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

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BENJAMIN LIFSHITZ and REBECCA KASHANIAN,

Plaintiffs,

Decision and order

- against -

Index No. 120/2022

LEVI WILHELM, MORDECHAI GURARY a/k/a MOTTY GURARY, ZALMAN WILHELM, BNOS MENACHEM, INC., JOHN DOES 1-10 and ABC CORPORATIONS 1-10,

July 5, 2022

Defendant,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a preliminary injunction. The defendants have cross-moved seeking to dismiss the lawsuit. Further, motions seeking sanctions were filed. All motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, on June 20, 2016, Levi Wilhelm, the owner of property located at 729 East New York Avenue in Kings County entered into a contract to sell the property to the plaintiff Benjamin Lifshitz. However, the actual date the contract was signed remains unclear. That ambiguity does not affect these motions. The purchase price was $600,000 and the contract required a closing within sixty days. Sometime in 2017 the parties entered into a rider wherein the closing was set for February 15, 2018. On that date there were encumbrances which made closing impossible and therefore the defendant argues that

pursuant to Article 21(b)(i) of the contract the seller defendant cancelled the contract. That article states that "if at the date of Closing Seller is unable to transfer title to Purchaser in accordance with this contract, or Purchaser has other valid grounds for refusing to close, whether by reason of liens, encumbrances or other objections to title or otherwise (herein collectively called "Defects"), other than those subject to which Purchaser is obligated to accept title hereunder or which Purchaser may have waived and other than those which Seller has herein expressly agreed to remove, remedy or discharge and if Purchaser shall be unwilling to waive the same and to close title without abatement of the purchase price, then, except as hereinafter set forth, Seller shall have the right, at Seller's sole election, either to take such action as Seller may deem advisable to remove, remedy, discharge or comply with such Defects or to cancel this contract" (id). In addition, it is alleged that on August 24, 2016 the parties entered into a ninety-nine year lease for the same property for ten dollars for the entire ninety-nine year period.

On February 25, 2022 Wilhelm sold the property to defendant Bnos Menachem Inc., a religious girls school. The plaintiff has moved seeking to enjoin the transfer of the property to Bnos Menachem on the grounds it could not have properly been sold to them and that the plaintiff is either the lawful tenant at the

premises or is awaiting closing to assume ownership. The defendants have moved seeking to dismiss many of the causes of action on the grounds they fail to allege any claims. Further, as noted, motions seeking sanctions have been filed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

Concerning the lease, pursuant to New York Tax Law §1401(e) any lease longer than forty-nine years is considered a 'conveyance' and subject to taxes thereupon (New York Tax Law §1402). Consequently, such lease must be recorded (Real Estate Investment Trusts Handbook, 6:71, Transfer Taxes: Recordation Taxes [2021]). There is no dispute that no such taxes concerning

this lease were ever contemplated and the lease was never recorded. Thus, even if the lease agreement was not a forgery and the defendant fully consented to absurd and perhaps unconscionable lease terms the lease is unenforceable since it did not comply with the above noted tax and recording provisions. Further, the plaintiff's explanation that the lease was executed to secure the plaintiff's investment in repairs to the property does not legally avoid the statutory recording and tax payments that were required. Thus, that explanation does not cure any of the legal infirmities associated with the lease. Moreover, there is no evidence presented at all that Bnos Menachem was aware of the existence of the lease. The complaint does allege Bnos Menachem was aware of the contract entered into between the plaintiff and the defendant, however, that knowledge, even if true, does not obviate the need to record the lease, as noted. Hence, the lease is not a basis upon which the plaintiff may pursue any claims to the premises.

Next, concerning the contract, a contract can be deemed abandoned where one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior (see, EMF General Contracting Corp., v. Bisbee, 6 AD3d 45, 774 NYS2d 39 [1st Dept., 2004]). Thus, the abandonment of a contract can only be accomplished through mutual assent of both parties (Graham v. James, 144 F.3d 229 [2d. Cir. 1998]). The

intent to abandon need not be express and may be inferred from the conduct of the parties, however, such intent must be unequivocal and mutual (Aini v. Sun Taiyang Co., Ltd., 964 F.Supp 762 [S.D.N.Y. 1997]). Further, the breach of the contract or the failure to perform does not constitute abandonment (Carver v. Apple Rubber Products Corp., 163 AD2d 849, 558 NYS2d 379 [4th Dept., 1990]). In this case, despite the passage of time and inactivity, there has been no presentation of an unequivocal intent for both parties to abandon the contract. On the contrary, there are surely questions of fact whether the buyer was simply waiting for the seller to remove the encumbrances prior to closing, and fully expected to close at some point.

The defendant argues that he cancelled the contract pursuant to Article 21(b) of the contract and consequently, such contract was duly rendered void enabling the sale to Bnos Menachem. The plaintiff argues that article did not permit the defendant to unilaterally cancel the contract and sell the property to Bons Menachem.

A careful analysis of Article 21(b)(i) of the contract reveals that it states that if the seller is unable to transfer title or if the buyer has other reasons for refusing to close then the seller may cancel the contract. The article does not provide reasons why the seller is unable to transfer title and only focuses upon the buyer's reasons for refusing to close.

Thus, the article provides reasons the buyer does not wish to close including the existence of any liens or encumbrances, unless the buyer is obligated to accept title anyway or unless there are encumbrances "which the Purchaser may have waived" (id) or unless the seller expressly agreed to remedy such encumbrances. The article continues to state that if the buyer is unwilling to waive the existence of any such encumbrances and does not wish to close without an abatement of the purchase price then the seller has the right to cancel the contract. Thus, while it appears the article expresses two distinct ways in which the seller can cancel the contract, in truth, the two ways are interwoven and no such unilateral authority is granted to the seller to cancel the contract. This is clear upon examination of the actual cancellation procedures found in Article 21(b)(ii) which of necessity must be read in conjunction with Article 21(b)(i). Article 21(b)(ii) governs the procedures that the seller must employ to successfully cancel the contract. It states that "if Seller elects to take action to remove, remedy or comply with such Defects, Seller shall be entitled from time to time, upon Notice to Purchaser, to adjourn the date for Closing hereunder for a period or periods not exceeding 60 days in the aggregate (but not extending beyond the date upon which Purchaser's mortgage commitment, if any, shall expire), and the date for Closing shall be adjourned to a date specified by Seller

not beyond such period. If for any reason whatsoever, Seller shall not have succeeded in removing, remedying or complying with such Defects at the expiration of such adjournment(s), and if Purchaser shall still be unwilling to waive the same and to close title without abatement of the purchase price, then either patty may cancel this contract by Notice to the other given within 10 days after such adjourned date" (id). Thus, this article provides the seller with two options depending on the circumstances. First, if the seller is working to remedy the encumbrances then seller, upon notice to purchaser, may extend the closing date for a maximum period of sixty days. There really is no dispute the seller never informed the buyer of any further adjourn dates or any new closing dates and thus cannot avail itself of this provision. Second, if the seller does not succeed in removing the encumbrances and the buyer is unwilling to waive the defects then any party can cancel the contract by providing ten days notice. Likewise, this option was not properly exercised by the defendant since it necessarily requires the buyer's knowledge and awareness since the buyer's ability to waive the defects without an abatement of the purchase price will obviate the ability on the part of the seller to cancel the contract. Thus, notwithstanding Article 21(b)(i) a unilateral cancellation is not contemplated at all. Indeed, there can be no cancellation of the contract without express notice to the buyer

to afford the buyer the option to close in any event. There is no dispute there was never notice of such cancellation. Moreover, the cancellation notice belatedly sent on March 15, 2022 was a nullity since it was not preceded by the buyer's express ability to waive the defects.

Moreover, there are further questions of fact whether in fact the seller ever cancelled the contract at all. Thus, Mr. Wilhelm admits that he could not close due to the existence of encumbrances (see, Affidavit of Levi Wilhelm, dated March 27, 2022, ¶¶ 6-8) and consequently cancelled the contract pursuant to Article 21(b). However, Mr. Lifshitz has provided affidavits wherein he states that "I consistently reached out to Levi to set a closing date, and Levi consistently responded as if the Contract was still valid and it was just a matter of resolving the mortgage and the earlier title defects" (see, Affidavit of Benjamin Lifshitz, dated May 31, 2022, ¶ 31). Further, Mr. Lifshitz states that "at no point did Levi ever cancel the Contract or request that I close subject to the title defects" (id., at ¶ 32). Moreover, Mr. Lifshitz also stated that at various points during the four year delay he reached out to Mr. Wilhelm who "always had another reason to stall" (see, Affidavit of Benjamin Lifshitz, dated March 15, 2022 ¶ 34). Further, Mr. Lifshitz states that "Wilhelm kept telling me that the IRS tax lien was still unresolved and that until he clears the lien he

would not be unable to close" (id at ¶ 35). Again, Mr. Lifshitz states that toward the end of 2020 he sought to set a closing date and that Mr. Wilhelm asked for more time to resolve the outstanding encumbrances. Specifically, Mr. Lifshitz sates that "we agreed to give him more time to work something out with the bank so that he could sell the Property to us and not take a loss" (id at ¶ 35). Thus, there are clearly questions of fact whether any cancellation ever occurred or if the parties waived the sixty-day maximum adjournment time-frame. Further discovery and perhaps a trial is surely necessary to resolve these factual discrepancies which indeed are the crux of the entire lawsuit. Moreover, as noted, no formal cancellation was ever forwarded to the plaintiff. Thus, the defendant is essentially arguing that there are no questions of fact the contract was duly cancelled, unilaterally, without informing the plaintiff of such cancellation and that therefore the defendant could legally sell the property to Bnos Menachem. However, questions have been presented that legally and factually challenge those contentions. Even if the defendant had the right to cancel the contract, a disputed right considering the plaintiff's contentions, there is no evidence at all the plaintiff was ever made aware of such cancellation. The defendant argues the mere passage of time rendered the contract cancelled and that apparently no notice was required. However, there is no legal principle that supports the

cancellation of a contract by mere inaction or the unexplained passage of time.

Furthermore, the complaint alleges that Bnos Menachem was aware of the existence of this contract (see, Complaint, ¶ 70). In addition, the complaint alleges that shortly after the contract was negotiated and executed Bnos Menachem sought to convince and even threaten the plaintiff to give up its rights under the contract (see, Complaint, ¶ 41-60). While those allegations will, of course, be subject to discovery, the allegations raise questions whether Bnos Menachem can claim they were bona fide purchasers for value enabling them to maintain the property (Fasion v. Lewis, 25 NY3d 220, 10 NYS3d 185 [2015]).

Therefore, based on the foregoing, the motion seeking to dismiss any of the causes of action is denied.

Turning to the motion seeking a preliminary injunction, in relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the

injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). Even if issues of fact exist, the court can still conclude the moving party has demonstrated a likelihood of success on the merits sufficient to grant an injunction (see, Ruiz v. Meloney, 26 AD3d 485, 810 NYS2d 216 [2d Dept., 2006]). Indeed, "the mere existence of an issue of fact will not itself be grounds for the denial of the motion" (Arcamone-Makinano v. Britton Property Inc., 83 AD3d 623, 920 NYS2d 362 [2d Dept., 2011]). This is especially true where the denial of an injunction would disturb the status quo and render the continuation of the lawsuit

ineffectual (Masjid Usman, Inc., v. Beech 140, LLC, 68 AD3d 942, 892 NYS2d 430 [2d Dept., 2009]). Thus, the moving party is not required to present "conclusive proof" of its entitlement to an injunction and "the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (Ying Fung Moy v. Hohi Umeki, 10 AD3d 604, 781 NYS2d 684 [2d Dept., 2004]). Of course, issues of fact will necessarily prevent the issuance of any injunction only where the factual issues "subvert[s] the plaintiff's likelihood of success on the merits in this case to such a degree that it cannot be said that the plaintiff established a clear right to relief" (County of Westchester v. United Water New Rochelle, 32 AD3d 979, 822 NYS2d 287 [2d Dept., 2006]). Thus, the denial of the injunction and thus permitting Bnos Menachem access to the property would render the lawsuit wholly ineffectual. Consequently, the motion seeking an injunction is granted. The property will remain padlocked unless written consent of all parties is provided to the sheriff or upon further order of this court.

Lastly, at this juncture all motions seeking sanctions are denied.

So ordered.

ENTER:

DATED: July 5, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC