249-251 Brighton Beach Ave. LLC v 249 Brighton Corp.
2018 NY Slip Op 31816(U)
June 20, 2018
Supreme Court, Kings County
Docket Number: 516627/2016
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part 91

249-251 BRIGHTON BEACH AVE. LLC,

Plaintiff,

against

249 BRIGHTON CORP., BOBBY RAKHMAN, AS ADMINISTRATOR OF THE ESTATE OF MARK RAKHMAN A/K/A MARK RAKHMAN, FIRA ROYTKOV AND SOFIA VINOKUROV, AND BRIGHTON PLAZA LLC,

Defendants.

Index Number 516627/2016

SEQ # 004

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other	

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Upon review of the foregoing papers, plaintiff's motion to dismiss the cross-claim for specific performance by intervenor Brighton Plaza LLC ("Brighton Plaza") is decided as follows.

Plaintiff brings this action against defendants to enforce a purchase and sale agreement between plaintiff and defendants. Plaintiff alleges that it entered into a contract with defendants to purchase 100% of the shares of defendant 249 Brighton Corp. ("249 Brighton"), which owned certain properties. Plaintiff made the down payment as agreed, with the remainder due at closing. Due to Hurricane Sandy, the closing was postponed for a year. Plaintiff agreed to pay $25,000 per month until the closing as defendants paid the real estate taxes. Defendants failed to pay the taxes, however, and plaintiff postponed the closing without a new date. On or about September 12, 2016 the plaintiff demanded that the defendants close the deal. Plaintiff asserts claims for specific performance, breach of contract, and constructive trust.

By order, dated July 19, 2017, this court permitted Brighton Plaza to intervene in this

case. Brighton Plaza filed an answer and cross-claim, in which it alleges that, on September 21, 2016, it entered into a contract of sale for the property owned by 249 Brighton. Brighton Plaza claims it remains ready, willing and able to purchase the property, but defendant has failed to transfer the property to it, and it seeks specific performance of its contract with 249 Brighton.

Plaintiff moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss Brighton Plaza's cross-claim for specific performance against the defendants. Brighton Plaza argues that plaintiff does not have the standing to move to dismiss Brighton Plaza's cross-claim against the co-defendants (*see Biyal v City of New York*, 56 AD2d 770, 770 [1st Dept 1977]). In *Biyal*, the plaintiffs sued defendants to recover for injuries sustained when she fell on now and ice. The plaintiffs sought to dismiss two of the three defendants from the case, and with them, the remaining defendant's cross-claims against those departing defendants. The First Department reasoned that plaintiffs had no standing to seek dismissal of the cross-claims because they were not "parties to the cross-claims even by implication," and had no basis to deprive the remaining defendant of its right to assert cross-claims for indemnification (*Biyal*, 56 AD2d at 770).

In the complaint, plaintiff seeks to enforce its agreement to purchase the shares of 249 Brighton, which owns properties located at 247 Brighton Beach Avenue, 249/251 Brighton Beach Avenue, 88 Brighton 1st Terrace, 89 Brighton 1st Lane, and 3064 Brighton 2nd Street, in Brooklyn, New York. Likewise, in its cross-claim, Brighton Plaza seeks to enforce its agreement with defendants to purchase the same properties.[1] It is clear, therefore, that the success of either

[1] While plaintiff describes its agreement as the purchase of all shares in 249 Brighton, which owns the subject properties, Brighton Plaza describes its agreement as the purchase of the properties themselves. Also, plaintiff describes one such property as 88 Brighton 1st Terrace, Brighton Plaza describes a property as 88 Brighton 1st Lane. Both properties are likely the same.

party on their claims impacts the ability of the other party to secure their interests. Accordingly, plaintiff has standing to object to Brighton Plaza's claim for specific performance.

To that end, plaintiff moves to dismiss Brighton Plaza's specific performance claim based on the language of Brighton Plaza's contract. The contract states in paragraph 26 that, if the purchaser's title insurance company determines that there is any objection to marketable title and the seller cannot remedy the objections, then the parties "may elect" to cancel the contract and the seller shall return any down payment, plus expenses. Plaintiff argues that Brighton Plaza is limited in its remedy to cancellation of the contract only, and may not sue for specific performance.

While the language seems to apply to this situation, where defendant's ability to convey clear title is suspect, the language is permissive and not mandatory. Thus, even though the parties "may elect" to cancel the contract, there is nothing in the contract that forbids either party from seeking specific performance. In fact, the contract states in paragraph 38(b) that, in the event the seller willfully defaults, the purchaser (Brighton Plaza) is entitled to any remedy at law or equity, including specific performance.[2]

Plaintiff also moves to dismiss on the basis that Brighton Plaza has not properly alleged a claim for specific performance. The elements of a claim for specific performance are: (1) substantial performance by claimant of its contractual obligations; and (2) that claimant is ready, willing, and able to satisfy those obligations not yet performed (*Chemtob v IL Padrone Const. II, LLC*, 149 AD3d 900, 902 [2d Dept 2017]). Some courts have also required the claimant to plead

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[2] Although there are no allegations of "willful" default, the contract does not state that Intervenor may seek specific performance ***only*** if there is willful default.

there is no adequate remedy at law (*E & D Group, LLC v Vialet*, 134 AD3d 981, 983 [2d Dept 2015]).

Brighton Plaza alleges that defendant failed to perform and that Brighton Plaza is ready, willing and able to perform, but Brighton Plaza does not allege substantial performance. While Brighton Plaza's counsel states that Brighton Plaza paid the deposit, which is currently being held in escrow, counsel does not explain how he has personal knowledge of this information. (*First Franklin Fin. Corp. v Alfau*, 157 AD3d 863, 865 [2d Dept 2018]). Additionally, Brighton Plaza does not allege it is without an adequate legal remedy.

For the reasons stated above, plaintiff's motion to dismiss Brighton Plaza's cross-claim is granted with leave for Brighton Plaza to serve an amended answer and cross-claim within 20 days of notice of entry of this order.

This constitutes the decision and order of the court.

June 20, 2018
DATE

DEVIN P. COHEN
Acting Justice, Supreme Court

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