

Dahari v Villafana

2016 NY Slip Op 31859(U)

October 3, 2016

Supreme Court, Kings County

Docket Number: 20219/2013

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Com 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd of October 2016.

P R E S E N T:

HON. SYLVIA G. ASH,
Justice.

-----X

GEORGE DAHARI,

Plaintiff,

- against -

**FRANCISCO VILLAFANA,
2 MORGAN REALTY, LLC and
SIGNATURE BANK,**

Defendants.

-----X

FRANCISCO VILLAFANA,

Third-Party Plaintiff,

- against -

MANUEL TAVERAS, ESQ.,

Third-Party Defendant.

-----X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1 - 3
4 - 5
6

Defendants, 2 Morgan Realty, LLC ("Morgan") and Signature Bank ("Signature"), move pursuant to CPLR § 2221, to reargue this Court's Order, dated April 6, 2016. Plaintiff, George Dahari opposes. Third-Party Defendant, Manuel Taveras ("Taveras"), moves to dismiss the third-

party complaint. Third-Party Plaintiff, Francisco Villafana (“Villafana”) opposes. For the reasons set forth below, Moran’s and Signature’s motions to reargue are granted. After reconsideration, Morgan’s motion for summary judgment is DENIED and Signature’s motion is GRANTED. Taveras’ motion to dismiss the third-party complaint is DENIED.

Background

Plaintiff seeks to invalidate the sale of real property located at 1031 Flushing Avenue, Brooklyn, New York (the “Premises”) and to obtain specific performance. Villafana, the owner of the premises, entered into a lease agreement with Plaintiff on May 13, 2005. Pursuant to the lease, Plaintiff agreed to occupy a commercial space on the premises. Plaintiff and Villafana renewed the lease in May 15, 2010 and included a provision that provided Plaintiff a right of first refusal to purchase the premises.

On January 18, 2013, Villafana decided to sell the premises for \$1,225,000. In facilitating the purchase, Morgan’s assignor, Guinefort Group, LLC, entered into a Contract of Sale with Villafana. In the Contract of Sale, Villafana represented that Plaintiff’s lease did not have a right of first refusal. Further, Villafana agreed to obtain a Tenant Estoppel Certificate (“Certificate”) from Plaintiff prior to closing. Villafana did not obtain the Certificate from Plaintiff, but instead provided Morgan a Certificate that he signed on Plaintiff’s behalf. On August 15, 2013, Villafana and Morgan closed on the Contract of Sale. In purchasing the premises, Morgan obtained a loan and line credit from Signature, secured by two mortgages on the premises.

Plaintiff brought this action on November 15, 2013, as a means of invalidating the Contract of Sale and to obtain specific performance on its right of first refusal. Morgan and Signature moved for summary judgment. Morgan argued that it did not have notice of Plaintiff’s right of first refusal because Plaintiff did not record her lease. Next, Morgan argued that Plaintiff was aware of the Contract of Sale in February 2013 and did not attempt to exercise her right of first refusal until November 15, 2013. Further, Morgan maintained that Plaintiff was not ready, willing and able to purchase the premises, pointing to Plaintiff’s admission of having a net worth no greater than \$133,674.

Signature argued that its mortgages were superior to Plaintiff’s right of first refusal because Plaintiff did not record her lease. According to Signature, prior to the August 2013 closing, it conducted a title search and obtained assurances from Morgan that Plaintiff did not have a right of first refusal. Further, Signature argued that Plaintiff “attorned” or waived her right to object to Morgan’s ownership of the premises because Plaintiff paid rent to Morgan after the closing.

In opposition, Plaintiff argued that Villafana thwarted her efforts to exercise her right of first refusal by various misrepresentations. Further, Plaintiff maintained that her refusal to sign the Certificate should have alerted Morgan and Signature to her rights in the premises. Plaintiff conceded that she lacked the means to purchase the premises on her own. However, Plaintiff claimed that, her cousin, Ruby Cato, agreed to assist her with the necessary funds. By Order dated April 6, 2016, this Court denied Morgan’s and Signature’s motion for summary judgment. Morgan and Signature now move to reargue.

Villafana brought the third-party action against Taveras, his attorney and real estate broker in the transaction concerning the premises. Villafana alleges that Taveras was aware of Plaintiff's right of first refusal. And that despite this knowledge, Taveras wrongly advised him to close on the Contract of Sale with Morgan and Signature. Villafana seeks to recover against Taveras on claims of breach of fiduciary duty, legal malpractice, fraud and contribution. Taveras moves to dismiss the third-party complaint. Taveras argues, among other things, that Villafana violated CPLR § 1007 by not serving all prior pleadings in the action upon him.

Discussion

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR § 2221[d][2]; *see Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]). The determination to grant leave to reargue a motion lies within the sound discretion of the court, however, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided (*Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]). The Court will consider Morgan and Signature's motion to reargue, as a means of clarifying its prior order.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). When deciding a motion for summary judgment, the court's function is to issue findings rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]). Based on the foregoing principles, the Court now reconsiders Morgan and Signature's motions for summary judgment.

Pursuant to Real Property Law § 291, an unrecorded conveyance is void only as against a subsequent good faith purchaser for value. However, the status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest in the property (*Barrett v Littles*, 201 AD2d 444 [2d Dept 1994]. "Actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property, and to all the world of the existence of any right which the person in possession is able to establish" (*see 1426 46 St., LLC v Klein*, 60 AD3d 740, 743 [2d Dept 2009]). Similarly, a mortgagee is under a duty to make an inquiry where it is aware of facts "that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue" (*LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 600 [2d Dept 2007]).

Here, issues of fact exist as to whether Morgan had notice of Plaintiff's right of first refusal because Morgan was aware of Plaintiff's possession of the premises prior to the closing. Further, Morgan failed to obtain a signed Certificate from Plaintiff, as called for by the Contract of Sale

between it and Villafana. Additional questions of fact exist as to whether Plaintiff attempted to exercise her right in a timely manner and whether Plaintiff was ready, willing, and able to purchase the premises. As such, Morgan's motion for summary judgment is DENIED.

As to Signature, the Court finds that Plaintiff's failure to record her lease, Signature's initiation of a title search and Morgan's assurances that Plaintiff did not have a right of first refusal are facts which demonstrate that Signature was unaware that Plaintiff had any rights in the premises. As such, Signature's motion for summary judgment is GRANTED

Turning now to whether the third-party complaint should be dismissed. Under CPLR §1007, a defendant, after serving its answer in the main action, may start a third-party suit against a third-party defendant by serving a third-party summons and complaint, along with all prior pleadings from the main action. An omission with respect to service of all prior pleadings is not a jurisdictional defect, and may be cured under CPLR § 2001 (*see Jackson v. Long Island Lighting Co.*, 59 AD2d 523 [2d Dept 1977]). Here, the alleged defects in service by Villafana are not sufficient to warrant dismissal of the third-party complaint. Therefore, Taveras's motion is denied.

Accordingly, Morgan's and Signature's motions to reargue are granted. After reconsideration, Morgan's motion for summary judgment is DENIED and Signature's motion is GRANTED. Taveras' motion to dismiss the third-party complaint is DENIED.

This constitutes the Decision and Order of the Court.

ENTER,



Sylvia G. Ash, J.S.C.

HON. SYLVIA G. ASH, JSC