Mattes v Aquart
2016 NY Slip Op 30517(U)
March 7, 2016
Supreme Court, New York County
Docket Number: 155110/14
Judge: Donna M. Mills

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

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JOSHUA MATTES and TRISTA HUANG,

Plaintiffs,

- against -

Index No. 155110/14
DECISION & ORDER
(Motion Seq. 001)

EMANUEL AQUART
and CHERYL VANESSA AQUART,

Defendants.

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DONNA MILLS, J.:

This is a dispute over a contract to sell a six-unit multiple dwelling building located at 9 East 124th Street, New York, New York 10025 (the premises). Defendants Emanuel and Cheryl Vanessa Aquart (the sellers) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiffs Joshua Mattes and Trista Huang (the purchasers) and for an inquest and/or assessment of damages on their counterclaim for damages from the alleged wrongful filing of a notice of pendency against the premises.

On or about May 24, 2013, the parties entered into a contract for the sale of the premises for a total purchase price of $1,350,000. The parties' agreement consisted of a standard "Residential Contract of Sale," plus two riders, one apparently requested by the sellers and one by the purchasers (together, the Contract).

Paragraph 39 of the sellers' rider provides:

> "The subject premises shall be delivered Vacant. In the event Seller shall not be able to relocate the Tenants/Occupants currently in possession, then Seller shall have the option to cancel this Contract and refund the downpayment to Purchasers. Purchasers shall have the option of continuing to proceed with the purchase as an occupied property or obtain refund of downpayment. Seller shall

> not be responsible to reimburse Purchaser for any expenses incurred as a result of cancellation of this Contract."

(Aquart aff, Ex. A). Paragraph 13 of the purchasers' rider provides, in pertinent part:

> "At closing, Seller shall deliver possession of the Premises to Purchaser vacant and free of any and tenancies, leases, occupants, and rights of others to possession. In the event Seller is not able to deliver vacant possession and close title pursuant to the Contract on or before July 31, 2013, Purchaser shall thereafter have the right to cancel the Contract upon at least five (5) days written notice to Seller . . ."

(*id.*).

By letter dated April 4, 2014, the sellers advised that they had made diligent efforts to obtain possession of the units, but were unable to evict or come to a reasonable settlement with the tenants and were canceling the contract and returning the purchasers' $47,250 downpayment (Aquart aff, Ex. D). By letter dated April 8, 2014, the purchasers rejected the April 4th letter and purported termination of the Contract, contending that the sellers had "no basis in the contract or equity" for terminating their agreement (*id.*, Ex. E). The downpayment check was returned and the purchasers demanded that the sellers close title on or before May 16, 2014, "*time being of the essence* [emphasis in original]" (*id.*). A second letter dated May 12, 2014 was sent advising that a closing had been scheduled at the office of the purchasers' counsel on May 16, 2014 at 11:00 A.M. (*id.*, Ex. F).

The sellers responded to the May 12th letter on May 14th, again advising that they could not deliver vacant possession of the premises and enquiring if the purchasers were willing to accept the premises "as is" with the current tenant in possession for the same purchase price (Aquart aff, Ex. G). The purchasers' attorney responded that same day, advising that, unless the sellers were willing to make a substantial price concession to compensate for the reduced value of an occupied building, the purchasers were insisting that the sellers deliver the premises vacant

with certificates of non-harassment for each tenant (*id.*, Ex. H). The purchasers' attorney then advised:

> "It is my understanding that the recalcitrant tenant did make a demand for a sum of money as compensation for relinquishing her rights as a tenant. While her offer may have been higher than your clients anticipated, it was clearly within the capacity of the sellers to pay and they cannot simply refuse to proceed with vacating the premises because the arithmetic was not as favorable to them as they expected."

(*id.*). This letter further states that the purchasers were ready, able and willing to close on May 16, 2014, but would agree to a short extension in order for the sellers to complete a transaction with the remaining tenant.

It is undisputed that the purchasers appeared at their counsel's office on May 16, 2014 for a closing and that the sellers failed to appear. This action was commenced on May 23, 2014. The complaint alleges a single cause of action seeking specific performance or damages for breach of the Contract. The sellers answered the complaint on or about July 1, 2014, asserting a counterclaim for damages for the wrongful filing of a notice of pendency.

In support of their motion for summary judgment, the sellers contend that their actions were completely within their contractual rights pursuant to paragraph 39 of the sellers' rider. The sellers also maintain that the deposition testimony of plaintiff Joshua Mattes and the failure and/or refusal of the purchasers to produce, in discovery, any evidence that establishes that the purchasers were ready, willing and able to close the transaction on May 16, 2014 warrants dismissal of the complaint.[1]

In opposition to the motion, the purchasers submit an affirmation from their counsel, Peter J. Kelley, Esq., by which he argues that the sellers' broker did obtain vacant possession of

[1] On April 14, 2015, defendants were specifically ordered to produce a commitment letter valid on the closing date no later than May 5, 2015 or be precluded from offering evidence of the same at inquest or trial.

all but one of the apartments in the premises, along with certificates of no harassment, but that the tenant of the single remaining occupied apartment on the parlor floor, which was subject to rent stabilization or rent control, "refused to vacate without substantial but not unreasonable or unusual compensation," which he alleges was "only $100,000" (Kelley affirmation, ¶¶ 4, 8; *see also* Burger aff, ¶ 5). Mr. Kelley then opines that the sellers stood to gain more than $1.2 million from the transaction, such that the sellers were clearly "able" to obtain and deliver at closing the vacant possession of the premises together with the required non-harassment letters. The purchasers also submit an affidavit from their real estate broker, Jeffrey Burger, who opines that, although the $100,000 demanded was "clearly a high price," it was not unreasonable in view of the "huge profit to be reaped by the seller" (Burger aff, ¶ 7). Plaintiff Joshua Mattes also submits an affidavit in which he avers that he and wife "repeatedly renewed and extended [our] loan commitment, at great cost and expense, to guarantee that we would be ready to proceed with the sale should defendants comply with the contract terms" (Mattes aff, ¶ 5).

The motion for summary judgment dismissing the complaint is granted. The evidence establishes that the sellers exercised their option to cancel the Contract and refund the downpayment after they reasonably determined that they were unable to deliver possession of the premises vacant. Where, as here, a provision in a contract for the sale of real property provides that a seller may cancel the contract and return the downpayment if the seller is unable to convey good title or a vacant building, it requires only that the seller act in good faith and that the default not be willful or of the seller's own volition (*see 101123 LLC v Solis Realty LLC*, 23 AD3d 107, 108 [1st Dept 2005]; *Naso v Haque*, 289 AD2d 309, 310 [2d Dept 2001]; *Mokar Props. Corp. v Hall*, 6 AD2d 536, 539 [1st Dept 1958]). Accepting the truth of the purchasers' own evidence, there is no question that the sellers proceeded in good faith to obtain vacant

possession of this multi-unit building. They apparently hired a broker who was successful in relocating five of the six existing tenants, a feat which is highly unlikely to have been accomplished at no cost to the sellers. The sellers' broker then apparently made efforts to negotiate a deal with the last tenant, but that this individual demanded a $100,000 buyout which, according to the purchasers' own purported expert, was "high." The term "shall not be able to relocate" in paragraph 39 of the sellers' rider does not mean "shall not be possible at all cost to relocate" as the purchasers contend.

The purchasers then, under the terms of the Contract, had two options: (1) continuing to proceed with the purchase as an occupied property; or (2) accept the proffered refund of their downpayment. Demanding a price concession by the sellers in order to proceed was not part of the deal. "When a contract for the sale of real property contains a clause specifically setting forth the remedies available to the buyer if the seller is unable to satisfy a stated condition, fundamental rules of contract construction and enforcement require that [the court] limit the buyer to the remedies for which it provided in the sale contract" (*101123 LLC v Solis Realty LLC*, 23 AD3d at 108).

Furthermore, in order to be entitled to specific performance or damages, the purchasers must demonstrate that they were ready, willing and able to perform pursuant to the Contract on the day they insisted upon closing (*Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 532-534 [2012]; *Gindi v Intertrade Internationale Ltd.*, 50 AD3d 575, 575-576 [1st Dept 2008]). And, in accordance therewith, the purchasers must show that they possessed the financial ability to complete the purchase (*Del Pozo v Impressive Homes, Inc.*, 29 AD3d 620, 620 [2d Dept 2006]). "When 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" (*Fridman v Kucher*, 34 AD3d 726, 728 [2d Dept 2006]; *see also Provost v Off Campus Apt. Co., II*, 211 AD2d 850, 851 [3d Dept 1995] ["The record reveals that plaintiffs submitted no documentation or other proof to substantiate their assertion that they had the funds necessary to purchase the property and, thus, are unable to prove they were ready, willing, and able to close the sale as a matter of law"]). The alleged anticipatory breach by the sellers does not affect this obligation (*Huntington Min. Holdings v Cottontail Plaza*, 60 NY2d 997, 998 [1983]; *Madison Equities, LLC v MZ Mgt. Corp.*, 17 AD3d 639, 640-641 [2d Dept 2005]).

There is insufficient proof that the purchasers possessed the necessary funds or had access to the credit needed to purchase the premises in May 2014. The only proof offered are two mortgage commitment letters from Wells Fargo. The first letter is for an FHA 203 loan in the amount of $1,427,959, with the sum of $220,400 to be held in escrow for construction work post-closing. However, this loan commitment expired on June 28, 2013 (*see* Aquart aff, Ex. J). Even if this were sufficient funds to close, a mortgage commitment letter which, by its own terms, expired nearly a year prior to May 16, 2014, does not constitute a valid tender of performance (*Conro v White*, 176 AD2d 1052, 1053 [3d Dept 1991]). The second letter offers the purchasers a conventional loan of $1,200,000; however, this letter was issued on July 7, 2014 (*id.*); and is clearly not an extension of the first mortgage commitment. No proof is offered to substantiate the testimony of plaintiff Mattes that the purchasers repeated renewed and extended their loan commitment or had several hundred thousand dollars in personal funds ready to close on May 16, 2014 (*see* Aquart aff, Ex. I: Mattes Tr. at 21, 25, 27; Mattes aff, ¶ 5).

For these reasons, summary judgment is awarded to defendants dismissing the complaint. However, the court is conditioning entry of judgment and the cancelation of the notice of

pendency upon proof that the purchasers' downpayment has been returned in accordance with the terms of the Contract.

Turning to the purchasers' counterclaim for damages for the alleged wrongful filing of a notice of pendency, the court has the discretion to award the defendants costs and expenses pursuant to CPLR 6514 (c) occasioned by the filing of a notice of pendency (*Knopf v Sanford*, 132 AD3d 416, 418 [1st Dept 2015]; *Lunney & Crocco v Wolfe*, 180 AD2d 472, 472 [1st Dept 1992]; *Josefsson v Keller*, 141 AD2d 700, 701 [2d Dept 1988]). A claim for specific performance by a contract vendee necessarily affects title to, or possession, use or enjoyment of the real property in question, and, thus, the filing was within the scope of CPLR 6501, and defendants have not demonstrated that plaintiffs were acting in bad faith in commencing this litigation. Accordingly, the defendants' request for an inquest and/or assessment of damages on their counterclaim is denied, and searching the record (CPLR 3212 [b]), the counterclaim is dismissed.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is hereby dismissed with statutory costs and disbursements to defendants; and it is further

ORDERED that the defendants' counterclaim is also dismissed; and it is further

ORDERED that the County Clerk is directed to enter a judgment of dismissal in favor of the defendants and cancel the notice of pendency filed in this action against 9 East 124th Street, New York, New York 10025 (Lot # 1749; Block # 107) upon service of a copy of this order with notice of entry and satisfactory proof that the plaintiffs' $47,250 downpayment has been returned.

Dated: March 7, 2016

ENTER:

J.S.C.

DONNA M. MILLS