

2020 JDA Invs. Corp. v Rosenberg
2020 NY Slip Op 33624(U)
October 28, 2020
Supreme Court, New York County
Docket Number: 654240/2020
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

2020 JDA INVESTMENTS CORP.,

Plaintiff,

- v -

SCOTT ROSENBERG as Trustee of the Scott Rosenberg
Living Trust dated 6/25/2007, and NOEL BLAIR, ESQ., as
Escrowee

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for

DISMISSAL

The motion to dismiss is denied

Background

This case arises out of the unsuccessful sale of an apartment located at 158 Mercer Street in Manhattan. Plaintiff was the purchaser and defendant Rosenberg was the seller. Defendant Blair was the escrow agent in relation to plaintiff's \$920,000 deposit made on January 16, 2020. In the contract, the seller was required to do certain work before the closing date.

Plaintiff alleges that on June 11, 2020, Rosenberg sent an email to plaintiff in which he admitted he was unable to close because the DOB had been unable to inspect certain work done by Rosenberg (as provided for in the Second Supplemental Rider to the contract).

Plaintiff contends that it sent a letter to Rosenberg on June 15, 2020 in which it detailed the work Rosenberg was supposed to perform but had not yet been completed. It also claims that

it sent a time of the essence letter on that same date and extended the time to close to July 15, 2020 at noon. Plaintiff maintains that it appeared at the closing (at counsel for Rosenberg's office) but Rosenberg did not close.

Plaintiff contends that certain work performed did not comply with the plans filed with DOB (such as the height of wall opening) and that Rosenberg failed to provide plaintiff with proof that the Seller complied with requirements in the contract relating to approval by the condo in which the apartment is located. Plaintiff brings two causes of action. The first seeks declaratory relief that it has a valid and enforceable lien in the amount of the deposit, that Rosenberg defaulted under the terms of the contract and that it is entitled to the return of the deposit. The second cause of action is for breach of contract and the return of the deposit.

Defendants move to dismiss the complaint. They offer a different version of the facts. They claim that the contract required that the unit be delivered to plaintiff vacant (a tenant was living there at the time of the contract) and with significant alterations. Defendants emphasize that the closing date (June 15, 2020) was not identified as a time of the essence obligation. They also observe that the Covid-19 pandemic restricted construction on the apartment and limited DOB's ability to perform inspections.

Defendants contend that as the closing date approached, they offered to provide a post-closing escrow of about \$100,000 to \$150,000 as an alternative to adjourning the closing. They claim that plaintiff rejected this offer and defendants completed the agreed alterations and were ready to close on July 15, 2020 (the date in plaintiff's time of the essence letter). Defendants contend that plaintiff was not ready to close.

Defendants argue that the June 15, 2020 time of the essence letter and the July 15, 2020 closing date were unreasonable and unenforceable. They claim that the short extension of the

closing date was not a reasonable time to make the physical alterations, to obtain DOB signoffs, and to remove a tenant. Defendants assert that considering what had to be done, the 60-day extensions of time already provided in the contract justify the Court's dismissal of this case. Defendants also argue that plaintiff is not registered to do business in New York and, therefore, its complaint must be dismissed.

In opposition to the motion to dismiss, plaintiff emphasizes that the contract was dated months prior to the pandemic. It also alleges that on the closing date, Rosenberg realized that the Condo Board's waiver of its right of first refusal had expired in February 2020. Plaintiff argues that Rosenberg improperly instructed the managing agent for the Condo to back date the waiver confirmation so it would appear that the Condo Board had issued a valid waiver.

Plaintiff argues that it properly held Rosenberg in default based on the failure to comply with legal requirements concerning the construction, the failure to tender a valid Condo Board waiver of the right of first refusal and the failure to provide documentation of compliance with the Condo's alteration rules. Plaintiff also points out that Rosenberg failed to transfer title to the storage unit to plaintiff. Plaintiff stresses that the contract does not contain a force majeure clause. Based on these reasons, plaintiff argues that the motion should be denied.

With respect to the jurisdictional defect, plaintiff argues that a foreign corporation's investment in New York property does not constitute doing business in the state. It also claims that defendants did not submit any evidence that plaintiff has an office or anything to suggest that it is doing business in New York. Plaintiff also argues that it is entitled to remedy this alleged defect and it registered to do business in New York during the pendency of this action and it has now done so.

Plaintiff filed an amended complaint after the filing of the instant motion to dismiss (NYSCEF Doc. No. 17).

In reply, defendants argue that the instant motion is not moot because the essential facts alleged by plaintiff are the same—a 29-day time of the essence notice that was unreasonable. Defendants acknowledge that there was a subsequent proposed closing date in September 2020 as part of defendants’ efforts to get plaintiff to reconsider its assertion that defendants had defaulted. But they emphasize that an invalid time of the essence clause imposes no obligation on defendants. Defendants maintain that the re-listing of the unit is not inconsistent with its motion or with the assertion that plaintiff could reaffirm the contract. They also insist that they are not arguing that the contract should be ignored based on a theory of force majeure or frustration of purpose. Rather, defendants argue that the unreasonableness of the time of the essence letter requires dismissal.

Discussion

A Court considering a motion to dismiss for failure to state a cause of action “must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint” (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

As an initial matter, the Court will consider the motion even though plaintiff amended its complaint as plaintiff did not argue that the instant motion is moot.

“What constitutes a reasonable time to close depends on the facts and circumstances of the particular case. Among the factors to be considered are the nature and object of the contract,

the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of hardship or prejudice to either one, as well as the specific number of days provided for the performance. Reasonableness in this case turns on whether the post-notice time period provided a reasonable time period in which to close” (*Miller v Almquist*, 241 AD2d 181, 185, 671 NYS2d 746 [1st Dept 1998] [internal quotations and citations omitted]).

The Court finds that it cannot make such a determination at the motion to dismiss stage. It cannot rule based on the pleadings alone whether the 29-day period was unreasonable. Plaintiff contends that calling a default was justifiable and points to the waiver issue (whether Rosenberg properly procured a timely waiver by the Condo Board) and the fact that the storage unit was not transferred to plaintiff as required in the contract.

As plaintiff points out, the contract was signed in January 2020, seven months before the closing date. While the unanticipated pandemic certainly may have delayed construction, there can be no reasonableness finding until more is known, such as what had already been completed by the date the time of the essence letter was sent and what the parties knew about the status of the contract. Therefore, discovery is necessary.

Oddly, defendants want it both ways. On one hand, they claim that they were prepared to close on July 15, 2020. On the other hand, they argue that the closing date was too soon. Certainly, parties may advance arguments in the alternative but the dissonance between these two positions only highlights the insufficient basis for their motion. If defendants were ready to close, then it would not matter how much time plaintiff provided in the time of the essence letter. Simply put, if defendants were ready to close in accordance with the contract, then there would have been a closing and this lawsuit would never have happened.

With respect to the corporate standing issue, plaintiff was entitled to remedy the purported defect (its lack of a certificate to do business in New York) after the commencement of the action (*Basile v Mulholland*, 73 AD3d 597, 899 NYS2d 851 (Mem) [1st Dept 2010]). And although plaintiff did not move to change the caption to reflect the name change, the Court will amend the caption to reflect this change.

Summary

This dispute is whether defendants breached an agreement to sell an apartment and whether plaintiff is entitled to the return of its deposit and related damages. The parties offer wildly disparate versions of why the agreement was never finalized. At the pleadings stage, the Court is unable to make conclusive findings of fact—as defendants argue—that the June 2020 time of the essence letter was unreasonable as a matter of law. Plaintiff presents various bases upon which it believes Rosenberg defaulted, including two issues that have nothing to do with the pandemic. The condo waiver issue and the storage unit are not contractual obligations that appear, on their face, to be unreasonable to accomplish within 29 days.

It may be that discovery reveals that plaintiff's demands were unreasonable under the circumstances and that it cannot recover against defendants. But plaintiff has clearly stated causes of action against defendants and defendants did not submit documentary evidence sufficient to dismiss this case.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is denied, defendants are directed to answer pursuant to the CPLR and the parties are directed to appear for a preliminary conference on February 18, 2021; and it is further

ORDERED that the caption be amended to reflect the substitution of plaintiff with 2020

JDA Corp., and the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
2020 JDA CORP.,

Plaintiff,

v.

SCOTT ROSENBERG as Trustee of the Scott
Rosenberg Living Trust dated 6/25/2007, and
NOEL BLAIR, ESQ., as Escrowee

Defendant(s).

-----X

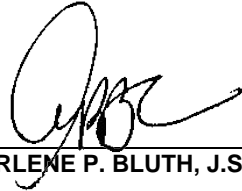
and it is further

ORDERED that counsel for plaintiff shall electronically serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being substituted pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)).

The parties are encouraged to e-file a preliminary conference order for the Court's approval prior to the scheduled conference.

Preliminary Conference: 2/18/21 at 10:00 AM.

10/28/2020 DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE