

<b>Prime Homes LLC v O'Reilly</b>
2017 NY Slip Op 30969(U)
May 8, 2017
Supreme Court, New York County
Docket Number: 151308/2016
Judge: Manuel J. Mendez
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: MANUEL J. MENDEZ**  
*Justice*

**PART 13**

**PRIME HOMES LLC,**  
**Plaintiff,**  
**-against-**

INDEX NO. 151308/2016  
MOTION DATE 03/29/17  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

**BRIAN O'REILLY and L.H.U. DEVELOPMENTS LLC,**  
**Defendants.**

The following papers, numbered 1 to 9 were read on this motion and cross-motion.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3; 4-6</u>
Answering Affidavits — Exhibits _____	<u>4-6; 7-8</u>
Replying Affidavits _____	<u>9</u>

**Cross-Motion:  Yes  No**

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Brian O'Reilly's (herein "O'Reilly") motion for summary judgment is denied. Plaintiff Prime Homes LLC's (herein "Prime") cross-motion to amend the complaint to add New My Management LLC and S&S Funding, LLC as party defendants to this action is granted. Defendant L.H.U. Development's (herein "LHU") motion for summary judgment is denied.

Plaintiff Prime commenced this action on February 17, 2016 seeking (i) specific performance of a contract between Defendant O'Reilly and Prime; (ii) quiet title and wipe the Memorandum of Contract from the land records; and (iii) a claim for tortious interference against LHU. This action arose in 2012 when Mr. O'Reilly contracted with Prime to sell his property located at 227 Edgecombe Avenue, New York, New York (herein the "Property") to Prime in a short sale for \$700,000. The closing was scheduled to take place within thirty (30) days from approval of the short sale by Mr. O'Reilly's mortgagee, which was approved June 26, 2012, but O'Reilly did not convey the Property to Prime as he was only a 2% owner of the Property at the time of the closing. In September of 2016, Mr. O'Reilly deeded the Property to New My Management LLC who mortgaged it to S&S Funding, LLC.

Prime originally commenced an earlier action against Mr. O'Reilly, under the index number 154505/2012 in New York Civil Supreme, but discontinued the action on June 6, 2016.

Mr. O'Reilly now moves pursuant to CPLR §3212 for summary judgment against Prime, to dismiss the Complaint and the Notice of Pendency against the Property. Prime opposes Mr. O'Reilly's motion, and cross-moves pursuant to CPLR §3025[b] to amend the Complaint and add two new party Defendants. LHU cross-moves opposing Prime's cross-motion as well as moving pursuant to CPLR §3212 to dismiss the Complaint against it. LHU also moves for summary judgment and opposes Prime's cross-motion to amend the Complaint.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [App. Div. 1998]; *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [App. Div. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (*Epstein v Scally*, 99 AD2d 713, 472 NYS2d 318 [1984]). Summary Judgment is “issue finding” not “issue determination” (*Epstein, supra*). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (*Brunetti v Musallam*, 11 AD3d 280, 783 NYS2d 347 [1<sup>st</sup> Dept. 2004]).

Mr. O'Reilly contends he is entitled to summary judgment as the contract between Prime and him was void ab initio and invalid because (i) Mr. O'Reilly and his mother were both owners of the Property as tenants in common, and therefore, he had no right to enter into the contract without his mother's approval, and (ii) Prime did not deposit the down payment required upon signing the contract rendering it unenforceable without consideration.

When a party commences a specific performance action, courts look at the marketable title held by the seller at the time the action is commenced (*S.E.S. Importers, Inc. v Pappalardo*, 53 NY2d 455, 442 NYS2d 453, 425 NE2d 841 [1981]). At the time of the closing on August 20, 2012 Mr. O'Reilly owned 2% of the Property, with his mother owning the remainder. However, on October 21, 2014, Mr. O'Reilly obtained 100% of the Property and gained marketable title (Prime Cross-Motion Ex. C). This action was commenced on February 17, 2016 (O'Reilly Motion Ex. 1). Mr. O'Reilly later deeded the Property to New My Management LLC on September 29, 2016 after the commencement of this action (Prime Cross-Motion Ex. E, F). Mr. O'Reilly had marketable title at the time this action commenced.

Prime annexed a copy of the negotiated down payment check dated April 16, 2012 for the agreed upon total of two-thousand (\$2,000) dollars (Prime Cross-Motion Ex. H). Mr. O'Reilly contends the down payment check was only the first indication that a down payment was paid and denies the down payment was tendered. He highlights the failure of the escrow agent to sign the escrowee provision of the Rider to the Contract. Mr. O'Reilly's summary judgment motion must fail as there remains an issue of fact as to whether Prime tendered the down payment as consideration.

Leave to amend pleadings pursuant to CPLR §3025[b] should be freely given “absent prejudice or surprise resulting directly from the delay” (Anoun v City of New York, 85 AD3d 694, 926 NYS2d 98 [1<sup>st</sup> Dept. 2011] citing to, Fahey v County of Ontario, 44 NY2d 934, 408 NYS2d 314, 380 NE2d 146 [1978]), “or if the proposed amendment is palpably improper or insufficient as a matter of law” (McGhee v Odell, 96 AD3d 449, 946 NYS2d 134, [1<sup>st</sup> Dept. 2012] citing to, Shepherd v New York City Tr. Auth., 129 AD2d 574, 514 NYS2d 72 [2<sup>nd</sup> Dept. 1987]). “Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment” (Valdes v Marbrose Realty, Inc., 289 AD2d 28, 734 NYS2d 24 [1<sup>st</sup> Dept. 2001]). The “purchaser stands in the shoes of the vendor and can obtain no better title than the vendor” (Goldstein v Gold, 106 AD2d 100, 483 NYS2d 375 [2<sup>nd</sup> Dept. 1984]). New My Management LLC and S&S Funding LLC purchased and encumbered, respectively, the Property while there was a Notice of Pendency filed in this action. Both had constructive notice of this litigation and are bound by its outcome because they stand in Mr. O’Reilly’s shoes.

“Any party may move for summary judgment in any action, after issue has been joined” (CPLR §3212[a]). LHU has not joined issue since Prime rejected LHU’s Answer as untimely. Therefore, LHU’s cross-motion for summary judgment is denied as procedurally improper.

Accordingly, it is ORDERED, that Defendant Brian O’Reilly’s motion for summary judgment dismissing the Complaint against him pursuant to CPLR §3212, is denied, and it is further,

ORDERED, that Defendant L.H.U. Development LLC’s motion for summary judgment dismissing the Complaint against it pursuant to CPLR §3212, is denied, and it is further,

ORDERED, that Plaintiff Prime Home LLC’s motion for leave to amend the caption and the Summons and Complaint is granted, and it is further,

ORDERED, that New My Management LLC and S&S Funding, LLC are added to this action as Party Defendants, and it is further,

ORDERED, that the caption in this action is amended as follows:

\_\_\_\_\_  
**PRIME HOMES LLC,**  
 Plaintiff,  
 -against-

**BRIAN O’REILLY, L.H.U. DEVELOPMENT LLC**  
**NEW MY MANAGEMENT LLC, and**  
**S&S FUNDING, LLC,**  
 \_\_\_\_\_  
 Defendants.

