

**Ashley Homes of Long Is., Inc. v County of  
Suffolk**

2007 NY Slip Op 30784(U)

March 27, 2007

Supreme Court, Suffolk County

Docket Number: 0020117/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 10/25/06 (#002)  
MOTION DATE 1/5/07 (#003)  
ADJ. DATE 1/5/07  
Mot. Seq. #002 - MotD  
Mot. Seq. #003 - XMD

-----X	:	
ASHLEY HOMES OF LONG ISLAND, INC.,	:	WINKLER, KURTZ, WINKLER & KUHN, LLP
	:	Attorney for Plaintiff
Plaintiff,	:	310 Hallock Avenue
	:	Port Jefferson Station, New York 11776
	:	
- against -	:	CHRISTINE MALAFI, ESQ.
	:	Suffolk County Attorney
	:	By: Patricia A. Rouse, Esq.
COUNTY OF SUFFOLK and MANUEL C.	:	100 Veterans Memorial Highway
GAVALES,	:	P.O. Box 6100
	:	Hauppauge, New York 11788
Defendants.	:	
-----X	:	

Upon the following papers numbered 1 to 28 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-16; Notice of Cross Motion and supporting papers 17-26; Answering Affidavits and supporting papers 27-28; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion by defendant County of Suffolk for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against it is granted to the extent of granting summary judgment dismissing plaintiff's first cause of action for specific performance, and is otherwise denied; and it is further

**ORDERED** that the cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability is denied as untimely (*see*, CPLR 3212 [a]).

This is an action, *inter alia*, to compel specific performance of a contract of sale between the plaintiff, as buyer, and defendant County of Suffolk, as seller, for the unimproved property known as 34 Willow Street, Jamesport, New York. The plaintiff also alleges a cause of action seeking damages for breach of contract.

Defendant Manuel C. Gavales is the former owner of the property. Gavales defaulted in the payment of property taxes levied for the 1995/1996 tax year. On December 12, 1996, the county

treasurer sold a tax lien on the property to the County to satisfy and discharge the taxes. Notice to redeem the property within 12 months of the tax lien sale was sent by the treasurer to Gavales by certified mail on or about August 21, 1997. On or about August 26, 1997, the notice was returned "addressee unknown," and Gavales subsequently failed to redeem the tax lien. On July 1, 1998, the County acquired the property by tax deed.

Thereafter, at a public auction held on May 16, 2002, the plaintiff successfully bid \$300,000 to purchase the property. Upon the County's acceptance of the bid, the plaintiff delivered to the County a down payment in the amount of \$60,000. The plaintiff was also required to sign a memorandum of sale incorporating the "Terms and Conditions of Sale" constituting the parties' contract, paragraph 8 of which provided, in part:

8. It is acknowledged and agreed that Suffolk County's sole obligation is to deliver such title as a reputable title insurance company, licensed in the State of New York, will insure. In the event that the Purchaser's title company requires either: (a) the County of Suffolk to commence a bar claim action in order to insure title; or (b) imposes title exception clearance conditions upon the County of Suffolk that the County of Suffolk deems to be unreasonable for the clearance of title exceptions, then the County of Suffolk reserves the right to: (a) require the Purchaser to obtain title insurance through another insurer who does not require said condition or (b) return the Purchaser's down payment and cancel the sale.

The plaintiff subsequently obtained a title report in which the title company agreed to issue its standard policy, listing among the exceptions to coverage the following:

10. Company will require proof that Manuel C. Gavales, prior record owner by deed Liber 9412 cp. 108 received proper notice of the tax sale.

Upon receiving this report, the County located a current address for Gavales and mailed him a second notice dated September 25, 2002 advising him of the tax sale and offering him an additional six months within which to redeem the property. It appears that Gavales thereupon notified the County of his intention to redeem the property. On June 12, 2003, the County quitclaimed its interest in the property to Gavales. By letter dated July 28, 2003, the County purported to cancel its contract with the plaintiff. This action followed. The plaintiff subsequently purchased the property from "Elwood East, Inc." for \$425,000 and discontinued this action against Gavales.<sup>1</sup> On or about April 8, 2004, the County refunded to the plaintiff all moneys paid on account of the plaintiff's successful bid, including the down payment.

The County now moves for summary judgment on the ground that its inability to deliver insurable title entitled it to terminate the contract under the "Terms and Conditions of Sale," and based on the doctrines of impossibility of performance and mutual mistake. The County contends, in part, that

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<sup>1</sup> The plaintiff's third and final cause of action was for damages against Gavales on a theory of unjust enrichment.

because the county treasurer failed to provide Gavales proper notice to redeem, the tax sale was defective and the County had no title to convey to the plaintiff (*see, e.g., Jones v Flowers*, 547 US 220, 126 S Ct 1708 [2006]; *but see*, Suffolk County Tax Act § 53).

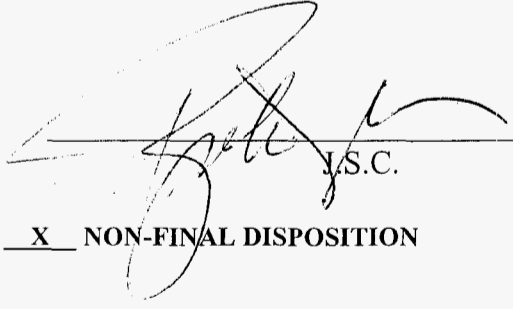
The County is entitled to summary judgment dismissing the plaintiff’s first cause of action for specific performance as it is evident that the County is unable to convey the property (*see, S.E.S. Importers v Pappalardo*, 53 NY2d 455, 442 NYS2d 453 [1981]; *Voyticky v Duffy*, 19 AD3d 685, 798 NYS2d 494 [2005], *lv dismissed in part, denied in part* 6 NY3d 800, 812 NYS2d 33 [2006]; *EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 774 NYS2d 39, *lv dismissed* 3 NY3d 656, 782 NYS2d 695, *lv denied* 3 NY3d 607, 785 NYS2d 25 [2004]).

Summary judgment is denied, however, with respect to the plaintiff’s second cause of action for breach of contract. Since a limitation conditioned on the inability to convey title “contemplates the existence of a situation beyond the control of the parties” (*Mokar Props. Corp. v Hall*, 6 AD2d 536, 539, 179 NYS2d 814, 819 [1958]), a party cannot exculpate itself from liability when such inability is self-created (*id.; accord, Naso v Haque*, 289 AD2d 309, 734 NYS2d 214 [2001]). Here, the Court finds a material issue of fact as to whether the County’s claimed inability to convey insurable title is based on its own failure, after the initial notice to redeem was returned undelivered, to take additional steps to provide notice to Gavales prior to the tax sale and, hence, whether it validly exercised the right to cancel the contract pursuant to paragraph 8. The Court likewise finds a question of fact, sufficient to defeat summary judgment, concerning the applicability of the doctrine of impossibility, as this doctrine may not be invoked where the event which renders a party’s performance impossible is not only foreseeable but also brought about by the party’s own conduct (*see, Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 524 NYS2d 384 [1987]; *AMF, Inc. v Cattalani*, 77 AD2d 779, 430 NYS2d 731 [1980]). Nor may mutual mistake be invoked by a party to avoid the consequences of its own negligence; here, there is a question whether the County, in the exercise of ordinary care, should have been alerted to the possibility of inadequate notice after the initial notice was returned undelivered (*see, G & G Invs. v Revlon Consumer Prods. Corp.*, 283 AD2d 253, 724 NYS2d 411 [2001]; *P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 640 NYS2d 558 [1996]).

As for the cross motion, the Court notes that it was made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see, Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Thompson v Leben Home for Adults*, 17 AD3d 347, 792 NYS2d 597 [2005]; *see also, Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2005]).

The Court directs that all remaining claims in this action be severed and continued.

Dated:           MAR 27 2007          

  
\_\_\_\_\_  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION