

Tilden Dev. Corp. v Nicaj

2007 NY Slip Op 30207(U)

March 8, 2007

Supreme Court, Queens County

Docket Number: 0015305

Judge: Duane A. Hart

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

TILDEN DEVELOPMENT CORP. x Index
Number 15305

2006

- against -

Motion
Date December 13,

2006

MARIA NICAJ, et al. Motion
Cal. Numbers 32 & 33

x

The following papers numbered 1 to 18 read on this motion by defendants Maria Nicaaj and Gjelosh Nicaaj to dismiss the complaint against them, pursuant to CPLR 3211(a)(1), (3) and (7); cross motion by the plaintiff to amend the complaint; and a separate motion by defendants Nicaaj to cancel a notice of pendency.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1-9
Notice of Cross Motion - Affidavits - Exhibits...	10-14
Reply Affidavits.....	15-18

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This action arises from an alleged breach of contract involving the purchase of real property owned by defendants Nicaaj and located at 50-30 208th Street, Block 07384 and Lot 00019, in Queens County. The plaintiff commenced this action seeking the return of a down payment in the amount of \$65,000.00, which is being held in escrow by the defendant Bertram M. Jorisch, defendants Nicaaj's attorney, plus the sum of \$400.00 which the plaintiff allegedly incurred in connection with a title search of the premises.

The defendants move to dismiss the complaint based upon documentary evidence, failure to state a cause of action and lack of capacity to sue because the plaintiff, Tilden Development Corp., does not exist as a legal entity as demonstrated by a

State of New York Department of State certification. The plaintiff cross-moves for leave to amend the complaint in order to correct a so-called misnomer in the name of the plaintiff. According to the plaintiff, the proper name of the plaintiff is Tilden Management Corp. The plaintiff submits an extract of records from the Department of State to demonstrate that Tilden Management Corp. is an active corporation and claims that it is the proper and actual name of the party who contracted to purchase defendant Nicaj's property and the intended plaintiff.

The plaintiff's cross motion to amend the complaint to reflect that the proper name of the plaintiff is Tilden Management Corp. is granted (see Stillman v Kalikow, 31 AD3d 431 [2006]; Cutting Edge, Inc. v Santora, 4 AD3d 867 [2004]).

In light of the foregoing, the defendants' motion to dismiss the complaint is denied as moot.

Finally, the court must vacate the notice of pendency filed by the plaintiff against the defendants' property which is the subject of the underlying contract. "A notice of pendency may be filed in any action ... in which the judgment ... would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). "Because of its drastic impact on the property and the ease with which it can be obtained, a notice of pendency should be applied to only those lawsuits directly affecting the subject property" (Tsiporin v Ziegel, 203 AD2d 451 [1994]; see 5303 Realty Corp. v O & Y Equity Corp., 64 NY2d 313 [1984]). In this case, the notice of pendency was improperly filed. Since the plaintiff's action essentially seeks the return of its down payment and the cost of its title search, the action does not directly affect the property which is the subject of the underlying contract of sale (Tsiporin v Ziegel, 203 AD2d 451, supra; see generally Raimonda v Cahn, 26 AD2d 939 [1966]).

Accordingly, the defendants' motion to cancel the notice of pendency is granted.

The County Clerk of Queens County is directed, upon payment of any fees which may be due and owing, to cancel the notice of pendency filed in this action against the property located at 50-30 208th Street, Queens County, and indexed under Block 07384 and Lot 00019. The Clerk shall enter upon the margin of the record a notice of cancellation referring to this order.

The proposed amended complaint shall be filed and served within twenty (20) days after service of a copy of the order with notice of entry.

Dated: March 8, 2007

J.S.C.