

<b>Silvershore Props., LLC v Dunning</b>
2017 NY Slip Op 30620(U)
April 3, 2017
Supreme Court, Kings County
Docket Number: 508384/2014
Judge: Sylvia G. Ash
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Com 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3<sup>rd</sup> of April 2017.

P R E S E N T:

**HON. SYLVIA G. ASH,**  
Justice.

-----X

**SILVERSHORE PROPERTIES, LLC,**

Plaintiff,

**Decision / Order**

- against -

Index No. 508384/2014

**EUGENE DUNNING and FRED D. WAY III,**

Defendants.

-----X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

\_\_\_\_\_ 1 \_\_\_\_\_  
\_\_\_\_\_ 2 \_\_\_\_\_  
\_\_\_\_\_ 3 \_\_\_\_\_

Plaintiff, Silvershore Properties, LLC, moves pursuant to CPLR §3212 for partial summary judgment on its claims for specific performance, declaratory judgment and a hearing to reduce the parties' contract price. Further, Plaintiff moves to dismiss Defendants' affirmative defenses. Defendants oppose. For the reasons set forth below, Plaintiff's motion is denied in its entirety.

***Background***

The underlying action arises out of a contractual dispute between the parties. On May 22, 2014, Plaintiff and Individual Defendant Eugene Dunning, contracted for Plaintiff to buy and for Mr. Dunning to sell a piece of real property in Brooklyn, New York for \$5,500,000. The contract called for a down payment of \$200,000. Plaintiff paid the down payment to Mr. Dunning's then transactional attorney, Individual Defendant Fred D. Way III.

The contract also called for a closing date of June 24, 2014. As a condition to closing, Mr. Dunning was required to obtain and produce tenant estoppel certificates from commercial tenants

then occupying the property. Plaintiff claims the parties failed to close on June 24, 2014 because Mr. Dunning was unable to obtain the required estoppel certificates. Defendants counter that the parties did not attempt to close on June 24, 2014 and that Plaintiff was aware that Mr. Dunning was taking steps to obtain the estoppel certificates. On July, 28, 2014, Mr. Way, acting on behalf of Mr. Dunning, sent Plaintiff a letter designating August 11, 2014 as the new closing date. Mr. Way's letter also indicated that "time was of the essence".

According to Mr. Way, the parties met on August 2014 in an apparent effort to effectuate closing. However, Mr. Way claims that Plaintiff refused to close unless Mr. Dunning agreed to reduce the contract price from \$5,500,000 to \$4,800,000. Plaintiff then commenced this action to obtain specific performance, to reduce the contract price and to nullify Mr. Way's July 28, 2014 letter. Plaintiff now moves for partial summary judgment on those claims. Additionally, Plaintiff seeks to dismiss Defendants' affirmative defenses of breach, repudiation and failure to state a cause of action.

With regards to its specific performance claim, Plaintiff argues that it is entitled to summary judgment because it substantially performed under the contract by tendering the \$200,000 down payment. Further, Plaintiff maintains that it was ready, willing and able to close on the June 24, 2014 closing date. Plaintiff submits a loan commitment from a bank and an affidavit from its mortgage broker in support of its readiness to close.

Concerning Mr. Way's July 28, 2014 letter, Plaintiff argues that the letter is unenforceable because Mr. Dunning breached the parties' agreement prior to the letter's issuance. According to Plaintiff, in addition to not providing the tenant estoppel certificates, Mr. Dunning made several misrepresentations about tenants' status on the property. Plaintiff claims to have learned that one of the tenants had not paid rent in years. And that another tenant's lease did not expire until 2019, despite Mr. Dunning's representations to the contrary. Plaintiff argues that \$5,500,000 contract price should be reduced because the price was improperly inflated by Mr. Dunning's misrepresentations.

In opposition, Defendants argue, among other things, that issues of fact exist as to whether Plaintiff was ready, willing and able to close. Defendants maintain that the parties did not attempt to close on June 24, 2014. According to Defendants, at the August 2014 meeting between the parties, Plaintiff indicated that it would close only if Mr. Dunning agreed to reduce the contract price from \$5,500,000 to \$4,800,000. Defendants dispute that Mr. Dunning made misrepresentations to Plaintiff regarding the tenants' status. Defendants maintain that Plaintiff was aware of the issues concerning the tenants. Further, Defendants maintain that Plaintiff's request of an abatement of the purchase price goes against what the parties agreed to in the contract.

According to Defendants, the contract provides Plaintiff two options if Mr. Dunning is unable to deliver title or if Plaintiff refuses to consummate the purchase. The first option allows Plaintiff to cancel the purchase and receive back its \$200,000 down payment. The second option allows Plaintiff to proceed with the purchase and receive a maximum abatement of \$50,000. Defendants argues that, if the Court decides to grant Plaintiff's request for specific performance, Plaintiff should not receive an abatement greater than \$50,000. In response, Plaintiff argues,

among other things, that the \$50,000 maximum abatement applies only to title defects, not the allegations at issue.

### *Discussion*

A party seeking summary judgment must submit proof in evidentiary form sufficient to establish its prima facie entitlement to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

A party seeking specific performance of a real-estate contract must establish that it was ready, willing, and able to perform its obligations under the contract "on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter" (*Ferrone v Tupper*, 304 AD2d 524, 525 [2003]).

Here, Plaintiff contends that it was ready, willing and able to perform based on the loan commitment from a bank and Plaintiff's mortgage broker's affidavit. However, Defendants' allegation that Plaintiff refused to close in August 2014 unless Mr. Dunning agreed to reduce the contract price from \$5,500,000 to \$4,800,000 raises a triable issue of fact as to whether Plaintiff was indeed ready to proceed. Therefore, Plaintiff's motion for summary judgment as to its specific performance claim is DENIED.

Moving on to Mr. Way's July 28, 2014 letter. "It is fundamental that time is never of the essence of a contract for the sale of real property unless the contract specifically so provides or special circumstances surrounding its execution so require" (*see Tarlo v Robinson*, 118 AD2d 561, 565 [2d Dept 1986]). However, "it is possible for the seller to convert a non-time-of-the-essence contract into one making time of the essence by giving the buyer 'clear, unequivocal notice' and a reasonable time to perform" (*ADC Orange v Coyote Acres*, 7 NY3d 484, 490 [2006]); *Sohayegh v Oberlander*, 155 AD2d 436, 438 ([2d Dept 1989]).

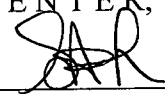
Here, Plaintiff argues that Mr. Way's letter should be voided because Mr. Dunning breached the parties' agreement in failing to obtain estoppel certificates and in making various misrepresentations about the status of the property's tenants. However, an issue of fact exists as to whether Mr. Dunning failed to obtain the estoppel certificates prior to closing. Further, Defendants deny that Mr. Dunning made misrepresentations to Plaintiff regarding the status of the tenants. As such, Plaintiff's motion, with regard to that part of its complaint is also DENIED.

Plaintiff's attempt at reducing the contract price is based upon the allegation that Mr. Dunning misrepresented the status of tenants at the property. However, Defendants deny that Mr. Dunning represented that status of the tenants to Plaintiff. Further, the parties dispute whether the contract allows Plaintiff to enjoy an abatement greater than \$50,000. Therefore, Plaintiff's motion, as it relates to its effort at reducing the contract price is similarly DENIED.

Lastly, because issues of fact exist in connection with Plaintiff's claims, Plaintiff's motion to dismiss Defendants' affirmative defenses is also DENIED.

This constitutes the Decision and Order of the Court.

ENTER,



\_\_\_\_\_  
Sylvia G. Ash, J.S.C

HON. SYLVIA G. ASH, JSC