

Hodaya Group LLC v Bryan
2022 NY Slip Op 32841(U)
August 22, 2022
Supreme Court, Kings County
Docket Number: Index No. 518604/2017
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

HODAYA GROUP LLC,

Plaintiff,

DECISION/ORDER

- against -

Index No. 518604/2017

**MARIA BRYAN, CHESTER G. BRYAN LAUREL MAY
BRYAN and WESSEL BRYAN,**

Motion Seq. No. 5, 6

Date Submitted: 7/7/2022

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiffs' motion for summary judgment and defendant Wessel Bryan Jr.'s cross motion to dismiss

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>48-63</u>
Notice of Cross Motion Affirmations, Affidavits and Exhibits.....	<u>67-76</u>
Affirmations and Affidavits in Opposition and Exhibits.....	<u>77-81</u>
Reply Affirmations.....	<u>82-84; 85-86</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is an action for specific performance with regard to a property located at 335 Martense Street, Brooklyn, NY (Block 4868 Lot 70). Since the action was commenced in 2017, plaintiff discontinued the action against defendants Chester G. Bryan and Laurel May Bryan [Doc 45], apparently because they could not be served with process. Plaintiff moved for an extension of time to serve them, but did not provide evidence of a diligent search, as is required, so the motion was denied. A year later, plaintiff brought another action against these two defendants, Hodaya Group LLC v Chester G. Bryan and Laurel May Bryan, Ind. 521211/2020. In that action, a motion was made for a default judgment against the two defendants, and to consolidate that action with this one (Mot Seq. #1 in that action). The motion was submitted, according to the court's computer, to the Default Judgement Motion Part and remained undecided on the date this motion was submitted. That action was then transferred to this court, at this court's request, by order dated 8/11/22. The branch of the

motion for consolidation was granted by the undersigned, pursuant to a consolidation order issued on 8/17/22. The branch of the motion for a default judgment order is denied for the same reasons the instant motion is denied, as set forth fully below.

Defendant Wessel Bryan, Jr. filed an answer to the complaint. Defendant Maria Bryan then filed a motion for summary judgment, which was denied (Motion Seq. #1) by order of this court dated October 31, 2019. To be clear, this motion for summary judgment was filed by defendant Maria Bryan, decedent's surviving spouse, and sought summary judgment on the grounds that "that the alleged contract of sale is not binding as all individuals with ownership interests in the real property have not executed same in contravention of General Obligations Law 5-703." The court denied the motion in part because the argument was unclear. One heir can sell his or her partial interest in a parcel of real property, and there is no requirement that every single heir sign such a contract. What counsel seems to have been arguing, when he stated "the contract of sale is invalid, null and void, and not at all binding on the parties thereto . . . in that it was not executed by all parties with ownership interest in the property" was that those who signed the contract could not convey the entire property as they were not all of the heirs. That is true.

The court notes that a foreclosure action is pending against this property, Citibank N.A. v Maria Bryan, et al, Ind. 510854/2022. Plaintiff herein was served with the complaint, as it filed a notice of pendency against the property. The caption in that action states that Maria Bryan is the Administratrix of the Estate of Wessel Bryan, pursuant to order of the Kings County Surrogate's Court, file 2015-4634. The court looked up this file on Web Surrogate [[Web Surrogate \(nycourts.gov\)](http://nycourts.gov)] and learned that Maria Bryan applied for Letters of Administration in 2015, as surviving spouse, and that the decedent's son (from a prior marriage) filed a cross petition for Letters, resulting in a settlement in 2019, with restricted

Letters of Administration issued to Maria Bryan on 5/21/19 which prohibit her from selling the decedent's real property without further order of the Surrogate's Court. It is noted that Wessel Bryan Sr. passed away on February 26, 2007.

The contract of sale is dated February 13, 2016, and is between plaintiff and five people, stated to be the heirs of Wessel Bryan, Sr. However, this action was only brought against four of them, the fifth, Trevor Bryan not having signed the contract. The sale price is listed as \$380,000 and a \$5,000 deposit was paid, which is presumably held in escrow by the seller's attorneys, stated to be Viscardi, Basner & Bigelow, P.C. The closing date is stated (Par 15) to be "30 days from receipt of executed contract by purchaser's attorney" [P15]. No broker is listed. The property has no doubt appreciated since the date of the contract. This action was commenced on September 26, 2017. The case is not as yet on the trial calendar.

The last recorded deed is dated September 4, 1987, and is to Wessel Bryan alone, who is stated thereon to be residing at the subject property. This property is a two-family dwelling. Wessel Bryan, Sr. passed away in 2007, according to his son's affidavit [Doc 69]. He avers that plaintiff is a "predatory purchaser" who approached him to purchase. He did not want to, but most of his siblings and his father's wife signed, so he relented and signed the contract. He states that one of his siblings, Trevor Bryan, is named on the contract as an heir, but he did not sign.

The first of the motions now before the court, filed by plaintiff, seeks summary judgment on its action for specific performance solely against the two defendants who they were able to serve, who both appeared and answered this complaint. The cross motion, filed by Wessel Bryan Jr., seeks an order "pursuant to CPLR §§ 3211(a)(10) [the court should not proceed in the absence of a person who should be a party] and 1003 [nonjoinder

of a party who should be joined], dismissing this action for its failure to join necessary parties to this action.” This is, again, an improper argument. All of the owners of a building are not required to join in a contract of sale, but they can only convey the interests that they have.

Viewing the big picture in this matter, however, and searching the record, the court finds that it must grant Mr. Bryan’s motion. This is in part based on his arguments, and in part based on Maria Bryan’s earlier arguments. While plaintiff could have entered into a valid contract of sale for the purchase of some of the heir’s interests in this building, and then brought a partition action against the remaining heirs,¹ that is not what took place here.

The court finds that the contract of sale is void and unenforceable. By its terms, it was for the sale of the entire property. It specifically provides that no closing was to be scheduled unless and until the purchaser’s attorney received a fully executed contract. He never received a fully executed contract. The fifth heir, Trevor Bryan, never signed the contract. Summary judgment cannot be granted against two of the five heirs solely because the court has jurisdiction over them. As there is no enforceable contract, there cannot be a default judgment on the issue of liability as against the other two heirs.

From the correspondence submitted in the motion papers, it appears that the sellers cancelled the contract back in 2017 and returned the down payment check. Purchaser responded [Doc 25] by sending the check back to sellers’ attorneys and informing them that a suit for specific performance would be brought.

¹ The frequency of such transactions resulted in New York enacting the Uniform Partition of Heirs’ Property Act, RPAPL §993 et seq. to protect heirs from predatory purchasers.

Whatever sum is left in escrow from the \$5,000 down payment should be returned to plaintiff's attorney. The court notes that the buyer's attorney improperly authorized \$600 to be released from the escrowed down payment for the cost of obtaining a power of attorney from Trevor Bryan, in the email at Doc 22. It is not known if part of the down payment was withdrawn.

In a real estate transaction such as a property purchase, the sending of the signed contract by the buyer, along with the down payment check, is considered NY law to be an offer. The offer must be accepted by the signing of the contract by the seller or sellers. Here, the sellers as listed on the contract, all of the persons necessary to convey a one hundred percent interest in the property, never signed the contract and returned it to the purchaser's attorney. It appears the down payment check was never deposited. Therefore, the inescapable conclusion is that the contract was never accepted by the sellers. "To apply the remedy of specific performance, it is necessary that there is a "meeting of the minds" of the parties and that the contract between the parties be complete. Also, there must have been a clear and unequivocal acceptance of the offer without any material qualification or variation." *12 Warren's Weed New York Real Property § 124.13 (2022)*. Apparently, here, despite efforts to "terminate" the contract, which included returning the uncashed down payment check, the purchaser would not acknowledge that its offer had not been accepted and proceeded to bring this action.

The court should have more carefully analyzed the situation when Maria Bryan brought her motion for summary judgment. Nonetheless, it is now clear that there was never an enforceable contract of sale. For this reason, her motion should have been granted, not because there was a party missing from the caption. Further, as Administrator of the Estate, but without permission to sell the property, Maria Bryan must now seek approval from the

Surrogate's Court for any sale. As the property is no doubt worth much more than it was worth in 2016, the passage of time has not caused the estate any prejudice.

Accordingly, plaintiff's motion [Seq. #5] is denied, and defendant Wessel Bryan's [Seq. #6] is granted. The complaint is dismissed.

This constitutes the decision and order of the court.

Dated: August 22, 2022

ENTER:

A handwritten signature in black ink, appearing to be 'DS' or similar initials, written over a horizontal line.

Hon. Debra Silber, J.S.C.