

Coizza v 164-50 Crossbay Realty Corp.

2005 NY Slip Op 30456(U)

July 18, 2005

Supreme Court, Queens County

Docket Number: 26004/2004

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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Eugene Coizza, II, and Anna Dellaquila, Index No. 26004/2004

Plaintiff(s),

Motion Date 02/22/05

- against -

Motion Cal. No. 10

164-50 Crossbay Realty Corp., and
Vincent Sodano,

Defendant(s).

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The following papers numbered 1 to 7 read on this motion by the plaintiffs for an order, *inter alia*, granting them preliminary injunctive relief pending the outcome of this matter.

Papers
Numbered

Order to Show Cause-Affirmation-Exhibits-Service.. 1 - 4
Affirmation In Opposition-Exhibits-Service..... 5 - 7

Upon the foregoing papers it is **ORDERED** that the plaintiffs' motion for preliminary injunctive relief is denied in all respects.

On or about August 9, 2002, the parties entered into a contract of sale for the transfer of commercial premises in which the plaintiffs were already commercial tenants. The purchase was to be wholly financed by a purchase-money mortgage from the defendants-sellers, with no money paid down by the plaintiffs-purchasers. The seller covenanted to deliver a valid certificate of occupancy for the premises at closing. The contract contained a liquidated-damages clause providing that damages be paid to the purchasers, personally guaranteed by the principal of the corporate defendant, in the event that transfer of title not close within thirty (30) days of the initial contract closing date of January 15, 2003 for any reason whatsoever. When the sellers failed to procure the certificate of occupancy, the purchasers proceeded to attempt to do so on their own, and the purchasers' attorney attempted to make time of the essence by letter dated November 1, 2004. The sellers were unable to procure the required certificate of occupancy, and elected to cancel the transaction and pay the liquidated damages, rather than to clear title and proceed to closing. This lawsuit ensued.

To be entitled to a preliminary injunction, a movant must establish (1) the likelihood of success on the merits, (2)

irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (see, *Schweizer v. Town of Smithtown*, 2005 N.Y. App. Div. LEXIS 7248 [2d Dept. 2005]; *Hightower v. Reid*, 5 A.D.3d 440 [2d Dept. 2004]; *Evans-Freke v. Showcase Contr. Corp.*, 3 A.D.3d 549 [2d Dept. 2004]). The purpose of a preliminary injunction is to maintain the *status quo* pending determination of the action (see, *Rattner & Assoc. v. Sears, Roebuck & Co.*, 294 A.D.2d 346 [2d Dept. 2002]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (see, *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604 [2d Dept. 2004]). The plaintiffs failed to demonstrate a clear right to relief under this standard (see, *Evans-Freke v. Showcase Contr. Corp.*, *supra*).

In interpreting a contract, the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized (see, *Gonzalez v. Norrito*, 256 A.D.2d 440 [2d Dept. 1998]; *Joseph v. Creek & Pines*, 217 A.D.2d 534 [2d Dept. 1995]). A contract should not be interpreted in such a way as to leave one of its provisions substantially without force or effect (see, *Tantleff v. Truscelli*, 110 A.D.2d 240 [2d Dept. 1985], *affirmed* 69 N.Y.2d 769 [1987]; *Penguin 3rd Ave. Food Corp. v. Brook-Rock Assocs.*, 174 A.D.2d 714 [2d Dept. 1991]). A court may not write into a contract conditions the parties did not include, by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning (see, *Tikotzky v. City of New York*, 286 A.D.2d 493 [2d Dept. 2001]).

Thus, where the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations". (*AFBT-II, LLC v. Country Vill. on Mooney Pond, Inc.*, 305 A.D.2d 340 [2d Dept. 2003], *quoting Slamow v. Del Col*, 174 A.D.2d 725, 726 [2d Dept. 1991], *affirmed* 79 N.Y.2d 1016 [2d Dept. 1992]; see also, *Del Vecchio v. Cohen*, *supra*; *Harris v. Ware*, 142 A.D.2d 666 [2d Dept. 1988]). This rule is especially important "in the context of real property transactions, where commercial certainty is a paramount concern, and where the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (see, *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470 [2004]; *Matter of Wallace v. 600 Partners Co.*, 86 N.Y.2d 543 [1995]). "In such circumstances, 'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include'" (*Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, *supra* at 475, *quoting Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72 [1978]). Hence, "courts may not by construction add or excise terms, nor distort the meaning of

those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 [2001]).

Applying these guiding principles of contract interpretation to the case at bar compels the conclusion that the purchasers' sole remedy under the subject contract is enforcement of the liquidated damages provision in paragraph 21, subsections, (b), (c) and (d), rather than specific enforcement. These sections provide as follows:

(b) **Seller's Inability to Convey Title, Liquidated Damages & Guarantee.** The Seller acknowledges that the Purchaser has leased a portion of the Premises to wit: 164-50A Crossbay Boulevard, for use of a retail store, and that Tenant has or is about to expend substantial sums in connection with the leasehold in anticipation of the conveyance called for herein. Because of this, the parties agree that in the event title does not close *for any reason whatsoever*, other than the Purchaser's willful default, that liquidated damages are agreed to be in the sum \$100,000.00, and shall be paid by the Seller to the Purchaser.

(c) Vincent Sodano is the President of the Seller and in order to induce the Purchaser to enter into this agreement and the Lease referred to herein hereby individually agrees to guarantee the payment of the liquidated damages called for to be paid by the Seller. Vincent Sodano personally agrees to indemnify and hold harmless the Purchaser with respect to any costs or expenses incidental to the collection of the "liquidated damages" including but not limited to reasonable counsel fees.

(d) It shall be conclusively established that liquidated damages are payable to the Purchaser in the event that title does not close within thirty (30) days from January 15, 2003 unless the failure to close is due to the unjustified willful actions of the Purchaser. *The parties hereto shall have the right to extend the closing date (and the date for liquidated damages) by entering into a written agreement signed by both parties so extending the closing date. [emphasis supplied].*

The court notes that Vincent Sodano signed the subject contract, drafted by the purchasers' attorney, on page 9 thereof, not only in his capacity as president of the corporate defendant, but also as individual guarantor of the liquidated damages provisions of paragraph (b), (c) and (d). This underscores the importance and exclusivity of this remedy to the purchasers should title fail to close, other than by reason of the willful

default on the part of the purchasers.

This court must give these provisions in a contract for the transfer of commercial property, entered into by sophisticated parties represented by counsel, their unequivocal and intended effect. The clear, unambiguous terms set forth above establish that the purchasers' sole remedy in the event title did not close, for any reason whatsoever, within thirty (30) days of January 15, 2003, (the contract's initial closing date), was that the purchasers were conclusively entitled to \$100,000.00 as liquidated damages. The precise liquidated-damages clause as is contained in the subject contract was held to constitute the purchasers exclusive remedy in *Filiotis v. Noonan*, (150 A.D.2d 425 [2d Dept. 1989]). The purchasers have not demonstrated otherwise, that the contract entitled them to specific performance as a remedy, nor have they demonstrated any willful or bad-faith on the part of the sellers that would justify a departure from the clear meaning and effect of these negotiated contractual provisions. The provisions further provided that the time for closing could be further extended, but only by written, mutual agreement of the parties, which was not effectuated in the matter at bar. The purported "time-of-the-essence" letter of purchasers' attorney cannot be given legal consequence, since it conflicts with the extension procedure devised in the contract drafted by the purchasers, and the court declines to simply ignore that provision of the contract. Moreover, the court's holding not only restores the parties to the *status quo ante*, but properly permits the purchasers to recover liquidated damages in order to compensate them for the leasehold improvements made to the subject property, which was the purpose of the liquidated-damages clause. The purchasers did not make a down-payment on the subject contract, so that they have not suffered any loss in that regard.

Even assuming, *arguendo*, that plaintiffs' remedy is not confined to liquidated damages, the plaintiffs have nonetheless failed to establish, despite the prolixity of the papers submitted in this application, their entitlement to specific performance for failure to satisfy the conditions precedent to such relief.

Time may be made of the essence by "clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act" (*Savitsky v. Sukenik*, 240 A.D.2d 557, 558 [2d Dept. 1997] quoting, *Zev v. Merman*, 134 A.D.2d 555, 557 [2d Dept. 1987], affirmed 73 N.Y.2d 781 [1988]; see also, *3M Holding Corp. v. Wagner*, 166 A.D.2d 580 [1990]; *Sohayegh v. Oberlander*, 155 A.D.2d 436 [2d Dept. 1989]).

Even if this court were to ascribe legal effect to the purchasers' time-of-the-essence letter, its contents fail to conform to the above requirements. The letter fails to clearly and unequivocally notify the sellers that they would be deemed to

be in default under the contract if they did not close on the purported law day, or to mention a default or its implications. Moreover, the statement in said letter that "[i]f, for some reason, you find the date and time fixed above to be severely inconvenient, our minds will not be closed to an altering of the date, time or place, provided it is close to the date fixed above," (see, letter of Brush E. Bushlow, Esq. dated November 1, 2004 at p.2) is equivocal, and fails, in this court's opinion, to clearly place the defendants on notice that, they must close on the law day, and that, in the event of their failure to tender title on that date, they will be deemed to be in default under the contract.

In addition, it is axiomatic that a purchaser who seeks specific performance of a real estate contract must demonstrate that he or she was ready, willing, and able to perform the contract (see, *Madison Equities, LLC v. MZ Mgmt. Corp.*, 17 A.D.3d 639 [2d Dept. 2005], quoting *Tsabari v. Haye*, 13 A.D.3d 360 [2d Dept. 2004]; *Internet Homes, Inc. v. Vitulli*, 8 A.D.3d 438 [2d Dept. 2004]; *Moutafis v. Osborne*, 7 A.D.3d 686 [2d Dept. 2004]; *City Ownership v. Giambrone*, 5 A.D.3d 529 [2d Dept. 2004]; *Zelmanovitch v. Ramos*, 299 A.D.2d 353 [2d Dept. 2002]; *Ferrone v. Tupper*, 304 A.D.2d 524 [2d Dept. 2003]). The purchasers fail to address whether or not they attended the law-day closing on November 29, 2004, and to provide proof that they were ready, willing and able to close on that date. The record is entirely silent on that issue. Hence, even were this court to determine that the remedy of specific performance is available under this contract, which it declines to find, the purchasers have failed to establish their entitlement to that relief, and their likelihood, in toto, of success on the merits of the within lawsuit.

In conclusion, the plaintiffs failed to meet their burden of establishing (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor. Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is **ORDERED** that the plaintiffs' motion is denied in all respects.

The foregoing constitutes the order, decision, and opinion of the court.

Dated: July 18, 2005

JANICE A. TAYLOR, J.S.C.