

GB Props. NYC LLC v Bonatti
2017 NY Slip Op 32334(U)
November 2, 2017
Supreme Court, Kings County
Docket Number: 503564/2017
Judge: Paul Wooten
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**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**PRESENT: HON. PAUL WOOTEN
*Justice*PART 97GB PROPERTIES NYC LLC,

Plaintiff,

- against -

INDEX NO. 503564/2017VIVIAN BONATTI, PAMELA CYNTHIA CESPEDES
AND KRISTIAN L. HOFELLER, as Executor of the
Estate of FORTUNATO CESPEDES and/or JULIA
CESPEDES,MOT. SEQ. NO. 1,2

Defendants.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...Answering Affidavits — Exhibits (Memo)Replying Affidavits (Reply Memo)**PAPERS NUMBERED**

GB Properties NYC LLC (plaintiff) brings this action via Summons and Complaint on February 22, 2017 asserting a cause of action for specific performance regarding a contract to sell real property located at 67 Bushwick Avenue in Brooklyn, New York executed between the parties on July 28, 2016 (the Contract). Also on February 22, 2017, plaintiff filed a Notice of Pendency on the property. Defendants Vivian Bonatti, Pamela Cynthia Cespedes and Kristian L. Hofeller, as Executor of the Estate of Fortunato Cespedes and/or Julia Cespedes (collectively, defendants) move via Order to Show Cause (OSC) for an Order: 1) pursuant to CPLR 3211(a)(1) and (7), dismissing the complaint; (2) cancelling the Notice of Pendency; and 3) temporarily enjoining plaintiff and its attorney from acting on the within complaint and Notice

of Pendency (motion sequence 1). Also before the Court is a motion by the defendants for an Order (1) pursuant to CPLR 3212, dismissing plaintiff's complaint in its entirety with prejudice; (2) vacating the Notice of Pendency filed February 22, 2017 on the real property at 67 Bushwick Avenue, Brooklyn, NY; and (3) permitting the defendants herein to retain the down payment made by the plaintiff in the contract of sale of 67 Bushwick Avenue (motion sequence 2).

BACKGROUND

It is undisputed that plaintiff, as nominee for a new LLC to be formed to close title, and defendants entered into a written contract on July 28, 2016, whereby defendants agreed to sell, and plaintiff agreed to purchase the real property, a two family dwelling, located at 67 Bushwick Avenue in Brooklyn, New York for a purchase price of \$1,850,000 with a \$92,500.00 down payment held in escrow by defendants' counsel (see Defendants' OSC, exhibit A [Contract of Sale and Rider]). Specifically, as to the down payment, the Contract provided:

If Purchaser defaults under this contract in closing title, Sellers as their sole remedy shall be entitled to declare this contract null and void and to receive from Escrow Agent and to retain all sums paid by Purchaser hereunder as liquidated damages, whereupon this contract shall terminate and neither party shall have any further claim against the other. The parties acknowledge that the actual damages sustained by Sellers would be difficult, if not impossible to ascertain (see *id.*, ¶ 22).

The Contract did not fix a precise closing date, but stated rather that it was to take place on or about sixty (60) days from the date of the execution of the contract or a mutually agreed upon date (see *id.*, ¶ 8). The parties failed to close 60 days after the Contract was signed, and plaintiff had not provided defendants with the EIN number for the LLC which was to take title to the property by November 2, 2016, precluding defendants' counsel from preparing the ACRIS documents (see Defendants' OSC, Affidavit of Michael J. Ferlisi [Ferlisi]). Accordingly, in a letter dated November 3, 2016, Ferlisi sent a letter to plaintiff's counsel, Aaron Stein, Esq. (Stein) declaring that the closing would take place on December 6, 2016 at his office, "which

date is hereby declared to be of the essence of this contract in respect of the performance of the Purchaser's obligations thereunder" (*see id.*, exhibit B). In response, Stein requested an extension of the time is of the essence closing set for December 6, 2016, which culminated in a negotiated Addendum to the Contract signed by Ferlisi and Stein on behalf of the defendants and plaintiff, respectively, which extended the closing date to December 28, 2016 (*see id.*, exhibit C). Specifically, the Addendum provided:

The time of the Essence Letter for a closing on December 6, 2016 is hereby extended to December 28, 2016. However, Time of the Essence shall still be applicable to this transaction except that the closing date is changed to December 28, 2016 (*see id.*, ¶ 1).

Moreover, as to the down payment, the Addendum provided:

In the event the closing of this transaction is not completed on December 28, 2016 as a result of the Purchaser failing to provide the balance due under the contract, then in such circumstances the down payment in the sum of \$92,500.00 shall be transferred to the Sellers as provided for in paragraph 22 of the contract entitled Liquidated Damages (*see id.*, ¶ 2).

In an email to Ferlisi on November 8, 2016, plaintiff designed 308 ENTERPRISES LLC (308) as the LLC to take title to the property as well as provided the EIN number. In reliance on the Addendum extending the time is of the essence date to December 28, 2016, Ferlisi prepared the Bargain and Sale Deed to transfer title to 308 (*see Defendants' OSC, Affidavit of Ferlisi*, ¶ 12). On December 28, 2016, defendants appeared at Ferlisi's office, along with the title closer from plaintiff's title company, defendants signed the Bargain and Sale Deed and ACRIS documents, but plaintiff failed to appear (*see id.*, ¶ 14, exhibits E and F). On December 30, 2016, plaintiff's attorney asked for a further extension of the closing to January 12, 2017. In an email dated December 30, 2016, defendants consented to an extension on the condition that plaintiff submit an additional \$85,000.00 to be held in escrow by Ferlisi by the close of business on January 4, 2017. Moreover, the email sent to plaintiff's counsel stated that should Ferlisi not receive said money timely, the down payment held in escrow will be forfeited to the defendants

as provided in the Contract of Sale, the time of the essence will control and not be extended to January 12, 2017, and the matter would be deemed concluded (*see id.*, exhibit G). Plaintiff failed to deliver the additional \$85,000.00, so Ferlisi advised defendants that plaintiff defaulted under the Contract (*see id.*, ¶ 17). On January 27, 2017, defendants entered into a contract of sale for the property with another party (*see id.*, exhibit H). Thereafter, on February 22, 2017, plaintiff filed the herein Complaint and Notice of Pendency, and the defendants filed the herein motions.

In support of their motions, defendants submit, *inter alia*, a copy of the pleadings; the affidavit of Michael J. Ferlisi, the attorney retained by the defendants to represent them in the sale of the subject property; a copy of the original Contract of Sale dated July 28, 2016 and rider; a copy of a time is of the essence letter dated November 3, 2016; an addendum to the contract dated December 6, 2016; a deed executed on December 28, 2016, as well as ACRIS documents dated the same date; and the affidavit of Abraham Garbo (Garbo), a member of plaintiff. In opposition, plaintiff submits the affidavit of Garbo; a copy of the original Contract of Sale dated July 28, 2016 and rider; a survey reading of the property dated January 9, 2017; and a tax and water search of the subject property.

Defendants maintain that as a matter of law they had a unilateral right to make the contract time is of the essence, but in this case, both parties agreed to establish December 28, 2016 as the time is of the essence closing date pursuant to the Addendum dated December 6, 2016. Moreover, defendants assert that plaintiff actually admits in paragraph 8 of Garbo's affidavit in opposition that it was not ready, willing, or able to fulfill its contractual obligations inasmuch as it did not have the requisite funding to purchase the property on the bilaterally agreed upon closing date. Lastly, defendants contend that in light of plaintiff's default on the contract, they are entitled to retain the down payment as liquidated damages.

In opposition, plaintiff maintains that issues of fact exist which preclude the granting of summary judgment. Plaintiff asserts that the Garbo affidavit raises issues of fact as to whether the failure to close was a result of defendants' failure to provide clean and insurable title as required by the contract of sale. Specifically, plaintiff points out that a survey conducted by Infinity Abstract on January 9, 2017 revealed that the property which was represented as 24 feet wide and 90 plus feet deep was actually only between 84 and 85 feet deep, and that there were encroachments on the property. Moreover, plaintiff asserts that pursuant to paragraph 9 of the contract rider, defendants agreed to obtain a final water meter reading prior to the closing, but a tax contin provided by Infinity Abstract showed that a final reading was not ordered and that the defendants owed more than \$11,000.00 in water and sewage charges. According to plaintiff, this evidences that defendants were not prepared to convey title at the closing, and that such failure, renders any tender of the deed on December 28, 2016 null and void.

In reply, defendants assert that plaintiff cannot deem the time is of the essence closing date as unilateral given the negotiations that took place between both parties which culminated in an Addendum signed by counsel for all parties. Moreover, defendants assert that the January 9, 2017 survey is irrelevant inasmuch as it was conducted 13 days after plaintiff's default. Lastly, as to the water bill, defendants assert that it was to be paid by the defendants from the proceeds of the sale.

STANDARD OF LAW

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering

sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

"To prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff purchaser must establish that it substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the vendor was able to convey the property, and that there was no adequate remedy at law" (1107 *Putnam, LLC v Beulah Church of God in Christ Jesus of the Apostolic Faith, Inc.*, 152 AD3d

474, 475 [2d Dept 2017]; *Grunbaum v Nicole Brittany, Ltd.*, 153 AD3d 1384 [2d Dept 2017]; see *E & D Group, LLC v Theodore Vialet*, 134 AD3d 981, 982 [2d Dept 2015]; *Lot 57 Acquisition Corp. v Yat Yar Equities Corp.*, 63 AD3d 1109, 1111 [2d Dept 2009]; *Piga v Rubin*, 300 AD2d 68, 69 [1st Dept 2002]).

"When the parties' original contract for the sale of real property does not make time of the essence, one party may make time of the essence by giving proper notice to the other party" (*Decatur (2004) Realty, LLC v Cruz*, 73 AD3d 970, 970 [2d Dept 2010]; see *Cave v Kollar*, 296 AD2d 370 [2d Dept 2002]; *ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484 [2006]). "The notice setting a new date for the closing must (1) give clear, distinct, and unequivocal notice that time is of the essence, (2) give the other party a reasonable time in which to act, and (3) inform the other party that if [it] does not perform by the designated date, [it] will be considered in default" (*Decatur (2004) Realty, LLC*, 73 AD3d at 971, quoting *Nehmadi v Davis*, 63 AD3d 1125, 1127 [2d Dept 2009]). "When a party to a real estate contract declares time to be of the essence in setting a closing date, each party must tender performance on that date, and a failure to perform constitutes a default" (*Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 137 [1st Dept 2012]).

The defendants established their prima facie entitlement to judgment as a matter of law by tendering evidence in admissible form, including, *inter alia*, Ferlisi's affidavit, Garbo's affidavit, the Contract of Sale and Addendum thereto, and the Bargain and Sale Deed, that the defendants were ready, willing, and able to perform their obligations for the sale of 67 Bushwick Avenue on the law day, and that the plaintiff failed to appear and proceed with the closing (see *Martocci v Schneider*, 119 AD3d 746 [2d Dept 2014]; *Benhamo v Marinelli*, 82 AD3d 922 [2d Dept 2011]; *Stenda Realty, LLC v Kornman*, 67 AD3d 996 [2d Dept 2009]; *Pinhas v Comperchio*, 50 AD3d 1117 [2d Dept 2008]). Notwithstanding that the original Contract of Sale did not contain a time is of the essence closing date, the Addendum negotiated between

counsel for both plaintiff and defendants and signed by counsel for both parties on December 6, 2016 clearly and unequivocally made December 28, 2016 time is of the essence. Defendants appeared on said date with representatives from plaintiff's title company and signed the Deed transferring property to 308 in accordance with the terms of the Contract of Sale. Accordingly, the failure by plaintiff to appear on December 28, 2016 was a default under the contract. In his affidavit Garbo concedes that in fact plaintiff did not have the necessary funds to consummate the sale on the law day, wherein he states that "[u]nfortunately, the hard money lender was unable to meet the time of the essence date which was unilaterally set by the Sellers for December 28, 2016" (see Garbo Affidavit, ¶ 8).

In opposition, the plaintiff fails to raise a triable issue of fact (see *Nehmadi*, 121 AD3d at 872). In particular, plaintiff argues that any alleged tender of the Deed at the time is of the essence closing is a nullity since defendants were not in compliance with the Contract of Sale since they could not tender clean and insurable title. However, this argument is wholly without merit since the title survey conducted by Infinity Abstract which allegedly showed that the property was smaller than represented by a few feet, and that there were encroachments on the property, was not performed until January 9, 2017, almost two weeks past the time is of the essence closing date, and after plaintiff was already in default under the contract (see *Stenda Realty, LLC*, 67 AD3d at 996). Moreover, as mentioned above, Garbo's own affidavit belies plaintiff's claim that it was ready, willing, and able to fulfill its own contractual obligations on December 28, 2016 since he concedes that plaintiff did not have the money to move forward with the sale (see *Bowery Boy Realty, Inc. v H.S.N. Realty Corp.*, 55 AD3d 766 [2d Dept 2008]). Further, this Court is perplexed by plaintiff's assertion that defendants unilaterally set the time is of the essence date inasmuch as plaintiff's counsel signed an Addendum which states explicitly that: "[t]he time of the Essence Letter for a closing on December 6, 2016 is hereby extended to December 28, 2016" (see Ferlisi Affidavit, exhibit C ¶ 1).

Since defendants have made their prima facie showing of their entitlement to judgment as a matter of law that the plaintiff defaulted by failing to appear for closing, pursuant to Paragraph 22 of the July 28, 2016 Contract of Sale between the parties, as well as the Addendum to the Contract dated December 6, 2016, the defendants are entitled to retain the down payment as liquidated damages (see *Iacono v Pilavas*, 125 AD3d 811 [2d Dept 2015]; *Pinhas*, 50 AD3d at 1117). Moreover, in light of this Court's dismissal of this action for specific performance, the Notice of Pendency shall be cancelled forthwith.

Given the Court's ruling with regards to defendants' motion for summary judgment and cancellation of the Notice of Pendency, the Court need not address or consider defendants' motion to dismiss, pursuant to CPLR 3211, which is now moot.

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED that the portion of defendants' motion, pursuant to CPLR 3212, dismissing plaintiff's complaint in its entirety with prejudice is granted, and the complaint is hereby dismissed as against all defendants with costs and disbursements to defendants upon the submission of an appropriate bill of costs (motion sequence 2); and it is further,

ORDERED that the portion of defendants' motion for an Order vacating the Notice of Pendency filed February 22, 2017 on the real property at 67 Bushwick Avenue, Brooklyn, NY is granted, and the Notice of Pendency shall be vacated upon service of a copy of this Order with Notice of Entry upon the County Clerk (motion sequence 2); and it is further,

ORDERED that the portion of defendants' motion for an Order permitting the defendants herein to retain the down payment made by the plaintiff in the contract of sale of 67 Bushwick Avenue (motion sequence 2) is granted and it is hereby ADJUDGED that defendants are entitled to retain the down payment in the amount of \$92,500.00; and it is further,

ORDERED that the motion by the defendants via OSC for an Order pursuant to CPLR 3211(a)(1) and (7), dismissing the complaint; cancelling the Notice of Pendency; and temporarily enjoining plaintiff and its attorney from acting on the within complaint and notice of pendency is denied in its entirety as moot (motion sequence 1); and it is further,

ORDERED that counsel for defendants shall serve a copy of this Decision and Order with Notice of Entry on plaintiff and the County Clerk within 14 days of the date of this Order.

This constitutes the Decision and Order of the Court.

Dated: 11/2/2017



PAUL WOOTEN J.S.C.