SHORT FORM ORDER

INDEX No. 10-41929

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-27-14 (004)
MOTION DATE 12-09-14 (005)
ADJ. DATE 2-25-15
Mot. Seq. #004-MG
#005- XMotD

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COUNTY OF SUFFOLK,

Plaintiff,

- against -

PALLOTTA & ASSOCIATES DEVELOPMENT INCORPORATED, GERARD A. PALOTTA a/k/a GERALD A. PALLOTTA, and HOWARD BRODER,

Defendants.

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Upon the following papers numbered 1 to 47 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 -15 ; Notice of Cross Motion and supporting papers 16-22; Answering Affidavits and supporting papers 23-38, 39-42 ; Replying Affidavits and supporting papers 42-43, 44-47 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Howard Broder ("Broder") for an order pursuant to CPLR 3212 granting summary judgment dismissing the fifth and sixth causes of action in the complaint is granted; and it is further

ORDERED that the cross-motion by plaintiff County of Suffolk ("County") for an order pursuant to CPLR 3212 granting summary judgment against all defendants in this action is granted to the extent that the County is granted summary judgment rescinding the sale of the subject property and rescinding the deeds into defendant Pallotta and defendant Pallotta & Associates; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff County is the fee owner of the subject property and may take all steps necessary to reassert its ownership of the property; and it is further

ORDERED that plaintiff County of Suffolk shall refund the $9,000 purchase price paid for the subject property to the defendant Gerard A. Pallotta; and it is further

ORDERED that the cross-motion by plaintiff County of Suffolk is otherwise denied; and it is further

ORDERED that the plaintiff and defendant Howard Broder shall appear before the undersigned for a status conference on March 29, 2016 at the Supreme Court, 1 Court Street, Riverhead, New York.

This is an action by the County of Suffolk against the defendants Gerard A. Pallotta ("Pallotta"), Pallotta & Associates Development, Incorporated ("Pallotta & Associates"), and Howard Broder with regard to the sale, transfer and mortgaging of certain real property known as Suffolk County Tax Map No. 01000-121.00-02.00-016.000, and also known as 5 Garden Street, Farmingdale, New York (hereinafter the "subject premises"). The salient facts, set forth more fully below, show that the plaintiff County sold the subject property at auction to defendant Pallotta with restrictive covenants preventing building on the property. Thereafter, Pallotta obtained variances from the Zoning Board of Appeals of the Town of Babylon and a building permit. Pallotta then transferred the property to the defendant Pallotta and Associates, which obtained a mortgage from the defendant Broder and proceeded to build a single family dwelling on the subject property. The complaint alleges six causes of action. The first four are brought against the defendants Pallotta and Pallotta & Associates. The first cause of action seeks a permanent mandatory injunction compelling the removal of the improvements to the subject premises. The second, third and fourth causes seek a judgment rescinding, cancelling, and declaring void the contract of sale and the conveyance of the subject property by the County in exchange for the return of the purchase price to defendant Pallotta, and declaring the County the fee owner of the subject property, based upon the fraudulent conduct of these defendants, and enforcement of the covenants and restrictions placed upon the sale of the property. The fifth and sixth causes of action are brought against the defendant Howard Broder. The fifth

cause of action seeks a judgment cancelling and discharging defendant Broder's mortgage on the subject property, pursuant to Real Property Law 291. The sixth cause of action seeks a judgment cancelling, discharging and declaring void defendant Broder's mortgage on the subject property on the basis that said defendant facilitated the Pallotta defendants' breach of the restrictive covenant.

Defendant Broder now moves for summary judgment dismissing the fifth and sixth causes of action in the complaint. In support of the motion, he submits, *inter alia*, his attorney's affirmation, a copy of the pleadings, a copy of the deed from Suffolk County to Gerard A. Pallotta with regard to the subject property, a copy of covenants and restrictions with regard to the subject property signed by Pallotta, a copy of a building permit, a copy of a deed from defendant Pallotta to defendant Pallotta & Associates, dated April 17, 2007, a copy of a title report, a copy of a mortgage between Pallotta Associates, dated April 17, 2007, a copy of an appraisal of the subject property, and the affidavit of defendant Broder, sworn to on April 29, 2014. Plaintiff County opposes the motion and cross-moves for an order granting summary judgment against all of the defendants. In support thereof, plaintiff submits its attorney's affidavit and a copy of the pleadings. The Pallotta defendants oppose both motions and submit, *inter alia*, their attorney's affirmation, a copy of a title report, and the affidavit of Gerard A. Pallotta, sworn to on January 15, 2015.

On October 15, 2007 the County held an auction for surplus County property, which included the subject property. The listing for the parcel noted that it was subject to a restrictive covenant and directed bidders to the terms and conditions of sale, which noted that some parcels, such as the subject property, contained the words "planning restrictive covenant." The brochure went on to state: "[t]hese so noted parcels are substandard and cannot be independently developed. They will be offered for sale with the following restrictive covenant: [t]he premises described shall not be independently improved by the erection of any structure, and can be merged into grantee's adjoining parcel, if applicable, so as to form a single lot..." The brochure goes on to state that the restrictive covenant shall be enforceable by injunctive relief or by any other remedy, in equity, or at law. It further stated that the covenant and restrictions would run with the land and shall be binding upon the grantee, its successors and assigns, and upon all persons claiming under them. On October 15, 2007, the defendant Pallotta, through an agent, was the successful bidder on the subject property for $9,000. On December 9, 2008, the County deeded the subject property to Pallotta by a deed which specifically contained the restrictive covenant prohibiting Pallotta from developing the property. Said deed was filed in the office of the County Clerk on December 24, 2008 at Liber 12575 of deeds at page 939.

Pallotta thereafter, in January of 2009, made application to the Town of Babylon Zoning Board of Appeals for variances to allow him to build a single family home on the subject property. As part of the Zoning Board's approval of the requested variances, Pallotta was required to file covenants and restrictions which required, among other things, that the dwelling was for owner occupied use only. A building permit was issued by the Town for the subject property on April 9, 2009. On April 17, 2007, Pallotta transferred the subject property to defendant Pallotta & Associates by a deed that failed to include the covenants and restrictions contained in the County's deed to Pallotta. On the same date, Broder and Pallotta & Associates entered into a building loan contract/mortgage by which Broder agreed to loan up to $175,000.00 to Pallotta & Associates for the construction of a two story dwelling on the subject property. The mortgage was recorded on April 29, 2007 in Liber 21811 of Mortgages at page 509. A title report/policy certified good and marketable title in the name of Pallotta and recertified title in Pallotta & Associates. However, the policy specifically omitted the deed from the County to Pallotta in its coverage. Thus, it is concluded that

the title insurance company found that Pallotta had good and marketable title without setting forth that the deed into him contained covenants and restrictions that would affect the marketability of the subject property in any arms length transaction. The inaccurate report enabled Pallotta to improperly deed the property to Pallotta & Associates without the covenants and restrictions which were to run with the land. Thereafter, Pallotta & Associates constructed a single family dwelling on the subject property, which it rented out in violation of the restrictive covenant imposed by the Zoning Board of Appeals of the Town of Babylon that the dwelling must be owner occupied.

Pallotta & Associates defaulted in paying the Broder mortgage on or about October 17, 2010. Broder commenced an action to foreclose said mortgage, *Broder v Pallotta & Associates Development, Inc., Gerard A. Pallotta et al*, under Suffolk County Supreme Court index no. 14-64309. The County of Suffolk is named as a defendant therein. This Court appointed a receiver of rents and profits in that action by order dated May 6, 2015. Defendant Broder has submitted an appraisal of the subject property which states that the property, as developed, has a value of $540,000.00, and that the property without the dwelling has a value of $4,300.00.

Defendant Broder has established his prima facie entitlement to summary judgment dismissing the fifth and sixth causes of action in the complaint. As to the fifth cause of action, the recording act embodied in Real Property Law 291 was intended to protect the rights of innocent purchasers who acquire interest in property without knowledge of prior encumbrances and to establish a public record which would furnish potential purchasers with notice, or at least constructive notice, of previous conveyances and encumbrances that might affect their interests (***Gletzer v Harris***, 12 NY3d 468, 473, 882 NYS2d 386 [2009]; ***Andy Assocs. v Bankers Trust Co.***, 49 NY2d 13, 424 NYS2d 139 [1979]). It is a notice statute and does not empower this Court to void defendant Broder's mortgage. Therefore, this cause of action seeking cancellation and discharge of Broder's mortgage must be dismissed.

The sixth cause of action alleges that Broder "facilitated defendant Pallotta & Associates breach of the restrictive covenant." Plaintiff also alleges that Broder was part of a scheme to defraud the County. The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (***McDonnell v Bradley***, 109 AD3d 592, 593, 970 NYS2d 612 [2d Dept 2013]; ***Selechnik v Law Off. of Howard R. Birnbach***, 82 AD3d 1077, 1078, 920 NYS2d 128 [2d Dept 2011]; ***Eurycleia Partners, LP v Seward & Kissel***, LLP, 12 NY3d 553, 559, 883 NYS2d 147 [2009]). The plaintiff has failed to proffer proof to establish the required elements of fraud. While Broder is charged with constructive notice of the covenants and restrictions placed on the property, the record establishes that the Pallotta defendants had already obtained variances and a building permit prior to his involvement. Pallotta had also filed further covenants and restrictions with regard to building on the subject property, pursuant to the Babylon Zoning Board's decision. Finally, it was the Pallotta defendants who were responsible for the transfer of the subject property to Pallotta & Associates by a deed that left out the required covenants and restrictions. All of these actions were taken without the participation of Broder. In light of these facts, the sixth cause of action must also be dismissed.

Plaintiff has established its right to summary judgment on its cross-motion to the extent set forth below, but it is otherwise denied.

The law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them (***Hidalgo v 4–34–68, Inc.***, 117 AD3d 798, 988 NYS2d 64 [2d Dept 2014]; *see* ***Fader v Taconic Tract Development, LLC,*** 128 AD3d 887, --- NYS3d ----, 2015 WL 2388955 [2d Dept 2015]***).*** "Courts will enforce such restraints only where the party seeking enforcement establishes their application by clear and convincing evidence" ***(Hidalgo v 4–34–68, Inc.***, *supra*,117 AD3d at p. 800). "However, where proved by clear and convincing evidence, they are to be enforced pursuant to their clear meaning" (***Blind Brook Club v Murray***, 255 AD2d 347, 348, 679 NYS2d 671 [2d Dept 1998]; *see* ***Witter v Taggart***, 78 NY2d 234, 573 NYS2d 146 [1991]). Here, plaintiff County has established, prima facie, that the deed covenant and restrictions were applicable to the subject property and should be enforced.

With regard to the cause of action for rescission of the contract of sale and the conveyence of the subject property, as a general rule, rescission of a contract is permitted for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but only for such as are material and willful, or, it not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" (*see* ***RR Chester, LLC v Arlington Bldg. Corp.***, 22 AD3d 652, 803 NYS2d 100 [2d Dept 2005]; *see, also,* ***Lenel Systems Intern., Inc. v Smith***, 106 AD3d 1536, 966 NYS2d 618 [4th Dept 2013]; ***Babylon Assoc. v County of Suffolk***, 101 AD2d 207, 475 NYS2d 869 [2d Dept 1984]). Here, the breach directly contradicted the very purpose of the covenants and restrictions which were imposed.

The Pallotta defendants argue that they were unaware of the covenants and restrictions on the property. This claim is untenable as a matter of law. The winning bid for the property was placed by an agent for Pallotta. It is well settled that "knowledge acquired by an agent acting within the scope of his [or her] agency is imputed to his [or her] principal and the latter is bound by such knowledge although the information is never actually communicated to [the principal]" (***Center v Hampton Affiliates***, 66 NY2d 782, 784, 497 NYS2d 898 [1985]; *see* ***Chaikovska v Ernst & Young, LLP***, 78 AD3d 1661, 913 NYS2d 449 [4th Dept 2005]). The presumption that agents communicate information to their principals does not depend on a case-by-case assessment of whether this is likely to happen. Instead, it is a legal presumption that governs in every case, except where the corporation is actually the agent's intended victim (***Kirschner v KPMG LLP***, 15 NY3d 446, 912 NYS2d 508, 93 [2010]). Thus, knowledge of the covenants and restrictions is imputed to Pallotta and Pallotta & Associates. It is also proper to impute a corporate officer's knowledge and conduct to the corporation, where, as here defendant Pallotta is the sole officer of Pallotta & Associates (***Keen v Keen***, 113 AD2d 964, 966, 493 NYS2d 636 [1985], *lv. dismissed* 67 NY2d 646, 499 NYS2d 683[1986]; *see* ***Arbor Leasing, LLC v BTMU Capital Corp.***, 68 AD3d 580 [1st Dept 2009]).

Furthermore, at minimum, Pallotta & Associates had constructive notice of the restrictive covenant burdening its land inasmuch as the restrictive covenant appeared in the deed of its direct predecessor in title; and therefore, it is bound by, and estopped from denying existence of covenant even though it did not appear in the purchaser's deed (***Breakers Motel, Inc. v Sunbeach Montauk Two, Inc.***, 224 AD2d 473, 638 NYS2d 135 [2d Dept 1996]; *see* ***A.J.P. Auto Sales Ltd., Inc. v Dejana***, 96 AD3d 886 [2d Dept 2012]).

Also of note is the extremely low purchase price of $9,000.00 for the subject property, well below that of a legal building lot. There is also the very troubling title insurance policy issued on the day of the

transfer of the subject property to Pallotta & Associates and the granting of the mortgage by defendant Broder. The title report/policy certified good and marketable title in the name of defendant Pallotta and recertified title in Pallotta & Associates, despite the fact that no search was conducted as to the deed from the County to Pallotta. Such search would have immediately revealed the covenants and restrictions preventing the development of the property.

Based on the above facts and relevant law, the Court finds that the Pallotta defendants had full knowledge of the covenants and restrictions on the subject property and knowingly violated them.

Accordingly, the County is entitled to summary judgment rescinding the sale of the subject property and rescinding the deeds into defendant Pallotta and defendant Pallotta & Associates, and the Court finds that the plaintiff County is the fee owner of the property and may take all steps necessary to reassert its ownership of the property.

"Rescission is an equitable remedy; therefore, whenever the court rescinds a contract, it has the duty to place the parties where they were before the vitiated contract was made" (***Vitale v Coyne Realty, Inc.***, 66 AD2d 562, 568, 414 NYS2d 388 [4th Dept 1979]). "If complete restoration is impossible the terms upon which rescission will be granted rest within the sound discretion of the court" (*id.* at 569; *see* ***Buffalo Builders Supply v Reeb***, 247 NY170, 176, 159 NE 899, 901 [1928]). "The court should adjust the equities between the parties to avoid unjust enrichment (CPLR 3004) in order that no one be placed in a better position after rescission than when the contract was executed" (*id.*, at 569); *see* ***Davenport v Martin***, 294 AD2d 891, 740 NYS2d 923 [4th Dept. 2002]; ***Ungewitter v Toch***, 31 AD2d 583, 294 NYS2d 1013 [3d Dept 1968]; *aff'd* 26 NY2d 687, 308 NYS2d 858 [1970]).

Based upon these principles, the County is directed to return the $9,000.00 purchase price for the subject property to the defendant Pallotta. However, as the Court cannot, based on the record before it, determine the relative equities between the plaintiff and the defendant Broder at this juncture, these parties are directed to appear for a conference.

Dated: March 7, 2016

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION