

Golfo v KYCIA Associates, Inc.

2006 NY Slip Op 30407(U)

June 29, 2006

Supreme Court, Suffolk County

Docket Number: 11864-2002

Judge: Emily Pines

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Short Form Order

Index Number: 11864-2002

Supreme Court - State of New York
J.A.S. Term, Part 23, Suffolk County

Present:

Hon. Emily Hines
Justice Supreme Court

Motion Date: 04-27-2006

Submit Date: 05-04-2006

Motion No.: 004 MD

Cross-Motion Date: 04-27-2006

Submit Date: 05-04-2006

Cross-Motion No.: 005 MG

CASEDISP

X

ANTHONY GOLFO and LESLIE
GOLFO,

Plaintiffs,

-against-

KYCIA ASSOCIATES, INC., and
JASTA ASSOCIATES, INC.,

Defendants.
X

ATTORNEY for PLAINTIFF

MICHAEL C. DeLISA, ESQ.
BOROVINA & MAULLO, P.L.L.C.
445 BROAD HOLLOW ROAD
MELVILLE, NEW YORK 11747

ATTORNEY for DEFENDANT

THEODORE D. SKLAR, ESQ.
ESSEKS, HEFTER & ANGEL, LLP
108 EAST MAIN STREET
P.O. BOX 279
RIVERHEAD, NEW YORK 11901

ORDERED, that the motion (motion sequence no. 004) of Plaintiffs for summary judgment pursuant to **CPLR 3212** and directing specific performance is denied; and it is further

ORDERED, that the motion (motion sequence no. 005) of Defendants for summary judgment dismissing the complaint pursuant to **CPLR 3212** and for ancillary relief is granted to the extent indicated herein, and the complaint is dismissed.

Factual and Procedural History

This is an action by Plaintiffs for specific performance and/or money damages for breach of four real estate contracts. Pursuant to

the four (4) contracts dated August 1, 2001, Plaintiffs agreed to purchase and Defendants agreed to sell four lots located in Wading River, Town of Riverhead, New York. The lots were more particularly described on the Suffolk County Tax Map as District 0600, Section 037.00, Block 001.00, Lots 003.001, 003.002, 003.003 and 003.004. As relevant to the motions *sub judice*, the rider to each of the form contracts provided at paragraph 35 as follows:

In the event that the closing of title does not take place on or before September 30, 2001, for any reason other than the seller's default, the seller shall have the right to cancel this contract by providing notice of such cancellation to the purchaser or his attorney as provided herein and by returning to the purchaser or his attorney the payments towards the purchase price, if any, received pursuant to this contract, less the seller's reasonable attorney's fees for services rendered to and including the date of cancellation in connection with the sale transaction contemplated by this contract. Upon such cancellation, this contract shall be null and void, and, except as otherwise provided herein, the parties shall have no further rights under this contract.

It is undisputed that the closing on the subject parcels did not occur on or before September 30, 2001, despite attempted negotiations and communications between counsel for the parties on the transactions. On March 25, 2002, Defendants purportedly elected to cancel the contracts and returned the down payment, minus legal fees in accordance with the aforestated provision, to Plaintiff. Plaintiffs commenced the instant action by filing a Summons and Complaint on or about May 7, 2002 and issue was joined by the filing and serving of an Answer on or about July 1, 2002. On May 31, 2002, Plaintiffs' trial counsel sent a letter to Defendants' counsel advising that a *lis pendens* had been filed against the subject premises and sent a check representing the refunded down payment money.

Thereafter, Plaintiffs moved for an order, *inter alia*, compelling certain disclosure and Defendants cross-moved for an order granting summary judgment dismissing the complaint; directing the Suffolk County Clerk to cancel the Notice of Pendency filed by Plaintiffs; awarding attorney's fees to Defendants; quashing a subpoena directed to Defendants' counsel, John M. Wagner; and awarding money sanctions against Plaintiffs pursuant to **22 NYCRR §130-1.1**.

By Order (COSTELLO, J.) dated June 2, 2003, Plaintiffs' motion to compel discovery, specifically to take the deposition of John M. Wagner, Esq., was denied and the Defendants' motion to quash the subpoena was granted and the subpoena was quashed. Additionally, Defendants' motion seeking summary judgment, attorney's fees and sanctions was denied. Regarding the denial of Defendants' motion for summary judgment, Judge Costello found that there was still an issue of fact as to whether the Defendants properly cancelled the contracts because the contract did not state that "time was of the essence". Therefore, he concluded that the closing date of September 30, 2001 "was waived by mutual consent of the parties" and that "Defendants were required to set a date for closing and make time of the essence by giving 'clear, distinct, unequivocal notice to that effect giving the other party reasonable time in which to act,'" citing, Savitsky v. Sukenik, 240 A.D.2d 557, 659 N.Y.S.2d 48 (2d Dept. 1997).

Defendants appealed the denial of the motion for summary judgment dismissing the complaint, cancellation of the *lis pendens*, attorneys' fees and sanctions. The Appellate Division, Second Department, affirmed the Supreme Court Order in Golfo v. Kycia, 15 A.D.3d 540, 791 N.Y.S.2d 577 (2d Dept. 2005). Specifically, the Court found that although Defendants' counsel, by letter dated December 12, 2001 asked Plaintiffs to schedule a "mutually agreeable closing date" within two weeks, Defendants did not purport to exercise their contractual right to cancel the contracts until March 25, 2002. Thus, the Court found that there was an issue of fact "as to whether the Defendants waived their right of cancellation." Notably, the Court did not indicate that Defendants were required to set a new closing date with a "time of the essence" provision to enable them to cancel the contract pursuant to paragraph 35 of the rider.

Subsequent to the Appellate Division Decision and Order, the parties conducted further discovery; specifically, the examinations before trial of Plaintiffs, Anthony Tohill ("Tohill), Plaintiffs' counsel on the real estate transactions, John Wagner ("Wagner"), Defendants' counsel on the real estate transactions, and Jadwiga Kycia, president of both Defendant corporations. Additionally, on February 16, 2006, the parties entered into a Stipulation and Order (PINES, J.) which required that Plaintiffs "provide answers to defendants outstanding discovery demands regarding their financial ability to close on the subject properties, and/or authorizations to enable the Defendants to obtain that information, on or before February 27, 2006." Plaintiffs thereafter brought the instant motion for summary judgment seeking an order directing specific performance of the subject contracts. Defendants cross-moved for summary judgment seeking an order dismissing the complaint, cancelling the *lis pendens* and in the alternative, compelling Plaintiffs to respond to outstanding discovery demands.

Discovery

Following the prior motions for summary judgment, five additional depositions have occurred. Plaintiff ANTHONY GOLFO appeared for an examination before trial on October 11, 2005. On that date, he essentially testified that he did not recall the date on which the closing on the subject lots was supposed to take place (**A. Golfo EBT at p. 52, lines 4-7**) and that he did not recall having any understanding of the consequences of failing to close title by a certain date (**A. Golfo EBT at p. 52, lines 15-18**). He also admitted that he was not ready to close as late as September 27, 2001 because he was in the process of dealing with certain structural issues involving the Town of Riverhead (not patty to this action) (**A. Golfo EBT at p. 93, lines 10-13**). Plaintiff LESLIE GOLFO appeared for an examination before trial on October 14, 2005 and testified that she did not have any knowledge or information about the subject contracts and property that is the subject of this action. (**L. Golfo EBT at p. 12, lines 21-24**). Tohill, Plaintiffs' counsel on the real estate transaction appeared for an examination before trial on November 3,

2005. Tohill testified that he represented Plaintiffs on the subject real estate transaction (**Tohill EBT at p. 6, lines 7-18**) and that rider paragraph 35 (set forth above) provided a right of Defendants to cancel the contracts in the event that the closing does not take place on or before September 30, 2001. (**Tohill EBT at p. 14, lines 13-20**). Moreover, Tohill testified that he discussed this paragraph with Plaintiffs, and that they agreed to the provision. (**Tohill EBT at p. 14, lines 21-24**). Most significant, Tohill testified that pursuant to paragraph 35 of the riders to the contracts, Defendants were not required to provide a "time of the essence" letter before invoking their rights to cancel the contracts. (**Tohill EBT at p. 15, lines 11-19**). Tohill also testified that he interacted with Defendants' counsel for approximately one year during the course of this real estate transaction, that Wagner never told him that Defendants were waiving their rights to cancel the contracts, nor did he understand that Defendants ever waived their rights to cancel under paragraph 35 of the riders. (**Tohill EBT at p. 15, lines 20-25 through p. 16, lines 1-8**).

Defendants' counsel on the real estate transactions, Wagner, testified at an examination before trial on November 3, 2005. Wagner testified that a "time of the essence" letter was not required as a condition to termination of the contracts because paragraph 35 of the riders provided a separate right of termination which afforded a unilateral right to cancel if a certain event (here, closing on or before September 30, 2001) did not occur. (**Wagner EBT at p. 23, line 16 through p. 24, line 3**).

Jadwiga Kycia, ("KYCIA") President of both corporate Defendants testified at an examination before trial on October 14, 2005. KYCIA testified that she wanted to close title to the subject parcels quickly because she needed the money and that Wagner advised her that he would draft a contract that would specify closing within one month of the signing of the contracts. (**Kycia EBT at p. 32, lines 10-25**). Furthermore, she testified that after September 30, 2001, she repeatedly told her attorney to cancel the contract, until he finally did so by letter in March of 2002 (**Kycia EBT at p. 48-49**), and that she

considered the contract terminated when titled did not close on September 30, 2001. (**Kycia EBT at p. 59, line 12**).

Legal Analysis

The issue on this motion and cross-motion for summary judgment was framed by the Appellate Division when it held that "issues of fact existed as to whether the defendants waived their right of cancellation." **Golfo, supra**. In order for the Court to reach this determination, it must examine paragraph 35 of the rider to the contracts in light of the most recent deposition testimony.

In the case at bar, paragraph 35 of the rider to the contracts afforded Defendants the right unilaterally to cancel the contract if the closing of title did not occur prior to September 30, 2001. Notwithstanding, the Appellate Division found that a question of fact existed as to whether defendants waived their rights to cancel. This question was unequivocally answered in the negative by both counsel on the real estate transactions and the defendants' president. Significantly, Plaintiffs' own counsel on this transaction testified at his deposition that paragraph 35 of the rider meant exactly what it said, and that no further "time of the essence" letter was required prior to Defendants invoking their right to cancel, if the closing did not occur on or before September 30, 2001. Importantly, he also testified that it was his understanding that neither Defendants nor their attorney waived the cancellation provision. Also, the testimony of Defendant's president illustrates that she actually believed that the contracts were terminated when title did not close on September 30, 2001 and that she repeatedly requested that her attorney cancel the contracts. Finally, Plaintiffs two witnesses were unable to express any opinion whatsoever on their understanding of when the closing was to occur. In essence, upon completion of these five depositions, Plaintiffs, when faced with the specific issue, have been unable to set forth that an issue of fact existed concerning whether Defendants waived their contractual right under **Article 35** as set forth.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v. New York University Medical Center, 64 N.Y.2d 85, 487 N.Y.S.2d 316 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue or where the issue is arguable. St. Andrews Homeowners Association, Inc., v. Saint Andrews Golf Club, 289 A.D.2d 388, 734 N.Y.S.2d 898 (2d Dept. 2001); Akseizr v. Kramer, 265 A.D.2d 356, 696 N.Y.S.2d 849 (2d Dept. 1999). However, once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. State Bank of Albany v. McAullife, 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983).

Here, Defendants have established their *prima facie* entitlement to summary judgment dismissing the complaint. As set forth above, the parties' agreements gave Defendants the unilateral right to cancel the contracts if the closing of title did not occur. As vetted by the testimony of the parties and their counsel on the real estate transactions, Defendants were interested in closing title quickly, would not change the rider provision and did not waive their right to cancel. Plaintiffs did not, when given the opportunity, offer a single basis to contradict this understanding. Thus, by letter dated March 25, 2002, Defendants properly canceled the contracts and refunded the down payments to Plaintiffs. Upon such cancellation, pursuant to paragraph 35, Plaintiffs had no further rights under the contract. See, Eckel, supra. In opposition to the motion, Plaintiffs have failed to raise a triable issue of fact regarding Defendants' waiver of the cancellation provision. In fact, all discovery completed since the Appellate Division Order belies Plaintiffs' claims that the Defendants waived the cancellation provisions of the contracts. In the face of the testimony of Plaintiffs' own attorney that the provision was not waived, Plaintiffs were required to come forward with evidentiary proof in admissible form demonstrating the existence of a triable issue of fact. Plaintiffs have failed to meet

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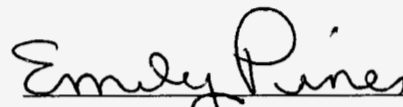
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that burden.

Based upon the foregoing, Defendants' motion for summary judgment dismissing the complaint is granted and the complaint is dismissed. The Suffolk County Clerk is directed to cancel the notice of pendency filed by Plaintiffs in this action. Plaintiffs' motion for summary judgment is denied in its entirety. Defendants' motion to compel discovery is denied as moot in light of the determination herein.

The foregoing constitutes the **Decision** and **Order** of the Court.

Dated: June 29, 2006
Riverhead, New York



Hon. Emily Pines
J. S. C.