313 43rd St. Realty LLC v TMS Enters. LP
2019 NY Slip Op 33277(U)
October 31, 2019
Supreme Court, Kings County
Docket Number: 512785/15
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-4 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 31st day of October, 2019

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PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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313 43RD STREET REALTY LLC,

Plaintiff,

- against -

Index No. 512785/15

TMS ENTERPRISES LP, 313 43RD STREET REALTY ASSOCIATES LTD. and STEVEN G. LEGUM,

Defendants.

---X

The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-6
Opposing Affidavits (Affirmations)	7
Reply Affidavits (Affirmations)	7, 8

Upon the foregoing papers, defendants TMS Enterprises LP (TMS), 313 43rd Street Realty Associates Ltd. (43rd Realty) (collectively, the sellers) and Steven Legum move, in motion (mot.) sequence (seq.) 4, for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff 313 43rd Street Realty LLC and granting summary judgment on defendants' first and second counterclaims. Plaintiff cross-moves, in mot. seq. 5, for an order, pursuant to CPLR 3212, granting it summary judgment and directing the release of certain contract of sale deposits to plaintiff.

Plaintiff commenced this action seeking the return of sums submitted as deposits for the purchase of two properties. On June 25, 2015, plaintiff, as buyer, and TMS, as seller, entered into a contract of sale for the property located at 313 43rd Street in Brooklyn for the purchase price of $8,500,000.00. Pursuant to the contract of sale, plaintiff delivered a $500,000.00 deposit to Legum, TMS's counsel, to be held in escrow. On June 25, 2015, plaintiff, as buyer, and 43rd Realty, as seller, entered into a contract of sale for the property located at 317 44th Street in Brooklyn for a purchase price of $1,000,000.00. Pursuant to the contract of sale, plaintiff delivered a $180,000.00 deposit to Legum, 43rd Realty's counsel, to be held in escrow. Each of the contracts set forth a September 8, 2015 closing date. Pursuant to an amendment to the TMS contract, $200,000 was released from escrow to TMS to be credited against the purchase price at closing.

Among the provisions of the contracts, which are virtually identical in form and language, are the following:

> "4. SELLER shall give and PURCHASER shall accept such title as any reputable title company, a member of the New York Board of Title Underwriters will be willing to approve and insure in accordance with their standard form of title policy, subject only to the matters provided for in this contract."

> "36. SELLER represents that the lease annexed hereto currently in full force and effect, that the tax statement annexed hereto represent the present tax status of the property, and that the gas and electric bills annexed hereto represent the most recent figures with respect thereto."

By letter dated September 25, 2015, Legum advised plaintiff's counsel that deeds to the subject properties would be tendered on October 7, 2015 with time being of the essence. By letter dated October 2, 2015, plaintiff's counsel responded that the time of essence closing date was an unreasonably short time after the agreed upon closing date and that plaintiff would be ready to close on or about October 26, 2015. By letter to plaintiff's counsel dated October 16, 2015, the sellers' counsel set a new time of the essence closing date of October 22, 2015 and advised that if plaintiff fails to close on said date it would be held in default of both contracts of sale. By letter dated October 19, 2015, plaintiff's counsel responded that the October 16, 2015 letter represented an anticipatory breach of contract relieving plaintiff of its contractual obligations and entitling plaintiff to return of the deposits.

On October 19, 2015, simultaneous with its response to the letter from the sellers' counsel, plaintiff commenced the instant action seeking return of the deposits. In the complaint, plaintiff alleged that at all relevant times it remained ready, willing and able to perform its obligations as purchaser under the both contracts and that the October 16, 2015 time of the essence letter from the sellers' counsel "is invalid and constitutes an anticipatory breach and repudiation of the obligations of TMS and 43rd Realty under their respective Contracts, thereby relieving plaintiff of any further obligations to perform as contract vendee under the Contracts." Plaintiff further alleged that the sellers were not ready, willing and able to close under the contracts. Plaintiff alleges that, as a result, it is entitled to the return of the full amount of the deposits. In its amended answer, dated December 10, 2015,

defendants set forth counterclaims for release of the respective deposits to the sellers under the respective contracts as well as a counterclaim for fraud.

On December 14, 2015, the sellers moved, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for the failure to state a cause of action or, alternatively, pursuant CPLR 3212, for summary judgment dismissing the complaint on the ground that the sellers are entitled to judgment as a matter of law. Plaintiff cross-moved for summary judgment directing the return of the deposits and, in effect, for summary judgment dismissing the two counterclaims asserted by the sellers for release of the deposits as damages for plaintiff's default. In addition to the argument that the allegedly unreasonable time of the essence closing date constituted a repudiation of the contracts, plaintiff argued that the sellers were unable to perform under the contracts as a certain commercial lease on the property between TMS and Ambulatory Surgery Center of Brooklyn, LLC (ASC) was no longer in effect (in violation of paragraph 36 of the contracts) and that the sellers could not convey marketable title as a judgment of foreclosure encumbered the property (in violation of paragraph 4 of the contracts). By order dated February 19, 2016, this court denied the sellers' motion and granted plaintiff's cross motion on the ground that a "firm closing date was never set."[1]

Following appeal, the February 19, 2016 and March 16, 2016 judgment entered thereon were modified by order of the Appellate Division, Second Department to the extent that plaintiff's cross motion was denied (*313 43rd St. Realty, LLC v TMS Enters., LP*, 163

[1]In the order, the court also granted a separate motion by plaintiff for dismissal of the third counterclaim for fraud as it was not pleaded with sufficient particularity (CPLR 3016 [b]).

AD3d 512 [2d Dept 2018]). The Appellate Division stated that the allegations in the complaint that the sellers unilaterally set an unreasonable closing date were inadequate to constitute a "positive and unequivocal" repudiation of the contracts of sale so as to form the basis for a cause of action premised on anticipatory breach of contract. Nevertheless, the court stated that the complaint adequately alleged, for purposes of a CPLR 3211 (a) (7) dismissal motion, that the sellers were "not ready, willing and able to close under [the] [c]ontracts [of sale]" and that construed liberally, the complaint states a cause of action for the return of deposits on contracts for the sale of real property. The Appellate Division also held that plaintiff's cross motion for summary judgment should not have been granted, as plaintiff's submissions "failed to establish that the sellers were not ready, willing, and able to close, or that they otherwise breached the contracts of sale" (*313 43rd St. Realty, LLC,* 163 AD3d at 515).

Following remand of this matter, the sellers served a demand for a bill of particulars as to "[e]ach and every manner in which and basis for the allegation in ¶ 6 of the complaint that defendants TMS and 43rd Realty were not, at the time set forth, ready, willing, and able to close." In its bill of particulars, dated September 4, 2018, plaintiff alleged that the sellers

> "were not ready, willing and able to close title in accordance with the terms and conditions of the Contract of Sale ("the Contract") because (i) the ACS Lease was not in full force and effect, as represented in and as required by paragraph 36 of the Contract; and (ii) there were a number of unresolved and potentially unresolvable title objections reflected in the Title Report, including but not limited to a judgment in favor of Michael M. Levi and an unsatisfied judgment of foreclosure and sale."

On March 27, 2019, the sellers brought the instant motion for an order granting summary judgment on their first and second counterclaims and dismissing plaintiff's complaint. The sellers argue that since no leases were annexed to the contracts, the plain language of paragraph 36 was not violated, and that with regard to the judgment of foreclosure, such was expected to be satisfied from the sale proceeds. In its cross motion, plaintiff essentially repeats its previous arguments that the sellers were unable to perform by reason of the terminated lease and title issues and that the time of the essence closing date was unreasonable. Plaintiff maintains that while the subject lease was not physically annexed to the contracts, the lease was delivered to plaintiff beforehand and it was understood by the parties that the lease was to be in effect on the closing date.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence" to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985])

In order to retain the down payment, a seller is required to prove that it was ready, willing, and able to perform on the law day (*see Imperatore v 329 Menahan St., LLC*, 130 AD3d 784, 785 [2d Dept 2015]; *Matter of Hicks*, 72 AD3d 1085 [2d Dept 2010]; *Pinhas v Comperchio,* 50 AD3d 1117 [2d Dept 2008]). In this matter, the sellers have failed to

establish as a matter of law that they could deliver title in accordance with the contracts of sale in light of the existence of the judgment of foreclosure. While the sellers argue that the mortgage could have been satisfied by sale proceeds, plaintiff's title insurer specifically required that the judgment of foreclosure be vacated, the pending foreclosure action discontinued and the notice of pendency cancelled by court order. Moreover, the sellers have not established as a matter of law that they did not breach the contracts of sale by terminating the ASC lease. "[W]hen interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*G3–Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37, 40, [internal quotation marks omitted]). "A contract should not be interpreted to produce a result that is . . . contrary to the reasonable expectations of the parties" (*Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003]; *see 833 Northern Corp. v Tashlik & Assoc., P.C.*, 256 AD2d 535, 537 [2d Dept 1998]). While the sellers argue that paragraph 36 of the contracts refer to a lease that is annexed thereto, and that no leases were in fact annexed when the contracts were entered into, the deposition testimony of the parties demonstrates that paragraph 36 was intended to refer to the ASC lease, which was provided to plaintiff prior to the signing of the contracts and therefore not physically annexed.

As a result, the sellers' motion for summary judgment is denied.

"To prevail on a cause of action for the return of a down payment on a contract for the sale of real property, the plaintiff must establish that the defendant breached or repudiated the contract and that the plaintiff was ready, willing, and able to perform on the closing date" (*Yu Ling Hu v Zapas*, 108 AD3d 621, 621 [2d Dept 2013]; *see Matter of Hicks*, 72 AD3d 1085, 1086 [2d Dept 2010]; *Pinhas,* 50 AD3d 1117]). However, a purchaser is not required to tender performance and attend a closing if the seller is unable to perform on the law day (*see Yu Ling Hu*, 108 AD3d at 622). As plaintiff previously cross-moved for summary judgment, which was denied by order of the Appellate Division, the instant cross motion is essentially a successive motion for summary judgment. "Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" (*Sutter v Wakefern Food Corp.*, 69 AD3d 844, 845 [2d Dept 2010]; *see Coccia v Liotti*, 101 AD3d 664, 666 [2d Dept 2012]). Although, in this context, newly discovered evidence may consist of "deposition testimony which was not elicited until after the date of a prior order denying an earlier motion for summary judgment" (*Auffermann v Distl*, 56 AD3d 502, 502 [2d Dept 2008]; *see Coccia v Liotti*, 101 AD3d at 666; *Alaimo v Mongelli*, 93 AD3d 742, 743 [2d Dept 2012]; *Staib v City of New York*, 289 AD2d 560 [2d Dept 2001]), such evidence is not "newly discovered" simply because it was not submitted on the previous motion (*Sutter,* 69 AD3d at 845). Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for

summary judgment and which could not have been established through alternative evidentiary means (*see Pavlovich v Zimmet*, 50 AD3d 1364, 1365 [3d Dept 2008]; *Capuano v Platzner Intl. Group*, 5 AD3d 620, 621 [2d Dept 2004]; *Rose v La Joux*, 93 AD2d 817, 818 [2d Dept 1983]). Indeed, "successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment" (*Capuano*, 5 AD3d at 621; *see Harding v Buchele*, 59 AD2d 754, 755 [2d Dept 1977]). The Appellate Division determined that based on the previous submissions, plaintiff failed to establish entitlement to summary judgment. The previous submissions of plaintiff set forth facts and allegations regarding the sellers' inability to close and breach of contract on account of the termination of the ASC lease and the title issues raised by the judgment of foreclosure.[2] While the parties have since appeared for examinations before trial, there is no showing that the testimony establishes facts that were not available to plaintiff at the time it made its initial cross motion for summary judgment or which could not have been established through alternative evidentiary means. Insofar as the same facts and arguments were presented by plaintiff in the previous cross motion for summary judgment, plaintiff is bound by the Appellate Division's denial of its prior cross motion for summary judgment.

Further, while issues are raised as to the sellers' breach and/or inability to close by reason of the termination of the ASC lease and the judgment of foreclosure, plaintiff has not

[2]Plaintiff did not address the title issues in its brief submitted to the Appellate Division.

set forth proof which establishes as a matter of law that such defects could not have been cured by the sellers within a reasonable time (*see Martocci v Schneider*, 119 AD3d 746, 749 [2d Dept 2014]).

As a result, plaintiff's cross motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
Administrative Judge

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