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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Justice

NINA PENINA INC.

-v-

CHIEF I. O. NJOKU

INDEX NO. 16605 1/04

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the annexed Decision and Order

FILED

MAR 25 2005

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/21/05

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 17

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NINA PENINA, INC.,

Plaintiff, Index No. 106051/04

- against -

CHIEF I.O. NJOKU,

Defendant.

----------X

EMILY JANE GOODMAN, J.S.C.:

In this action, Plaintiff seeks specific performance of a real estate contract, involving a property subject to a Community Facility Use Restriction, as defined in the New York City Zoning Code (the "Use Restriction"). By Order to Show Cause, dated June 24, 2004, Defendant (1) moves to dismiss Plaintiff's Verified Complaint on the basis that it fails to state a cause of action for breach of contract and fraud, (2) seeks summary judgment on his counterclaim for a declaration that Plaintiff breached the contract and that therefore, Defendant is entitled to keep the $100,000 down payment, and (3) seeks an Order cancelling a Notice of Pendency filed against the property. Plaintiff opposes the motion.

Background

In 1999, Defendant purchased premises, located at 655 St. Nicholas Avenue, New York, from the City of New York, at a public auction (the "Premises"). The City of New York conveyed title to the Premises, subject to the Use Restriction. The deed to the

Premises provides that the Use Restriction runs with the land and burdens the Premises, in perpetuity, notwithstanding any variance grant or changes to the New York City Zoning Resolutions.

Five years later, Plaintiff entered into a contract of sale, dated March 3, 2004, with 223 Randolph Avenue Associates LLC, for the sale of the Premises, which provided for a closing date of May 17, 2004. A $100,000 down payment was tendered on or about March 4, 2004. The Contract was amended, by an amendment, dated March 8, 2004, (the "Amendment," or collectively, the "Contract") to substitute Chief I.O. Njoku as the seller. The Amendment also added a provision in paragraph 6 thereof, concerning the Use Restriction (the "Use Restriction Provision"). The Use Restriction Provision contains, among other things, a representation that everything above the first floor of the Premises could be used for all R7-2 zoning uses, notwithstanding the Use Restriction.

By a letter dated March 24, 2004, the Department of City Planning informed Plaintiff that residential development is not allowed on the Premises at all, due to the Use Restriction. Consequently, Plaintiff insisted that Defendant undertake to remove the Use Restriction. However, by a letter dated April 14, 2004, Defendant's counsel, Mr. Stoute, attempted to return the deposit and cancel the sale. On April 15th, Plaintiff's counsel returned the check and notified Mr. Stoute that Defendant was still obligated to convey the Premises and "cure the issue."

This action was commenced the next day. Plaintiff essentially maintains that

Defendant misrepresented that the space above the first floor of the Premises could be used for all R7-2 zoning uses, including residential development, notwithstanding the Use Restriction, and, that the portion above the first floor would not be restricted in terms of the rent, resale rights, number of units or subdividing. The Contract was breached, Plaintiff maintains, because Defendant failed to convey the Premises to it free of the Use Restriction.

Discussion

In order to decide this motion, the Court must first interpret the meaning of the Use Restriction Provision. That provision provides:

> Seller represents that to the extent there is a "Community Facility" use Restriction on the premises, the right of ownership of the premises is not limited, and for-profit ownership of the premises and rental by any owner of the premises of the necessary portion for "Community Facility" use is allowed and said rent charges not restricted. Additionally, seller represents that as long as first floor is designated by purchaser for community facility use, purchaser may build out the premises to the usual F.A.R. allowed under R7-2 zoning as if there had not been any restriction hereon, with the first floor being utilized for a Community Facility use **and the rest of the building being utilized for residential use, and all floors above the first floor may be used for residential purposes and are in no way restricted as to use, rents, resale rights, number of units or subdividing,** and the first sentence of this paragraph shall apply to the first floor Community Facility use portion. **In the event any representation in this paragraph is incorrect seller at its own cost and expense shall cure same within a reasonable period and the closing shall be adjourned until same is cured.** Seller represents they are conveying to purchaser all their rights interest and ownership of to the premises, and the premises is zoned R7-2. The aforementioned "Community Facility" use Restriction is in the deed by which Seller took title. Seller represents the premises complies with city regulations for similarly zoned properties which allows construction to max size and use fashion, provided that the community facility use portion has a separate entrance from the residential portion (emphasis added).

According to Plaintiff, the cure language of the Use Restriction Provision unambiguously imposes a duty on Defendant to have the Use Restriction removed or

modified, citing, Meisels v 1295 Union Equities Corp. (306 AD2d 144 [1st Dept 2003] [defendant has a duty to take affirmative action to convey marketable title]), Barnett v Star Mechanical Corp. (171 AD2d 142 [3d Dept 1991] [same]), and Pamerqua Realty Corp. v Dollar Serv. Corp., (93 AD2d 249 [2d Dept 1983] [where the seller warrants and represents that the property is in compliance with zoning laws, and the property is not in compliance, the purchaser is entitled to demand that the seller rectify the defect or return the down payment]).

Defendant, on the other hand, argues that the cure language of the Use Restriction Provision requires him only to "correct his own previous misstatement." Defendant maintains that Plaintiff's remedy is governed by paragraph 21 of the Contract, and that Plaintiff would only be entitled to the return of the down payment and reimbursement of minor miscellaneous expenses.[1]

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[1]Paragraph 21 provides, in relevant part:

> (b) (i) If at the date of the Closing Seller is unable to transfer title to Purchaser in accordance with this contract, or Purchaser has other valid grounds for refusing to close, whether by reasons of liens, encumbrances or other objections to title or otherwise (herein collectively called "Defects"), other than those which Seller has herein expressly agreed to remove, remedy or discharge and if Purchaser shall be unwilling to waive the same and to close title without abatement in the purchase price, then, except as hereinafter set forth, Seller shall have the right, at Seller's sole discretion, either to take such action as Seller may deem advisable to remove, remedy, discharge or comply with such Defects or to cancel this contract; . . .
>
> (c) If this contract is canceled pursuant to its terms, other than as a result of Purchaser's default, this contract shall terminate and come to an end, and neither party shall have any further rights, obligations, or liabilities against or to the other hereunder or otherwise, except that: (i) seller shall promptly refund or cause the Escrowee to refund the Downpayment to Purchaser . . .".

The Court rejects both Plaintiff's and Defendant's interpretations of the cure language of the Use Restriction Provision. A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect (see Joseph v Creek & Pines, Ltd., 217 AD2d 534 [2d Dept 1995] [seller's representation that septic systems would be in good working order was intended to survive the closing; otherwise, the representations would have no force or effect]). Here, under Defendant's interpretation, the representations have no binding effect whatsoever if the cure language merely required Defendant to "correct his own previous misstatement." This interpretation could not have been the reasonable expectations of the parties. Plaintiff's interpretation ignores the fact that the ability to "cure" is outside of Defendant's control, but rather, is within the control of the City of New York-who is not a party to, nor bound by, the Contract. Plaintiff's interpretation leads to a clearly unintended result if the City declines to waive the Use Restriction. Under Plaintiff's interpretation, the closing would be adjourned in perpetuity, until the representations are "cured," which at that point, would be an impossibility.

Where a particular interpretation would lead to an absurd result, the court can reject such a construction in favor of one which would better accord with the reasonable expectations of the parties (see Reape v New York News, Inc., 122 AD2d 29 [2d Dept 1986]). Accordingly, in the event that Use Restriction Provision contains material misrepresentations, the Court reads that provision to require Defendant to use his best

efforts, for a reasonable period of time, at his own cost and expense, to endeavor to have the City modify the Use Restriction so that Plaintiff can develop the Premises, above the first floor, for any R7-2 zoning uses, including residential development.[2] Although not provided for in the Amendment, it is proper for the Court to read into the Contract the requirement that Defendant use his best efforts to attempt to have the City modify the Use Restriction (see Wood v Duff-Gordon, 222 NY 88 [1917] [court implied a promise to use reasonable efforts into the contract]; Timberline Dev, LLC v Kronman, 263 AD2d 175 [1st Dept 2000] [requirement to employ reasonable or best efforts in the performance of a contract obligation is deemed implicit in every agreement]). This construction gives binding effect to Defendant's representations, while avoiding the situation where the Defendant is the guarantor that the Use Restriction will be modified or removed, when in fact it may not be.

Defendant's Motion for Summary Judgment

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment" (see CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "Failure to make such

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[2]Plaintiff submits a letter from a law firm specializing in zoning matters, which states that in order to remove the Use Restriction, the owner must make an application to the New York City Planning Commission and the New York City Council (with the participation of the Department of Citywide Administrative Services), in accordance with the Uniform Land Use Review Procedure.

showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact'" (Zuckerman, 49 NY2d at 562).

Contrary to Defendant's position, Plaintiff's breach of contract claim is neither vague nor conclusory, and therefore, should not be dismissed. The Verified Complaint indicates the essential terms of the Contract and attaches the Contract as an exhibit to the Complaint.[3] Plaintiff also attaches documents to the Contract indicating that the representations in the Use Restriction Provision were false. Plaintiff alleges in paragraph 13 of the Verified Complaint that Defendant was to "provide the Premises at closing legal for development and used indicated [in the Use Restriction Provision] and defendant is attempting not to comply with his obligations thereunder, which expressly require defendant to cure the situation if said development and uses are not as of right." It is undisputed that Defendant has not sought a waiver or modification of the Use Restriction. Accordingly, the breach of contract claim is sufficient to withstand dismissal.

However, Defendant correctly maintains that Plaintiff's third cause of action for fraud should be dismissed. To make out a prima facie case for fraud, the complaint must allege, with specificity, the representation of a material fact, falsity, scienter, reasonable

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[3]Pursuant to CPLR 3014, a copy of any writing attached to a pleading is a part of the pleading.

reliance and damages (see Small v Lorillard Tobacco Co., 252 AD2d 1, 15 [1st Dept 1998]). The only alleged misrepresentations referred to in the Verified Complaint, or documents attached thereto, are the statements made in Use Restriction Provision, which only state a cause of action for breach of contract (see Joseph v Creek & Pines, Ltd., 217 AD2d 534, supra, [fraud claim dismissed because the only representations relied upon by plaintiff were the representations that defendant made in the contract of sale]). As Plaintiff has not alleged any false statements collateral to the contract, the fraud claim must be dismissed as duplicative of breach of contract claim (see Krantz v Chateau Stores of Canada, Ltd., 256 AD2d 186 [1st Dept 1998]). To the extent that the third cause of action for fraud alleges that Defendant falsely represented that he would sell the Premises to Plaintiff, while never intending to do so, such allegations merely state a claim for breach of contract. A cause of action does not arise when the only fraud alleged relates to a breach of contract (id.; see also Tesoro Petroleum Corp. v Holborn Oil Co., 108 AD2d 607 [1st Dept 1985] [defendant's false assurances of performance, made with intent to deceive, does not state a separate duty from a contractual duty]).

Defendant is not entitled to summary judgment on his counterclaim for a declaratory judgment. Declaratory relief is unnecessary and inappropriate (see Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 54 [1st Dept 1988]["A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract"]).

Finally, the Court denies the branch of Defendant's motion, pursuant to CPLR 6514, seeking cancellation of the Notice of Pendency.

It is hereby

ORDERED that Defendant's motion for summary judgment is granted only to the extent that the third cause of action for fraud is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: March 21, 2005

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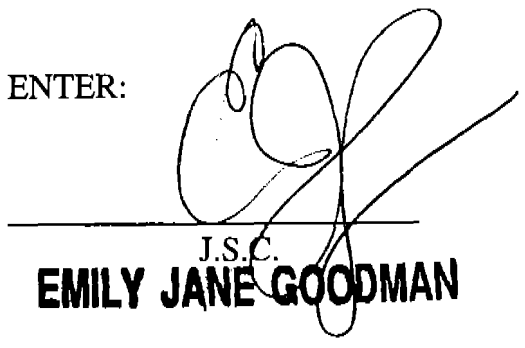

J.S.C.
EMILY JANE GOODMAN