*** that the defendants' (mot seq 005) to dismiss the amended verified complaint is granted to the extent that first and second causes of action are dismissed, and it is further

***ORDERED*** that the plaintiff's application (mot seq 005) seeking to disqualify the law firm Esseks, Hefter & Angel, LLP, is denied as moot, and it further

***ORDERED,*** that in light of the foregoing, defendants' motion to cancel plaintiff's Lis Pendens is granted, and it is further

***ORDERED*** that the plaintiff's motion (mot seq 006) seeking to enjoin the defendants from performing any construction activities on the premises is denied in its entirety, and it is further

***ORDERED*** that counsel for defendants shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)( l), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court

Pursuant to an amended verified complaint, the plaintiff in this action seeks specific performance on a contract of sale for waterfront residential property located in North Haven and owned by the defendants. Alternatively, he seeks money damages based upon the anticipatory breach of the subject contract of sale. The salient facts are not in dispute.

The subject contract of sale was dated September 9, 2010 and was negotiated between defendant/property owner Mary M. Whelan (who is an attorney) and plaintiff's attorneys Sigmund S. Semon, Esq., and Ira Halperin, Esq., both of Meltzer, Lippe, Goldstein and Breitstone, LLP. The purchase price for the property was Six Million Fifty Thousand ($6,050,000.00) dollars and the contract required a down payment of One Hundred Thousand ($100,000,00) Dollars upon execution. The contract also provided that the defendants would hold a purchase money mortgage in the sum of Four Million Five Hundred Thousand ($4,500,000.00) dollars. Plaintiff was to pay One Million Four-Hundred Fifty Thousand ($1,450,000.00) dollars at the time of closing. The contract contained an "on or before" closing date of December 24, 2010. The "Time of Closing" provision in the contract of sale (paragraph 39 of the rider) did not include "time is of the essence" language. The contract terminated by its own terms on December 24, 2010.

The transaction's history between the time of the contract's execution and its termination is as follows:

In or around late November of 2010 and following the contract's execution, the defendants began verbally requesting financial documentation from the plaintiff ostensibly in order to establish his ability to repay the purchase money mortgage. In correspondence between the plaintiff's counsel and David Heller, Esq.[1], the parties debated whether the contract required the plaintiff to provide the defendants with personal and financial information. (Although the contract does not contain any specific requirement that plaintiff provide financial documentation to the defendant as a condition of the closing/financing, defendant argued that the obligation is required by the miscellaneous provision in the contract which generally states that the parties will provide documents to one another "as may reasonably requested by the other in order to carry out the intent and purpose of this contract." [Paragraph 28(g).].)

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[1] Mr. Heller was retained by the defendants after the execution of the contract.

In a November 29, 2010, letter to the plaintiff's counsel, Mr. Heller apparently requested that the plaintiff provide specific financial documents to establish his creditworthiness. Plaintiff's attorney responded by letter dated November 30, 2010, and advised that "...there is no requirement for our client to provide federal income tax returns (or to provide copies of same), authorization to obtain credit information, or a written financial statement." That letter further states, "[p]lease be further advised that our client fully expects to close on the transaction in accordance with the terms and conditions contained in the contract. Please confirm by return mail that your client is prepared to close on the date specified in the contract and in accordance with the terms contained therein." Pursuant to a letter dated December 3, 2010, defendants, through their attorney, responded, in pertinent part, as follows: "Please be advised, sellers are prepared to close on the date specified in the contract, subject to timely submission of financial and personal information, sufficient and necessary to warrant a $4,500,000.00 purchase money mortgage, subject to subordination." No further correspondence was exchanged between the parties. Instead, plaintiff commenced this action and filed a Lis Pendens on the subject property on December 8, 2010.

Thereafter, defendant moved to dismiss the action. By Short Form Order dated April 7, 2011, the undersigned granted the motion in so far as it sought specific performance on the contract since the plaintiff failed to establish a specific "law day" for the closing of sale prior to initiating the action for anticipatory breach of the agreement. That Short Form Order also allowed the plaintiff thirty days from Notice of Entry to amend its complaint which plead a claim for money damages only as an alternative to specific performance.

In matters such as that at bar, "[a]n anticipatory breach by the party from whom specific performance is sought excuses the party seeking specific performance from tendering performance, but not from the requirement that the party seeking specific performance establish that he or she was ready, willing, and able to perform." ***Eivers v. Dreamworks Constr., Inc.;*** 48 AD3d 625, 625-26; (*see also*; ***Fridman v. Kucher;*** 34 AD3d 726; ***McCabe v Witteveen,*** 34 AD3d 652, 653-54**;** ***Johnson v. Phelan****; 281 AD2d 394*, 395; ***Zev v Merman,*** 134 AD2d 555, 557**,** ***affd*** 73 NY2d 781). Said another way, one party's improper cancellation of the contract does not excuse the other party from its duty to tender its own performance. (see**,** ***Zev v. Merman*****, Id.; *Huntington Min. Holdings v. Cottontail Plaza*, 96 A.D.2d 526,** *affd.* **60 N.Y.2d 997; *Stawski v. Epstein*,** 67 A.D.2d 681**.)** "By contrast, a party seeking damages for breach of a contract for the sale of real property need not establish that he or she was ready, willing, and able to perform on the closing date when there has been an anticipatory breach by the other party." ***Zeitoune v. Cohen*****,** 66 A.D.3d 889 at 892**.**

As was permitted by the above-referenced Short Form Order, on May 13, 2011 the plaintiff amended its complaint adding three separate causes of action. The first cause of action seeks specific performance based upon plaintiff's claim that defendant failed to close on the contract of sale on a new and specific "law day" plaintiff set for May 13, 2011. The second cause of action seeks the imposition of a constructive trust on the subject premises securing the $100,000.00 down payment made by plaintiffs. The third cause of action is for money damages equal to the agreed upon purchase price of $6,050,000.00 together with the costs and disbursements of the action. In addition, plaintiff filed a second Lis Pendens.

The attempted "law day" closing that is the new basis of plaintiff's claim for specific

performance was scheduled by plaintiff's counsel in an April 8, 2011 letter sent to defendant's counsel. That letter, in contrast to the fatally non-specific December 3, 2010 "law day" letter, identified the date, time and place of closing, indicated that "time is of the essence" and advised that failure to perform on that date would be considered a default under the contract. Thereafter, on May 3, 2011, plaintiff's counsel again wrote to defendants' counsel requesting that plaintiff's provide certain information for the "law day" closing including (but not limited to):payoff information on existing mortgages, the manner in which defendants wished checks to be cut, and insurance information (presumably for title insurance for the purchase money mortgage). That same day, defendants' counsel responded with a letter to plaintiff's counsel which indicated (among other things) that the plaintiff was no longer entitled to establish a "law day" as the contract had terminated by its own terms on December 24, 2010. On May 5, 2011, plaintiff's counsel wrote to defendants' counsel advising that notwithstanding defendants' May 3, 2011 letter, plaintiff intended on closing as stated in his April 8, 2011 letter. Thereafter, on May 13, 2011, plaintiff arrived at defendants' counsel's office and tendered performance of his obligations as set forth in the contract of sale. Plaintiff's performance of his contractual obligations was memorialized in a transcript prepared by a court reporter/notary public[2].

The defendants initial motion (#003) sought to enjoin the plaintiff from placing a second lis pendens on the subject real property alleging that the filing of same would constitute a violation of CPLR §6516(c). Defendants initially sought a temporary restraining order, which was denied by this Court on the day that the Order to Show Cause was presented. Thereafter, plaintiff completed the filing of a second lis pendens against the premises. Accordingly, the defendants motion, which was solely directed at preventing the filing of the second Lis Pendens, is denied as moot.

The defendants' second motion seeks to dismiss the amended verified complaint on various grounds relating to this Court's prior order and for declaratory judgment "finding the contract terminated, for all purposes, as of December 24, 2010, by express and written Contract provision" and for the cancellation of the Lis Pendens. Defendant also seeks declaratory judgment "directing recision on the stated basis of mistake, and/or misrepresentation and fraud, or alternatively, reformation of a certain residential contract of sale...". Defendant seeks the cancellation of the Lis Pendens and finally, the disqualification of plaintiff's counsel.[3]

Defendants' Motion to Dismiss and Motion to Preclude the Filing of a Second Lis Pendens

Specific Performance

As with the first closing, the second "law day" closing scheduled by the plaintiff is insufficient to sustain a claim for specific performance. Although the plaintiff's actions would have

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[2]Apparently, the second "law day" closing was attended by William Power Maloney, Esq. of Esseks, Hefter & Angel, LLP. On May 18, 2011, Plaintiff objected to Esseks firm's representation of Mr. Jannetti due to the fact that the same firm had previously consulted with the plaintiffs on the real estate transaction that is the subject of this litigation. Shortly after plaintiffs' objection to that representation, the firm formally recused. Although plaintiffs' objection was meritorious, the withdrawal of the firm renders the application for disqualification moot.

[3]See fn. 2, *supra*.

been sufficient as a matter of law to establish a "law day" and the tender of performance of his obligations under the contract would be sufficient to support a claim for specific performance, the contract of sale had already expired by nearly 5 months on the May 13, 2011—the date that the plaintiff set for the closing. Being that the contract has already terminated prior to the "law day", plaintiff was not entitled to schedule the second closing.

In this regard, the clear terms of the contract of sale merit mention. Paragraph 39 of the Rider to the Contract of Sale dated September 9, 2010 unambiguously states as follows: "*If Purchaser fails to close the transaction on or before December 24, 2010, this contract shall become null and void and Seller shall retain the deposit made hereunder. Neither party shall have any further recourse against the other*" (emphasis added). There was no agreement between the parties or anything in the contract itself which extended the December 24, 2010 contract termination date. Furthermore, the Court is not free alter the construction of a plain and unambiguous contract, "and ... circumstances extrinsic to the agreement will not be considered when the intention of the parties can be gathered from the instrument itself." ***Donerail Corp. N.V. v. 405 Park LLC,*** 30 Misc.3d 1221(A) at page 4 citing ***West, Weir & Bartel, Inc. v. Mary Carter Paint Co.***, 25 N.Y.2d 535, 540, 307 N.Y.S.2d 449, 255 N.E.2d 709 (1969).

Accordingly, since the plaintiff was not entitled to schedule a closing after the contract was terminated by its own terms, plaintiff's claim for specific performance must be dismissed for failure to state a cause of action. In light of the foregoing, the Court need not reach the defendants' other unique theories for dismissal of the amended verified complaint or for declaratory judgment. In addition, because plaintiff is not entitled to specific performance, it is appropriate for the Court to vacate the Lis Pendens as well.

Constructive Trust

Similarly, with regard to the plaintiff's second cause of action, i.e. seeking to impose a constructive trust on the subject premises to secure the down payment paid by the plaintiff, the terms of the contract are clear. As stated herein, the Court will not reform a contract the terms of which are unambiguous. ***Donerail Corp. N.V. v. 405 Park, LLC,*** *supra.*

Indeed, the contract of sale unequivocally states that the down payment is non-refundable. Specifically, paragraph 34 of the Rider to the Contract of Sale dated September 9, 2010, states: "The down payment referenced under paragraph 3(a) is to be paid directly to Seller without being held in escrow by Purchaser's attorney or other escrow agent and said down payment is non-refundable except as provided in paragraph 36(a)[4]. Plaintiff has not alleged that the he is entitled to a return of the down payment pursuant to paragraph 36(a). Moreover, in order to impose a constructive trust on the premises, the plaintiff would have had to allege the elements of a constructive trust, to wit; (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment, i.e. something other than an arm's length transaction (see, ***Olin v. Lenoci***, 119 A.D.2d

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[4]Paragraph 36(a) refers to certain permits or certificate of compliance for the dock existing at the premises. This paragraph allows the *purchaser* to cancel the contract and receive a return of the down payment if the seller does not provide certain documentation to him regarding the legality of the dock.

739). Plaintiff has not made any such allegations. Accordingly, plaintiff's cause of action for constructive trust must also be dismissed.

Money Damages

Notwithstanding the foregoing, plaintiff may still seek compensation for the breach of contract through money damages, which the plaintiff has properly plead in its amended verified complaint. Although the contract also contains specific language precluding plaintiff from recovering money damages in the event of a default (paragraph 23(b)), such a provision is unenforceable under New York Law. "A vendor of real property who breaches the contract of sale in bad faith cannot limit the damages recoverable by the injured purchaser by relying on a contractual limitation such as the one at bar (see, ***Progressive Solar Concepts v. Gabes***, 161 A.D.2d 752, 753, 556 N.Y.S.2d 105; ***Mokar Props. Corp. v. Hall***, 6 A.D.2d 536, 539–40, 179 N.Y.S.2d 814; ***Bulkley v. Rouken Glen, Inc.***, 222 App.Div. 570, 574, 226 N.Y.S. 544, affd. 248 N.Y. 647, 162 N.E. 560; 9 Encyclopedia of N.Y. Law, Damages, § 352; 77 Am.Jur.2d, Vendor & Purchaser, § 663; 92 CJS, Vendor & Purchaser, § 603)." (***BGW Development Corp. v. Mount Kisco Lodge No. 1552 of Benevolent and Protective Order of Elks of the United State of America, Inc.***, 247 A.D.2d 565, 569). Plaintiff herein alleges that the defendants' failure to close on the sale of the real property constituted "misconduct". "New York follows the rule that where the proof establishes that the vendor of real property failed to perform in bad faith, the purchaser may recover the loss of its bargain (see, ***Conger v. Weaver***, 20 N.Y. 140; ***Mokar Props. Corp. v. Hall***, *supra*, at 539, 179 N.Y.S.2d 814; 9 Encyclopedia of N.Y. Law, Damages, § 358), and those expenses and disbursements reasonably and necessarily incurred in preparation for its performance which were within the contemplation of the parties when the contract was made" (***BGW Development Corp. v. Mount Kisko Lodge No. 1552 of Benev.*** *supra* at 569) .

Based upon the foregoing, defendants' application to dismiss the third cause of action is denied in its entirety. It should be duly noted by the defendants that "the measure of damages for loss of bargain in a case in which the vendor, in bad faith, breaches a contract for the sale of real property which has been partially performed by the purchaser is the difference between the market value of the property and the amount unpaid on the purchase price" (***BGW Development Corp.,*** *supra* at 569).

Plaintiff's Application for Injunctive Relief

Plaintiff also moves for injunctive relief (mot seq #006) seeking to preclude the defendants from making any improvements to their property. The actions of the plaintiff were insufficient to sustain a cause of action for specific performance. As such, the plaintiff's motion seeking injunctive relief related to the contract of sale which has expired must be denied as moot.

The foregoing constitutes the decision and order of the Court.

**Dated:** 5/29/12

**RIVERHEAD, NY**

**Ralph T. Gazzillo**
**A.J.S.C.**