State of New York
Supreme Court: County of Greene

HAROLD LAMBERT,
Plaintiffs

–against-

PAUL A. SCHILLER and PATRICIA SCHILLER,
Defendants

DECISION & ORDER

 # 15-0814

Appearances:
For Plaintiff:
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For Defendant:
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(Tailleur, J.)

The parties entered into a "Memorandum of Understanding" dated June 25, 2010 [hereinafter "MOU"] for the sale of four (4) parcels of land to the plaintiff. The MOU listed the parcels, including the "First Parcel" which was identified as "Tax ID # 17.01-2-18", comprising 7.8 acres (MOU, ¶ 3, attached as exhibit "B" to the defendant's affidavit and memorandum of law in support of the motion). The agreed-upon purchase price of the first parcel was $60,000.00 (Id., ¶ 6). The MOU included paragraph "9" which follows.

> 9. Certain terms of the financing include: After $100,000 in principal payments are made all four parcels will be deeded to Lambert [the plaintiff herein] via Bargain and Sale Deed. However Lambert agrees to have a total of $60,000 in principal paid by November 2010. At such time the 7.8

> acre parcel will be conveyed by Bargain and Sale deed with a mortgage of $40,000 remaining on it (the remaining principal amount of $40,000 having been spread over the other parcels). This $60,000 in principal payment being composed of the $10,000 down payment, plus the monthly principal amounts paid by then, plus prepayment of months December 2010 thru April 2011, plus any other amount needed to equal $60,000 by November 2010. There shall be no monthly payment due for December thru April. However interest shall accru [sic] at a rate of ½% per month on the unpaid principal balance. In any case any amount of unpaid interest shall be added to the principal on a monthly basis.

The plaintiff does not claim that he paid the $60,000 by November of 2010 but the parties agree that he did pay $61,484 in principal from the date of the MOU (June 25, 2010) until August 25, 2011. Those payments are memorialized in the schedules attached to the defendants' affidavit as exhibits "D" and "E".

The plaintiff asserts that when he demanded the deed for the first parcel the defendants refused to convey such to him (plaintiff's aff in opposition to defendant's motion for summary judgment and in support of plaintiff's cross-motion, 2). In turn, the defendants allege that the plaintiff's failure to pay the $60,000 to them by November 2010 was a breach of contract therefore plaintiff was not entitled to conveyance of the first parcel (defendant's aff, ¶ 9).

In early 2014, the defendants commenced an eviction proceeding against plaintiff in the Town Court of the Town of New Baltimore (defendant's aff, ¶ 12). Thereafter, in March of 2014, the parties signed a contract of sale (hereinafter "first contract"). However, the plaintiff later alleged that he signed this first contract under duress because of the pending eviction proceeding (tr at 18, lines 17-19, attached as exhibit "J" to defendant's affidavit). Thereafter, in August of 2014, the parties executed another contract (hereinafter "second contract"). Both the first and second contracts

varied the terms for the sale of the lands in question.

On September 15, 2015, the plaintiff commenced the instant action seeking: (1) specific performance of that part of the MOU for the sale of the first parcel; (2) an equitable lien on the first parcel; (3) the imposition of a constructive trust on the first parcel; and (4) a declaration that the contracts dated March 2014 and August 2014 are null and void as the products of duress, coercion and unconscionability. Issue has been joined and discovery commenced.

Presently, the defendants have moved: to serve an amended Answer; for summary judgment dismissing the plaintiff's Complaint; and for an Order granting full title and possession of the premises to them. The plaintiff has cross-moved for partial summary judgment, arguing that the defendants repudiated the MOU; and seeking specific performance of the MOU as to all parcels since "tender has been obviated by the acts of the defendants" (plaintiff's aff in support of cross motion at 9). The plaintiff is also seeking leave to amend his Complaint.

The defendants oppose the cross-motion, arguing that the plaintiff breached the MOU and that the two contracts executed subsequent to the MOU constitute a novation and rescission of the prior contract and MOU (defendant's aff, ¶ 19). The defendants further argue that the MOU and first contract were rescinded by mutual consent and operation of law (see Id., ¶ 33), and that only the second contract should be considered by this Court.

Novation is "a mutual agreement among all parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation between the [parties] or a like agreement for the discharge of [a party] to [another party] by the

substitution of a [third party]" (22A NY Jur 2d § 467) [note: on-line edition]. New York courts have set a stringent standard for the novation of a contract. The requirements are: (1) a previously valid obligation; (2) an agreement by the parties to: (a) extinguish the old contract and (b) enter into a new contract; and (3) consideration for the new contract. Where the original contract has been breached, there cannot be a novation to such contract because a previously valid obligation would not exist at the time of entering the new contract. The party claiming a novation must prove that all parties to a valid existing contract agreed that it would be extinguished and that they would be bound by the terms of the new agreement. Both parties must have clearly expressed their intention that the subsequent agreement supersede or be substituted for the old agreement" (28 NY Practice Contract Law § 8:21) [note: on-line edition].

Here, the defendants allege that the MOU was breached by the plaintiff (see defendant's aff, ¶ 9) and that the first contract was substituted for the breached MOU with the consent of the parties (Id., ¶ 13). The defendants likewise allege that the first contract was then breached and the parties entered into the second contract (Id., ¶ 30). However, if the defendants' argument that the MOU was breached is accepted it necessarily follows that a novation could not have occurred insofar as, "where the original contract has been breached, there cannot be a novation because a previously valid obligation would not exist at the time of entering the new contract" (28 NY Practice Contract Law § 8:21) [note: on-line edition]. Furthermore, a party seeking novation must prove that all the parties to an existing contract agreed that it would be extinguished and that they would be bound by the terms of the new agreement (Id.). This proof must contain a "clear expression that the subsequent agreement substituted

and superseded the prior *agreement*" (Id.).

Here, the plaintiff asserts in his sworn affidavit that he executed the new agreement "in fear of losing [his] home and investment and under the threat of an eviction" (plaintiff's aff, 3).[1] There is no clear expression that the parties intended to substitute either the first contract for the MOU or the second contract for the first contract. Therefore, the Court finds that novation of the MOU did *not* occur.

The Court has examined the MOU and the exhibits submitted in support of the respective motions. The Court has read paragraph "9" of the MOU and finds that the conveyance of the first parcel would occur when the principal amount of $60,000 was paid in November of 2010. The defendants do not dispute that the plaintiff had paid $61,348 in principal as of August 25, 2011. The Court notes that the plaintiff also had paid an additional $35,064 in principal up to January 25, 2014, when the eviction proceeding was commenced.

The MOU which is at the heart of this dispute is an installment sales contract, an agreement for the sale of land which "arises when the seller ("contract vendor") retains title, with a deed to issue to the purchaser ("contract vendee") only after all periodic payments due to complete the purchase price have been made" (2-16 Bergman on New York Mortgage Foreclosures § 16.06 [1] [b]) [note: on-line edition]. The vendee holds equitable title and has an equitable lien in the payments made (see, Id.). A

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[1] The Court notes that the defendants resided at the first parcel and had "installed a lengthy driveway from Route 9W with a culvert in the road, installed a septic system, connected and activated a well, erected a double-wide mobile home, erected barns/outbuildings, paid for extension of utilities to the premises, expanded and improved a pond on the premises, performed other extensive site work and invested other funds in the premises" (plaintiff's aff ¶ 2, 2-3).

contract vendee is in the "same position as a common law mortgagor. Land sales contracts are in substance mortgages and so are treated accordingly" (Id.).

In a similar case, a vendor moved to eject a vendee who was a contract purchaser after the vendee allegedly breached the contract. The lower court denied the relief sought and the Appellate Division affirmed stating:

> We disagree with the plaintiff's contention that the court improvidently exercised its discretion in denying its motion for leave to enter a default judgment. The order of ejectment requested in the complaint is improper under the circumstances. 'The execution of a contract for the purchase of real estate and the making of a part payment gives the contract vendee equitable title to the property and an equitable lien in the amount of payment'. Further, a contract vendee who holds equitable title occupies the same position as the common-law mortgagor. Thus the contract vendor may not enforce its rights by the simple expedient of an action in ejectment but must instead proceed to foreclose the vendee's equitable title. The facts before us indicate that part payment has been made under the contract, thereby giving the [contract vendee] equitable title to the property (Heritage Art Galleries, Ltd. v Raia, 173 AD2d 441, 441 [2d Dept 1991], citations omitted).

Where a vendee has made payments on an installment sales contract, the vendee obtains equitable title to the property (Id., 442). When the vendee defaults, the vendor must either foreclose the vendor's equitable lien or "bring an action at law for the purchase price" (Id., citations omitted; see also, Warren's Weed New York Real Property § 32.97) [note: on-line edition]. The conclusion, then, is that a contract vendee who defaults cannot be divested of equitable title except by a foreclosure proceeding (see, Madero v Henness, 200 AD2d 917, 918 [3d Dept 1994]).

However, in the instant case, the defendants' options are even more limited because there is no clause in the MOU that provides for acceleration of the amount due or for forfeiture of the vendor's rights in the event of vendee default. Where neither

clause exists,[2] "an action to foreclose the contract and extinguish the rights of the vendee may not be maintained" (Cerullo v Cerullo, 40 AD2d 945, 945 [4th Dept 1972], appeal dismissed 32 NY2d 676 [1973]). Therefore, here the defendants/vendors are limited to an action against the plaintiff/vendee for the unpaid installments, and may not pursue an action seeking forfeiture of the amounts already paid (which represent the plaintiff's equity in the property) (see, Id.).

The plaintiff/vendee herein has moved for partial summary judgment granting specific performance of the MOU for the first parcel. "To obtain summary judgment for specific performance of a real estate contract, plaintiff must demonstrate that [he] substantially performed [his] contractual obligations and [was] ready, willing and able to fulfill [his] remaining obligations; that the defendant was able but unwilling to convey the property and that there is no adequate remedy at law" (Fallati v Mackey, 31 AD3d 879, 879 [3d Dept 2006]; citations omitted, lv denied, 7 NY3d 711 [2006]).

The defendants have admitted that "[t]he amount of the payments made by the plaintiff is not in dispute" (plaintiff's aff, ¶ 10), that being a total of $61,348 in principal between June 25, 2010 and August 25, 2011. Such amount is in excess of the $60,000 required to convey the first parcel (see MOU attached as exhibit "B" to defendant's motion). The defendants argue that since this amount was paid *after* November of 2010, the plaintiff breached the contract and no conveyance of title to the first parcel can be made (defendant's aff, ¶ 9).

The Court has examined the payment record of the plaintiff as found in

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[2] An acceleration clause may not be implied (see, Cerullo, supra, at 945).

defendants' submissions. It is clear that the plaintiff made regular payments of $5,000 per month from February 25, 2010 to September of 2011. However, the defendant had not made a total of $60,000 in principal payments by November of 2010, nor did he prepay the payments for December 2010 to April 2011 (see MOU, ¶ 9). In the months after August of 2011, some months passed without a payment and irregular amounts were sometimes accepted (see exhibit "D" attached to defendant's motion). Where, as here, a vendor knowingly accepts late payments over an extended period of time, the necessary elements to "constitute a waiver of the right to insist upon timely payments" are established (Snide v Larrow, 93 AD2d 959, 959 [3d Dept 1983]). The Court finds that by this course of conduct, the defendants waived their right to timely payment and cannot claim default on that basis.

Second, "a vendor and purchaser are allowed a reasonable amount of time to perform their respective obligations pursuant to a contract for the sale of real estate" (91 NYJur 2d, Real Property Sales and Exchanges, § 97). "Where time is not made of the essence in the original contract, the vendor must, prior to asserting a claim of default, serve a clear, distinct and unequivocal notice demanding performance and fixing a reasonable time to do so. Acquiescence in the delay will constitute a waiver of the default, entitling the purchaser to specific performance" (Id.). The defendants have not asserted that they served any notice after the plaintiff failed to pay the $60,000 by November 2010 as required by the MOU. In fact, as noted above, they continued to accept payments from that date until at least December of 2013. The plaintiff has stated that he "repeatedly demanded that the sellers [the defendants herein] deed [him] this parcel [the first parcel] but they refused to do so, claiming that [he] had to pay them

$100,000 in principal before they would [do so]" (aff of plaintiff, 2).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). "A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (Jacobsen v New York City Health and Hosps. Corp., 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). If the moving party makes out a prima facie showing, "the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (Id., internal quotation marks omitted).

Here, the plaintiff-vendee has established a prima facie case for specific performance as to the first parcel. Clearly the plaintiff has paid the principal amount of the purchase price for such parcel. However, the defendants have held title to the first parcel and refused to convey it to the plaintiff. The defendants have not established the existence of material issue of fact concerning the first parcel that would require a trial of the action. Therefore, the motion for partial summary judgment is **GRANTED** as to the first parcel and it is hereby **ORDERED** that the defendants deliver to the plaintiff a Bargain and Sale Deed and all documents necessary to record the Deed as well as the customary fees paid by the Seller within twenty (20) days of the date of this Decision and Order.

The plaintiff has also moved to amend his Complaint and Reply, while the

defendants have moved to amend their Answer. Insofar as leave to amend pleadings shall be freely given (see, CPLR § 3025 [b]), both motions in this regard are **GRANTED**. However, all amendments shall conform to this Decision and Order and shall be filed within thirty (30) days of the date of this Decision and Order.

The relief granted in this Decision and Order is limited to the relief specifically granted. All other motions are **DENIED**.

The foregoing constitutes the **DECISION and ORDER** of this Court, the original of which is being transmitted to counsel for Plaintiff. All other papers have been delivered to the Greene County Clerk by Chambers. The signing of this Decision and Order does not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

DATED: December 2, 2016
Catskill, New York

Hon. Charles M. Tailleur
Acting Supreme Court Justice

Papers Considered:
Defendants' motion with attached Exhibits A-M
Plaintiff's cross-motion with attached Exhibits A-H
Affidavit of J. Theodore Hilscher with attached Exhibits A-C
Reply Affirmation of Brendan F. Baynes

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