New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.
2024 NY Slip Op 31308(U)
April 10, 2024
Supreme Court, Kings County
Docket Number: Index No. 49320/01
Judge: Lawrence Knipel
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At an IAS Part 57 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 10th day of April, 2024

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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NEW YORK TILE WHOLESALE CORP.,

Plaintiff,

- against -

THOMAS FATATO REALTY CORP., AND GARDEN ESTATES LLC.,

Defendants.
----------X

ORDER

Index No.: 49320/01

Plaintiff sued for specific performance to enforce the right of first refusal of the sale of the subject property. A non-jury trial was held before this Court. In a Decision dated January 19, 2024, this Court found that the evidence supported the claim and specific performance was granted.

The Court signed an Order and Judgment submitted by plaintiff, which, *inter alia*, directed Garden to execute a deed to the subject property, and referred the issue of an accounting to a special referee to hear and report on the net profits of the property.

In this motion (Motion Sequence 57), defendants Thomas Fatato Realty Corp. (TF) and Garden Estates LLC (Garden) move by order to show cause pursuant to CPLR 4404(b), *inter alia*, to set aside the judgment of this Court and to enjoin enforcement of the judgment.

The contract of sale between TF and Garden, dated October 12, 2000 (NYSCEF Doc. 229), provides that the purchase price was $2,295,000, with $190,558.19 due on signing. An allowance was made for an unpaid existing mortgage in the amount of $1,400,000, and for a purchase money mortgage from purchaser to seller for $604,441.90. The balance of $100,000 was due at closing. (The rider to the contract provided that the purchase price was $2,295,000; deposit was $25,000; mortgage was $1,400,000; purchase money mortgage was $770,000; and $100,000 was due at closing.)

The mortgage for $604,441.90 (NYSCEF Doc. 228) provided that it was without interest and was to be paid 30 days after the premises were totally vacated and mortgagor has received notice of same in writing. In the rider to the contract of sale, the seller represented that there was an existing mortgage of approximately $1,400,000, which, at the time of closing, mortgagor would either assume, take subject to the mortgage or seller would take back a purchase money mortgage (Par. R5). Paragraph Six of the judgment submitted by plaintiff provided that the total sum of $2,295,000 should be held in escrow, as well as interest at the annual rate of 9% on $190,558.19 from October 12, 2000, subject to deductions of various taxes or costs.

In this motion, defendants contend that interest on the entire purchase price should be paid from October 12, 2000, not just on the down payment assumed to have been paid. Plaintiff argues that interest is due only on the amount of money actually paid by Garden for the property, and their out of pocket expenses were at best $190,558.19. Garden did not pay anything on the existing mortgage or the purchase money mortgage, and there is no evidence it paid any other amount due at closing.

"It is well established that a purchaser of real property who is awarded specific performance, may also recover damages sustained by him or her as a result of the seller's unreasonable and unwarranted delay in conveying the property (citations omitted). Moreover, the seller, as trustee of the real property for the

benefit of the purchaser, is liable for rents and profits derived from the property during the delay, and the purchaser, as trustee of the purchase money, if not paid, for the benefit of the seller, is liable for interest accruing on the purchase price (citations omitted) (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 196 AD2d 564 [2d Dept 1993][It was error to deny plaintiff damages for rent and profits and to deny the owners an offset for interest on the purchase price]; see also *Feely v Midas Properties*, 221 AD2d 314 [2d Dept 1995]["plaintiffs, having failed to offer to pay interest on the purchase price which they retained from the date of the defendants' default, are not entitled to a credit for rents"]; *4200 Avenue K Realty Corp. v 4200 Realty Co.*, 123 AD2d 419 [2d Dept 1986][the accounting in this case should take into consideration the rents and profits received by the seller, necessary expenditures by sellers for the maintenance and operation of the premises, and the benefit to the purchase by reason of its retention and use of the purchase money]).

Defendants argue that the interest should accrue on the entire purchase price, even the purchase money mortgage and the existing mortgage which, defendants contend, were to be paid after "a few years after the development." Since defendants were directed to account for net profits realized from the property, with interest, plaintiff should be required to pay interest on the entire purchase price.

In addition, the deductions in the Judgment for real property transfer taxes and for any outstanding real estate taxes were improper, since the former were allegedly paid and there were no unpaid real estate taxes. Further, the portion of the Judgment which requires a satisfaction of the purchase money mortgage is improper, since it must first be paid by plaintiff and only then can satisfaction be filed. Similarly the $1,400,00 existing mortgage must be paid by plaintiff. In addition, it is "unclear" which entity has authority to convey the property, Garden, the current owner, or, if the entire transaction is rescinded, TF. Lastly, defendants object to placing the purchase price in escrow. If it is to be held in escrow, defendants should be allowed to a provision that 9% interest continues to accrue.

Plaintiff argues in opposition that defendants had already submitted several letters and emails and, in fact, have already moved once before pursuant to CPLR 4404(b). Defendants, it is urged, have thus violated CPLR 4406 which provides that there shall be only one motion under Article 44 which should present every ground for post-trial relief available.

Further, plaintiff contends, interest is intended to compensate for the loss of use of money, not to provide a windfall. Here, Garden did not lose the use of money aside from the down payment for which the Judgment provides interest shall be paid. The cases cited by defendants, it is argued, do not deal with the issue of interest on unpaid amounts, and do not support defendants' arguments that plaintiff should pay interest on the entire price, even for payments Garden never made. Further, it is argued, it is illogical to contend interest must be paid on the $604,441.90 purchase money mortgage, which by its terms say no interest was due and none was ever paid. Nor should interest be awarded on the $1.4 million mortgage since there were no payments made with respect to it.

In addition, plaintiff contends, despite defendants' statement to the contrary, the Judgment clearly states that Garden should transfer the property. Moreover, the escrow requirement is appropriate and necessary, a satisfaction of the purchase money mortgage should be delivered once plaintiff pays for it, and the deductions for transfer taxes and real estate taxes should be paid as appropriate for the conveyance to plaintiff.

Preliminarily, while this motion (MS 57) is not the first made pursuant to CPLR 4404(b), in the Court's discretion, it is not improper or untimely. Defendants' first motion pursuant to CPLR 4404(b) (MS 55) was directed at the conclusions of the Court in the Decision after trial, such as whether plaintiff was entitled to specific performance and on how much of the property it should take effect. The instant motion

(MS 57) is directed at the Judgment entered once the conclusions of the Court as to specific performance are accepted, such as interest, escrow, etc.

The major issue in this motion is whether interest should be awarded on the entire purchase price or only the down payment. The Judgment submitted by plaintiff and signed by the Court provides that Garden should convey title, so it follows that since it is Garden who, in plaintiff's eyes, must be made whole by plaintiff's payment for the property, interest should be paid for only out or pocket costs. However, by granting plaintiff's request for specific performance, the better analysis is that the transaction between TF and Garden is void, and TF should be the entity to convey the property to plaintiff in a new transaction. TF, as seller, is not obligated to have the same provisions in its contract with plaintiff as it had in its contract with Garden. Thus, notwithstanding that Garden did not have to pay interest on the purchase money mortgage or the existing mortgage, the benefits of those provisions may not have inured to the benefit of plaintiff in its own, new, transaction. Although TF agreed to forego interest payments on the mortgages in its transaction with Garden, it does not have to agree to do so to in its transaction with plaintiff. Without proof that the contract of sale between TF and plaintiff would include all the terms of the contract between TF and Garden, it cannot be said that it would be unfair or inequitable to deprive TF with interest on the entire purchase price which would have been paid by plaintiff had the transaction taken place in 2000.

Accordingly, plaintiff shall pay to TF the purchase price of $2,295,000 with interest on the entire amount from the date of breach, October 12, 2000. Of that amount, $3,000,000 shall be held in escrow pending the accounting of profits due to plaintiff, with interest, and any other adjustments that should be made for transfer taxes or real estate taxes as determined by the Special Referee. Defendant TF shall execute and deliver to plaintiff a deed in accordance with Paragraphs 2 and 3 of the Judgment. TF shall provide a

satisfaction of any mortgage paid off by plaintiff's payment of the purchase price. The provisions of the Judgment not modified by this order shall remain in effect.

Defendants' motion is therefore granted to the extent indicated.

This constitutes the decision and order of this Court.

ENTER,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE