To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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PETER CHERNOFF,

Plaintiff,

Index No. 68819/2016

– against –

WESTCHESTER DEVELOPMENT CORP. and LUIS MEDINA,

DECISION AFTER TRIAL

Defendants.

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Factual and Procedural Background

Plaintiff, as buyer, contracted to purchase from the defendants, as sellers, three parcels of real property located at 28 Croton Ave., Ossining, New York, 29 Croton Ave., and 31 Croton Ave. in Ossining, for a total of $850,000. The properties were offered in one listing.

The parties executed three separate contracts as follows: (1) 28 Croton, a vacant lot used as a parking lot for $250,000; (2) 29 Croton, a mixed-use building with a storefront and three rental apartment units for $300,000; and (3) 31 Croton, a mixed-use building with an office and two rental apartment units for a contract price of $300,000.

A closing was originally scheduled for October 10, 2016. After the closing did not take place on the initial date, defendants' attorney issued a *time of the essence* letter to plaintiff's attorney, dated November 10, 2016. The letter scheduled a closing for December 12, 2016 and identified all three properties. The closing did not take place on the rescheduled date.

As a result, plaintiff buyer commenced this action for specific performance against the defendants. A non-jury trial took place before this Court on December 16, 2019. The following relevant testimony was elicited:

Trial Testimony

The plaintiff, Peter Chernoff, testified that he found the properties in spring 2016 through an online listing (TR: 22-23). Bill Schunk, as broker and hard money lender, represented it as a package deal because there was a cross-collateralized mortgage on the three properties (TR: 23). Chernoff testified that 29 Croton Avenue was a commercial building with apartments. 31 Croton Avenue was office space and apartments, and 28

Croton Avenue was a parking lot (TR: 24-25). The parking lot was for the buildings (TR: 42). Chernoff offered $850,000.00 for all three properties and testified that the contract prices were merely arbitrary numbers. He entered into three contracts in July 2016 and paid an $85,000.00 down payment. His attorney ordered title insurance thereafter (TR: 27, 36).

Chernoff testified that he had an equity partner, Mark Rosenzweig, who owned many buildings with him in equal proportions (TR: 20-22). In prior deals, Chernoff would inform Rosenzweig of the closing date and Rosenzweig would wire the money to Chernoff (TR 35-36). Though they did not have written agreements or memoranda, they would use or create LLCs and had a custom of signing an agreement promissory note at the time of each deal (TR: 51-52, 54).

According to Chernoff, the closing was scheduled for October 10, 2016, however, it did not go forward because there were violations on the properties. Chernoff claimed that he did not attend the adjourned closing scheduled for December 12, 2016, because the contract was not honored, there was no closing preparation, and there were no preclosing discussions (TR: 34-35, 40). At that time, Chernoff did not have the funds to pay for the properties, though Rosenzweig did (TR: 43). Chernoff also did not formally apply for bank financing (TR: 44). At the time of trial, Chernoff testified that he was willing to close, especially once a title report was completed (TR: 36-37).

Chernoff testified that the 29 and 31 Croton Avenue properties both had violations for lack of backflow prevention devices to prevent sewage from backing up into the water supply (TR: 28-29). The defendant offered to fix the violations after the closing, which Chernoff rejected, considering it a bad business practice (TR: 28, 31). Chernoff requested a $17,000.00 price reduction to cover the engineer, device, plumber installation, and potentially an electrician (TR: 29-30, 47). As of November 22, 2016, Chernoff did not know that the County approved the plan for one of the devices for one of the buildings (31 Croton) (TR: 50). By December 12, 2016, the violations were not cured, and the plans for the other building had not been approved by the County (TR: 33).

According to Chernoff, neither party discussed going forward with closing only on the 28 Croton Avenue parking lot and he could not contact Schunk to inquire if one property could be released from cross-collateralization as he was instructed by the defendant not to speak to him any longer (TR: 40-41).

Chernoff also noted that the certificate of occupancy was incorrect, however, this was cleared up prior to a potential closing date of November 29, 2016 (TR: 45). Chernoff questioned the "voracity" of the seller after discovering the certificate of occupancy issue and wanted no further contact with him after the closing (TR: 55-56). Though the contracts require the purchaser to order title promptly, Chernoff waited until September after the certificate of occupancy issues was cleared (TR: 57-58).

The defendant called Thomas McGarrity, Esq. as a witness. McGarrity was retained by the defendant, Luis Medina, to prepare the contracts and attend the closing. McGarrity attended the December 12, 2016 closing with Medina and Bill Schunk. Chernoff was not present despite a demand for his appearance (TR: 69-71). McGarrity testified that defendants were ready to proceed and referred to the deeds prepared in October

2016 and marked at trial as exhibits J, K, and L (TR: 73). McGarrity testified that he also had payoff letters to Chase and that a mortgage satisfaction and schedule A would be prepared by the title company as part of the title report (TR: 74-76, 82).

McGarrity testified it was not his job to contact the title company, which had not shown up to closing, and he was unaware if Chernoff had contacted the title company (TR: 78).

McGarrity also claimed he prepared adjustments before the closing in November and then would adjust accordingly (TR: 85-87). He did not recall how Chernoff was going to fund the purchase, though he never heard of Rosenzweig (TR: 88-89, 91). Finally, he did not have a payoff letter from Schunk and would have held a discussion at closing to confirm Schunk's calculations (TR: 92).

William "Bill" Schunk, a licensed real estate broker and private lender, testified that he lent money to the defendant and listed the properties for sale (TR: 94-95). He testified that although there was an issue with the certificate of occupancy, the owner could get a predate letter stating the property was preexisting and nonconforming (TR: 97).

Schunk characterized the down payment as three separate deposits, each ten percent of the contract amount, and said that he was aware of municipal violations on the buildings at the time the contract was signed (TR: 98). Schunk picked up the mail at the property on a monthly basis and recalled receiving a notice to go to court for failure to install a backflow prevention device (TR: 123). Schunk testified that he did not officially recognize the devices were a violation and advised Chernoff about the need to retrofit (TR: 126-27). Schunk testified

> What I know is that when we enter into contracts, the buyers order title reports, and when they order the title reports, they get a CO report and they get violations, and if and when there are violations, then to whatever extent I need to be involved to correct those violations, I do . . . There [were] many conversations with Peter and myself about these violations in an effort to resolve how they would be dealt with. It wasn't as if we were trying - - or I was trying to pull the wool over his eyes and let this transaction happen without his knowledge. That didn't occur. He knew (TR: 130).

Schunk testified that Chernoff was a diligent purchaser and went to the building department multiple times so he was aware of the violations (TR: 130-31). Schunk testified that the process of getting the backflow devices began in May 2016 before the contracts were signed (TR: 107). He paid about $7,000.00 for the plumbing work and attended the December 12, 2016 closing as both the broker expecting commission and as a mortgage lender expecting to be paid in full (TR: 109-110). Schunk said he knew the buyer was aware of the issues because "that's when this whole thing fell apart" (TR: 112).

Defendants' Exhibit F, dated May 2016 and revised August 10, 2016, showed plans were resubmitted many times. (TR: 117-18). Schunk testified that he worked with an architect who drew plans for village approval, which were sent back and resubmitted

at least twice and took about a year and a half to get both village and county approval (TR: 100). Schunk found and paid a plumber for the installation of the devices (TR: 101-02). Defendants' Exhibits N and O were admitted establishing that the Westchester County Department of Health allowed the backflow installations to go forward on both properties (TR: 103-04, 107). Medina received a final approval for the backflow device in March 2018 (TR: 135).

Post-Trial Submissions

At the conclusion of trial, this Court directed both parties to submit memoranda of law.

Plaintiff asserts that the three properties were sold under one listing and he did not object to executing three separate contracts which all provided for an "on or about closing date of October 10, 2016." Plaintiff argues that the defendants' "time is of the essence" letter was untimely and a nullity due to the plumbing violations. Plaintiff argues that only one letter was issued, on November 10, 2016, pertaining to all three properties, despite two of them having municipal violations in defiance of Paragraph 10 of the contracts, which required properties to be conveyed free of violations at closing. The letter requested a time of the essence closing on December 12, 2016 however, initial testing of the fixing of the backflow device was not completed until March 2, 2018. Plaintiff argues that before the closing could take place, the defendants were obligated to fix the backflow issue which constitutes violations of record.

Further, plaintiff argues that the seller made no attempt to communicate a willingness to transfer only the vacant parking lot. Both parties intended to sell or buy three properties. Plaintiff argues that he was ready, willing and able to close on the properties pursuant to the terms of the contracts, subject to an updated title search and tax continuation as soon as violations of record were cleared. This was not done as indicated until March 2, 2018.

Defendants argue that plaintiff did not prove he was able to close and therefore failed to prove his prima facie case. Defendants argue that Chernoff did not have cash or liquid assets, that the purchase was not mortgage contingent, that he was unsuccessful in financing inquiries, and that nothing was signed by the partner he purported to have. Additionally, there was no proof that Rosenzweig agreed to this project.

Defendants argue that the contracts are separate agreements with different subject matters and fully divisible. None of the contracts provided that the sale of one parcel was conditioned on that of another and, therefore, they are separate and there was no impediment to closing on 28 Croton Avenue on December 12, 2016 while the backflow issue with the other property was resolved.

Defendants further argue that the backflow violations did not prevent closing because plans were filed, fees were paid, and only the final approval and installation remained outstanding. Additionally, Schunk offered to put $7,000.00 in escrow to complete installation, but Chernoff wanted a $17,000.00 price reduction to pay his own workers to complete it, as well as to duplicate the engineering process. Despite the violations, there was no interruption in use and occupancy and there was nothing more

than a fine. Additionally, paragraph 20 provided the seller can use the cash balance of the purchase price to pay or discharge liens and encumbrances.

Discussion

To be entitled to specific performance of a contract for the sale of real property, the plaintiff must establish that it substantially performed its contractual obligations and is ready, willing, and able to perform its remaining obligations, that defendant is able to convey the property, and that there is no adequate remedy at law (*Breskin v Moronto*, 172 AD3d 1296, 1297 [2d Dept 2019]; *Finkelstein v Lynda*, 166 AD3d 948, 949 [2d Dept 2018]; *EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]).

Based upon the testimony and the evidence adduced at trial, the Court finds that plaintiff demonstrated entitlement to specific performance of the contract. The evidence demonstrates that plaintiff complied with his obligations under the contract and is ready, willing, and able to purchase the property.

The Court also finds that the contracts signed for the purchase of the properties are not divisible. While defendants attempt to portray the sale as three separate transactions, this argument is belied by the evidence. The properties were offered in one listing and the defendants' attorney issued one 'time of the essence' letter identifying all three properties.

Moreover, there is no evidence to support defendants' contention that the plaintiff is in breach for failing to close on the vacant lot on December 12, 2016, which did not have a backflow requirement. "[F]or time to be made the essence of a contract of sale, where time was not made of the essence in the original contract itself, there must be a clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act" (*Zev v Merman*, 134 AD2d 555, 557 [2d Dept 1987]). The letter from defendants dated November 10, 2016 was not clear, distinct, and unequivocal that the sellers intended to close on the vacant lot which did not have any open violations. The letter evidenced one transaction affecting all three properties and all violations of record had not been cleared on the properties as of the proposed closing date. Inasmuch as there were plumbing violations on two of the three parcels, the Court finds that the sellers breached the contract and were not able to close on December 12, 2016, the date set by the sellers.

The defendants argue that the failure to cure the backflow prevention as of the date of the "time of the essence" closing on December 12, 2016, was not a legal reason for plaintiff to refuse to close. The defendants contend that the violation was curable within a reasonable time and therefore, the plaintiff was obligated to tender performance and permit the sellers an opportunity to cure (*see Hegner v. Reed*, 2 AD3d 683 [2d Dept 2003]). The Court is not persuaded. While defendants argue that the violations could have been cured within a reasonable time it is undisputed that the plans and specifications for the backflow prevention device for 31 Croton were not actually approved by Westchester County until January 22, 2018 and the repairs completed by March 2, 2018 15 months after the demanded closing date of December 12, 2016.

Conclusion

Accordingly, the Court finds that the plaintiffs are entitled to specific performance of the contract and the sellers shall convey all properties to the plaintiff pursuant to the terms of the contracts of sale signed July 2016.

Dated: White Plains, New York
June 16, 2020

HON. WILLIAM J. GIACOMO, J.S.C.