533 Park Ave. Realty LLC v Park Ave. Bldg. & Roofing Supplies LLC
2015 NY Slip Op 32815(U)
July 29, 2015
Supreme Court, Kings County
Docket Number: 8313/14
Judge: David B. Vaughan
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At an IAS Term, Part DBV-4 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 29th day of July, 2015.

PRESENT:

HON. DAVID B. VAUGHAN,
Justice.

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533 PARK AVENUE REALTY LLC,

PLAINTIFF,

- against -

INDEX NO. 8313/14

PARK AVENUE BUILDING & ROOFING SUPPLIES LLC, 533 PARK AVENUE LLC; 537 PARK LLC,

DEFENDANTS.

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The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4
Opposing Affidavits (Affirmations)	5
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers Memoranda of Law	7, 8

Upon the foregoing papers, defendants Park Avenue Building & Roofing Supplies LLC, 535 Park Avenue LLC, and 537 Park LLC (defendants) move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the amended verified complaint of plaintiff 533 Park Avenue Realty LLC (plaintiff); to cancel the three notices of pendency filed by plaintiff and docketed

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with the Kings County Clerk's Office on June 3, 2014, covering the real property known as and located at 525-533 Park Avenue, Brooklyn, New York, Block 1716, Lot 61, 533 Park Avenue, Brooklyn, New York, Block 1716, Lot 60, and 537 Park Avenue, Brooklyn, New York, Block 1716, Lot 59, pursuant to CPLR 3211 (a) (1) and CPLR 6514 (b); for attorney's fees, costs and expenses, pursuant to CPLR 6514 (c); and for sanctions, attorney's fees and costs, pursuant to 22 NYCRR § 130-1.1.

Facts

Defendants are the owners of real property in Brooklyn, New York, located at 525-533 Park Avenue, 535 Park Avenue and 537 Park Avenue (the Premises). In September, 2009, plaintiff's assignor, non-party Kevin & Richard Hardware Corp., d/b/a Kevin & Richard Heating & Plumbing Supply (Kevin and Richard), different from plaintiff in name only, became a tenant in one of the buildings located on the Premises pursuant to a lease dated September 15, 2009 (the Lease). The Lease provided Kevin & Richard with an option to purchase the Premises, which had to be exercised on or before November 14, 2011, the expiration of the original lease term. If Kevin & Richard failed to timely exercise the option, the Lease would expire on November 14, 2011.

Rather than timely exercising their option, Kevin and Richard obtained three amendments to the lease, whereby the expiration date of the lease term, and thus the deadline to exercise the option, was ultimately extended to April 30, 2014.

On March 3, 2014, Kevin and Richard entered into a Purchase and Sale agreement (the Purchase Agreement) with defendants for the sale of the Premises; the closing scheduled for April 30, 2014 at 10:00 A.M., "time being of the essence."[1] By an Assignment Agreement dated April 1, 2014, Kevin and Richard assigned all of its rights, title and interests in the Purchase Agreement to plaintiff.

Pursuant to the Purchase Agreement, the Premises were defined as "certain plots, pieces and parcels of land (collectively, the 'Land')" comprising the three parcels of property located at the addresses noted above, "together with the building [sic] and all other improvements . . . located on the Land," including a store containing a commercial luncheonette, and a one-family residential house. As such, section 5 of the Purchase Agreement, entitled "Status of Title," obligated plaintiff to take title to the Premises subject to certain contractually bargained-for exceptions and encumbrances (i.e. Permitted Encumbrances), including, among other things, the presence of: (1) a commercial lease for one of the tenants in the Premises (the "Luncheonette Lease"), (2) the rights and interests of all other tenants then existing at the Premises; (3) any title exceptions not timely raised by plaintiff; (4) any other covenants, restrictions, easements, party wall reservations and agreements of accord, if any, provided same did not prevent the current use of the Premises;

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[1]Defendants' attorney avers that the parties entered into the Purchase Agreement on or about March 31, 2014. However, the Purchase Agreement provides, in part, that "(this 'Agreement') made as of the 3/ day of March, 2014 (the 'Effective Date') . . ." The confusion may have arisen because the figure after the number three appears to be a back slash, rather than the number one.

and (5) all violations. Moreover, section 28 (c) of the Purchase Agreement, the meaning of which is disputed by the parties, provides, in pertinent part, that:

> "Neither this Agreement nor any memorandum hereof may be recorded by or on behalf of Purchaser. Any breach of the provisions of this clause (c) shall constitute a default by Purchaser under this Agreement. *Purchaser agrees not to file any lis pendens or other instrument against all or a portion of the Premises in connection herewith*" (emphasis added).

During this time period, plaintiff ordered title insurance, and on March 3, 2014, the title insurance company prepared three separate title reports, one for each parcel, which were forwarded to defendants' attorney.

On or about April 23, 2014, plaintiff's attorney emailed defendants' attorney seeking an adjournment of the April 30, 2014 closing date until May, 2014, because plaintiff was "delayed a bit in getting a mortgage commitment;" its first lender having declined its loan. Plaintiff's attorney attached a "Conditional Loan Approval" to his email from another bank, indicating that the loan terms were subject to the bank's "underwriting, appraisal review, and quality control standards."

Defendants did not respond to or accept plaintiff's request to extend the closing date into May, 2014. On April 29, 2014, plaintiff's attorney communicated with defendants' attorney regarding the amount of a deposit which was released to defendants from their attorney's escrow account in 2013, but neither party addressed the closing date, or plaintiff's request to extend it. On the closing date, defendants appeared but plaintiff did not, and the

closing proceeded. Defendants appeared through their attorney, and the closing was transcribed, beginning at 12:13 P.M.

After the conclusion of the closing, by letter dated April 30, 2014, defendants advised plaintiff that pursuant to section 18 of the Purchase Agreement, the Purchase Agreement was deemed terminated because plaintiff failed to appear at the closing, adding that "**TIME WAS OF THE ESSENCE AS TO SUCH CLOSING DATE**."

In response, by letter dated May 2, 2014, plaintiff's attorney advised defendants' attorney that there were "open title issues" as reflected in the title reports, including the release of the mortgages covering the Premises, the release of Environmental Control Board (ECB) violations, and an occupied residential one-family house, which was required to be delivered vacant. Plaintiff's attorney concluded that defendants were not prepared to close on April 30, 2014; that it was "standard practice that a [p]urchaser ha[d] 30 days to close from the scheduled closing date;" that plaintiff "[did] not accept the unilateral termination of the Contract of Sale and [was] prepared to go forward;" and that defendants' attorney should take the necessary steps to clear title issues so that the closing could be scheduled.

By letter dated May 7, 2014, defendants' attorney advised plaintiff's attorney that there were no open title issues; that defendants were prepared to pay off the mortgages encumbering the property and "to escrow for any open ECB violations to the extent required under the [Purchase Agreement];" that the property not occupied by plaintiff was occupied by a tenant pursuant to a lease of which plaintiff had notice and to which it had consented;

that defendants were fully prepared to close on April 30, 2014; and that no further notice was required by defendants when a closing date was time of the essence.

On May 12, 2014, plaintiff increased its offer for the purchase of the Premises by $25,000. After some discussion, defendants rejected the offer.

On or about May 23, 2014, defendants commenced a holdover proceeding in Kings County Civil Court seeking, among other things, an award of possession of the Premises and a warrant of eviction. This litigation is currently proceeding.

On or about May 30, 2014, plaintiff commenced this action by filing an unverified complaint, seeking specific performance. Plaintiff alleged that it had not defaulted under the Purchase Agreement, and that defendants had defaulted because they had failed to deliver one of the properties covered by the Purchase Agreement vacant (the residential one-family house). Along with the complaint, plaintiff filed three notices of pendency with the Kings County Clerk's Office with respect to each of the three parcels comprising the Premises, which were recorded on June 3, 2014.

By letter dated June 30, 2014, defendants' attorney advised plaintiff and its attorney that unless plaintiff withdrew the complaint and cancelled the notices of pendency by July 3rd, 2014, defendants would seek sanctions, costs and attorney's fees, as well as dismissal of the complaint and cancellation of the notices of pendency. Plaintiff and its attorney did not respond to defendants' letter, nor did they withdraw the complaint or cancel the notices of pendency.

Accordingly, in August, 2014, defendants moved by order to show cause to dismiss the complaint pursuant to CPLR 3211 (1) (a) (arguing that under the Purchase Agreement, they were not required to deliver the residential one-family house vacant); to cancel the notices of pendency (because the Purchase Agreement expressly prohibited plaintiff from filing them and because this action was commenced and was being prosecuted in bad faith, pursuant to CPLR 6514 [b], which further entitled them to attorney's fees, costs and expenses pursuant to CPLR 6514 [c]); and for sanctions against plaintiff and its counsel for frivolous conduct (because the complaint was allegedly intended solely to harass and injure defendants by preventing their sale of the Premises and to gain some perceived leverage in reviving the terminated Purchase Agreement). The order to show cause was signed by this court on August 5, 2015, and a return date was set for September 10, 2014.

On August 24, 2014, in the related holdover proceeding, defendants' attorney learned that plaintiff had obtained new counsel. By letter dated August 29, 2014, defendants' attorney advised plaintiff's new attorney of the procedural history of the action and forwarded the June 30, 2014 letter demanding withdrawal of the notices of pendency and the first complaint.

Plaintiff's new attorney did not respond to this letter. Instead, plaintiff served the instant amended complaint on September 5, 2014, asserting a cause of action for breach of contract, seeking specific performance of the Purchase Agreement or, in the alternative, the return of its deposit ($575,489 plus interest). The amended complaint alleges that

"defendants committed an anticipatory breach of the contract by not being ready to close on the purported time of essence closing date . . . and by wrongfully declaring plaintiff in default." In essence, the complaint alleges that defendants did not close on the Purchase Agreement because they failed, among other things, to comply with the 10:00 A.M. time of the essence closing, constituting a waiver; to tender a pay-off letter regarding defendants' outstanding mortgages; and to clear various title issues. Based on the foregoing, the complaint alleges that plaintiff did not default under the Purchase Agreement, and that the Agreement therefore remains viable.

In response to the filing of the amended complaint, defendants withdrew the order to show cause to dismiss the first complaint without prejudice to filing the second, instant motion to dismiss, which is presently before this court.

Discussion

"A motion to dismiss on the basis of CPLR 3211 (a) (1) should be granted only where the documentary evidence that forms the basis of the defense is such that it refutes the plaintiff's factual allegations or conclusively disposes of the plaintiff's claims as a matter of law" (*Schiller v Bender, Burrows & Rosenthal, LLP*, 116 AD3d 756, 757 [2014]). "On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court should accept the facts alleged in the complaint as true and afford the proponent the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*). However, while on such a motion "the facts pleaded are presumed to be true,

bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (*Matter of Gottlieb v City of New York*, 129 AD3d 724 [2015] [internal quotation marks and citations omitted]; *see also CIBC Bank & Trust Co. (Cayman) Ltd. v Credit Lyonnais*, 270 AD2d 138 [2000]).

In support of their motion, defendants first argue that plaintiff is not entitled to specific performance or, in the alternative, the return of its deposit, because plaintiff was not ready, willing, and able to close on the closing date, time being of the essence.

In opposition, plaintiff argues that the amended complaint sets forth a cognizable factual and legal claim for specific performance or, alternatively, for the return of its deposit. In this regard, plaintiff contends that its failure to appear at the closing should be excused because defendants waived the time of the essence closing by adjourning the closing until the afternoon (12:13 P.M.) without its consent or notice, and failed to tender performance at the scheduled time set forth in the Purchase Agreement (10:00 A.M.) or at any time that day. Plaintiff also seeks to excuse its failure to appear on the grounds that it had a good faith belief that the closing was adjourned based upon: (a) the deliberate failure of defendants' attorney to respond to its April 23rd, 2014 request for an adjournment, and to address the closing in his communication with plaintiff's attorney the day before the closing, and (b) defendants' failure, prior to closing, to satisfy the mortgage, to resolve outstanding title issues, and to produce documents required by the three title reports, all of which demonstrate that defendants were not ready, willing and able to close on law day.

"A purchaser who seeks specific performance of a contract for the sale of real property must demonstrate that he or she was ready, willing, and able to perform the contract, regardless of any anticipatory breach by a seller" (*Fridman v Kucher*, 34 AD3d 726, 727-728 [2006]). In this regard, "[w]hen a purchaser submits no documentation or other proof to substantiate that it had the funds necessary to purchase the property, it cannot prove, as a matter of law, that it was ready, willing, and able to close" (*id.*; *see also Dixon v Malouf*, 70 AD3d 763, 763-764 [2010]; *Zeitoune v Cohen*, 66 AD3d 889, 891 [2009]).

Here, as plaintiff concedes, and as evidenced by plaintiff's April 23, 2014 email with the attached "Conditional Loan Approval," plaintiff did not have the funds to purchase the Premises on the April 30th, 2014 time of the essence closing date because it was unable to secure a mortgage commitment, only possibly obtaining one sometime in May, 2014. In addition, it is undisputed that plaintiff did not appear at the closing. Accordingly, plaintiff is not entitled to specific performance, regardless of defendants' alleged anticipatory breach or purported inability to tender the Premises pursuant to the Purchase Agreement.

In its opposition, plaintiff has failed to demonstrate that it was ready, willing and able to purchase the Premises on the closing date. In any event, plaintiff's arguments in opposition to defendants' motion are without merit. "When a contract for the sale of real property contains a provision that time is of the essence, the parties bound by that clause must tender performance on the law day unless the time for performance has been extended by mutual agreement" (*184 Joralemon, LLC v Brklyn Hts Condos, LLC*, 117 AD3d 699, 702

[2014]). "Where time is of the essence, performance on the specific date is a material element of the contract, and failure to perform on that date constitutes a material breach of the contract" (*id.*).

Here, plaintiff has not demonstrated that the closing was adjourned by mutual agreement. Nor has plaintiff provided any evidence to support its claim that its failure to appear should be excused based upon its good faith belief that the closing was adjourned. First, the Purchase Agreement expressly provided that the closing date was April 30th, 2014, time being of the essence. Second, although plaintiff requested an adjournment on April 23rd, 2014, namely "We appreciate you confirming with your client that they are agreeable to us closing the transaction in May," defendants did not agree to the adjournment. As defendants' correctly note, plaintiff's unanswered request for an adjournment did not constitute a mutual agreement and, in any event, evidenced that there was no express agreement for an adjournment. Third, plaintiff's claim (in the amended complaint) that it believed, in good faith, that defendants had agreed to its request for an adjournment based upon defendants having previously extended its purchase option deadline is belied by the fact that those previous extensions were expressly set forth in three separate Lease Amendments, unlike the case here. Finally, defendants correctly point out that plaintiff's attorney, in its May 2, 2014 letter, misstates the law with respect to time of the essence closings, namely, "[i]t is standard practice that a Purchaser has 30 days to close from the scheduled closing date," when this practice only applies when time is not of the essence.

Plaintiff has also failed to provide any legal authority to support its claim that defendants' waived the time of the essence closing because it adjourned the closing to the afternoon without its consent, as allegedly evidenced by the transcript, which began at 12:13 P.M. In any event, when time is of the essence, "each party must tender performance on *law day*" rather than the "law hour," as plaintiff argues (*Grace v Nappa*, 46 NY2d 560, 565 [1979] [emphasis added]; *see also Wolf v Atai,* 139 AD2d 729, 731 [1988] ["Since the plaintiffs were ready to perform their contractual obligations on the day chosen by the defendant as a closing date, the defendant should not be allowed to claim that the plaintiffs were in breach of contract, merely because they were unable to perform promptly at 10:00 a.m."]). Thus, even assuming that the closing did not begin until 12:13 P.M., defendants would not have waived the time of the essence provision. In any event, defendants' attorney for the closing, Mr. Samson R. Bechhofer, avers in his sworn affidavit that he was present at the closing starting at 10:00 A.M., as required under the Purchase Agreement; that the court reporter was also present at that time; and that rather than waiving the time of the essence closing by beginning the transcription of the proceeding at 12:13 P.M., defendants waited for plaintiff to appear, and only decided to put the events of the closing on the record at 12:13 P.M., when it became clear that plaintiff would not be appearing. Finally, in light of the foregoing, plaintiff's unsupported argument that defendants waived the time of the essence requirement because they intentionally relinquished a known right by waiting two hours for plaintiff to appear at the closing is without merit.

With respect to plaintiff's contention that defendants were not ready, willing and able to close on law day because defendants failed to resolve various title issues, namely the mortgages, the ECB violations, and the presence of a residential tenant on the Premises, this argument is directly contradicted by the Purchase Agreement. In this regard, pursuant to section 6 (a) (i) of the Agreement, entitled "*Title Insurance: Liens*," plaintiff was required, within five days of the execution of the Agreement, to order a title report and survey, and to direct the title company to deliver a copy of the report to defendants' counsel simultaneously with its delivery to plaintiff. This section further provides that:

> "If the Report discloses any encumbrance, lien or other title exception that is not a Permitted Encumbrance (collectively, the 'Commitment Objections'), *then Purchaser may object to same by giving written notice (a 'Title Notice' to Seller no later than the Termination Date (the 'Title Notice Date'),*[2] *time being of the essence. Purchaser shall have no right to object to any exceptions or other matters disclosed in the Report or the Survey except for items which were not Permitted Encumbrances*" (emphasis added).

Here, plaintiff did not raise any title issues prior to the closing or send the required Title Notice to defendants. In particular, seven days before the closing, on April 23rd, 2014, plaintiff merely requested an adjournment because it had not yet obtained financing. It was only on May 2nd, 2014, after the closing, and after defendants had notified plaintiff that the Purchase Agreement was terminated because plaintiff had failed to appear, that plaintiff advised defendants that they were not prepared to close on April 30th because of open title

[2]Also the closing date (April 30th, 2014).

issues (satisfaction of mortgages and ECB liens, and presence of residential tenant). Since plaintiff did not notify defendants of its objections to title, plaintiff waived its right to object to closing on the basis of any title defects (*see Venetoklis Family Ltd. Partnership v Kora Developers, LLC,* 74 AD3d 1057, 1058 [2010]; *Weintraub v Stankovic*, 43 AD3d 543, 544-545 [2007]; *Beil v Certilman, Balin, Adler & Hyman*, 182 AD2d 737, 737 [1992]).

With respect to plaintiff's claim that defendants were not ready to close because of the existence of the residential tenant on the Premises, pursuant to section 5 (j) of the Purchase Agreement ("Status of Title"), plaintiff expressly agreed to take title to the Premises subject to:

> "that certain Commercial Tenancy Agreement, dated June 1, 2013 made with Park Avenue Luncheonette/Nereida Rodriguez with respect to 537 Park Avenue (a copy of which Agreement is annexed hereto as Exhibit) [sic][3] *and the rights and interests held by any other tenants, as tenants only*" (emphasis added).

While plaintiff argues that this provision only required it to accept 537 Park Avenue subject to the terms of the commercial tenancy agreement with Park Avenue Luncheonette, this interpretation undermines the plain meaning of the provision, namely the phrase "the rights and interests held by *any other tenants*, as tenants only," i.e. the tenant occupying the residential property or, stated otherwise, tenants other than the Luncheonette. "Where a real estate contract identifies an exception as a 'permitted exception,' the transaction is to proceed despite that exception" (*CPS Operating Co. LLC v Pathmark Stores, Inc.*, 76 AD3d 1, 6

[3]It appears from both copies of the Purchase Agreement in the record that there is a closed parenthesis after the word Exhibit.

[2010]; *see also 681 Chestnut Ridge Rd. LLC v Edwin Gould Found. for Children*, 23 Misc 3d 1110 [A] [2009], *affd*, 73 AD3d 624 [2010] [the unambiguous contract precluded buyer's claim of breach of contract based on the easements, as the contract directly contradicted buyer's claim that it was entitled to file a Notice of Exception when the updated survey failed to show the location of the easements; buyer also precluded from filing a Notice of Exception regarding burial plot on property because it was identified on the original survey and therefore a "permitted encumbrance"]). Since the Purchase Agreement provides that plaintiff was to take title subject to all permitted encumbrances, including the Luncheonette Lease and "the rights and interests held by any other tenants, as tenants only," plaintiff's argument that this tenant constituted an encumbrance which prevented defendants from tendering performance must be rejected.

Plaintiff also argues that based upon the ordinary language of section 5 (j) of Purchase Agreement, the residential property should have been delivered vacant at the time of the closing without a leasehold interest. However, "[w]hen interpreting contracts . . . when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks and citations omitted]). This rule has particular import "in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's" (*id.*). In these circumstances, "courts may

not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*id.*). Here, the Purchase Agreement does not obligate defendants to deliver the Premises vacant, and in any event, as indicated above, plaintiff's interpretation of section 5 (j) is directly contradicted by the Purchase Agreement.

Plaintiff also agues that defendants breached the Purchase Agreement by failing to provide the title company, either before or at the closing, with all documents, information and certifications as required under schedule B-1 of the three title insurance policies (one for each property), which were necessary in order for the title policies to issue, as well as other documents, including, among other things, a "pay-off-letter" with respect to the mortgages on the Premises; organizational and operational agreements; proof of good standing; proof that the transactions had been authorized; proof of the LLCs' formation; names of managing members; a demonstration of good funds to pay off outstanding mortgages; and a demonstration of good funds to satisfy ECB liens. However, section 17 (a) of the Purchase Agreement does not require defendants to provide the documents noted above. Rather, under the Agreement, defendants were obligated to deliver at closing: the bargain and sale deeds for the Premises; plans and specifications for the Buildings, to the extent in defendants' possession; a certification of defendants' non-foreign status; permits, licenses and approvals relating to ownership, use or operation of the Premises, to the extent in defendants'

possession; and a closing statement listing apportionments, all of which were provided, as evidenced by the transcript of the closing, as follows:

> "Said sellers are ready, willing and able to deliver the documents required under Article 17 of said Purchase and Sale Agreement, namely, a Bargain and Sale Deed Without Covenants Against Grantor's Acts covering each of the properties, a duly executed certification as to sellers' non-foreign status and real property transfer tax returns.
>
> There are no apportionments to be made at the closing, and the balance due to be paid by purchaser to sellers is $3,800,211.
>
> In accordance with the said Purchase and Sale Agreement, I am delivering Bargain and Sale Deeds covering the following properties: 533 Park Avenue, Brooklyn, New York; 535 Park Avenue, Brooklyn, New York; and 537 Park Avenue, Brooklyn, New York, together with Real Estate Transfer Tax Returns as required under ACRIS and FIRPTA, Non-Foreign Status Certifications, all as signed by Thomas J. Hussey as chief financial officer for each of the selling entities. Such documents are annexed as Exhibits B through J" [and were marked for identification]).

In any event, under section 18 of the Purchase Agreement, the delivery of the documents under section 17 of the Agreement was only required "upon tender of the Purchase Price provided for and [in] compliance with all other conditions set forth in this Agreement."[4]

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[4]Similarly, at real estate closings, the pay-off-letter need only be produced after the purchaser tenders payment (*Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 140 [1st Dept 2012] ["In the typical case, the mortgage is paid off on the day of closing contemporaneously with the remittal of the balance of the purchase price. Of course, no rational seller would pay off a mortgage in advance of the closing, because if the closing failed to occur, the seller would have lost the mortgage loan."]; *see also Gray v Wallman & Kramer,* 224 AD2d 275, 276 [1st Dept 1996]). In any event, "[i]n order to place the vendor of realty under a contract of sale in default for a claimed failure to provide clear title, the purchaser normally must first tender performance himself and demand good title" (*Ilemar Corp. v Krochmal*, 44 NY2d 702, 703 [1978]). In this

Finally, plaintiff fails to point to any provision in the Purchase Agreement requiring defendants to personally appear at the closing.

In light of the documentary evidence demonstrating that plaintiff was not ready, willing and able to close, that it failed to appear at the closing, and that it therefore defaulted under the Purchase Agreement, plaintiff is not entitled to either specific performance or the return of its deposit. Accordingly, the complaint is dismissed (CPLR 3211 [a][1],[a][7]).

Defendants also move to cancel the notices of pendency, arguing that cancellation is warranted once the complaint is dismissed, that plaintiff agreed not to file any notices of pendency pursuant to the purchase agreement, and that plaintiff commenced and prosecuted this action in bad faith (CPLR 6514 [b]), entitling them to an award of costs, expenses, and attorney's fees (CPLR 6514 [c]).

With respect to the former relief, "[a] notice of pendency is authorized to be filed in an action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property" (*Ewart v Ewart*, 78 AD3d 992, 992 [2010]). Inasmuch as the court has dismissed the cause of action for specific performance, the only cause of action which

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regard, "[t]ender of performance by the purchaser is excused only if the title defect is not curable, for in such a case it would serve no purpose to require the purchaser to go through the futile motions of tendering performance" (*id.*). Here, plaintiff never tendered performance or demanded good title from defendants, nor does it allege in the complaint or in its opposition papers that any defects in title were incurable (*see R.C.P.S. Assocs. v Karam Developers*, 258 AD2d 510, 511 [2d Dept 1999]). In any event, defendants have demonstrated that the existence of the subject mortgages was not an incurable defect by evidencing the satisfactions of these mortgages (Affidavit of Eric D. Sherman, Exhibit 16).

"would affect the title to, or possession, use, or enjoyment of, real property," the notices of pendency must be cancelled and vacated (*cf. Re-Poly Mfg. Corp. v Dragonides,* 109 AD3d 532, 535 [2013]; CPLR 6501; *see also Maiorino v Galindo*, 65 AD3d 525, 527 [2009]).

In any event, plaintiff was expressly prohibited from filing the notices of pendency pursuant to Section 28 (c) of the Purchase Agreement, which provides as follows:

> 28. PARTIES: ASSIGNMENT AND RECORDING.
>
> * * *
>
> "(c) Neither this Agreement nor any memorandum hereof may be recorded by or on behalf of Purchaser. Any breach of the provisions of this clause (c) shall constitute a default by Purchaser under this Agreement. *Purchaser agrees not to file any lis pendens or other instrument against all or a portion of the Premises in connection herewith. In furtherance of the foregoing, Purchaser (i) acknowledges that the filing of a lis pendens or other evidence of Purchaser's rights or the existence of this Agreement against all or a portion of the Premises could cause significant monetary and other damages to Seller* and (ii) hereby agrees to indemnify Seller from and against any and all claims, losses, liabilities and expenses (including, without limitation, reasonable attorneys' [sic] fees and disbursements incurred in the enforcement of the foregoing indemnification obligation) arising out of the breach by Purchaser of any of its obligations under this clause (c)."

Plaintiff argues that the phrase "*Purchaser agrees not to file any lis pendens or other instrument against all or a portion of the Premises in connection herewith*" refers only to a prohibition against filing a lis pendens when the purchaser is held in default by the seller for recording the Purchase Agreement or a memorandum thereof. Stated otherwise, plaintiff contends that this section of the Agreement does not constitute an all-inclusive prohibition

against filing a lis pendens for all purposes. Plaintiff concludes that since the Purchase Agreement was drafted by defendants, any ambiguity must be construed against them.

Although the first sentence of this section prohibits plaintiff from recording the Agreement or any memorandum thereof, which places plaintiff in default (second sentence), the third sentence of this section separately prohibits plaintiff from filing any lis pendens, as opposed to recording the Agreement or a memorandum thereof, "*in connection herewith*" - herewith referring to the Premises set forth in the Purchase Agreement. The fourth sentence also confirms that the prohibition against the filing of a lis pendens is not limited to recording the Agreement or any memorandum thereof because it provides that "the filing of a lis pendens *or* other evidence of Purchaser's rights *or the existence of this Agreement* against all or a portion of the Premises could cause significant monetary and other damages to Seller . . .". Finally, the fifth sentence of this section provides that the purchaser agrees to indemnify the seller "from and against any and all claims, losses, liabilities and expenses . . . arising out of the breach by Purchaser of any of its obligations under this clause (c)," one of which is the separate prohibition against filing a lis pendens. In light of the foregoing, under this section of the Purchase Agreement, plaintiff was prohibited from filing the notices of pendency.

Defendants also seek cancellation of the notices of pendency in the court's discretion pursuant to CPLR 6514 (b), and for an award of award of costs, expenses and attorney's fees pursuant to CPLR 6514 (c), on the grounds that plaintiff commenced this action in bad faith,

with the intention of harassing them and impeding their ability to sell the Premises. "CPLR 6514 (b) allows for the discretionary cancellation of a notice of pendency, upon motion of any person aggrieved, "'if the plaintiff has not commenced or prosecuted the action in good faith'" (*Reingold v Bowins*, 34 AD3d 667, 668 [2006], quoting CPLR 6514 [b]). "Where a plaintiff is using the notice of pendency for an ulterior purpose, a finding of lack of good faith can be made" (*id.* [internal quotation marks and citations omitted]). "The purpose of CPLR 6514 (c) to reimburse a party for costs and expenses incurred as a result of a wrongful filing of a notice of pendency, and such costs and expenses are 'in addition to' . . . and separate and distinct from, any damages sustained by a party arising from the underlying claims in the action" (*No. 1 Funding Ctr., Inc. v. H & G Operating Corp.*, 48 AD3d 908, 911 [2008]).

The relief defendants' seek pursuant to CPLR 6514 (c) is duplicative of the costs and expenses they may seek under section 28 of the Purchase Agreement. Moreover, while it is true that plaintiff defaulted under the Purchase Agreement by failing to appear at the closing, and that it impermissibly filed the notices of pendency, the court is not convinced that plaintiff commenced this action and filed the notices of pendency in bad faith, or that its conduct or that of its counsel warrants the imposition of sanctions under section 130-1.1 (*see Shkolnik v Krutoy,* 65 AD3d 1214, 1216 [2009] [the court did not improvidently exercise its discretion in denying that branch of the motion of the defendants which was for summary judgment on the issue of liability on their first counterclaim for an award, pursuant to CPLR

6514 (c), of costs and expenses incurred as a result of the plaintiff's filing of a notice of pendency, notwithstanding that the notice of pendency itself was subsequently cancelled as having been wrongfully filed]). Accordingly, those branches of defendants' motion for relief under CPLR 6514 (b) and (c), as well as for sanctions under section 130-1.1, are denied.

In summary, those branches of defendants' motion to dismiss the complaint and to cancel and vacate the notices of pendency, are granted.

This constitute the decision and order of the court.

ENTER,

David B. Vaughan

J. S. C.
HON. DAVID B. VAUGHAN

FILED
AUG 07 2015
KINGS COUNTY CLERK'S OFFICE