321 W16 Prop. Owner, LLC v 321 W. 16th, LLC
2023 NY Slip Op 33317(U)
September 22, 2023
Supreme Court, New York County
Docket Number: Index No. 656695/2022
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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321 W16 PROPERTY OWNER, LLC, Index No. 656695/2022

Plaintiff

- against - DECISION AND ORDER

321 W. 16TH, LLC, and AXOS BANK,

Defendants

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LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

Plaintiff is a prospective buyer of an apartment building at 321 West 16th Street, New York County. After defendant refused to sell the building on the closing dates pursuant to the parties' contract of sale, plaintiff commenced this action for breach of the contract. Defendant now moves to cancel the notice of pendency that plaintiff filed on the building in 2022. C.P.L.R. § 6514(b). Plaintiff cross-moves for summary judgment on plaintiff's breach of contract claim seeking defendant's specific performance of its contract to sell the building to plaintiff or, alternatively, dismissing defendant's affirmative defenses. C.P.L.R. §§ 3211(b), 3212(b) and (e). The parties agree that, if the court grants plaintiff's cross-motion, defendant's motion will be academic after performance of the contract. Plaintiff also agrees that, in that event, plaintiff

will discontinue its remaining claim for damages. Defendant discontinues its second affirmative defense, plaintiff's failure to state a claim, a superfluous defense; fourth affirmative defense, plaintiff's inadequate service, which defendant has waived, C.P.L.R. § 3211(e); and sixth affirmative defense, the invalidity of plaintiff's declaration that time was of the essence.

Defendant principally claims, in its first affirmative defense, that its performance of the contract of sale is impossible, but indicates only that performance will be costly. To close the sale, defendant must repay the loan from defendant's mortgagee, former defendant Axos Bank, an obligation well known to defendant when it entered the contract of sale and therefore not an intervening or superseding event causing defendant's breach of the contract, as its seventh affirmative defense claims. Because defendant finds it difficult to clear the outstanding mortgage, as defendant must under § 2.5 of the contract of sale, defendant's third and fifth affirmative defenses claim that only plaintiff's alternative remedy, defendant's return of plaintiff's deposit, rather than specific performance, is available.

II. IMPOSSIBILITY OF PERFORMANCE AND FRUSTRATION OF PURPOSE

The doctrine of impossibility excuses performance of a contract by a party only when performance becomes objectively

impossible because the subject of the contract or the party's means of performing has been destroyed. Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900, 902 (1987); Gap, Inc. v. 44-45 Broadway Leasing Co. LLC, 206 A.D.3d 503, 504 (1st Dep't 2022); Valentino U.S.A., Inc. v. 693 Fifth Owner LLC, 203 A.D.3d 480, 480 (1st Dep't 2022). Financial hardship does not qualify as impossibility excusing performance of a contract. Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 68 A.D.3d 562, 562 (1st Dep't 2009).

A blanket mortgage covering multiple properties encumbers defendant's building at 321 West 16th Street and includes (1) a debt service coverage ratio that requires the net operating income of all the properties encumbered to be 125% of the debt serviced under the mortgage and (2) a loan-to-value ceiling that limits the loan balance to 55% of the properties' value. Obviously it is not impossible for defendant to reduce the debt serviced under the mortgage or reduce the loan balance. While it may not be profitable for defendant to reduce this debt, nothing has prohibited defendant from doing so. "[W]here performance is possible, albeit unprofitable, the legal excuse of impossibility is not available." Warner v Kaplan, 71 A.D.3d 1, 5 (1st Dep't 2009).

Nor does the debt service coverage ratio, loan-to-value ceiling, or overall obligation to clear the mortgage frustrate

the contract's purpose. The frustration of purpose defense requires defendant to be completely deprived of the ability to close the sale as contemplated by the contract. Gap, Inc. v. 44-45 Broadway Leasing Co. LLC, 206 A.D.3d at 504; Valentino U.S.A., Inc. v. 693 Fifth Owner LLC, 203 A.D.3d at 480. Although these requirements may render defendant's consummation of the sale more difficult and less profitable, defendant is not totally prevented from closing the sale.

III. PLAINTIFF'S READINESS, WILLINGNESS, AND ABILITY TO CLOSE

Defendant also claims that plaintiff fails to show it was ready, willing, and able to close the sale on the dates set for the closing, April 27, May 4, and June 3, 2022, and remains ready, willing, and able to close. In support of plaintiff's cross-motion, however, its manager attests that as of April 27, 2022, plaintiff had received clearance from plaintiff's lender and thus had met its lender's requirements for a loan, held the balance of the purchase price in its operating account, and therefore was ready, willing, and able to close the sale with no impediments. He also attests to and presents communications between the parties preparatory to the closing that it was scheduled at the office fo the lender's attorney, signaling the lender's commitment to the transaction, which defendant does not dispute.

Notably, after defendant refused to close April 27, 2022,

due to an earlier notice of pendency that the New York City Department of Housing Preservation and Development (HPD) had filed on the building in 2015, on April 29, 2022, plaintiff's attorney asked defendant's attorney to "please let us know if there are any other issues" that impeded the closing. Aff. of David Gleitman, NYSCEF Doc. 36, ¶ 36. On May 1, 2022, defendant's attorney responded that only HPD's notice of pendency still was troubling defendant, even though by then plaintiff had agreed to purchase the building subject to HPD's notice of pendency. That response May 1, 2022, was the time for defendant to notify plaintiff that, in defendant's view, plaintiff was not ready, willing, or able to close the sale. Again, on May 3, 2022, before the scheduled closing May 4, 2022, plaintiff's attorney asked defendant's attorney: "What is the impediment to closing tomorrow . . . ?" Id. ¶ 46. Again, on May 4, 2022, defendant's attorney responded that only HPD's notice of pendency posed a concern to defendant. That response May 4, 2022, was another opportunity for defendant to notify plaintiff that defendant considered plaintiff unready, unwilling, or unable to close the sale.

Defendant presents no contradictory evidence. Although plaintiff did not present documentary evidence to support plaintiff's sworn statements regarding clearance from its lender and the balance of the purchase price in its operating account

until its reply, the court provided defendant repeated second chances to oppose plaintiff's cross-motion and another chance to request a surreply, which defendant declined. The unsworn commitment for a $5,436,000 loan from nonparty New York Community Bank and wire transfer to plaintiff's sole owner and member are inadmissible hearsay in any event, but plaintiff's manager does attest that plaintiff received the commitment and the wire transfer. Plaintiff's affidavits, defendant's acknowledgment of the commitment by plaintiff's lender to the parties' transaction, and defendant's silence as to plaintiff's readiness, willingness, or ability to close the sale when twice asked to specify any such issue, absent contradictory evidence, demonstrate plaintiff was and is ready, willing, and able to perform the contract of sale. Pesa v. Yoma Dev. Group, Inc., 18 N.Y.3d 527, 532 (2012).

IV. SPECIFIC PERFORMANCE

Finally, to obtain specific performance, plaintiff need not show that damages are an inadequate remedy, because § 10.2 of the contract designates specific performance as a remedy for defendant's default at plaintiff's option. See Vector Media, LLC v. Go New York Tours Inc., 187 A.D.3d 531, 532 (1st Dep't 2020); BDC Mgt. Servs., LLC v. Singer, 144 A.D.3d 597, 598 (1st Dep't 2016). Therefore the court dismisses all affirmative defenses that defendant has not already discontinued and grants plaintiff's cross-motion for summary judgment as follows.

C.P.L.R. §§ 3211(b), 3212(b) and (e). Within 60 days after entry of this order, unless the parties agree to another deadline, defendant shall perform all acts necessary to transfer ownership of the apartment building at 321 West 16th Street, New York County, in exchange for the purchase price and any further obligations of plaintiff under the parties' contract of sale. The Clerk shall enter a judgment to that effect. Upon compliance with this order, plaintiff discontinues any remaining claims, C.P.L.R. § 3217, and defendant's motion to cancel the notice of pendency on the real property described above will be moot and therefore is denied.

DATED: September 22, 2023

LUCY BILLINGS, J.S.C.

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