Okere v Brois
2021 NY Slip Op 32011(U)
June 22, 2021
Supreme Court, Westchester County
Docket Number: 62735/2018
Judge: Terry Jane Ruderman
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To commence the statutory time 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
---x
HENRY C. OKERE and KAREN PORTER,

Plaintiffs,

-against-

Index No. 62735/2018

THEODORE BROIS and HELENE BROIS,

TRIAL DECISION

Defendants.
---x
RUDERMAN, J.

Upon the trial conducted in this matter on May 17, 2021[1] and the post-trial memoranda submitted by counsel on June 14, 2021, this Court decides as follows:

Defendants Theodore Brois and Helene Brois authorized Concierge Auction, LLC, to conduct an auction of their property located at 3 Tallwoods Road in Armonk, New York, by an agreement dated May 21, 2018. The Auction Marketing Agreement provided that the auction "shall be conducted without reserve" and that defendants, as sellers, "shall be obligated to sell the [property] to the highest bidder." That agreement included a provision giving the sellers the right to cancel the auction, by written notice of cancellation and certain payments, which right expired

[1] On the date scheduled for trial, the parties agreed that the submitted documents established the facts, except for a small amount of testimony by plaintiff Okere and some discussion on the record on the issue of damages. It was therefore agreed on the record that no further testimony, and no cross-examination, was necessary, and that the Court could decide this matter based on the evidentiary submissions uploaded to NYSCEF, upon additional submission by counsel of post-trial memoranda (and one short agreed-upon affidavit providing information regarding the real estate taxes and hazard insurance premiums on the property). To the extent further new evidentiary materials were submitted in addition to those post-trial memoranda, those materials are improper, and they have not been considered in deciding this matter.

at 12:00 p.m. on the day of the auction. Defendants pre-executed a contract of sale for the property on June 26, 2018. They also signed a document entitled an Auction Sale Acknowledgment on June 26, 2018, acknowledging that the highest opening bid was $1,500,000.

On June 28, 2018, plaintiffs Henry C. Okere and Karen Porter registered to participate in the auction, executing and submitting the required bidding documents, and wiring the sum of $100,000.00 as a bidding deposit to Boston National Title Agency, as Concierge required. At the time of the auction on June 29, 2018, the bid submitted by plaintiffs was declared the winning bid, at $1,605,000.00. In the days that followed, plaintiffs wired the remainder of the contractual down payment and the auctioneer's fee, and on July 2, 2018, they executed the contract of sale, which was forwarded to defendants' attorney on the same date.

However, defendants took the position that they had revoked their offer before an enforceable contract existed. Helene Brois claims to have expressed to Concierge her desire to cancel or revoke defendants' agreement to sell the property in accordance with their agreement. She asserts that she telephoned Concierge on Friday, June 29, 2018, to state that she wanted to revoke her offer, and that she sent text messages the next day, Saturday, June 30, 2018; emails were also sent by Erik Kukk, Esq. to Concierge's representatives on July 2, 2018, to the same effect.

The sale contract had provided for a closing date of July 27, 2018. When that date passed, on July 30, 2018, counsel for plaintiffs sent a letter to defendants directly, declaring time of the essence, and setting a new closing date of August 15, 2018. That letter was sent to defendants themselves rather than to counsel because defendants' attorney had suffered a heart attack and was unable to further represent defendants at that time, and defendants had not

provided the name of a new attorney. On August 2, 2018, plaintiffs turned over the sum remaining due on the contract, $1,475,000.00 to their attorney to be held in escrow.

By letter dated August 9, 2018, new counsel for defendants responded to the Time of the Essence Letter, taking the position that the Time of the Essence letter was defective, and further, that there was no enforceable contract of sale.

Discussion

The parties entered into an enforceable contract.

The Court rejects defendants' contention that no enforceable contract could have come into existence unless and until the plaintiffs countersigned the contract of sale and delivered it to defendants, or their counsel, prior to defendants' revocation of their offer to sell. In the context of this sale of real property by auction, without reserve, where defendants pre-signed a contract of sale containing all the necessary terms, with the final sale price to be inserted, an enforceable contract was formed when the hammer came down at the time of the auction.

The formation of an enforceable contract was not impacted by defendants' post-auction communications with Concierge. Defendants failed to establish their claim that they validly revoked the auction contract, their offer to sell or the signed contract of sale. Helene Brois's assertion that she communicated to Concierge her desire to cancel or revoke defendants' agreement to sell the property fails to provide defendants with any basis for relief. To the extent she asserts that contacted Concierge by telephone on Friday, June 29, 2018, to state that she wanted to revoke her offer, she does not pinpoint the time when she made such a call; by referring in her affidavit to the period of time "after the attempted auction," she appears to indicate that it was after noon. In any event, even a timely communication by telephone would

not have sufficed to revoke defendants' offer, since any effective revocation was required to be in writing, as well as being made before noon on the auction date. The text messages Helene Brois sent the next day, Saturday, June 30, 2018 were also ineffective, as were emails sent by Erik Kukk, Esq. to Concierge's representatives on July 2, 2018 to the same effect. None of those asserted or proved communications could have properly, timely or validly revoked or withdrawn defendants' offer to sell.

Plaintiffs' rights to enforce the fully-executed contract of sale arose upon the acceptance of their bid, without reference to the post-auction communications between Concierge Auction and defendants. Moreover, it is immaterial whether or when Concierge sent a fully-executed contract to defendants; that signed contract existed, and was enforceable, before a copy was forwarded to defendants.

Plaintiffs properly declared time of the essence.

Counsel's letter dated July 30, 2018 properly declared time of the essence. Initially, it was appropriate to mail the letter directly to defendants, given the heart attack suffered by the attorney who had represented defendants. There is no question that defendants received and understood the import of the letter, which is confirmed by the response sent on August 9, 2018 by their new attorney.

It was also proper to set the closing date for August 15, 2018. Where a contract for the sale of real property does not provide that time is of the essence, both the vendor and the purchaser are entitled to a reasonable adjournment beyond the closing date to perform the contract" (*Levine v Sarbello*, 112 AD2d 197, 199-200 [2d Dept 1985], citing 62 NY Jur, Vendor and Purchaser, § 37; 1 Warren's Weed, New York Real Property, Adjournments §§ 2.01, 2.05

[4th ed]; *Willard v Mercer*, 58 NY2d 840 [1983]). "What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case" (*Zev v Merman*, 73 NY2d 781, 783 [1988]). "Included within a court's determination of reasonableness 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 prejudice or hardship to either one, as well as the specific number of days provided for performance" (id. at 783). "Where the facts are undisputed, what is a reasonable time becomes a question of law" (*Hegeman v Bedford*, 5 AD3d 632, 632 [Dept 2004]).

There was nothing unreasonable about the sixteen days notice given here. Eighteen days notice was considered reasonable in *EC, L.L.C. v Eaglecrest Manufactured Home Park, Inc.* (275 AD2d 898 [4th Dept 2000]); fifteen days notice was held to be reasonable in *Sohayegh v Oberlander* (155 AD2d 436 [2d Dept 1989]); and five days' notice was considered reasonable in *Guippone v Gaias*, 13 AD3d 339 [2d Dept 2004]). While a short period may be treated as unreasonable if the opposing party provides a valid reason for needing more time (*see e.g.. Rodrigues NBA, LLC v Allied XV, LLC*, 164 AD3d 1388, 1389 [2d Dept 2018]), when no valid objection is made to a "time of the essence" re-scheduling of the closing, the other side may be considered to have acquiesced (*see Westreich v Bosler*, 106 AD3d 569 [1st Dept 2013]). Here, not only did defendants fail to express a viable need for additional time before closing, but there was no greater amount of time within which defendants would have been ready and willing to close. Rather, the protests contained in the responsive letter by defendants' present counsel, dated August 9, 2018, did not involve an insufficiency in the time provided.

Nor did the August 9, 2018 letter by defendants' attorney state any other valid grounds for

declining to close. Its vague assertion that the letter was defective failed to establish any such grounds, and its denial of the existence of a contract between the parties was erroneous.

Plaintiffs have sufficiently established that they substantially performed their own contractual obligations and were ready, willing and able to fulfill their remaining obligations on August 15, 2018 at 10:00 a.m., the date and time set for closing (*see Alba v Kaufmann*, 27 AD3d 816, 818 [3d Dept 2006], citing *EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]). Plaintiffs also established defendants' anticipatory breach, based on their refusal to accept the existence of the contract and their rejection of plaintiffs' proposal to close on the scheduled time-of-the-essence date. Under such circumstances, plaintiffs had no obligation to prove via documents defendants' failure to appear at the scheduled closing.

Damages

As to the appropriate award of damages, "the equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d at 52).

A particular difficulty is presented here in addressing damages, arising out of the two mortgages on the property. The sale proceeds would have been sufficient to fully pay off those mortgages on the contract's sale date – $ 921,341.38 on the first mortgage and $501,670.77 on the HELOC – but defendants defaulted in payment of those two mortgages at around the time they breached the sale contract, and the sums now due to satisfy the liens and convey clear title to the property significantly exceed the sale price provided for in the parties' contract. There can be no question that the bank has the right to have the liens paid off in their entirety at the time of the closing on the sale of the property. This Court may not issue an order that "would violate the

rights of a third party whose interest in the equity is superior to [plaintiffs']" (*see Strategic Value Master Fund, Ltd. v Cargill Fin. Servs., Corp.*, 421 F Supp 2d 741, 760 [SD NY 2006], *affd* 811 F2d 127 [2d Cir 1987] [per curiam], citing *Joneil Fifth Ave. Ltd. v Ebeling & Reuss Co.*, 458 F Supp 1197, 1200 [SD NY 1978], citing Restatement of Contracts § 368). Therefore, any resolution of this action must simultaneously provide that plaintiffs are entitled to take title to the subject property from defendants for the contract price of $1,650.000.00, and that the bank is entitled to have its liens fully satisfied at the closing on that sale. Furthermore, defendants are the only parties who are liable to the bank for the amounts due on the mortgages in excess of the contract price.

To formulate a resolution of this dispute, the Court looks to *Green Point Sav. Bank v Litas Investing Co.* (124 AD2d 555, 557 [2d Dept 1986]). There, the Second Department awarded the plaintiff-buyer specific performance although the seller claimed to be unable to convey clear title at the scheduled closing, as a result of additional encumbrances on the property in an amount that exceeded the sale price, due to the seller's own business dealings post-contract. The Court there reasoned that since the seller had a contractual obligation to discharge the liens and convey clear and marketable title, and because any professed inability to do so was its own doing, specific performance was the appropriate remedy. It directed that the defendant should "rais[e] the money to pay off the second mortgage lien on the premises and convey[] clear title to the plaintiff in accordance with the contract" (*id.* at 557).

Accordingly, plaintiffs are entitled to an award of specific performance of the contract of sale. To the extent that the sale proceeds are insufficient to pay off the mortgage liens, any additional sums that must be paid to the bank to fully satisfy the liens are the obligation of

defendants, and defendants must be directed to make such payments. Recognizing the possibility that defendants may profess an inability to satisfy the mortgage liens at the closing, this Court's judgment will include an alternative directive, as suggested by plaintiffs: in the event defendants fail to pay off the mortgage and HELOC at the closing, then, to the extent the sale proceeds do not cover those liens, plaintiffs are entitled, at their option, to pay off the existing mortgages so that they may take the subject property with clear title, and upon so doing, they will be entitled to enter a supplemental money judgment against defendants in this action, in the amount of any such payment necessary to obtain clear title, upon appropriate proof of payment.

This Court is not convinced that any other money judgment is warranted. The claim that plaintiffs suffered losses based on their need to pay rent of $3,200 per month, as well as utilities, and the cost of a storage unit, fails to entitle them to such a judgment. It is noted that they would have paid utilities in any event, that the need for a storage unit was not shown to have arisen out of the failure of the sale contract, and that they would have been responsible for significantly more than those claimed losses in real estate taxes on the property, had they succeeded in obtaining it at the outset.

Plaintiffs' application for an award of attorney's fees is denied. "Generally, attorney's fees may not be awarded absent an agreement between the parties or a statute or court rule authorizing them (*Bloom v Jenasaqua Realty Holding Co.*, 174 AD2d 644, 645 [2d Dept 1991]; *see Matter of A.G. Ship Maintenance v Lezak*, 69 NY2d 1 [1986]). Plaintiffs have not alleged or shown that the agreement contained such a provision.

Settle judgment.

Dated: White Plains, New York
June 22 2021

HON. TERRY JANE RUDERMAN, J.S.C.