

**Minford Assoc. LLC v Minford Assn. Hous. Dev.
Fund Corp.**

2020 NY Slip Op 32030(U)

May 28, 2020

Supreme Court, Bronx County

Docket Number: 29872/19E

Judge: Ben R. Barbato

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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 21**

Present: Honorable Ben R. Barbato

MINFORD ASSOCIATES LLC,

Plaintiff,

-against-

MINFORD ASSOCIATION HOUSING DEVELOPMENT
FUND CORPORATION,

Defendant.

DECISION/ORDER

Index No.:29872/19E

Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion to dismiss:

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed	1
Affirmation in Opposition and Exhibit Annexed	2
Memorandums of Law	3, 4
Reply Memorandum of Law	5
Affirmation in Support (Trauner)	6

The above Motions have been transferred from Justice Donald Miles on May 26, 2020 to this court pursuant to Order of the Administrative Judge and shall be decided by this court pursuant to CPLR§9002.

The instant action arises from a Contract of Sale, for those premises known as 1558 Minford Place (Block 2977, Lot 144), located in the County of Bronx, City and State of New York, dated November 21, 2018. Defendant moves this court for an Order pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff’s first, second, third, fourth and fifth causes of action. Defendant argues that dismissal must be granted because the terms of the Contract, specifically paragraph numbered 6.4 provides that as “ a condition precedent . . . Seller must obtain approval from the Attorney General of the State of New York . . . to transfer the Premises”. It further states that if Seller does not “for any reason” obtain the Attorney General’s approval “after a good faith effort to achieve approval by the date . . . one hundred eighty (180) days from the date

hereof, then either party may terminate this contract". Defendant states that on January 2, 2019, it submitted a Verified Petition seeking the Attorney General's approval for the transfer of the sole asset of Defendant, Minford Associates Housing Development Fund Corporation, namely those premises known as 1558 Minford Place, Bronx, New York. On July 16, 2019, one hundred ninety six (196) days after submission of the Verified Petition and two hundred thirty eight (238) days from the signing of the Contract of Sale, Defendant notified Plaintiff by letter that they did not obtain approval from the Office of the Attorney General for the sale of the subject premise. Defendant's letter also invoked that provision of the Contract of Sale, paragraph numbered 6.4, terminating said Contract and declaring same null and void. Defendant further specifically argues that the relief sought requesting specific performance and damages for breach of contract cannot survive since the transfer of the subject premises requires approval by the Office of the Attorney General of the State of New York and that requirement is not within Defendant's ability to secure. Defendant also seeks vacating the Notice of Pendency filed by Plaintiff.

By Summons and Verified Complaint Plaintiff, Minford Associates, commenced the instant action claiming Defendant failed to exercise good faith in presenting their Verified Petition to the New York State Attorney General. That Defendant attempted to change the scope and terms of the contract by interfacing with the New York City Department of Housing Preservation and Development (HPD), refused to take steps to complete the transaction or otherwise move towards closing of title which it is alleged caused significant damage to Plaintiff, and as among other injuries, to also suffer consequential damages. Plaintiff pursuant to it's Complaint seeks by it's First Cause of Action, a judgment for breach of contract directing Defendant to specifically perform pursuant to the contract, by it's Second Cause of Action, to assess consequential damages, plus statutory interest, cost and disbursements, by it's Third Cause

of Action, breach of contract in an amount to be determined at trial, plus statutory interest, cost and disbursements, by its Fourth Cause of Action a judgment for fraud/fraudulent inducement. Plaintiff argues that, “. . . submission of a single petition at the front end of a due diligence period does not *per se* constitute good faith”. Plaintiff further asserts that the Verified Petition submitted by Defendant had “several material defects” thereby evidencing such submission as not being made in good faith.

CPLR § 3211 (a) (7) provides that a party may move for judgment dismissing one or more causes of action when “the pleading fails to state a cause of action.” *Leon v. Martinez*, 84 N.Y. 2d 83 (1994) The Court must first examine the pleadings and determine if from the four corners of the pleading they facially state a cause of action. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977) If it appears that the Plaintiff has no cognizable cause of action either because Plaintiff failed to articulate the facts amounting to a cause of action or because the law bars such an action based on the factual circumstances wherein the cause of action arose, the Court must dismiss the cause of action (*id.* at 275). Thus when the allegations in the complaint are flatly contradicted by the documentary evidence submitted by Defendant, the Court shall not accord the same any truth *Biondi v. Beekman Hill House Apartment Corporation*, 257 A.D.2d 76 (1st Dept. 1999).

The proponent of a motion to dismiss a complaint pursuant to CPLR § 3211 (a) (1) bears the burden of coming forward with documentary evidence, which refutes the factual allegations contained in Plaintiff’s complaint thereby conclusively establishing a defense to the asserted claims as a matter of law. *Goshen v. Mutual Life Insurance Company of New York*, 98 N.Y. 2d 314 (2002) Documentary evidence means a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the

ground upon which the motion is based. *Base Yield Alpha Fund (Master) v. Goldman Sachs Group, INC.*, 115 A.D.3d 128 (1st Dept 2014), *Webster v. State of New York*, 2003 NY Slip Op 50590 (U), (Court of Claims 2003).

The transfer of the subject premises in this instance is governed by Not-for-Profit Corporation Law §511(a) which authorizes the Attorney General to approve real property transactions. This may be accomplished by the submission of a Verified Petition to the Attorney General's Office which shall include all that information previously required for the Court's approval as set forth in N-PCL§511 pursuant to subparagraph 1 through 9 (See: McKinney's NPCL§511). The Petition must demonstrate that the corporation is not insolvent and will not become insolvent as a result of the transaction and it must include the existence of any objections to such sale. If it shall appear, to the satisfaction of the Attorney General, that the consideration and the terms are fair and reasonable then the Attorney General may authorize the sale. A review of Defendant's Verified Petition reveals that it complied with the direction as set forth in Not-for-Profit Corporation Law §511(a). Approval by the office of the Attorney General, required for the transfer of title was not received, within the time frame set by the Contract of Sale.

It is well settled law that a Contract of Sale exists and is enforceable where there is an offer and acceptance, consideration tendered and the mutual assent to be bound by the agreement. (22 N.Y. Jur 2d Contracts §9) The instant Contract of Sale, the Defendant's ability to transfer the subject property was made contingent upon the Attorney General's approval. The required approval was therefore a condition precedent to the enforceability of the Contract of Sale. Since the Attorney General's Office did not approve the sale of the subject property, and this court determines that Defendant acted in good faith with respect to its submission of its Verified Petition, the Contract of Sale is rendered unenforceable and therefore a nullity. *Oppenheimer &*

Co., Inc. v. Oppenheim, Appel, Dixon & Co., 86 N.Y. 2d 685. Further, Plaintiff's argument that Defendant changed the terms and scope of the contract by interfacing with the New York City Department of Housing Preservation and Development (HPD) is likewise without merit since the HPD was the supervising agency and it's consent was necessary for the transfer of the subject premises and also necessary to obtain approval for the transfer of title by the State Attorney General's office.

The necessary elements of fraud requires the making of a materially false representation with the intent to defraud. That materially false representation must have been reasonably relied upon and damages incurred based upon such reliance. *MBIA Insurance Corp., v. Credit Suisse Securities (USA) LLC*, 927 N.Y.S. 2d 517, 2011 N.Y. Slip Op 21191. Here two major law firms, representing their expertise in the type and form of real estate transactions, as is the subject of the instant lawsuit, enter into an arms length agreement for the transfer of property valued at, two million two hundred thousand (\$2,200,000.00) dollars. Plaintiff therefore must establish that it relied on the material misrepresentation and that such reliance was justified. *Dembeck v. 220 Cent. Park S., LLC*, 33 A.D.3d 491 (1st Dept. 2006) "It is well established that, 'if the facts represented are not matters peculiarly within [defendants] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, (the plaintiff) must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentation.'" (*Schumaker v. Mather*, 133 N.Y. 590, 596 [1892], see *DDJ Mgt., LLC v. Rhone Group LLC*, 15 N.Y. 3d 147 [2010]), as cited by *ACA Financial Guaranty Corp., v. Goldman Sachs & Co.*, 25 N.Y. 3d 1043, 1044 (2015).

As stated above the instant matter involves the transfer of property namely 1558 Minford

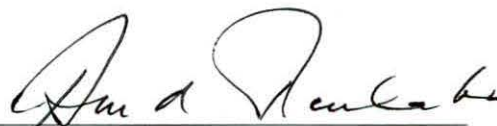
Place, Bronx, New York, which property represents the sole asset of Defendant, Minford Associates Housing Development Fund Corporation, which by its attorney entered into a Contract of Sale with Plaintiff, Minford Associates LLC, also represented by counsel, to sell to Plaintiff the subject premises. Both parties were aware of the requirements necessary to effectuate the sale of said premises and knowingly entered into a binding Contract of Sale which sale was made contingent upon the approval of the Office of the New York State Attorney General. That approval was not received and therefore based upon the terms and conditions of the Contract of Sale, Seller, the Defendant herein elected to invoke the option delineated in paragraph numbered 6.4 to terminate and declare the Contract a nullity. Upon termination Plaintiff brought the instant action and Defendant now moves this Court for an Order dismissing Plaintiff's Complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7).

Therefore it is

ORDERED, that Defendant's motion for an Order pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's first, second, third, fourth and fifth causes of action is **granted**, and it is further

ORDERED, that the Clerk of Bronx County by direction of this Court shall vacate and remove the Notice of Pendency filed by Plaintiff against that property known as 558 Minford Place (Block 2977, Lot 144), located in the County of Bronx, City and State of New York,

Dated: May 28, 2020



Hon. Ben R. Barbato, J.S.C.