SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73
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HERSHY MEISELS,

Plaintiff,

-against-

RONEN MELAMED, FULTON STAR HOLDINGS LLC,

Defendants.
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Index No.: 502760/2020
Motion Date: 10-4-21
Mot. Seq. Nos.: 2

DECISION/ORDER

Upon the following e-filed documents, listed by NYSCEF as item numbers 38-64, the motion is decided as follows:

The plaintiff, HERSHY MEISELS, commenced this action seeking the return of the down payment he tendered to defendant RONEN MELAMED in connection with his purchase of Melamed's 100% interest in defendant FULTON STAR HOLDINGS LLC ("Fulton Star"). Plaintiff now moves for an order pursuant to CPLR 3212 awarding him summary judgment for the relief demanded in the amended complaint and striking the answer and affirmative defenses of defendants; together with such other and further relief as the court deems just and proper.

Background:

Pursuant to a Membership Purchase Agreement ("MPA") entered into in July of 2016, defendant Melamed agreed to sell and plaintiff Meisels agreed to buy all of Melamed's interest in Fulton Star for $2,200,000. Apparently, the only asset of Fulton Star at the time was its rights under an alleged contract of sale to purchase real properly located at 1118 Fulton Street, Brooklyn, NY. In this regard, the MPA provided as follows:

> WHEREAS, the LLC is in contract to purchase the Property located at 1118 Fulton Street, Brooklyn, NY 11216 (the "Property");….

Plaintiff tendered to Melamed a check in the amount of $110,000 upon the execution of the MPA as a down-payment. Paragraph 4 provided that "[t]he balance of $2,100,000 shall be payable at Closing. Assignor shall pay any and all liens attributed to its Membership Interest The balance of was payable at Closing." The Court notes that the down payment and the balance of $2,100,000 add up to $2,210,000, which is $10,000.00 more than the stated purchase price stated in the MPA.

Paragraph 3 of the MPA provided that "The closing of the sale ("Closing") shall take place on or about November 15, 2016 ("The Closing Date") or any time after September 1, 2016 upon 20 days' notice to the assignee." Plaintiff was the assignee.

Paragraph 14 provided: " Notwithstanding anything to the contrary contained herein, Assignee shall not be required to close on the transaction contemplated hereby if the Company does not receive title clear of all liens and encumbrances on or prior to Closing. Apparently, this provision required that Fulton Star was required to have clear title of all liens and encumbrances of the real property located at 1118 Fulton Street, Brooklyn, NY on for before the closing.

By correspondence dated September 21, 2016, Melamed, through counsel, purported to declare time to be of the essence under the MPA for November 1, 2016. Since the plaintiff did not appear at the time is of the essence closing date, defendant Melamed claims he is entitled to keep plaintiff's down payment. Plaintiff contends that Melamed was not ready, willing and able to perform under the MPA on November 1, 2016 and that for this reason, he is entitled to the return of his down payment.

In support this contention, plaintiff submitted a title report for 1118 Fulton Street, Brooklyn, NY. The title report indicates that as of November 1, 2016, the following mortgage encumbered the property:

A. Mortgage made by Sidikat O. Kasumu2001 to Budget Mortgage Bankers, Ltd., in the sum of $231,200.00, dated March 20, 2001 and recorded April 11, 2001 in Liber 5131 Page 722.

> Assignment of Mortgage made by Budget Mortgage Bankers, Ltd. To Homeside Lending, Inc., dated March 20, 2001 and recorded on April 11, 2001 in Reel 5131 Page 1728.
>
> Assignment of Mortgage made by Washington Mutual Bank f/k/a Washington Mutual Bank, FA, successor by merger to Homeside Lending, Inc. to Wells Fargo Bank, NA, dated January 10, 2007 and recorded January 26, 2007 in CRFN 2007000049703.

The title report also reflects that the following liens and judgments were filed against the property:

> Sidewalk lien filed November 27, 1990 as Control No. 000182941-19.
>
> Sidewalk lien filed July 19, 2006 as Control No. 002242376-16, Index No. HWK973.
>
> Lis Pendens filed May 23, 2016 as Index No. 508486/2016. Eleven (11) environmental control board liens found of record against Rowe Inc.

Meisels contends that in light of the above, Melamed was not ready, willing and able to perform under the MPA.

Discussion:

Where a seller seeks to hold a purchaser in breach of a contract, the seller must establish that it was ready, willing and able to perform on the time-of-the-essence closing date, and that the purchaser failed to demonstrate a lawful excuse for its failure to close (*see Martocci v Schneider*, 119 AD3d 746, 748 [2d Dept 2014]. Thus, a seller who declares time to be of the essence must be ready, willing and able to perform as required by the contract on the time-is-of the essence closing date (*see Grace v Nappa*, 46 NY2d 560, 565-566 [1979] (where time was specifically made of the essence, the seller's failure to provide, as required by the contract, a recordable mortgage estoppel certificate, was a material breach excusing purchaser's performance on the closing date and gave the purchaser the right to recover the down payment and reasonable costs of its title search). A seller who is not ready, willing and able to close on the law day cannot retain the down payment (*see Cipriano v Glen Cove Lodge No. 1458*, 1 NY3d 53, 63 [2003] ("Because [the seller] was in material breach of its contractual obligations to [the purchaser], we conclude that [the purchaser] had a lawful excuse for his failure to appear on the

January 28 closing date. The Appellate Division's holding that [the seller] was entitled to retain [the purchaser's] down payment was therefore an error").

It is axiomatic that to succeed on a motion for summary judgment, the moving party must first "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp*., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572, citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see also* CPLR 3212[b]). If the movant makes such a showing, in order to defeat the motion "the burden shift[s] to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). If the movant fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposing papers" (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [internal quotation marks and alterations omitted]). In deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inferences must be drawn in that party's favor (*see McNulty v. City of New York*, 100 N.Y.2d 227, 230, 762 N.Y.S.2d 12, 792 N.E.2d 162; *Boyd v. Rome Realty Leasing Ltd. Partnership*, 21 A.D.3d 920, 921, 801 N.Y.S.2d 340; *Erikson v. J.I.B. Realty Corp.*, 12 A.D.3d 344, 783 N.Y.S.2d 661).

Here, the plaintiff did not demonstrate as a matter of law that the defendants were not ready, willing or able to perform on the time is of the essence closing date. Parenthetically, the MPA only required Fulton Star to have clear title to 1118 Fulton Street, Brooklyn, NY on or before the closing of the MPA. There was no requirement that the closing be scheduled on a day after all liens encumbrances on the property had been cleared. The plaintiff did not demonstrate as a matter of law that the liens encumbrances could not have cleared on the closing date had he performed his obligations under the MPA on the time is of the essence closing day. Plaintiff's failure to establish his entitlement to summary judgment in the first instance requires denial of the motion regardless of the sufficiency of the opposing papers" (*Vega*, supra.).

Accordingly, it is hereby

ORDERED that the motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: December 31, 2021

PETER P. SWEENEY, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020