

Hoover 8 LLC v 15 Hoover St. LLC
2012 NY Slip Op 32082(U)
July 31, 2012
Sup Ct, Nassau County
Docket Number: 1451/11
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

HOOVER 8 LLC,

Plaintiff,

INDEX No. 1451/11

MOTION DATE: June 12, 2012
Motion Sequence # 003, 004

-against-

15 HOOVER STREET LLC and MADISON
COMMERCIAL REAL ESTATE SERVICES
LLC,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Reply Affirmation..... XX

Motion by plaintiff Hoover 8 LLC for leave to renew its motion for partial summary judgment on its first, second, and fourth causes of action is **granted**. Cross-motion by defendant 15 Hoover Street LLC for leave to renew its motion for summary judgment is **granted**. Upon renewal, plaintiff's motion for summary judgment is **granted**, and defendant's motion for summary judgment is **denied**.

Defendant 15 Hoover Street LLC is the owner of a parcel of property located at 15 Hoover Street in Inwood. On December 15, 2010, defendant entered into a contract to sell the property to plaintiff Hoover 8 LLC for \$2,550,000. The contract provided in paragraph

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4 that upon execution and delivery of the contract, purchaser would pay a down payment of \$255,000 by check payable to the order of "Escrowee." Paragraphs 3 and 29 provided that the escrowee was to be the title insurer, which was to be selected by the purchaser.

Paragraph 7 of the contract provided that the purchaser had 14 days from the execution of the contract to conduct "Phase II environmental testing." Paragraph 7 further provides that the purchaser was entitled to cancel the contract for a reason discovered by purchaser "as a result of" the phase 2 testing upon written notice on or prior to the 14 day "Diligence Date." However, if, notwithstanding purchaser's best efforts, the environmental testing report was not complete on the Diligence Date, that date would be postponed until the second day following the receipt by the purchaser of the Phase II report.

Paragraph 18 of the contract provides that any notice shall be deemed given only if in writing and sent by "personal delivery, reliable overnight courier with evidence of receipt, or by facsimile transmission."

On the date of the contract, PDC Corporation, acting on the purchaser's behalf, issued a check to the order of Madison Title Agency, LLC in the amount of \$255,000. However, the following day, December 16, 2010, plaintiff determined that it wanted to change the title insurer to Chicago Title Insurance Company.

On December 17, 2010, plaintiff engaged Hydro Tech Environmental Corp to perform the environmental testing. Among the conditions which Hydro Tech was to test for was "suspect asbestos- containing materials."

On January 12, 2011, Hydro Tech submitted a comprehensive site assessment report. Hydro Tech's report contained a phase 1 environmental site assessment and a phase 2 investigation consisting of a ground penetrating radar survey and soil and groundwater sampling conducted at a total of 6 soil sampling locations and three temporary wells. In the report, Hydro Tech identified the presence of asbestos containing material in the onsite building and semi-volatile organic compounds (petroleum) in the groundwater at concentrations above the applicable regulatory standards.

On January 14, 2011, plaintiff notified 15 Hoover Street that it was cancelling the contract. The notice of cancellation was sent by email and Federal Express. On January 18, 2011, 15 Hoover rejected the notice of cancellation claiming that it was untimely.

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Plaintiff commenced this action on January 31, 2011. In the first cause of action, plaintiff seeks a declaratory judgment that it validly cancelled the contract and is entitled to the return of its deposit. In the second cause of action, plaintiff seeks damages against 15 Hoover for breach of contract. In the third cause of action, plaintiff seeks to impose a vendee's lien in the amount of its down payment. In the fourth cause of action, plaintiff seeks injunctive relief. In the fifth cause of action, plaintiff asserts a claim for conversion of its down payment. In the sixth cause of action, plaintiff asserts a claim against defendant Madison Commercial Real Estate Services LLC for money had and received, i.e. the \$255,000 down payment.

In its answer, defendant 15 Hoover Street asserted a counterclaim for breach of contract on the theory that plaintiff's cancellation was wrongful and a repudiation of the contract. In the second counterclaim, defendant requested a judgment directing the escrow agent to deliver the escrow to the seller. In the third counterclaim, defendant seeks damages based upon the purchaser's actions with respect to the escrow account.

Plaintiff moved for partial summary judgment on its first, second, and fourth causes of action, and defendant cross moved for summary judgment on its first and second counterclaims. By order dated August 16, 2011, the court denied the parties' summary judgment motions. The court concluded that plaintiff's notice of cancellation was timely. However, the court interpreted the language that the purchaser could cancel for a reason discovered "as a result of" the Phase II testing to mean that the purchaser could not cancel based upon a known environmental condition, unless the testing revealed that the contamination was significantly worse than understood at the time of the contract. Plaintiff offered no evidence that it was unaware of the presence of asbestos or semi-volatile organic compounds, or that the testing revealed that either condition was significantly worse than understood at the time of the contract. Thus, plaintiff did not establish prima facie that it was entitled to cancel the contract.

On the other hand, defendant offered no evidence that plaintiff was aware of the presence of both asbestos and semi-volatile organic compounds. Nor did defendant show that neither environmental condition was significantly worse than it appeared at the time of the contract. Thus, defendant did not establish prima facie that plaintiff was not permitted to cancel the contract.

Plaintiff moves, and defendant cross moves, for leave to renew their summary judgment motions. The court grants leave to renew both motions.

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On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Eli Rowe, a member of Hoover 8, submits an affidavit stating that he had no knowledge of environmental contamination at the property prior to the contract. Plaintiff also submits an affirmation dated September 19, 2003 in which David Neuberg, a member of 15 Hoover Street, states that a 1,000 gallon underground storage tank located on the property was not leaking. Plaintiff also submits an "environmental questionnaire" which defendant submitted to Hydro Tech in preparation for its investigation of the property. In the questionnaire, defendant's member Ian Rubinstein states that an environmental site assessment had previously been conducted at the property. However, Rubinstein states that to his knowledge there are no conditions with respect to the property which would require a clean-up or remedial action.

The court concludes that plaintiff has established prima facie entitlement to cancel the contract based upon lack of knowledge of the environmental contamination. The burden shifts to defendant to offer evidence that plaintiff had knowledge of the environmental contamination or, for some other reason, was not entitled to cancel the contract.

Defendant submits a report dated April 3, 2012 from Langan Engineering and Environmental Services. Langan reviewed Hydro Tech's environmental site assessment report, apparently without conducting their own investigation of the property. In any event, Langan concludes that the asbestos and semi-volatile organic compounds do not constitute "recognized environmental conditions" because the asbestos could be addressed during renovation and the semi-volatile organic compounds did not exceed Department of Environmental Conservation quality standards. Thus, defendant argues that there was no contamination and therefore no "reason" which would allow plaintiff to cancel the contract.

Defendant's argument would have more force, if the contract had provided that purchaser could cancel based upon an objective condition, such as reportable environmental

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contamination, as determined by a reputable environmental contractor. The contract at bar provided for cancellation based upon a subjective condition, i.e. a reason discovered by the purchaser as a result of the phase 2 environmental report. Nevertheless, the purchaser was still required to cancel in good faith, that is it must not have known of the environmental issue, or its extent, prior to entering into the contract. Since defendant offers no evidence that plaintiff knew of the semi-volatile organic compounds prior to entering into the contract, defendant offers no evidence that plaintiff's cancellation was not in good faith.

Upon renewal, plaintiff's motion for summary judgment is **granted** as to its first, second, and fourth causes of action, and defendant's motion for summary judgment is **denied**. The court issues a declaratory judgment that plaintiff is entitled to the return of its \$255,000 deposit. The escrowee is directed to return the deposit, plus accrued interest, to plaintiff upon service of a copy of this order.

So ordered.

Dated JUL 31 2012


J.S.C.

ENTERED
AUG 01 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE