Horrigan Dev. LLC v Drozd
2017 NY Slip Op 30270(U)
February 3, 2017
Supreme Court, Kings County
Docket Number: 503433/2013
Judge: Sylvia G. Ash

At an IAS Term, Comm-11 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 3rd day of February, 2017.

PRESENT: **HON. SYLVIA G. ASH**

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HORRIGAN DEVELOPMENT LLC,

Plaintiff(s),

- against -

JOSEPH DROZD and JOSEPH DROZD as Executor of the Estate of MARIA DROZD.,

Defendant(s).

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DECISION / ORDER

Index # 503433/2013

The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2
Opposing Affidavits (Affirmations)	3, 4
Reply Affidavits (Affirmations)	5, 6

Plaintiff, HORRIGAN DEVELOPMENT LLC ("Horrigan"), moves for an Order pursuant to CPLR 3212[e] and 3025[b] granting it leave to amend the complaint and awarding it partial summary judgment granting specific performance of a contract of sale and requiring Defendant JOSEPH DROZD ("Drozd") to transfer his 71.34% interest in real property to Horrigan. Drozd opposes and cross-moves for summary judgment dismissing the complaint.

Background

On or about December 7, 2010, the parties entered into a contract of sale whereby Drozd agreed to sell the property known as 91 Jewel Street in Brooklyn, New York (hereinafter referred to as the "Property") to Horrigan for the purchase price of $1,650,000.00. Horrigan paid the initial deposit of $82,500.00 and the remaining balance of $1,567,500.00 was to be paid at closing. The closing date was scheduled for February 25, 2011.

At the time that the parties entered into the contract, Drozd owned 71.34% of the Property. Drozd had acquired 50% of title to the Property from his mother, Maria Drozd, via two separate deeds dated October 31, 1998 and December 17, 2002. When the mother died on

December 27, 2008, her 50% share was devised as follows: 24.66% to her son, Kaziamiez Drozd; 32.66% to her son, Tadeusz Drozd; and 42.68% to Drozd. As a result, Drozd obtained an additional 21.34% in title, leaving him with 71.34% total with Kaziamiez and Tadeusz holding the remainder.

Regal Title Agency ("Regal Title"), the title insurer hired by Horrigan, issued a title report dated January 2, 2011, confirming the foregoing. To clear title, Regal Title required Drozd to probate his father's will in order to properly place the mother in the chain of title, the father having owned the Property prior to the mother. In addition, Regal Title required Drozd's brothers, Kaziamiez and Tadeusz, to execute the deed as grantors.

According to Drozd, he filed a petition to probate his father's will. A guardian ad litem was appointed to protect the interests of Drozd's two incapacitated brothers, Stanley and Edward. The parties anticipated a closing date sometime in April 2012, however the guardian ad litem's report was not finalized until June 4, 2012.

On February 25, 2012, Tadeusz passed away in Poland. According to Tadeusz's will, he left all of his property to his common-law wife in Poland, Anna Mitchna. As a result, to clear title, Regal Title required Tadeusz's estate to be probated in Poland and for Drozd to commence an ancillary proceeding in New York to obtain court approval of the Property's sale. Drozd states that he was advised by his estate law attorney, Steven Bracco, Esq., by letter dated June 14, 2013, that it would cost more than $35,000.00 in legal fees to commence the ancillary proceeding and obtain a court order authorizing the sale of the Property.

Drozd states that he informed Horrigan of the costs, both orally and in writing via a letter dated June 27, 2013 (hereinafter referred to as "2013 Letter"), stating:

> With regard to the above matter, enclosed please find a letter from the Estate Attorney, Steven Bracco, indicating that the cost to have the sale of the premises approved by the Surrogate's Court will cost approximately $35,000.00.
>
> As per the terms of the Contract of Sale, specifically Schedule D, Item #15, and paragraph 13.02 of the Contract, the Seller shall not be required to bring any action or proceedintg [sic] or to incur any expense in excess of the Maximum Expense specified in Schedule "D."
>
> Also enclosed please find a copy of the appraisal indicating a value of $2,100,000.00. The Surrogate's Court will have to

> approve the sale, and the requirement of the Court is that the purchase price needs to be equal or close to a current appraised value.
>
> Please advise if your client is willing to increase their offer to the current appraised value.

Soon after receiving the 2013 Letter, Horrigan commenced the instant action for specific performance and breach of contract. Horrigan filed its note of issue on November 12, 2015.

With the instant motion, Horrigan moves for summary judgment on its claim for specific performance seeking a transfer of Drozd's undisputed 71.34% interest in the Property and a proportional abatement in the purchase price.[1] Horrigan argues that it has been ready, willing and able to close for five years, having obtained a mortgage commitment from Ridgewood Savings Bank. Horrigan further argues that Drozd breached the contract by demanding an increase of the purchase price to the appraised value and misleading it about the family's estate problems, specifically, his ability to clear ownership to the Property. Based on the foregoing, Horrigan contends that it is entitled to partial summary judgment compelling Drozd to execute a deed conveying his 71.34% interest to Horrigan.

Drozd opposes Horrigan's motion and cross-moves for summary judgment dismissing the complaint and deeming the down payment forfeited. Drozd argues that Horrigan is not entitled to specific performance because it failed to schedule a law date closing. Drozd submits that there was no provision in the contract that time would be of the essence and the closing date fixed in the contract was waived by mutual consent of the parties to afford Drozd time to cure the title defects. Drozd further argues that, pursuant to paragraph 13.02 of the contract,[2] his maximum expenditure to cure title defects was capped at $5,000.00. Thus, under the circumstances, Horrigan had two options–to cancel the contract and obtain a refund of the down payment or to take title as is. Drozd further argues that his 2013 Letter gave Horrigan written notice that it would cost more than $35,000.00 to cure title defects, and, at that point, it was

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[1] Horrigan simultaneously moves to amend its complaint to include the relief of an abatement in the purchase price to the extent its complaint can be construed as not having stated such a claim.

[2] Paragraph 13.02 of the contract provides, in relevant part: "If Seller shall be unable to convey title to the Premises at the Closing in accordance with the provisions of this contract...Purchaser, nevertheless, may elect to accept such title as Seller may be able to convey with a credit against the monies payable at the Closing equal to the reasonably estimated cost to cure the same (up to the Maximum Expense described below), but without any other credit or liability on the part of Seller. If Purchaser shall not so elect, Purchaser may terminate this contract and the sole liability of Seller shall be to refund the Down payment to Purchaser and to reimburse Purchaser for the net cost of title examination...Seller shall not be required to bring any action or proceeding or to incur any expense in excess of the Maximum Expense...to cure any title defect or to enable Seller otherwise to comply with the provisions of this contract...."

incumbent upon Horrigan to make the required election and that Horrigan's failure to do so constituted a breach of contract.

In response, Horrigan argues that the 2013 Letter was a repudiation of the contract and as such, it was under no obligation to set a law closing date or tender performance. Further, that Drozd misrepresented his authority to transfer 100% of the Property to Horrigan and his inability to convey 100% of the Property was self-created due to his failure to obtain his brother's signature.

In reply, Drozd argues that the 2013 Letter does not indicate a refusal to close. Further, that the evidence establishes that Drozd intended to close on the sale and that, as a layman, he did not know that his mother, father, and subsequently, his brother's estate would all need to be cleared for title and the complexity of such a process. Further, that his brothers were in agreement, in any case, to sell the Property to Horrigan at the agreed upon price.

Discussion

"[W]hen parties set down their agreements in a clear, complete document, their writing should ... be enforced according to its terms" (*Vermont Teddy Bear, Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004][*citations omitted*]). This rule is especially important "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 length" (*Id.*).

In addition, "[w]hen 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 we limit the buyer to the remedies for which it provided in the sale contract" (*Mehlman v 592-600 Union Ave. Corp.*, 46 AD3d 338, 343 [1st Dept 2007][*quoting 101123 LLC v Solis Realty LLC*, 23 AD3d 107, 108, 801 NYS2d 31 [1st Dept 2005]).

Upon consideration of the foregoing principles and the undisputed evidence, the Court finds Drozd is entitled to summary judgment dismissing the complaint. Paragraph 13.02, which contemplates the precise situation herein, where the seller is unable to convey title in accordance with the contract, expressly limits Horrigan's remedies to two options: (1) cancel the sale and receive a refund of its down payment and title costs or (2) take the property subject to the title defects, with a maximum credit of the Maximum Expense amount, which in this case was $5,000.00. Drozd clearly indicated to Horrigan, via the 2013 Letter, that the cost to clear title

would surpass $5,000.00 seven times over and, accordingly, that he was under no obligation to pursue the requisite legal proceedings to clear title. Nothing in the 2013 Letter indicates Drozd's refusal to close.

To the extent Horrigan argues that he was deliberately mislead by Drozd, the Court finds that all of the evidence demonstrates the contrary. Based on the title report, Horrigan knew soon after entering the subject contract that Drozd owned only 71.34% of the Property. The evidence indicates that Drozd intended to convey full title to the Property with his brothers' consent and made good-faith efforts to clear title, such as commencing legal action to probate his father's will. Unfortunately, the untimely death of Tadeusz in Poland was an unexpected event that significantly complicated the process of conveying full title of the Property to Horrigan. Although Horrigan was not without recourse pursuant to the contract, instead of electing a remedy, Horrigan commenced the instant action. Thus, in the circumstances herein, it is Horrigan who breached the contract by failing to cancel the contract or take the property subject to the title defects (*see Mehlman v 592-600 Union Ave. Corp., supra*). Accordingly, Drozd is entitled to summary judgment dismissing the complaint.

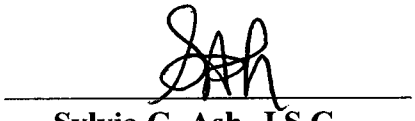
Based on the above, it is hereby.

ORDERED that Plaintiff Horrigan's motion is DENIED in its entirety; and it is further

ORDERED that Defendant Drozd's motion for summary judgment dismissing the complaint is GRANTED and the complaint is hereby dismissed.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.