

Raviv Group LLC v Scott
2017 NY Slip Op 31592(U)
July 27, 2017
Supreme Court, Kings County
Docket Number: 503095/16
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 30th day of June, 2017.

P R E S E N T:

Hon. LARRY D. MARTIN, J.S.C.

RAVIV GROUP LLC,
PLAINTIFF,

-VS-

DENISE SCOTT and NAZRUL ISLAM,
DEFENDANTS.

INDEX No. 503095/16

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>1-2</u>
Answering Affidavit (Affirmation) _____	<u>3</u>
Reply Affidavit (Affirmation) _____	<u>4</u>

Upon the foregoing papers, defendant Denise Scott (Scott) moves for an order: (1) pursuant to CPLR 3211 (a) (7) dismissing the instant action; (2) pursuant to CPLR 6514 (a), (b) and (c), canceling the notice of pendency and granting an award of costs in her favor; (3) for a judgment declaring that the purported contract of sale dated December 12, 2012 (the "2012 sales contract") is deemed cancelled, void and rescinded or voidable on the grounds that plaintiff Raviv Group LLC (Raviv) failed to comply with Real Property Law (RPL) § 265-a; (4) for costs and disbursements associated with the filing of the instant motion; and (5) for attorneys' fees.

Background

Raviv commenced the instant action seeking to quiet title to the property located at 162 Putnam Avenue in Brooklyn, New York, to recover damages for tortious interference with the 2012 sales contract and for declaratory relief (Notice of Motion, exhibit B, complaint). In the complaint, Raviv alleges, among other things, that, on or about December 12, 2012, Scott, as seller, and a representative of Raviv, as purchaser, executed a contract of sale for the purchase of the subject property (Notice of Motion, exhibit E). The 2012 sales contract provided for an all cash purchase price of \$570,000.00 with a down-payment of \$14,000.00 (*id.*, exhibit E). Scott tendered a check in the amount of \$14,000.00 on that date (Notice of Motion, exhibit F). Raviv alleges, among other things, that co-defendant Nazrul Islam (Islam) tortiously interfered with the 2012 sales contract by entering into a separate contract of sale with Scott for the purchase of the subject property "while knowing that [Scott] was in contract to sell the [subject property] to" Raviv (complaint, ¶ 36). As

a result, Raviv seeks a declaratory judgment “declaring that any contract of sale” for the subject property between Scott and Islam “is void and ineffective, and barring any conveyance of the [subject property] from” Scott to Islam (complaint, ¶ 41).

The court notes that, on or about June 26, 2013, Raviv commenced a prior related action entitled *Raviv Group, LLC v Denise Scott*, index no. 11678/13, seeking specific performance of the 2012 sales contract. On or about September 3, 2014, a related foreclosure action entitled *Reverse Mortgage v Johnson*, index no. 508080/14, was commenced in the Kings County Supreme Court¹ (Notice of Motion, exhibit H). Thereafter, on or about January 6, 2016, Islam commenced an action entitled *Nazrul Islam v Denise Scott*, index no. 500175/16 (the “Nazrul action”), against Scott for specific performance of a contract of sale regarding the subject property (Notice of Motion, exhibit G). Subsequently, the Islam action was dismissed by Judgment and Order (King, J.) dated July 5, 2016.²

Discussion

In support of the motion, Scott argues that the 2012 sales contract in violation of the Home Equity Theft Protection Act (HETPA; Real Property Law § 265-a [2] [f]). Scott maintains that the the 2012 sales contract falls under the protection of the HETPA because it is an agreement between an “equity seller”, Scott, and an “equity purchaser”, Raviv, for the purchase of a residence within the meaning of RPL § 265-a (2). According to Scott, the mortgage encumbering the subject property was in default since November 4, 2009. Scott further asserts that the 2012 contract “is facially defective and does not contain the required terms, provisions and accompanying notices” required by the provisions of the HETPA. More specifically, Scott claims that the 2012 sales contract did not include the required statutory language regarding cancellation and rescission of the 2012 sales contract. As a result, Scott contends that the 2012 sales contract is is statutorily void, cancelled, rescinded or voidable. Scott argues that Raviv’s check was canceled and not deposited and, as a result, she is exercised her right to cancel the 2012 sales contract. Alternatively, Scott maintains that the 2012 sales contract should be deemed voidable.

In addition, Scott argues that documentary evidence demonstrates that Raviv’s claims lack merit. Scott maintains that the February 2012 sales contract between Islam and Scott (which forms

¹By short form order dated July 7, 2015, this court recused itself from the related foreclosure action.

²The July 5, 2016 Judgment and Order (King, J.) in *Islam v Scott*, index no. 500175/16, among other things, granted on default defendant’s motion to dismiss the complaint and cancel the notice of pendency.

the basis of the dismissed Islam action) predates the December 12, 2012 sales contract between Raviv and Scott. Scott argues that the claim of tortious interference is invalid because the February 2012 sales contract existed prior to the December 12, 2012 sales contract.

Lastly, Scott argues that she should be awarded costs and sanctions on the grounds that the instant action is frivolous.

In opposition, Raviv counters that it is an equitable owner of the subject property. Raviv disputes Scott's contention that the provisions of the HETPA are applicable to the 2012 sales contract. In response to Scott's contentions, Raviv asserts that the 2012 sales contract was not a "covered contract" within the meaning of the HETPA because it was not executed during the pendency of an action to foreclose upon a mortgage encumbering the subject property. Notably, the 2012 sales contract was executed on December 12, 2012 prior to the September 3, 2014 commencement of the related foreclosure action. Raviv also maintains that the HETPA only applies when there is a mortgage in default and the contract conveying the subject property also includes a reconveyance arrangement between the parties. Raviv correctly points out that, in the case at bar, there was no reconveyance arrangement in the 2012 sales contract. In this regard, Raviv asserts that the 2012 sales contract was not in violation of the HETPA provisions. Raviv further argues that the 2012 sales contract should not be cancelled and that it is neither void nor voidable. Raviv asserts that the relief requested by Scott is akin to a summary judgment motion and is inappropriate as issue has not been joined.

Additionally, Raviv argues that Scott's return of its down-payment check is insufficient to cancel the 2012 sales contract. Raviv also contends that Scott lacks standing to contest the cause of action for tortious interference with a contract as asserted against Islam. Raviv points to an averments made by Scott in an affidavit submitted in the Islam action in which Scott avers that it is her "strong opinion that [the Islam action] was commenced so that [Islam] can scare off investors by placing a lis pendens on the subject property" (Affirmation in Opposition, exhibit E, Affidavit of Scott, ¶ 6). In this regard, Raviv claims that it has sufficiently stated a cause of action for tortious interference with a contract as against Islam.

Raviv also argues that the notice of pendency should not be cancelled as successive because it was filed under two separate actions, the instant action to quiet title and the Islam action which is for specific performance. The notice of pendency filed against the subject property herein was filed on March 4, 2016. It expires on March 4, 2019.

Finally, Raviv rejects Scott's request for an award for costs and sanctions herein.

In reply, Scott reiterates her argument that the 2012 sales contract is in violation of the

provisions of the HETPA and asserts that even if the court finds otherwise, the complaint herein fails to state a cause of action. Scott argues that, in the complaint, Raviv failed to plead any of the averments she made in her affidavit. Scott insists that the cause of action for tortious interference with a contract must fail because the allegation that Islam entered into a contract with Scott while being aware of a contract between Scott and Islam is inaccurate. As a result, Scott argues that the cause of action for tortious interference with a contract is without merit. Scott points out that Raviv has failed to seek to amend the pleadings to allege the “procurement” engaged in by Scott and Islam. Scott asserts that the commencement of the Islam action did not have the effect of restricting Raviv’s ability to negotiate with Scott. Additionally, Scott argues that the dismissal of the Islam action renders this action academic. Finally, Scott argues that the notice of pendency should be cancelled.

(A) CPLR 3211 (a) (1) and (a) (7)

(i) Standard

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*F & M General Contracting v Oncel*, 132 AD3d 946, 947 [2d Dept 2015], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “However, when evidentiary material is adduced in support of a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion has not been converted to one for summary judgment, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, ... dismissal should not eventuate” (*F & M General Contracting*, 132 AD3d at 947-48, internal citation and quotation marks omitted).

(ii) HETPA

Based upon a review of the record submitted by the parties and the relevant law, the court finds that the provisions of the HETPA are inapplicable to the 2012 sales contract. Notably, the 2012 sales contract is not a covered contract as it does not involve a residence in foreclosure or default where such contract is subject to a reconveyance agreement (*see* RPL § 265-a [i] [i], [ii]). In light of the foregoing, the court denies that portion of Scott’s motion to dismiss the complaint herein on the grounds that the 2012 sales contract violates the provisions of the HETPA.

(iii) Tortious Interference with a Contract

“The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant’s knowledge of that contract, (3) the defendant’s intentional procurement of the third party’s breach of that contract, and (4) damages” (*Flushing Expo, Inc. v New World Mall, LLC*, 116 AD3d 826, 826 [2d Dept 2014]).

Based upon a review of the papers submitted and the relevant law, the court grants that portion of Scott’s motion to dismiss the cause of action for tortious interference with a contract. Notably, one of the elements to be established for a cause of action for tortious interference with a contract is the existence of a valid contract between the plaintiff and a third party. Insofar as this claim is being asserted against Islam, there is no valid contract between Raviv and Scott. As the court determined in its decision and order dated **June 30, 2017**, in the related action for specific performance entitled *Raviv Group, LLC v Denise Scott*, index no. 11678/13, Scott did not have a 100% ownership interest in the subject premises so as to be able to convey same to Raviv.

(iv) Quiet Title and Declaratory Relief

In light of the foregoing, ^{the court} grants Scott’s motion to dismiss Raviv’s claims to quiet title to the subject property based upon the purported contract between ^{it} and Scott. Moreover, Raviv’s request for declaratory relief is denied.

(B) Cancellation of the Notice of Pendency

Based upon the foregoing, that branch of Scott’s motion to cancel the notice of pendency is granted and the Kings County Clerk is directed to cancel the notice of pendency filed herein (*see* CPLR 6501).

(C) Costs and Sanctions

In the exercise of its discretion, the court denies that branch of Scott’s motion seeking an sanctions and award of costs (*see* 22 NYCRR §§ 130-1.1[a], 130-1.1[c][1]).

Conclusion

Accordingly, Scott’s motion to dismiss the complaint herein, to cancel the notice of pendency and for an award of costs and sanctions is granted to the extent of dismissing the complaint as asserted against ^{her} and canceling the notice of pendency filed herein. The foregoing constitutes the decision and order of the court.

JUN 30 2017

For Clerks use only
MG EXT
MD
Motion Seq. #

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ENTER,



HON. LARRY D. MARTIN
J.S.C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT