

Brooklyn 5511 Mgt. LLC v Hang Feng 5511 LLC

2021 NY Slip Op 32449(U)

November 24, 2021

Supreme Court, Kings County

Docket Number: Index No. 521763/21

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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BROOKLYN 5511 MANAGEMENT LLC

Plaintiffs, Decision and order

- against -

Index No. 521763/21

HANG FENG 5511 LLC,

Defendant, November 24, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3212 seeking summary judgement dismissing the lawsuit and cancelling the Notice of Pendency. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On April 7, 2021 the plaintiff purchaser entered into a contract with defendant seller concerning property located at 5517 7th Avenue in Kings County. The purchase price was \$2,999,000 and the plaintiff made a down payment of \$300,000. A rider to the contract provided that "Seller acknowledges that Purchaser is permitted to assume the Seller's existing underlying mortgage and Seller shall cooperate to facilitate the process. However, if the mortgage is not assumable, purchaser must still proceed to purchase" (see, Rider to Contract, ¶ X). Instead of assuming the mortgage and completing a mortgage application required by the mortgagor, the plaintiff proposed purchasing the defendant's shares of the corporation to assume the mortgage in

that way. The defendant consented, however, upon learning of negative tax consequences in the amount of \$54,750, requested the plaintiff pay that amount to facilitate the transfer of shares. The plaintiff refused and offered \$10,000. A time of the essence letter was sent by the defendant requiring the closing take place on July 30, 2021. On that date the plaintiff failed to appear. The defendant declared the contract breached and entered into another contract to sell the property to someone else. The plaintiff filed a Notice of Pendency and a summons and complaint seeking a return of the down payment or specific performance ordering a closing pursuant to the contract and attorney's fees. The defendant has moved essentially seeking summary judgement dismissing the complaint as well as cancelling the Notice of Pendency on the grounds there are no questions of fact the complaint fails to support the claims asserted. The plaintiff opposes the motion contending there are questions of fact whether the complaint alleges valid claims.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion

may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdarian v. Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

In this case the plaintiff argues there are questions of fact whether the defendant satisfied its obligation to cooperate and facilitate the assumption of the mortgage. Andy Wai Lam To a member of the plaintiff submitted an affidavit wherein he notes that his attorney contacted the mortgagor Cathay Bank who informed him that a new appraisal would be required in order to assume the mortgage. Alternatively, Cathay Bank explained that an appraisal would be waived if the seller would amend its operating agreement whereby the purchaser would assume ownership of the seller entity (see, Affidavit of Mr. To). The seller refused to agree to this transfer unless the purchaser paid the additional increase in taxes the seller would incur and the purchaser refused to pay that amount.

The seller asserts there was no requirement demanding they exchange its shares to enable the purchaser to avoid an appraisal. Rather, they contend they were only required to facilitate the mortgage assumption and there are no questions the seller did not breach that requirement. The purchaser argues that "the defendant had the contractual duty to take whatever steps were necessary to progress this to conclusion, to wit, the assumption of the mortgage and the sale of the property" (see,

Affirmation in Opposition, ¶ 24). Of course, the contract did not require the seller to take "whatever steps" were necessary, rather merely to "cooperate" and to "facilitate" the process. Surely, such duty on the part of the seller did not include incurring any additional expense and surely not an extra \$54,000 in tax liabilities.

However, counsel for the purchaser Ms. Choy asserted that "Cathay Bank acknowledged that the only option of having the underlying loan assumed would be by an Amendment of the existing Operating Agreement and Assignment and Assumption of membership interest between the parties" (see, Affirmation of Lana Choy Esq., ¶ 32). Similarly, Mr. To asserted that "Cathay Bank acknowledged that the only option of having the underlying loan assumed would be by an Amendment of the existing Operating Agreement and Assignment and Assumption of membership interest between the parties" (see, Affirmation of Mr. To, ¶ 22). Thus, there are representations there was no other way in which to effectuate the assumption of the mortgage. To be sure, the seller could not be expected to incur extra tax liabilities, however, that is a matter that could have been resolved between the parties or could have been subject to separate litigation. Indeed, it is curious the parties would frustrate a deal of this nature for approximately \$44,000.

In any event the representations in the name of Cathay Bank

that a standard deed transfer was not an option in this case, although initially such option was available, requires further examination and will inform whether the seller breached the agreement by not consenting to that method of mortgage assumption.


Moreover, although the seller has asserted transferring the stock would have incurred tax liability there is no indication of the tax liability from a deed transfer. Thus, the good faith of the seller is called into question further raising questions of fact.

Consequently, the motion seeking to dismiss the lawsuit and the cancel the Notice of Pendency is denied.

So ordered.

ENTER:

DATED: November 24, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC