

**Downtown Realty Operating Corp. v Flatiron
21 Assoc., LLC**

2007 NY Slip Op 31781(U)

June 6, 2007

Supreme Court, New York County

Docket Number: 0603676/2005

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARCY S. FRIEDMAN

PRESENT: _____
Justice

PART 57

Downtown Realty

INDEX NO. 603576/05

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

Flatiron 21 Assoc.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to dismiss

Notice of Motion/ and cross motion ~~Order to Show Cause~~ ~~Affidavits~~ ~~Exhibits~~
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1, 2, 2a	_____
3	_____
4	_____

Memos of Law M1-M4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

FILED

JUN 21 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6-6-07

[Signature]
MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
DOWNTOWN REALTY OPERATING
CORPORATION and FLATIRON 21ST STREET,
LLC,

Index No.: 603676/2005

Plaintiff(s),

DECISION/ORDER

- against -

FLATIRON 21 ASSOCIATES, LLC,
Defendant(s).

_____ x
This action arises out of a contract for the purchase and sale of real property located at 30 West 21st Street in Manhattan. Defendant-seller Flatiron 21 Associates, LLC (“Flatiron”) moves, pursuant to CPLR 3211, to dismiss the complaint of plaintiff-buyers, Downtown Realty Operating Corporation and Flatiron 21st Street, LLC (collectively “Downtown”), for specific performance. In the alternative, Flatiron’s motion seeks summary judgment dismissing the complaint, summary judgment on its counterclaim, and vacatur of the notice of pendency filed in this action. Plaintiffs cross-move for a stay of defendant’s motion pending discovery and for disqualification of defendant’s counsel. By separate motion, plaintiffs move to amend their complaint to plead a cause of action for rescission of the parties’ contract. Defendant cross-moves for attorney’s fees and costs incurred on plaintiffs’ motion to amend, and for sanctions.

The branch of plaintiffs’ motion to disqualify defendant’s counsel was withdrawn by stipulation of the parties dated January 11, 2007. By letter dated January 2, 2007, plaintiffs withdrew the notice of pendency, and advised the court that “[w]e are modifying our motion to

amend the complaint to seek only rescission and a return of the \$2.5 MM deposit.” In this letter, plaintiffs also took the position that defendant’s motion for summary judgment was moot because the proposed amended complaint “drops the claim for specific performance.”

The parties entered into a Purchase and Sale Agreement for the premises on June 24, 2005. This Agreement provided for a purchase price of 25 million dollars and a down payment of 2.5 million dollars which was made at or about the time of execution of the agreement. The Agreement provided for a closing date 60 days from the date of execution (i.e., August 22, 2005), but permitted seller or purchaser, by giving notice to the other party, to adjourn the closing date for an additional 30 days, with such date “being time of the essence with respect to purchaser’s obligations.” (Agreement, § 1.1 [D],[A] [D.’s Motion to Dismiss, Ex. A].) It is undisputed that Downtown exercised its option to adjourn the initial closing date to September 21, 2005, with time of the essence. As a result of this exercise of the option to adjourn, the down payment was released from escrow and paid to Flatiron, as provided in the Agreement. (Id., § 3.2.) It is also undisputed that, at Downtown’s request, the closing date was further adjourned to October 7, 2005, with time of the essence. In consideration for the adjournment, Downtown agreed to pay liquidated damages of \$6,181 per day, commencing on September 21, 2005 and continuing through the adjourned closing date, as memorialized in an agreement dated September 19, 2005. (D.’s Motion to Dismiss, Ex. E.)

There is a sharp dispute between the parties as to whether they reached an agreement to adjourn the closing date beyond October 7, and whether Flatiron was able to deliver insurable title as of October 7. By letter dated October 14, 2005, Flatiron purported to terminate the Agreement on the ground that Downtown defaulted in its obligations under the Agreement by

failing to close on October 7. The instant action was commenced on or about October 17, 2005.

Plaintiffs' initial complaint pleaded a sole cause of action for specific performance. The proposed amended complaint annexed to plaintiffs' motion to amend pleaded causes of action for specific performance and rescission. However, as noted above, after service of the motion to amend, plaintiffs substituted a proposed amended complaint that pleads only a cause of action for rescission.

Motion to Amend

Leave to amend "'shall be freely given' absent prejudice or surprise resulting directly from the delay." (McCaskey, Davies & Assocs., Inc. v New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983]. See CPLR 3025[b].) The decision whether to permit amendment of pleadings is committed to the discretion of the court. (Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983].) "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side." (Id. at 959 [internal quotation marks and citation omitted].) The party opposing the amendment has the burden of demonstrating prejudice. (Leslie v Hymes, 60 AD2d 564 [1st Dept 1977].)

It is now also settled that, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (Non-Linear Trading Co. v Braddis Assocs., Inc., 243 AD2d 107, 116 [1st Dept 1998] [internal quotation marks and citations omitted]), and leave to amend will be denied when the proposed pleading "is palpably insufficient as a matter of law." (Davis & Davis, P.C. v Morson, 286 AD2d 584, 585 [1st Dept 2001]; Bankers Trust Co. v Cusumano, 177 AD2d 450 [1st Dept 1991], lv dismissed 81 NY2d 1067 [1993].) "Therefore, a motion for leave to amend a pleading must be supported by an

affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.” (Non-Linear Trading Co., 243 AD2d at 116 [internal quotation marks and citations omitted].)

Applying these standards, the court concludes that leave to amend should be granted. While plaintiffs’ delay of 14 months in moving to amend is lengthy, defendant has not met its burden of demonstrating that it has sustained prejudice as a result of the delay. The initial complaint pleaded that defendant had failed to clear a title defect and was not ready, willing and able to close on the October 7 closing date. (Complaint, ¶¶ 16, 17.) The facts underlying the rescission claim are thus the same as the facts underlying the specific performance claim, and have been known to defendant since the outset of the litigation. Moreover, the case is at the pre-trial stage and discovery has not yet been conducted. These circumstances militate against a finding of prejudice based on the conduct of the litigation. (See Hair Programming, Inc. v Space Prods., S.S.A., Inc., 171 AD2d 620 [1st Dept 1991]; Leslie v Hymes, 60 AD2d 564, supra; Barraza v Sambade, 212 AD2d 655 [2d Dept 1995].)

Flatiron also fails to make a showing of prejudice based on the conclusory assertion of its attorney that it relied to its detriment on Downtown’s intent to seek specific performance. More particularly, Flatiron asserts that during the year after commencement of this action, it negotiated to sell the premises to Downtown (notwithstanding Downtown’s alleged default under the Agreement)¹; that it relied on Downtown’s intent to proceed with the sale; and that if it had

¹This action was commenced in October 2005. Defendant’s motion for summary judgment dismissing the specific performance claim was initially returnable on December 23, 2005. By stipulations dated March 7, 2006, March 28, May 3, June 1, and July 5, the motion was adjourned based on settlement negotiations. Stipulations dated August 2, August 23, and September 26 stated that the motion was further adjourned “because the parties are finalizing settlement negotiations that may result in a resolution of this matter. The parties expect that a closing is reasonably likely to occur in the near

understood that Downtown would assert a claim for rescission in the event the sale was not consummated, it “would have been unwilling to bear the risk of the decline in the real estate market that Plaintiffs now acknowledge has occurred, and would instead have proceeded to litigate the summary judgment motion in the hope of being able to find a new buyer before such a market decline occurred.” (D.’s Memo. of Law in Opp. to Motion to Amend at 4-5.) Even assuming arguendo that the court may consider this conclusory assertion in a brief, which is unsupported by an affidavit on personal knowledge, it is patently insufficient to show defendant’s prejudicial reliance on plaintiffs’ pleading of a sole claim for specific performance in the original complaint. Defendant, a sophisticated real estate developer, does not claim that it was unaware of the potential for a downturn in the real estate market over the period in which it conducted negotiations with plaintiffs for the sale of the property. Nor does defendant make any showing that it did not have reasons of its own for negotiating with plaintiffs over a protracted period and attempting to close the sale with them rather than another buyer. The mere fact that defendant participated after commencement of this action in settlement negotiations to sell the property to plaintiffs cannot suffice to show that defendant materially changed its position in reliance on plaintiffs’ assertion of a right to purchase. (Compare Chung-Li Chou v Main St. Assocs., 208 AD2d 670 [2d Dept 1994].)

Significantly, there is no showing on this motion that plaintiffs did not negotiate in good faith for the sale of the property in the year after the action was commenced, or that they deliberately delayed in prosecuting this action in order to take advantage of changes in the real

future.” On October 26, 2006, defendant agreed to an adjournment to November 16 “to permit Plaintiffs a final opportunity to close on the contract.” (Reply Aff. of Alan Lewis, Esq. to D.’s Cross-Motion for Sanctions, ¶ 3.)

estate market. While such conduct, if found on a fully developed record when the action is finally determined, could warrant the denial of equitable relief to plaintiffs (see EMF Gen. Contr. Corp. v Bisbee, 6 AD3d 45 [1st Dept 2004], lv dismissed 3 NY2d 656 and lv denied 3 NY2d 607; 331 E. 14th St. LLC v 331 E. Corp., 293 AD2d 361 [1st Dept 2002], lv dismissed 98 NY2d 727), the record on this motion does not allege, let alone offer evidence, that plaintiffs engaged in such conduct. The court accordingly holds that defendant has failed to make a showing of prejudice that would bar the amendment.²

The court further holds that the record does not demonstrate that Downtown's rescission claim is without merit as a matter of law. As a threshold matter, it is undisputed that the parties' Agreement authorized rescission as a remedy for the seller's breach. (Agreement, § 12.1[B].) Flatiron contends, however, that an essential element of the rescission claim -- namely, that Flatiron defaulted on the contract of sale -- is without merit as a matter of law. This contention is not demonstrated on this record. Flatiron acknowledges that the parties' Agreement required Flatiron to provide insurable title at the closing. (See id., § 8.2 [D.'s Motion to Dismiss, Ex. A].)

²There is authority that in exercising its discretion to determine whether to grant leave to amend, "the trial court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether any prejudice resulted from the delay." (Crystal House Manor, Inc. v Totura, 5 AD3d 425, 426 [2d Dept 2004]. See Sewkarren v DeBellis, 11 AD3d 445 [2d Dept 2004].) The court notes that plaintiffs fail in their papers in support of the motion to amend to give an explanation for their delay in seeking to assert the rescission claim. On their reply, however, plaintiffs point out that they were involved in negotiations to purchase the property during the period of their delay in seeking leave to amend. (Ps.' Reply Memo. in Support of Motion to Amend at 6.) The parties' stipulations confirm that the motions were adjourned pending the negotiations (see 4, n 1, supra), and the court file shows that no other proceedings were taken in this action during the nearly one year the motions were adjourned. The court finds that the parties' conduct in attempting to resolve the action constitutes a reasonable excuse for the delay in moving to amend. In any event, the court would grant the amendment in the exercise of discretion, given the absence of any showing of prejudice as a result of the delay. (See Edenwald Contr. Co. v City of New York, 60 NY2d 957, supra.)

By letter dated July 15, 2005, Downtown provided Flatiron with its list of exceptions to title which were included in a title report issued on the same date by Commonwealth Land Title Insurance Company, and which Downtown required to be cleared prior to closing. (Ps.' Motion to Amend, Ex. D.) This list included item 6 of the title report, an exception from coverage for an option to purchase the subject premises set forth in a recorded lease for a term from June 1, 1986 through May 31, 2026 between landlord Madison Park Lofts Corp. and tenant 30 West 21st Street Associates. (Title Report, Schedule B; Memorandum of Lease [D.'s Motion to Dismiss, Ex. M].)

Flatiron contends that Downtown was unable to close on the October 7, 2005 time of the essence date, and that Flatiron was prepared to provide insurable title on that date. (Aff. of Stephen Friedman [D.'s Attorney] in Support of D.'s Motion to Dismiss, ¶ 34.) As evidence of this contention, defendant submits a "Common Exceptions Affidavit," which was to have been attested to by Flatiron and which stated that there are tenants in the premises and "no options to purchase or rights of first refusal either pursuant to written leases or by separate agreements." (Id., Ex. N.) This affidavit was approved as to form by the title insurer on September 15, 2005. (See id.) Notably, however, it was not signed by Flatiron and therefore cannot serve to demonstrate that Flatiron had eliminated the exception to title by October 7. Indeed, plaintiffs submit a letter from the title insurer, dated December 15, 2005, showing that the exception to title had still not been eliminated as of that date, and stating that in order to eliminate the exception (item 6), the insurer "must receive from the record owners, an Affidavit stating that the Lease has been surrendered or terminated and the tenant is no longer in possession of the premises. Commonwealth has received no proof to date." (Ps.' Motion to Amend, Ex. E.)

Flatiron makes no showing that it ever signed the affidavit or that the tenant who was the subject of the title exception ever moved.

Under these circumstances, triable issues of fact exist as to whether Flatiron breached the Agreement by virtue of an inability to deliver insurable title on the October 7 time of the essence closing date. “It is axiomatic that a seller cannot place a purchaser in default without first tendering his or her own performance. Where, as here, a real estate contract states that the seller shall tender title at closing that a reputable title company will insure, the burden of producing insurable title has been construed as a condition precedent to the seller holding the purchaser in default.” (Gargano v Rubin, 200 AD2d 554, 555 [2d Dept 1994][internal citations omitted]. See also 1776 Assocs. Corp. v Broadway W. 57th St. Assocs., 181 AD2d 601 [1st Dept 1992], appeal dismissed 80 NY2d 824.) Defendant has not eliminated factual issues as to whether this burden was met.³

Ignoring the above authority, defendant argues that it is irrelevant whether it had insurable title as of the October 7 closing date because plaintiffs did not yet have the financing to close on the property. None of the cases cited by defendant stands for this proposition. (See D.’s Memo. of Law in Opp. to Motion to Amend at 9-10, citing Iannelli Bros. v Muscarella, 30 AD2d 698 [2d Dept 1968, affd for reasons stated below 24 NY2d 779 [1969]; Huntington Mining Holdings, Inc. v Cottontail Plaza, Inc., 60 NY2d 997 [1983]; Knoff v Johnson, 29 AD3d 741 [2d Dept 2006], reversing 2004 WL 2334272 [Sup Ct, Kings County 2004]; Bucciero v Li, 191 AD2d 887 [3d Dept 1993].) These authorities hold that a party’s anticipatory breach of a

³In view of this holding, the court does not reach the separate issue of whether the parties had an agreement to extend the closing date.

contract to sell real property relieves the opposing party of the obligation to tender performance. Defendant cites no authority that a buyer's request for an adjournment of the closing date because it does not yet have the funds necessary to close constitutes an anticipatory breach that would relieve the seller of the duty to perform. (See HRL Union Ave. Corp. v New York City Housing Auth., 223 AD2d 486 [1st Dept 1996], lv denied 88 NY2d 803.) Defendant has not demonstrated, on this inadequate briefing, that the rescission claim is unavailable because of plaintiffs' own inability to close.

The court has considered defendant's remaining contentions as to the merits of the rescission claim and finds that defendant has failed to show that the rescission claim is palpably insufficient. The amendment will therefore be allowed.

Motion to Dismiss or for Summary Judgment

Defendant elected to have its motion for dismissal of plaintiffs' specific performance claim applied to the rescission claim in the amended pleading. (D.'s Memo. of Law in Opp. to Motion to Amend at 10.) Applying the motion to the rescission claim (see Sage Realty Corp. v Proskauer Rose L.L.P., 251 AD2d 35 [1st Dept 1998]), the court holds, for the reasons stated on the motion to amend, that defendant fails to demonstrate as a matter of law that the rescission claim is without merit. The branch of defendant's motion for summary judgment on its counterclaim for liquidated damages must be denied for the same reasons.

Accordingly it is hereby ORDERED that plaintiffs' motion to amend the complaint is granted to the extent that plaintiffs' proposed amended complaint attached to the letter of plaintiffs' counsel Richard Seltzer, Esq., dated January 2, 2007, is deemed served nunc pro tunc as of January 2, 2007; and it is further

ORDERED that defendant's cross-motion for costs and sanctions is denied as without merit; and it is further

ORDERED that defendant's motion to dismiss and for summary judgment is denied as moot as to plaintiffs' specific performance cause of action; and it is further

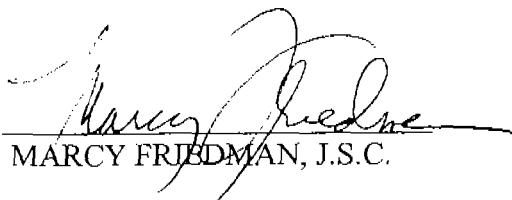
ORDERED that defendant's motion to dismiss and for summary judgment is deemed applicable to the rescission cause of action in plaintiffs' amended answer, and said motion is denied; and it is further

ORDERED that plaintiffs' cross-motion to stay the hearing of defendant's motion to dismiss and for summary judgment, and to disqualify counsel is denied as moot; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 57 of this Court on Thursday, July 12, 2007 at 11:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
June 6, 2007


MARCY FRIEDMAN, J.S.C.