State of New York Supreme Court
County of Steuben

DANIEL GRINOLS,

Plaintiff,

vs.

GWENDOLYN ROSS,

Defendant.

DECISION
Index No. 2015-1473 CV

Appearances: *Rachel Scura Lickliter, Esquire,* Dansville for Plaintiff

Brian Schu, Esquire, Hornell for Defendant

This matter comes before the Court for decision after trial on plaintiff's complaint alleging that defendant breached her duty of reasonable care and obligation to act in good faith, when she refused to sign an insurance proceeds check issued to both plaintiff and defendant for damages to one of four properties which were subject to a mortgage held by defendant. Plaintiff also claims that defendant breached the parties' agreement which required defendant to release the Hartshorn property from the mortgage once plaintiff made six consecutive mortgage payments in a timely fashion. Plaintiff requests specific performance, damages, costs and attorney's fees.

Defendant opposes plaintiff's requested relief and contends that she had no duty to give plaintiff the $46,500 in insurance proceeds from the Church Street property because the insurance proceeds were less than the balance left on the

mortgage. With regard to the Hartshorn property, the defendant does not dispute that she did not release the property from the mortgage, but contends that plaintiff failed to produce any credible evidence to support his claim that he was damaged as a result of defendant's actions. Defendant filed a counterclaim alleging that plaintiff has breached the terms of the Mortgage Note (Note) by failing to make any mortgage payments since June, 2015. Defendant claims that she advised plaintiff that he was in default on or about December 16, 2015 and demanded the outstanding balance due of $51,522.56 together with interest from July 1, 2015. Defendant seeks attorney's fees and court costs.

The Court conducted a non-jury trial on May 31 and August 22, 2017. After close of proof, the parties' counsel were allowed to file written closing arguments which the Court has received. Based on the proof presented at trial and the law applicable thereto, I make the following findings of fact and conclusions of law.

The parties commenced their business relationship in 2014 when plaintiff bought four properties from defendant located in the City of Hornell: 49 Hartshorn Street, 51-53 Bemis Avenue, 53 Church Street, and 26 Cottage Avenue. Plaintiff gave defendant a $30,000 down payment, signed a Note for the balance of $70,000, and gave defendant a mortgage on the four properties to secure the Note. The terms of the Note required plaintiff to make monthly non-allocated payments of $1,288.11, commencing March 1, 2014, and continuing through February 1, 2019, at which time the outstanding principal balance would be due in full. The Note also

provided that "(i)n the event Mortgagor pays his first six (6) monthly payments in a timely fashion, the Mortgagee shall release the 49 Hartshorn Street, Hornell, NY property from the mortgage."

At the commencement of trial, the parties stipulated that, between March and August, 2014, plaintiff made the six payments under the terms of the Note and defendant did not release the property from the mortgage. Plaintiff testified that, after making the sixth payment in August, 2014, he asked defendant to release the property and, although she agreed to do so, she never did. Plaintiff testified that he asked defendant "three or four" more times to release the property. She did not do so, nor did she give an explanation for breaching the agreement.

Defendant testified that plaintiff asked her to release the property in May, 2014, before the sixth mortgage payment had been made, but she refused his request because plaintiff had not yet made the sixth payment. Defendant testified that plaintiff asked her again, at the time of the Church Street property fire, but she again refused to do so because plaintiff had stated that he was not going to make any mortgage payment for six months.

Plaintiff filed a breach of contract cause of action asking the Court to award him specific performance directing defendant to release the Hartshorn property from the mortgage. Although plaintiff's attorney, in her written closing argument, claimed plaintiff suffered monetary damages as a result of defendant's refusal to release the Hartshorn property, plaintiff's attorney also claimed damages "should be rectified by

(d)efendant being ordered to immediately release Hartshorn Street from the Mortgage Note and Mortgage." Even though plaintiff claims he suffered damages, which is a legal remedy, as a result of defendant's failure to release the Hartshorn property, plaintiff has sought only the equitable relief of specific performance on this cause of action. Therefore, defendant's claim that plaintiff's relief cannot be granted because he has failed to prove monetary damages with respect to this cause of action is without merit.

"Specific performance is a discretionary remedy which is an alternative to the award of damages as a means of enforcing a contract" *(Pecorella v. Greater Buffalo Press, Inc.,* 107 AD2d 1064, 1065 [4th Dept. 1985]). It has traditionally been used in breach of contract actions involving real estate, on the premise that each parcel of real property is unique *(Van Wagner Advertising Corp. v. S & M Enterprises,* 67 NY2d 186, 191-192 [1986]*; EMF Gen. Contr. Corp. v. Bisbee*, 6 AD3d 45, 52 [1st Dept. 2004]; *Cho v. 401-403 57th Street Realty Corp.,* 300 AD2d 174, 175 [1st Dept. 2002]). "The goal of specific performance is to produce 'as nearly as is practicable, the same effect as if the contract had been performed' " *(Dalton v. Educational Testing Serv.,* 87 NY2d 384, 393 [1995], citing Farnsworth, Contracts Section 12.5, at 823 [1982]). To be entitled to specific performance, the party seeking this remedy must prove that he has performed his contractual obligations and that he is ready, willing and able to perform his remaining obligations (*Grunbaum v. Nicole Brittany,*

Ltd., ___ AD3d ___ 2017 NY Slip Op. 06638 [2nd Dept. 2017]; *County of Jefferson v. Onondaga Development, LLC,* 151 AD3d 1793 [4th Dept, 2017]).

The right to specific performance is not automatic, but rests in the sound discretion of the Court (*Van Wagner Advertising Corp. v. S & M Enterprises,* Id. at 191-192; *Pecorella v. Greater Buffalo Press, Inc.* Id. at 1065). However, the court's discretion is not unlimited and must be founded on "the established doctrines and settled principles of equity" (*DaSilva v. Musso,* 53 NY2d 543, 547 [1981]). The Court may deny specific performance based on the existence of equitable defenses such as "serious unfairness, undue hardship, and laches, or unreasonable prejudicial delay" (*Van Wagner Advertising Corp. v. S & M Enterprises*, Id.; *EMF Gen. Contr. Corp. v. Bisbee*, Id.). Absent a viable defense, the court must direct specific performance unless to do so would result in "a drastic or harsh remedy, or work an injustice" (*DaSilva v. Musso,* Id. at 547; *Van Wagner Advertsing Corp. v. S & M Enterprises,* Id.; *EMF Gen. Contr. Corp. v. Bisbee,* Id.; *Matter of Town Board of Town of Brighton v. West Brighton Fire Department,* 126 AD3d 1433, 1435 [4th Dept. 2015]; *Pecorella v. Greater Buffalo Press, Inc.*, Id., citing *Hadcock Motors v. Metzger*, 92 AD2d 1, 4 [4th Dept. 1983]).

Defendant has failed to come forward with evidence sufficient to establish that, under the facts presented, an award of specific performance would be unfair or create an undue hardship on her, or that an award of specific performance would be a drastic or harsh remedy, or work an injustice. Although defendant admitted that

she refused to release the Hartshorn property after the Church Street fire, this does not explain why she refused to release the property for five months before the fire occurred. The Church Street fire and the insurance proceeds therefrom had no bearing on defendant's obligation to release the Hartshorn property. At the time he was entitled to the release, plaintiff was complying with the Note. Plaintiff continued to make his monthly payments until the dispute arose over the insurance proceeds. The Note did not give defendant the discretion to decide when, or if, she would release the property. The Note stated that defendant "shall" release the property upon plaintiff's sixth mortgage payment. The agreement contained no contingencies or conditions precedent to her obligation to release the property. There was no condition in the Note that plaintiff had to request release or otherwise be in compliance with the Note. Had defendant wanted to require that release of the Hartshorn property be contingent on plaintiff being in compliance with other terms in the Note, she could have included this language in the Note.

Although defendant testified that the parties orally modified the terms of the Note in July, 2015, she presented no evidence to support this claim. Further, the terms of the contract provided that any change or modification of the Note must be made "in writing by the Lender." Therefore, based on the stipulation of the parties and the evidence presented at trial, plaintiff's request for specific performance is granted, given that defendant has not raised any equitable defenses nor proved that specific performance would result in a drastic or harsh remedy, or work an injustice.

Rather, specific performance will give plaintiff the result he anticipated, and what the parties bargained for, when they signed the Note.

Plaintiff also claims that, by failing to release the Hartshorn property from the mortgage after he made his sixth mortgage payment, defendant violated New York Real Actions and Proceedings Law (RPAPL) Section 1921. This statute requires a mortgagee to discharge a mortgage from a property upon satisfaction of the terms of the mortgage. The statute requires imposition of a monetary fine if the mortgage is not discharged within a certain amount of time. However, Section 1921 does not apply to a person who makes fewer than five (5) mortgage loans in a calendar year. In this case, no proof was presented to establish that defendant has made five or more mortgage loans at any time. Therefore, RPAPL Section 1921 is inapplicable to defendant and the facts of this case, and plaintiff's request for relief under this statute is denied.

Plaintiff also claims that he suffered monetary damages due to defendant's failure to release the property as a result of a lost sale of the Hartshorn property. However, plaintiff's evidence was that this sale was contingent on the release of the Bemis Street property as well. Plaintiff had no right to the release of the Bemis Street property under the terms of the parties' mortgage. Therefore, his claim of damages on this basis is also denied.

Plaintiff next claims that defendant had an obligation, under the implied covenant of good faith and fair dealing between parties to a contract, to execute the

insurance proceeds check, issued as a result of the Church Street fire, to allow plaintiff to repair and protect the property. Plaintiff alleges that, because of defendant's seven-month delay in signing the check, the Church Street property suffered damage that could have been avoided if defendant had the insurance proceeds immediately so he could make the necessary repairs to preserve the property. Plaintiff claims the he suffered $12,183 in damages directly related to defendant's delay in signing the check, and related damages of $26,460 composed of lost rent, increased costs owed to third parties and legal fees.

Defendant contends that she did not breach any duty owed to plaintiff because, as a secured creditor mortgagee, she is entitled to keep the insurance proceeds, up to the amount of the unpaid mortgage. She argues that the mortgage amount owed is more than the proceeds of the insurance check, and, therefore, she had no duty to release any of the insurance proceeds to plaintiff.

The general rule is that a mortgagee is entitled to insurance proceeds to be paid for loss sustained to the extent of the mortgagee's interest in the damaged or destroyed property, and the balance of the proceeds, if any, are paid to the mortgagor, so long as the mortgagor is not in default of any conditions of the policy (*Beets Wal Realty Corp. v. New York Prop. Ins. Underwriting Assn.*, 260 AD2d 520, 521 [2nd Dept. 1999]; *Capizzi v. Security Mutual Insurance Company*, 254 AD2d 783 [4th Dept. 1998]); *Sportsmen's Park v. New York Prop. Ins. Underwriting Assn.*, 97 AD2d 893, 894 [3rd Dept. 1983]; *Grady v. Utica Mut. Ins. Co.*, 69 AD2d 668, 673 [2nd Dept. 1979]).

The implied covenant of good faith and fair dealing between parties to a contract requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Moran v. Erk*, 11 NY3d 452, 457 [2008], citing *Dalton v. Educational Testing Services*, Id. at 389). While the duties of good faith and fair dealing encompass "any promises which a reasonable person in the position of the Promissee would be justified in understanding were included," they "do not imply obligations 'inconsistent with other terms of the contractual relationship' " *(511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 153 [2002], citing *Murphy v. American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]).

In this case, defendant financed $70,000 of the $100,000 purchase price for all four properties. To protect her financial interest, she held the mortgage on all the properties plaintiff bought from her. As the mortgagee, defendant was entitled to receive any insurance proceeds paid out as a result of damages to the properties up to the amount of her mortgage. The balance, if any, would then be paid to the mortgagor.

Plaintiff claims that the Church Street property had suffered extensive water damage that could have been avoided if defendant had released the insurance proceeds and allowed him to repair the property and protect it from further damage. He claims that defendant breached the implied covenant of good faith and fair dealing because she knew that plaintiff was using the mortgaged properties to

generate rental income and that, without the insurance proceeds, plaintiff could not repair Church Street, thus losing rental income. He claims that defendant's refusal to release the proceeds destroyed the rights he bargained for when he signed the contract. However, the concept of good faith and fair dealing does not create a duty that is inconsistent with other contract provisions (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, Id.; *Murphy v. American Home Prods. Corp.*, Id.). In this case, the law allows a secured creditor to be paid ahead of the debtor. Because plaintiff owed defendant approximately $51,000 on the unpaid Note, requiring defendant to give plaintiff the insurance proceeds would, effectively , deprive her of the security she bargained for when she agreed to accept plaintiff's mortgage. The cases cited by plaintiff do not provide otherwise, as none of those cases address the rights of the parties in a sale of land when one of the parties holds the mortgage.

Plaintiff's argument that defendant was not entitled to the insurance proceeds because the property was not destroyed is without merit. Given the total purchase price of the properties, the amount of the insurance proceeds and the testimony that the property still has not been placed back in use, it is clear that damage to the Church Street property was substantial. Total destruction of the property is not required (*accord Sportsmen's Park v. New York Prop. Ins. Underwriting Assn.,* Id.).

Plaintiff claims that, even if defendant is entitled to keep the insurance proceeds to the extent of her interest in the property, the insurance proceeds paid out exceeded the amount of the mortgage owed on the Church Street property and,

therefore, plaintiff was entitled to this excess amount. Plaintiff contends that he purchased four properties from defendant for $100,000 and, therefore, the purchase price for each property was $25,000. Plaintiff suggests that, because he paid defendant $30,000 at closing, her security interest in the Church Street property, and each of the other three properties, was reduced by $7,500. Plaintiff claims this figure must be reduced by the mortgage payments he has made and, therefore, is actually much lower. He claims the insurance proceeds are well in excess of the security value of the Church Street property and, therefore, he is entitled to the difference between defendant's interest in the Church Street property and the remaining insurance proceeds.

This argument is fundamentally flawed. First, the Note does not contain an agreement between the parties that each property was purchased for $25,000, nor does the Note support a finding that plaintiff's $30,000 down payment was to be allocated equally among the four properties to reduce defendant's security proportionately. Second, the contract does not support plaintiff's claim that the $1,281.11 monthly mortgage payment was to be allocated among the four properties, thereby reducing every month the security value of each property. The language in the mortgage does not restrict defendant's security interest in the way plaintiff asserts.

Plaintiff also argues that the total assessed value of all four properties is $124,400. Plaintiff contends that, because the value of these properties far exceed

the mortgage amount, defendant has no right or claim to the insurance proceeds. This claim is without merit. Other than plaintiff's closing argument, which is not evidence, he presented no evidence to establish the mortgaged properties' assessed value. Therefore, even if the assessed values are as plaintiff claims, this information cannot be considered by the Court in reaching a decision. Second, even if the assessed values of the properties had been proven, plaintiff presented no New York case law that supports his claim that defendant is not entitled to the insurance proceeds because the value of the properties provides security far in excess of the mortgage debt. In this State, a mortgagee is entitled to receive insurance proceeds to the extent of her interest in the damaged or destroyed property. If there are proceeds remaining, they are given to the mortgagor (*Beets Wal Realty Corp. v. New York Prop. Ins. Underwriting Assn.*, Id.; *Capizzi v. Security Mutual Insurance Company*, Id.; *Sportsmen's Park v. New York Prop. Ins. Underwriting Assn.*, Id.; *Grady v. Utica Mut. Ins. Co.*, Id.). As neither the Note nor the Mortgage contained a provision allocating the indebtedness or the payments among the properties, but provided that the four properties secured the indebtedness, defendant was entitled to receive the insurance proceeds up to the amount of the mortgage. The cases cited in plaintiff's closing argument are not New York cases and are not binding. Therefore, plaintiff's claim for damages is denied as defendant had no obligation to turn over the insurance proceeds to him as the amount due on the mortgage exceeded the insurance proceeds. Plaintiff is also not entitled to an award of

attorney fees as there was no contractual provision which provided for attorney fees in the event defendant breached the agreement.

Defendant brought a counterclaim alleging that plaintiff is in default under the terms of the Note and Mortgage because he has failed to make any mortgage payments since June, 2015, after she signed over the insurance proceeds to him. Defendant claims that she is entitled to a judgment against plaintiff in the amount of $51,522.56, together with interest from July 1, 2015, plus attorney fees and court costs. The parties stipulated on the first day of trial that plaintiff's last mortgage payment was made on July 20, 2015, and that the balance due on the mortgage is $51,522.56. Plaintiff has admitted his default in paying the mortgage note since July, 2015.

To recover under a breach of contract cause of action, a party must prove the existence of the contract, that party's performance under the contract, the opposing party's breach and the damages which result (*Niagara Foods, Inc. v. Ferguson Elec. Serv. Co. Inc.,* 11 AD3d 1374, 1376 [4th Dept. 2013]). Generally, a party seeking to recover damages from another for breach of contract must show that she is free from fault in performing the contract (*County of Jefferson v. Onondaga Dev. LLC,* 151 AD3d 1793 [4th Dept. 2017]; *Rosenthal Co. v. Brilliant Silk Mfg. Co.,* 217 AD 667 [1st Dept. 1926]). The question presented is whether defendant's failure to release the Hartshorn property is such a material breach of the contract as to justify plaintiff's refusal to make payment on the balance due (see *Helgar Corp. v. Warner's Features,* 22 NY 449).

Under the circumstances presented here, the Court cannot find that the failure to release the Hartshorn property was such a material breach of the mortgage as to totally defeat the contract. Even the plaintiff did not treat this breach as such a material part of the contract, as he did not stop making payments on the mortgage until the dispute arose over the distribution of the fire insurance proceeds. Once defendant agreed to release substantially all of the funds to him, defendant came current with his payments. Plaintiff concedes that there was a contract and that he failed to pay on the mortgage after July 2015, even after he received substantially all of the insurance proceeds.

Defendant has established her cause of action for breach of the mortgage Note by plaintiff's failure to pay the installments due from July 2015 forward. Under the terms of the Note, defendant was entitled to consider the full amount of the Note due immediately for any failure to pay. The Note also allowed defendant to collect any other charges which she was entitled to under the mortgage. The mortgage included a provision requiring plaintiff to pay reasonable attorney fees, if defendant sued anyone to enforce her rights under the mortgage.

Therefore, defendant is entitled to a money judgment against plaintiff for $51,522.56 plus interest from July 2015. Plaintiff is entitled to a hearing on the amount of attorney fees incurred by defendant to enforce her cause of action for nonpayment. Defendant's attorney shall submit an affidavit in support of his claim

for attorney fees. Plaintiff's counsel shall have twenty (20) days after submission to set forth plaintiff's objections or to request a hearing.

Plaintiff's counsel to submit judgment for specific performance.

Defendant's counsel to submit money judgment.

Dated: November 28, 2017. ENTER:

Marianne Furfure

Hon. Marianne Furfure
Acting Supreme Court Justice