Vahdat v Capdel LLC
2019 NY Slip Op 32028(U)
July 15, 2019
Supreme Court, New York County
Docket Number: 652099/2019
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
---X
MOUJAN VAHDAT,
Plaintiff,

-against-

CAPDEL LLC,
Defendant.
---X

Index No.: 652099/2019

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Plaintiff Moujan Vahdat claims that defendant Capdel LLC (Capdel) breached an agreement to provide him with a right of first refusal to purchase real property. Capdel moves to dismiss, to vacate the notice of pendency on the property and for sanctions. Because the right of first refusal no longer exists--a party related to plaintiff exercised it but then defaulted--Capdel's motion is granted in its entirety. This frivolous action is dismissed and defendant is awarded "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" (22 NYCRR 130-1.1[a]).

Background

The relevant facts are undisputed and are drawn from the documentary evidence and the prior court decisions discussed below.

Capdel owns real property located at 2108-2110 Second Avenue in Manhattan (the Property). Plaintiff's company, East 110th Street LLC (East 110th), owns a neighboring property. In a written agreement dated July 21, 2006, the Property's prior owner and East 110th agreed that East 110th and "any of its successors and assigns formed by its managing member Moujan Vahdat" would have a right of first refusal to buy the Property

(Dkt. 9 [the Agreement]). In 2017, plaintiff exercised the right of first refusal under the Agreement (Dkt. 18) and Second Avenue Group LLC (SAG), whose managing member was plaintiff, entered into a contract with Capdel for the sale of the Property. Closing was scheduled for October 18, 2017. The parties executed a stipulation extending the closing to November 1, 2017, time being of the essence. On October 27, 2017, SAG--represented by the same attorney appearing for plaintiff in this case--commenced an action in this court and moved to stay the closing (*Second Avenue Group LLC v Capdel LLC*, Index No. 656611/2017 [Sup Ct, NY County] [the Prior Action]). The court denied the motion. SAG did not appear at the closing. SAG and Capdel then each cross-moved for a judgment resolving whether SAG defaulted and whether it was entitled to return of its down payment. By order dated June 4, 2018, the court held that SAG defaulted by failing to appear at the closing and that Capdel was entitled to the $190,000 down payment as liquidated damages (*see* Dkt. 11). On January 3, 2019, the Appellate Division affirmed (168 AD3d 415 [1st Dept 2019]).

Three months later, on April 10, 2019, plaintiff commenced this action and filed a notice of pendency on the Property (*see* Dkt. 2). Plaintiff seeks a declaratory judgment that he has a right of first refusal on the Property and to enjoin Capdel from selling the Property in derogation of that purported right. Capdel immediately wrote plaintiff's attorney, demanding that the lawsuit and notice of pendency be voluntarily withdrawn "to avoid motion practice" (Dkt. 16 [4/17/19 Letter]). Capdel explained that plaintiff already exercised the right of first refusal and that the failure to close precluded further

enforcement of the Agreement (*id.*). Capdel further informed plaintiff of an imminent 1031 exchange transaction that could be jeopardized by plaintiff's proceedings and threatened to seek sanctions if the notice of pendency was not lifted and the action was not discontinued. After plaintiff failed to respond to its letter, Capdel made this motion to dismiss on April 30, 2019.

Analysis

Plaintiff already exercised his right of first refusal on the Property and then breached by failing to close (Dkt. 18; *see* Dkts. 11-12). Therefore, he can no longer prevent Capdel from selling the Property (*Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 163 [1986]; *see F & T Mgmt. & Parking Corp. v Flushing Plumbing Supply Co.*, 68 AD3d 920, 923 [2d Dept 2009]; *see also* Dkt. 6 at 7-8 [collecting cases]). "If the law were otherwise, then a holder of a right of first refusal could tie up the property for years and years. He would just need to keep exercising the right, default over and over again, and keep repeating that cycle. Meanwhile, the owner of the property would be stuck and have no recourse to sell the property to anyone else" (Dkt. 6 at 8).

Significantly, plaintiff has cited no law to the contrary and there is no legal support whatsoever for his meritless opposition. Plaintiff contends that <u>he</u> never previously exercised his right of first refusal because it was SAG that did so in 2017 (*see* Dkt. 24).* The Agreement, however, makes clear that the right belongs to plaintiff and

* Plaintiff also frivolously contends that SAG is not a party to the Agreement and actually had no right of first refusal (Dkt. 24 ¶ 10). That position is contradicted by the record and, in any event,

any assignee formed by him. The parties' emails from 2017, moreover, conclusively prove that plaintiff exercised his right of first refusal and chose to contract through SAG (*see* Dkt. 18). Nor is there any authority for plaintiff's unsupported belief that he or his affiliates can continuously exercise the right after invoking it once and then defaulting.

This action--the third case commenced against defendant by plaintiff or his affiliates all of whom were represented by the same counsel (*see* Dkt. 13)--should not have been instituted. Then, in response to defendant's letter setting forth the reasons that this case lacks merit and the consequences of failing to cancel the notice of pendency (Dkt. 16), plaintiff should have discontinued the action. Instead, plaintiff forced defendant to incur fees and the deal that defendant had in place with a third party was lost. To add insult to injury, plaintiff opposed the motion late, costing defendant more time. Plaintiff's arguments that sanctions are inappropriate because SAG is not a successor or assign of East 110th St. and because he has "long stood ready, willing and able to purchase" the Property and wants nothing more than to do so in accordance with his rights are belied by the record and by the affirmed findings in the Prior Action (Dkt. 24 at ¶¶ 8, 10, 14). His position is untenable. Because this action and plaintiff's opposition to its dismissal are "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," Capdel is entitled to recover the reasonable legal fees it incurred (22 NYCRR § 130-1.1[a], [c][1]; *see Abe v New York Univ.*, 169 AD3d 445, 449 [1st Dept 2019]; *Pfeiffer v*

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is of no consequence. Once a party affiliated with plaintiff defaulted on purchasing the Property, plaintiff no longer had any rights.

Imperatore, 158 AD3d 497 [1st Dept 2018]; *Eshaghian v Eshaghian*, 146 AD3d 529, 529 [1st Dept 2017]).

Finally, the notice of pendency is canceled as this action is dismissed.

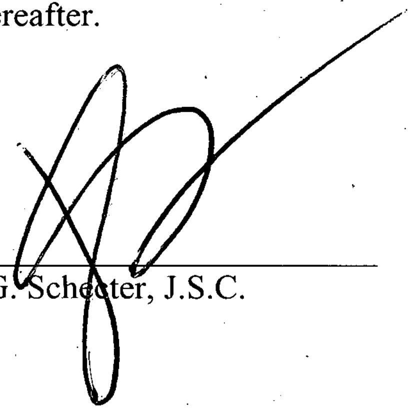
Accordingly, it is

ORDERED that Capdel's motion to dismiss the complaint is granted, the Clerk is directed cancel the Notice of Pendency filed at Dkt. 2 and to enter judgment dismissing the complaint with prejudice; Capdel's attorneys' fees motion is hereby severed and shall continue; and it is further

ORDERED that Capdel's motion for an award of attorneys' fees against plaintiff is granted; and it is further

ORDERED that within one week of the entry of this order, Capdel shall file a letter not to exceed five pages in which it attaches its legal bills incurred defending this action and explain why they are reasonable, to which plaintiff may respond, also in a letter not to exceed five pages, within one week thereafter.

Dated: July 15, 2019 ENTER:



Jennifer G. Schecter, J.S.C.