

Scarab Jewelers, Inc. v Mandarano

2007 NY Slip Op 32003(U)

June 29, 2007

Supreme Court, Suffolk County

Docket Number: 0018243/2003

Judge: Emily Pines

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

Present:

HON. EMILY PINES
Justice Supreme Court

COPY

SCARAB JEWELERS, INC.,

X

Plaintiff,

-against-

CARMINE MANDARANO,

Defendant .

X

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DECISION AFTER TRIAL

This case came before the Court for trial on March 19, 2007 and continued on March 20, 2007. Post-trial memorandum were submitted by counsel on May 11, 2007. The action seeks specific performance of a contract for the purchase and sale of real property located at 277 East Main Street, East Islip, New York (the "subject premises").

At the commencement of the trial, counsel for the respective parties stipulated on the record that on or about September 6, 2001, the parties entered into a written contract of sale for the subject premises, which represented a portion of commercial real property owned by Defendant. Counsel also stipulated that Defendant would not assert a claim that Plaintiff failed to obtain a mortgage commitment or conduct a Phase I environmental study.

The contract at issue contained a rider, which at paragraph "R23" stated:

Subject to Seller obtaining permission from the Town of Islip to subdivide the property per the attached survey and shall be responsible for all costs to obtain same. *The approved subdivision must not include any requirement of erecting or installing any barrier or other separating device between the 2 lots. Closing will not occur until after the subdivision has been completed.

(Plaintiff's Exhibit 2). Absent from the contract was any provision governing how long it should take to obtain subdivision approval for the subject premises.

THE TESTIMONY

Christopher Reiszl

Christopher Reiszl ("Reiszl"), one of the 50% owners of Plaintiff corporation testified on behalf of Plaintiff. Reiszl testified that Plaintiff offered to purchase the property without the condition of subdivision approval but that Defendant needed the subdivision. Reiszl testified that plaintiff performed all its obligations under the contract including obtaining a title report, mortgage commitment and Small Business Administration loan. Reiszl testified that after a period of time he began to question why the contract was not closing and in March of 2002, had his then attorney, Kevin Mescall ("Mescall") write to Defendant's attorney, Timothy Mattimore ("Mattimore") to inquire regarding the status of the deal **(Plaintiff's Exhibit 4)**. In response, Mescall received a letter dated March 19, 2002 from Mattimore's office indicating that the subdivision application was scheduled before the Board of Appeals on April 2, 2002. **(Plaintiff's Exhibit 5)**. In correspondence from Mescall to Mattimore dated May 22, 2002 **(Plaintiff's Exhibit 6)**, Mescall memorializes an earlier conversation with Mattimore wherein it was advised that the subdivision application was approved by the Board of Appeals with minor conditions. By the same correspondence the mortgage contingency clause was extended until November 21, 2002.

Reiszl then testified that in November of 2002, Mescall sent a letter to Mattimore advising that Plaintiff had received a verbal commitment for financing and inquiring of the status of the subdivision application **(Plaintiff's Exhibit 11)**. On November 21, 2002, Mescall sent another letter advising that Plaintiff received its financing and was ready to proceed with closing. He requested copies of the final subdivision approval and survey. **(Plaintiff's Exhibit 13)**. By correspondence

dated December 11, 2002, Mescall again requested the status of the final subdivision approval for the subject premises. **(Plaintiff's Exhibit 14)**.

Plaintiff also submitted into evidence correspondence from Mattimore to the Town of Islip Planning Department ("Planning Department") dated January 23, 2002 **(Plaintiff's Exhibit 38)**, which was a submission of the minor subdivision application to the Planning Department. On or about March 27, 2002, the Planning Department sent correspondence to Mattimore indicating that the plans submitted January 23, 2002 were disapproved and listed 14 items that needed to be addressed. **(Plaintiff's Exhibit 39)**.

On or about January 20, 2003, Mattimore sent to Mescall a copy of the Board of Appeals decision dated April 2, 2002. **(Plaintiff's Exhibit 17)**. The decision granted the subdivision of the subject premises "subject to final site plan approval by the Planning Department of the Town of Islip to deal with such things as a cross driveway easement, parking and other requirements." On April 23, 2003, Mattimore responded to the March 27, 2002 letter from the Planning Department. **(Plaintiff's Exhibit 40)**. On March 18, 2004, the Planning Department again wrote to Mattimore and advised that the plans for the subdivision were disapproved. **(Plaintiff's Exhibit 41)**. In the letter, the Planning Division enumerated 23 comments that needed to be addressed prior the matter being resubmitted. Among the items listed was #7 which stated that "In an effort to mitigate the landscaping relaxations, recommend removal of the paved area between the buildings and in front of the building on Lot 2."

Rieszl testified that defendant never requested Plaintiff's assistance with the items requested by the Planning Department nor did defendant discuss the items with Plaintiff. Plaintiff then began the process of obtaining site plan approval on its own and hired an engineer to revise the site plan to address the 23 items. Rieszl testified that he met with representatives from the Town of Islip and then tried to submit a revised plan but he could not do so because it needed to be signed by Defendant. He asked Defendant to sign the plan and states that Defendant never consented. Rieszl believes that the site plan is still in the Planning Department and that Plaintiff remains ready, willing and able to purchase the subject premises.

On cross-examination, Rieszl admitted that Plaintiff understood that Defendant wanted to preserve his parking and maintain his medical practice on the subject premises. He further admitted that the contract contained a condition that there would be no barriers between the subject premises

and Defendant's parcel and that this provision was for the benefit of both parties. Reiszl further acknowledged that the June 23, 2003 letter from the Planning Department required that the paved area between the buildings be removed and that the curb cut on Main Street be removed. Reiszl testified that after the June 23, 2003 letter was received by Defendant that he (Defendant) said that the contract between the parties was cancelled.

John LaRock

John LaRock ("LaRock") is the co-owner of the Plaintiff corporation with Rieszl. LaRock testified that he tried to contact defendant personally several times to discuss the site plan but that he never responded. He could not remember however, the exact time frame within which he attempted such contacts. LaRock further testified that he helped with the preparation of the site plan application and worked with the New York State Department of Transportation, including obtaining a bond, but that he could not proceed without Defendant's signature. LaRock also referred to the November 5, 2002 letter from Mescall to Mattimore (**Plaintiff's Exhibit 11**), wherein Plaintiff advises that it is ready to close. LaRock testified that Defendant requested an additional \$15,000.

Dr. Carmine Mandarano

Defendant testified that he owns the property known as 281/277 E. Main Street, East Islip, New York and that it is two separate tax lots. He operates a medical practice out of the other building located on the property (at 281 E. Main Street) and entered into a contract to sell the subject premises to plaintiff. He has operated his medical practice at this location for 15 years and the entrance is located on Montauk Highway (Main Street). Defendant testified that he needed to preserve the parking and access of his patients to the building, especially the handicapped parking which is located in the front of the building. He testified that there is a smaller entrance to the property on Laurel Avenue, but the only building entrance is on Montauk Highway.

Defendant stated that he was never told that the subdivision application was denied, rather that it was approved subject to Planning Department approval, which was not granted. He referred to the June 2003 Planning Department letter which imposed certain conditions that made defendant not want to proceed with the closing. Specifically, he referred to the removal of the entrance on Montauk Highway, the removal of areas designated as handicapped parking and the requirement of a barrier between the buildings. He submitted photographs depicting the entrance to the parking lot from Laurel Avenue (**Plaintiff's Exhibit 37A**) and the area between the two buildings (**Plaintiff's Exhibit**

37B).

Defendant testified that when he received the June 23, 2003 Planning Department letter, he and his attorney felt that the site plan approval had become a practical impossibility and he returned the down payment to Plaintiff. He states that he did not request additional money from Plaintiff and states that he was never asked to sign Department of Transportation documents. He stated that the subject premises has been vacant since 2001.

On cross-examination, defendant claimed that plaintiff insisted that the property be subdivided and that he was told by his attorney (Mattimore) that the subdivision was going to be difficult. Defendant acknowledged a letter from Mattimore's assistant (**Plaintiff's Exhibit 3**) dated April 19, 2001, in which he was advised that it would be a problem obtaining subdivision approval from the Town of Islip. Defendant admitted that he felt the process was taking too long, that he told Mattimore and that Mattimore told him that getting approval from the Town of Islip was problematic. He admitted that after he received the June 23, 2003 letter and spoke to Mattimore, he realized that the Town of Islip had put up too many obstacles to the site plan approval since more than two years had elapsed since the contract was executed, and that it was reasonable to cancel the contract.

Vaidotas Bobelis

Plaintiff called as a witness Vaidotas Bobelis ("Bobelis"), senior site plan reviewer for the Town of Islip, Division of Planning and Development. He testified that he had a Bachelor of Science in Geology from SUNY Binghamton and had been employed with the Town of Islip for four years. He testified that he had done a preliminary review of the application for the minor subdivision of the subject premises on behalf of Mr. Janover who was the principal involved with the review of the application for the town. Bobelis testified regarding the process required for defendant to obtain subdivision approval from the Board of Zoning Appeals and that the site plan still had to be approved. Bobelis testified that he did not have any record of a formal site plan being filed with the Planning Department.

Bobelis testified that the March 27, 2002 Planning Department letter (**Plaintiff's Exhibit 39**), requested some basic information that was required for proper review, and that the response by Mattimore was not submitted until approximately 13 months later (**Plaintiff's Exhibit 40**). With regard to the June 23, 2003 letter and the 23-item list of comments, (**Plaintiff's Exhibit 29**), Bobelis

testified that some information required for site plan review was missing, the plan that was submitted did not conform to the Zoning Board approval and that the document fell shy of the standard required for site plan review. On the issue of the removal of the paved area between the buildings, Bobelis testified that defendant could have submitted a site plan that did not remove the paving between the two buildings as requested in item #7 of the June 23, 2003 letter and that such submission would be considered. Bobelis testified that a site plan was delivered to Planning by Plaintiff (**Plaintiff's Exhibit 42**) which was not reviewed because there was no official application. That site plan did not remove the paving between the buildings and had an entrance from Montauk Highway and Bobelis stated that he did not know whether such plan would be approved. Finally, Bobelis stated that the next step in the process would have been for Defendant to prepare and file an official site plan and application with the Planning Department and that such plan would have to reflect changes that occurred in Town of Islip Code in 2004.

On cross-examination, Bobelis testified that Mattimore regularly appears on applications before the Town of Islip. Bobelis testified that the cost of a site plan was not expensive in terms of the overall cost of development but that the planning board did not consider the economic impact of on the property owner in denying the relief requested.

At the conclusion of Plaintiff's case, Defendant moved for a directed verdict and the Court reserved decision.

Timothy Mattimore

Defendant called Timothy Mattimore, Esq., to testify on his behalf. As set forth above, Defendant hired Mattimore to represent him on the real estate transaction with Plaintiff and to obtain the subdivision of the subject premises. Mattimore testified that he was an attorney for 35 years and that his practice concentrated in zoning, land use and planning issues, real estate closings and a general practice. He practiced almost exclusively in the Town of Islip but was winding down his practice as he was recently appointed as Deputy Chief Executive Officer of the Suffolk County Water Authority. Mattimore testified that he has handled 150-200 applications in the Town of Islip and had been qualified as an expert witness approximately 5 times.

Mattimore testified that he was hired to obtain the subdivision of the subject premises which had 2 structures located on the property; Defendant's medical office and a vacant building. He testified that Defendant wanted to subdivide the medical office from the vacant building and sell the

vacant building and that the subdivision was a condition of the contract of sale.

Mattimore stated that in the spring of 2003 he advised Defendant that proceeding with the subdivision had become impractical or a practical impossibility because after obtaining the approval from the Board of Appeals in April of 2002 he attempted negotiating with the Planning Department and there were major differences of opinion. Specifically, there were issues regarding the curb cut, landscaping, parking and the removal of a portion of the building on the subject premises. Additionally, he testified that the Planning Department wanted the handicapped parking relocated to the side of the building and Defendant felt that it was too far from the front of the building for his patients. Moreover, Mattimore testified that the Planning Department suggested or directed that the common driveway between the buildings and the curb cut for Montauk Highway be removed. Such removal and the planting of grass or sod between the buildings as requested, Mattimore stated would constitute a barrier between the buildings in contravention of the contract. The removal of the common driveway would also dramatically reduce the number of parking spaces.

Mattimore further testified that he believed he met with someone from the Planning Department at least five times and that the cost for a site plan for property like the subject premises would have cost about \$7,500 to \$10,000 in 2002 or 2003 and that revisions would be extra. He testified that at some point in 2003, he returned the down payment to Plaintiff because it appeared they had run into major stumbling block to have site plan approved. Mattimore reviewed the site plan proposed by Plaintiffs that showed no removal of the parking area and opined that it would not have been approved by the Planning Department. Mattimore explained that the delay that occurred between the January 2002 submission and the April 2003 revisions were due to continued meetings with the Planning Department and his attempt to convince them of defendant's position regarding maintaining the common driveway and curb cut on Montauk Highway. Mattimore stated that based upon these meetings, he concluded that he did not believe that the site plan, as proposed by Defendant, would ever be approved by the Planning Department.

On cross-examination, Mattimore testified that Defendant wanted the subdivision of the property and that he did not know of any particular reason why there was no cap on the amount of time of expense that Defendant would have to incur to obtain the subdivision approval. Mattimore did admit that in drafting contracts, there are restraints that could be included. He testified that in his opinion obtaining the approval should take four to six months. He explained the 13 month delay as a time period during which he was regularly talking to the Planning Department about the proposed

revisions. Finally, Mattimore testified that he did not submit the site plan because he was told by someone from the Town of Islip that the plans would not be approved if they did not remove the paved area between the buildings, although he could not recall when and with whom that conversation took place. Mattimore did state that he had conversations with Bobelis regarding the application and the removal of the paved area and curb cut to Montauk Highway, and disputed Bobelis' earlier testimony that he did not recall speaking to Mattimore. Upon receipt of the June 23, 2003 letter, he believed the approval was a practical impossibility and the down payment was returned to Plaintiff.

At the conclusion of Mattimore's testimony, defendant rested and renewed its motion for a directed verdict. Plaintiff also moved for a directed verdict and the Court reserved decision on both motions.

DISCUSSION

By Order (PITTS, J.) dated May 11, 2004, Plaintiff's motion for summary judgment granting specific performance of the contract was denied. There, the Court held that "neither the Defendant's failure nor his ultimate refusal to obtain subdivision approval, in and of itself, establishes a breach of contract." Justice Pitts recognized that "a seller may not be bound indefinitely to perform his obligations under a contract of sale even if, as here, the contract does not specify a time for performance." Subsequently, Defendant moved for summary judgment cancelling the contract and such motion was also denied by Order (DOYLE, J.) dated July 31, 2006. In that Decision and Order, the Court found that there were issues of fact as to whether the Defendant acted diligently and in good faith to obtain the required subdivision approval.

It is well settled that while a condition relating to subdivision in a real estate contract is generally for the benefit of the purchaser, who can waive the condition, where the seller is retaining one of the lots, the approval is for his benefit as well and the condition cannot be waived unless both parties agree. *Savino v. Deleyer*, 160 A.D.2d 989, 554 N.Y.S.2d 710 (2d Dept. 1990); *Louis Bonavita & Sons, Inc., v. Quarry*, 126 A.D.2d 707 (2d Dept. 1987); *Poquott Development Corp., v. Johnson*, 104 A.D.2d 442, 478 N.Y.S.2d 960 (2d Dept. 1984). Thus, here, since Defendant was retaining one of the lots of the proposed subdivision, his consent would be needed to waive the condition of subdivision approval. As such consent was not given, the condition of subdivision needed to be satisfied for performance of the contract to occur.

The issue, therefore, is narrowly framed as whether Defendant failed to act diligently to obtain the subdivision approval or whether obtaining the subdivision and requisite site plan approval became a practical impossibility, thus warranting the cancellation of the contract. A condition to obtain subdivision approval impliedly requires the seller to use his/her good faith efforts to attempt to obtain same. *Savino, supra. Buffardi v. Parillo*, 168 A.D.2d 812, 563 N.Y.S.2d 948 (2d Dept. 1990). Moreover, when there is no time expressed in a real estate contract for performance of a condition, there is an implied duty to perform within a reasonable time. *Manzi Homes, Inc., v. Mooney*, 29 A.D.3d 748, 816 N.Y.S.2d 130 (2d Dept. 2006). A party can not be bound indefinitely to the contract and ultimately compelled to specifically perform, rather, the obligation can only be enforced for a reasonable period of time. *Lieberman Properties v. Braunstein*, 134 A.D.2d 55, 522 N.Y.S.2d 874 (2d Dept. 1987). Finally, “the law does not require a party to fulfill a condition of a contract that is incapable of fulfillment and is not that party’s fault.” *Buffardi, supra*.

In this case, the real estate contract contained a condition that the sale was subject to the subdivision of the property from the Town of Islip. However, that condition was further restricted by language that prohibited the subdivision from requiring any barrier between the two parcels, the subject premises being sold to Plaintiff and the parcel retained by Defendant.

The testimony reflected that Plaintiff hired an attorney, Mattimore, to obtain the subdivision approval and that the Town of Islip Board of Appeals approved the subdivision, in April of 2002, subject to approval by the Planning Department. Meanwhile, from January 2002 forward, Mattimore was communicating and meeting informally with the Planning Department in an attempt to secure its approval of the subdivision. The Planning Department appeared steadfast in its requirement that the paving be removed from between the two buildings and that landscaping be planted in that area. Mattimore testified that he attempted to get the Planning Department to modify its position in this regard, but in his opinion, and based upon his 35 years of experience, all such efforts were fruitless. Finally, after more than a year of negotiations, he determined that the Planning Department would not approve the subdivision in such a manner as would comply with the “no barrier” requirement of the contract, and thus returned Plaintiff’s down payment and cancelled the contract.

The Court finds credible Mattimore’s testimony regarding his several attempts, albeit unsuccessful, to convince the Town of Islip Planning Department to approve a plan for the subject premises that did not include a barrier between the two parcels. Mattimore did obtain the initial

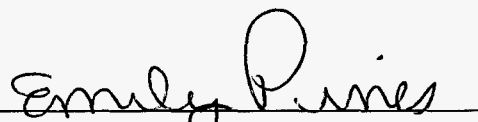
Board of Appeals approval in what the Court considers a reasonable period, approximately six (6) months from execution of the contract of sale. However, the efforts to obtain the final approval reached a stale mate on the issue of the landscaping between the properties. While Plaintiff attempted to secure approval without the landscaping barrier and claims that its efforts were thwarted by Defendant's failure to sign the requisite applications, the Court finds no credible evidence that such plan, had it been submitted, would have been approved by the Planning Department. Although Bobelis testified that such a plan would have been considered, he could not testify whether such plan would have been approved. Additionally, Defendant and Mattimore both testified that the Planning Department was seeking to impose other requirements, such as relocation of the handicapped parking and removal of the curb cut to Montauk Highway. Defendant testified credibly that the conditions were not reasonable and would be burdensome to his patients who would have to walk further to the entrance to his building.

Based upon the foregoing, and upon application of the principles set forth herein above, the Court finds that plaintiff has not met its burden of establishing its entitlement to specific performance. Rather, defendant, after more than a year of unsuccessfully attempting to obtain final subdivision/site plan approval, determined that such was a practical impossibility and properly cancelled the contract and returned plaintiff's down payment. Defendant was not required to continue to attempt to obtain the approval, especially when his own, experienced attorney believed that such efforts were to no avail. Accordingly, for the reasons set forth, Defendant's motion for a directed verdict dismissing the Plaintiff's claim for specific performance is granted.

This constitutes the **DECISION** and **ORDER** of the Court.

Submit Judgment on fifteen (15) days notice of settlement.

Dated: June 29, 2007
Riverhead, New York


EMILY PINES
J. S. C.