

Revelation Bldrs, LLC v Pellechia

2007 NY Slip Op 30506(U)

March 28, 2007

Supreme Court, Suffolk County

Docket Number: 0016694/2006

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #001, 002 - Mot D
R/D: 081606
S/D 120106

REVELATION BUILDERS, LLC

PLTF'S/PET'S ATTY:
AUERBACH & DAZZO, PC
77 Medford Avenue
Patchogue, New York 11772

Plaintiff,

against -

LINDA PELLECHIA

DEFT'S/RESP'S ATTY:
STEVEN ROSENBERG, ESQ.
142 Mineola Avenue, Suite 3B
Roslyn Heights, New York 11577

Defendants.

Upon the following papers numbered 1 to 20 read on this motion for an order pursuant to CPLR §3211 (a)(1) & (7), 3212, & 6514
Notice of Motion/Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers 5-16
Answering Affidavits and supporting papers 17-18 Replying Affidavits and supporting papers 19-20
Other: ~~(and after hearing counsel in support and opposed to the motion)~~ letter dated 3/6/07 requesting correction of street address. it is.

ORDERED that this motion by defendant Linda Pellechia ("Pellechia") brought on by Order to Show Cause (Loughlin, J.) seeking an order pursuant to CPLR §3211 (a)(1) & (7), 3212, & 6514 granting summary judgment dismissing plaintiff's complaint and cancelling the notice of pendency filed by plaintiff for premises known as 44 Seymore Lane, Medford, New York and the cross motion by plaintiff Revelation Builders, LLC ("RB") brought on by Order to Show Cause dated September 11, 2006 for an order pursuant to CPLR §6301 enjoining the defendant from conveying the premises pending further Court order and denying defendant's motion are determined as follows:

On May 31, 2005 plaintiff "RB" entered in to a contract to purchase defendant's "Pellechia's" premises for \$275,000.00. Plaintiff "RB" is a builder and intends to subdivide and build a second residence on the parcel.

Paragraph 15 of the contract provides:

Closing to take place on or about December 20, 2005 but purchaser shall be entitled to an additional 6 month extension provided they are diligently attempting to obtain the approvals as set forth in paragraph 51 of the rider herein.

Paragraph 51 of the Rider to the Contract provides:

The Purchaser shall have until December 20, 2005 to obtain the approvals. The Purchaser agrees to promptly file applications for the approval and to diligently pursue the approvals. In the event that the Purchaser shall not have obtained the necessary approvals by December 20, 2005, the Seller shall, at Purchaser's request, extend the contingency period for an additional six month period to June 20, 2006 provided that the Purchaser is diligently pursuing the approvals or is awaiting a determination on its applications.

Defendant "Pellechia" claims that the builder failed to diligently file the documents required to obtain subdivision approvals from the Town of Islip and Suffolk County. By letter dated June 20, 2006 seller's counsel notified plaintiff's attorney that the contract was terminated and returned the purchaser's \$13,750.00 down payment. On June 29, 2006 plaintiff "RB" filed a notice of pendency and commenced this action seeking damages for breach of contract and specific performance.

Defendant's motion seeks an order dismissing plaintiff's complaint claiming "RB" breached the contract by failing to diligently file the documents necessary to obtain subdivision approval. In support of the motion and in opposition to plaintiff's motion defendant "Pellechia" submits two affidavits and two affirmations of counsel and claims that the purchaser failed to close within the time period required under the contract and therefore the seller had the right to terminate the contract. Defendant claims that plaintiff has failed to submit any documentary evidence to prove that "RB" timely filed a subdivision application and that there is no proof to show that "Pellechia" delayed the builder's ability to file the application. It is defendant's position that the plaintiff acted in bad faith by delaying the application process and by failing to close, and therefore plaintiff's complaint must be dismissed. Defendant also claims that she is entitled to liquidated damages based upon plaintiff's breach.

In opposition and in support of its motion for a preliminary injunction, plaintiff "RB" submits two affidavits from an attorney/member of "RB" together with an affirmation of counsel. Plaintiff claims that the seller breached the contract of sale by failing to cooperate with the builder to provide information necessary to begin the subdivision process. Plaintiff asserts that "Pellechia" failed to provide information concerning the tenant on the premises and confirmation that no prior subdivision application had been submitted and/or denied. Plaintiff claims this information was needed prior to the builder expending the considerable sum of money required to obtain subdivision approval. Plaintiff maintains that defendant's attorney stonewalled the builder's attempt to gather the information from June, 2005 until the end of October, 2005. Plaintiff claims that "Pellechia" again delayed the subdivision approval process in February, 2006 by failing to execute documents required to be filed with the Town and County Healthy Department. It is plaintiff's position that under these circumstances no basis exists to grant defendant's motion to dismiss the complaint and that an injunction must be granted to prevent "Pellechia" from attempting to sell the premises to a third party purchaser. Plaintiff claims "RB" is ready, willing and able to perform the remaining obligation required under the terms of the contract and to purchase the premises upon Town and County approval.

To succeed on a motion pursuant to CPLR §3211(a)(1), the documentary evidence upon which defendant's motion is predicated must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claims (SIDDIQUI v. NATIONWIDE, 255 AD2d 30, 687 NYS2d 457 (3rd Dept., 1999); FERNANDEZ v. CIGNA, 188 AD2d 700, 590 NYS2d 925 (3rd Dept., 1992)).

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981)).

Based upon the submission of evidence by the parties significant issues of fact exist surrounding the actions taken by the buyer and the seller from June, 2005 through June, 2006 sufficient to require a plenary trial. Defendant's motion for an order pursuant to CPLR §3211 (a)(1) & (7), 3212 & 6514 dismissing plaintiff's complaint and cancelling the notice of pendency filed by the plaintiff must therefore be denied.

A preliminary injunction may be granted upon a clear showing of three things; 1) the likelihood of ultimate success on the merits, 2) irreparable injury to movant absent the granting of the preliminary injunction and 3) balancing of the equities in her favor (ALBINI v. SOLORK ASSOCIATES, 37 AD 2d 835, 325, NYS 2d 150 (2nd Dept., 1971); HUDSON VALLEY TREE, INC. v. BARCANA, INC., 114 AD 2d 400, 494 NYS 2d 124 (2nd Dept., 1985)).

Plaintiff has made a clear showing of each of the three elements required to justify granting a preliminary injunction. Plaintiff's motion for an order enjoining the transfer of the premises located at 44 Seymore Lane, Medford, New York pending further Court order must therefore be granted. Accordingly, it is

ORDERED that defendant's motion for an order pursuant to CPLR §3211 (a)(1) &(7), 3212 & 6514 is denied, and it is further

ORDERED that plaintiff's motion for an order pursuant to CPLR §6301 is granted to the extent indicated hereinabove, and it is further

ORDERED that a preliminary conference shall be held on March 15, 2007 at 9:30 a.m. at the Supreme Court Trial Term Part XIII, 400 Carleton Avenue, Central Islip, New York to resolve all outstanding discovery issues. No appearance shall be required if the parties enter into a preliminary conference disclosure and discovery schedule and submit same to the Court prior to March 8, 2007. A copy of the form is attached to this order for the parties use and convenience. All discovery proceedings must be completed on or before August 13, 2007 .

Dated: March 28, 2007

MELVYN TANENBAUM

J.S.C.

NON-FINAL DISPOSITION