

Del Pozo v Impressive Homes, Inc.

2007 NY Slip Op 30089(U)

February 23, 2007

Supreme Court, Queens County

Docket Number: 0005345

Judge: Orin R. Kitzes

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**PART 17
HON. ORIN R. KITZES**

-----X

GERMAN DEL POZO.

Plaintiff,

Index No. 5345/04

-against-

Motion Date: 2/21/07

Motion No. 28

IMPRESSIVE HOMES, INC.,

Defendant(s).

-----X

The following papers numbered 1 to 9 read on this application by plaintiff an order extending the period of duration of the notice of pendency, filed in this action on March 5, 2004, for three years.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affirmation-Exhibits.....	1-3
Affirmation in Opposition-.....	4-6
Reply Affirmation.....	7-9

Upon the foregoing papers, this application by plaintiffs an order extending the period of duration of the notice of pendency, filed in this action on March 5, 2004, for three years is granted, for the following reasons:

A lis pendens is a notice of a claim made in respect to property which is the subject of a pending suit, but it does not of itself create an encumbrance upon the property. Simon v Vanderveer, 155 N.Y. 377, 382 (1898). The purpose of a notice of pendency is to carry out the public policy that a plaintiff's action shall not be defeated by an alienation of the property during the course of the lawsuit. Mechanics Exchange Savings Bank v Chesterfield, 34 A.D.2d 111 (3rd Dept 1970).

To counterbalance the ease with which a party may hinder another's right to transfer property, the appellate court has required strict compliance with the statutory procedural requirements of N.Y. C.P.L.R. art. 65. Proper administration of the law requires promptness on the part of a litigant so favored and that he accept the shield which has been given to him upon the terms imposed, and that he not be permitted to so use the privilege granted that it becomes a

sword usable against the owner or possessor of realty. If the terms imposed are not met, the privilege is at an end. In re Sakow, 97 N.Y.2d 436 (2002.)

A notice of pendency is valid for three years from the date of filing and may be extended for additional three-year periods upon a showing of good cause. C.P.L.R. 6513. The extension, however, must be requested prior to the expiration of the prior notice. This is an exacting rule; a notice of pendency that has expired without extension is a nullity. In re Sakow, 97 N.Y.2d 436.

Plaintiff now seeks an order extending its time to extend the expiration of a lis pendens that shall expire on March 5, 2007. Pursuant to CPLR 6513, an extension of the period of a notice of pendency may be granted by the court “upon motion of the plaintiff and upon such notice as it may require, for good cause shown. . . . An extension order shall be filed, recorded and indexed before expiration of the prior period.” Moreover, it is well established that the court has no authority to extend the time period of an expired Notice of Pendency. *See*, In re Sakow, 97 N.Y.2d 436; Slutsky v Blooming Grove Inn, Inc., 147 AD2d 208 (2d Dept 1989.)

This action involves plaintiff seeking specific performance of a contract, dated, June 7, 2002, for the purchase of a three-family house to be build upon real property located at 35-15 101st Street, Corona, New York, for alleged breach of contract. The parties entered into the contract of sale, whereby defendant agreed to sell the property to plaintiff for the purchase price of \$610,000 and plaintiffs made a down payment of \$10,000.00. The contract also provided that it was contingent on the buyers obtaining a mortgage of \$579,500.00 within 30 days of the contract, and a closing date of June 18, 2002 was provided in the contract. The house has now been completed.

In an order of this court dated, November 15, 2004, this Court granted defendant’s motion for summary judgment and dismissed the complaint, based upon, inter alia, a finding that plaintiff was not ready willing and able to complete the transaction. In Del Pozo v. Impressive Homes, Inc 29 A.D.3d 621 (2d Dept 2006), the November order of this Court was reversed. The Second Department found that, the plaintiff purchaser succeeded in raising questions of fact warranting the denial of the motion. Specifically, the plaintiff had raised a triable issue regarding whether he was financially capable of completing the subject real estate transaction, a prerequisite for obtaining specific performance. Plaintiff also raised a question of fact with respect to whether the parties, by their conduct, waived compliance with the mortgage

contingency clause in their contract. In this regard, the record had shown that the defendant waited long after the expiration of the deadline for the plaintiff to obtain a mortgage commitment before cancelling the contract, and its notice of cancellation made no reference to the plaintiff's failure to obtain a mortgage commitment. The Appellate Division also found that the record revealed questions as to whether the defendant breached the contract, thereby entitling the plaintiff to an award of damages. The action was sent back to Supreme Court and is currently in the discovery stage and proceeding toward trial.

Regarding the instant application, it was sought in advance of the termination of the prior period not at its expiration. Defendant claims plaintiff has failed to show a good cause basis for the extension and there has been extensive delay in this action due to plaintiff's inaction. The Court finds that resolution of this action has been delayed due to extensive motion practice that cannot serve as an impediment to the granting of this extension. Moreover, contrary to defendant's claims, any delay in discovery cannot be solely blamed on plaintiff's ignoring discovery obligations. The delay in this action's resolution is a product of the extensive motion and appeal procedure both parties have utilized. This is good cause for the extension of the notice of pendency filed in 2004. Accordingly, the application is granted and it is further:

ORDERED, that the period of duration of the Notice of Pendency filed by German Del Pozo in the office of the Clerk of Queens County on March 5, 2004, affecting the premises located at 35-15 101st Street, Corona, New York, Block 1742, Lot 49 (Part of the old lot 49) be and the same hereby is extended for a period of three years from March 5, 2007 until March 5, 2010; and it is further

ORDERED, that this order be filed, recorded and indexed prior to the expiration of the Notice of Pendency hereinbefore mentioned and now in force; and it is further

ORDERED, that a copy of this Order with Notice of Entry be served upon the Clerk of the Court of Queens County.

DATED: February 23, 2007

ORIN R. KITZES, J. S. C.