

Sanchez v Dan 43 Ave., LLC

2007 NY Slip Op 32977(U)

August 27, 2007

Supreme Court, Queens County

Docket Number: 0008713/2007

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

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ELIDIA SANCHEZ	x	Index Number <u>8713</u>	2007
		Motion Date <u>June 12,</u>	2007
-against-		Motion Cal. Number <u>32</u>	
DAN 43 AVE., LLC		Motion Seq. No. <u>1</u>	
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	x		

The following papers numbered 1 to 13 read on this motion by defendant pursuant to CPLR 3212 and 3211(a)(1), (7) and (8) for summary judgment dismissing the complaint, and to dismiss the complaint or in the alternative, for partial summary judgment, and to cancel the notice of pendency, to declare that plaintiff breached the contract of sale, to award defendant the amount of \$50,000.00 as liquidated damages, and to set this matter down for trial or an inquest; and this cross motion by plaintiff for leave to amend the complaint as proposed, adding causes of action based upon breach of contract, unjust enrichment and fraud in the inducement, and seeking to recover monetary damages and the down payment.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-7
Notice of Cross Motion - Affidavits - Exhibits...	8-13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff, as prospective purchaser, commenced this action seeking specific performance of a contract dated June 6, 2006 of sale of real property, known as 99-10 43rd Avenue, Corona, New York (Block 1628, Lot 130), and an award of costs and disbursements, including attorneys' fees. Defendant served an answer, admitting certain allegations asserted in the complaint, denying others, and

asserting affirmative defenses based upon lack of personal jurisdiction due to improper service, failure to state a cause of action, a defense based upon documentary evidence (i.e. a provision found in the contract of sale at page 4, paragraph 12), and breach of contract. Defendant also interposed counterclaims for breach of contract, seeking an award of liquidated damages and attorneys' fees, and declaratory relief.

Defendant's notice of motion indicates that the motion is made pursuant to CPLR 3212 and 3211(a)(1), (7) and (8). The motion, however, was made after joinder of issue and for that reason, it is actually one for summary judgment pursuant to CPLR 3212 on grounds enumerated in subdivision (a) of CPLR 3212 (see CPLR 3212[a] and CPLR 3211[e]). Although defendant refers to CPLR 3211(a)(8) in the heading of its notice of motion, defendant fails to state anywhere in the body of the notice, or in its supporting or opposing papers, that it seeks summary judgment dismissing the complaint based upon lack of personal jurisdiction due to improper service of process,¹ or that the service of process was improper. Thus, defendant cannot be considered to have moved for summary judgment based upon its defense of lack of personal jurisdiction due to improper service. Insofar as defendant has made no showing it moved for summary judgment based upon such defense within 60 days of service of its answer, or experienced a hardship warranting extension of the statutory period, defendant's first affirmative defense is deemed waived (CPLR 3211[e]; DeSena v HIP Hosp., Inc., 258 AD2d 555 [1999]; Wade v Byung Yang Kim, 250 AD2d 323 [1998]; Fleet Bank, N.A. v Riese, 247 AD2d 276 [1998]).

Those branches of the motion by defendant to declare that plaintiff breached the contract of sale, to award defendant the amount of \$50,000.00 as liquidated damages, and to set this matter down for an inquest are denied. Those branches of the motion, in essence, seek summary judgment on the counterclaims in defendant's favor. Although defendant asserts that plaintiff served an "answer" to the counterclaims, no copy of a reply has been

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Furthermore, even assuming that such a reference to CPLR 3211(a)(8) in the notice's heading would constitute a reference to an objection based upon lack of personal jurisdiction, such objection may incorporate three categories, i.e. lack of a proper jurisdictional basis, the lack of adequate notice and the lack of an opportunity to be heard (see generally World-Wide Volkswagen Corp. v Woodson, 444 US 286 [1980]; Mullane v Central Hanover Trust Co., 339 US 306 [1950]). Again, the notice of motion does not specify to which category defendant targeted its objection.

submitted by the parties to the court (CPLR 3212[b]; Deer Park Associates v Robbins Store, Inc., 243 AD2d 443 [1997]; Lawlor v County of Nassau, 166 AD2d 692 [1990]).

With respect to the branch of the motion by defendant for summary judgment dismissing the complaint, defendant asserts that the complaint fails to state a cause of action for specific performance, insofar as the contract of sale contains a clause limiting plaintiff's remedies to a refund of her down payment. Defendant further asserts that plaintiff is in default under the contract of sale. On December 22, 2000, the day of the scheduled closing, the parties met at the offices of a real estate agency, but when it became clear the closing would not be concluded, defendant consented to an extension of time for the closing. Defendant further claims it thereafter advised plaintiff, by letter of its then counsel dated December 28, 2006, that time was of the essence, and requested that plaintiff arrange a new closing date. Defendant allegedly terminated the contract of sale by letter dated March 23, 2007, upon plaintiff's failure to provide it with a copy of a mortgage commitment in accordance with the contract.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Defendant has failed to establish its entitlement to summary judgment dismissing the complaint by demonstrating the absence of a triable issue of fact regarding plaintiff's purported waiver of specific performance (see Alvarez v Prospect Hosp., 68 NY2d 320, *supra*; Winegrad v New York Univ. Med. Ctr., 64 NY2d at 853; Zuckerman v City of New York, 49 NY2d 557, *supra*).

A limitation of remedies conditioned on the inability to convey title (a typical term found in contracts of sale), which necessarily contemplates the existence of a situation beyond the control of the parties (see e.g. Bosco, Bisignano & Mascolo, Esqs., LLP v Turyan, 8 AD3d 418 [2004]; Mokar Props. Corp. v Hall, 6 AD2d 536, 539 [1958]). "Although a purchaser of real property can waive the right to specific performance in the event of the seller's willful default, such a waiver can be accomplished only by an explicit provision in the contract of sale (see S.E.S. Importers

v Pappalardo, 53 NY2d 455, 468)" (Reckess v Goldman, 12 AD3d 658, 659 [2004]).

In this instance, the parties disagree as to whether the contract of sale includes a certain rider, insofar as plaintiff claims the copy of the undated rider, offered by defendant as an exhibit, is the product of fraudulent inducement. Plaintiff does not dispute, however, that the contract itself, includes a limitation of remedies provision, at page 12, paragraph 4. That provision is unmodified by the purported rider, and reads:

"12. If, for any reason whatsoever willfully default, the Seller shall fail to complete and/or to deliver title to the premises herein described in accordance with the provisions hereof, it is agreed that the Seller's liability shall be limited to the refund of the Purchasers' [sic] payment referred to in Paragraph "7" and upon the refund of said sum, this Purchase Agreement shall be and become null and void. In any event, the Seller shall not be required to bring any action or proceeding or otherwise to incur any expense to render the title to the premises marketable or to cure any objections to title."

(emphasis supplied).

The fundamental precept of contract interpretation is that a written agreement is to be construed in accordance with the parties' intent. A written agreement that is complete, clear, and unambiguous on its face must be enforced in accordance with the plain meaning of its terms (see Civil Serv. Empls. Assn. v Plainedge Union Free Sch. Dist., 12 AD3d 395, 396 [2004]; Lane v Seltzer, 303 AD2d 378, 379 [2003]; Hindes v Weisz, 303 AD2d 459, 460-461 [2003]). However, the inquiry of whether a contract is ambiguous in the first instance, is within the province of the court (see Katina v Famiglietti, 306 AD2d 440 [2003]). In this case, the first sentence of paragraph 4, at page 12, of the contract of sale, is ambiguous, and appears to have a word, or words, missing.

Due to the ambiguity in the provision of paragraph 4 of the subject contract of sale, it is unclear whether the parties intended an explicit provision waiving plaintiff's right to specific performance. Although the court may look to extrinsic evidence as guidance as to whether a contract term is missing, and to which party's interpretation governs, there has been no discovery in the action. Defendant brought its motion before plaintiff had a reasonable opportunity for disclosure

(see generally Baron v Incorporated Village of Freeport, 143 AD2d 792 [1988]). There may be salient information in the possession of the parties which may be revealed through pretrial disclosure proceedings, including the identity of the drafter of the provision (CPLR 3212[f]; see Matter of Cowen & Co. v Anderson, 76 NY2d 318 [1990]).

That branch of the motion by defendant for summary judgment dismissing the complaint and to cancel the notice of pendency is denied without prejudice to renewal upon the completion of disclosure.

Plaintiff's proposed amended complaint is not plainly devoid of merit, and defendant has failed to allege that it will be prejudiced by the amendment (see CPLR 3025[b]; Giarguaro S.p.A. v Amko Intern. Trading, Inc., 300 AD2d 349 [2002]). That branch of the cross motion by plaintiff for leave to amend the complaint as proposed, adding causes of action based upon breach of contract, unjust enrichment and fraud in the inducement, and seeking to recover monetary damages and the down payment is granted. Plaintiff shall file a copy of the amended complaint within 20 days of service of a copy of this order with notice of entry. The amended pleading which was attached to the notice of cross motion is deemed served. Defendant shall serve an amended answer within 20 days after service of a copy of this order with notice of entry.

Dated: August 27, 2007

Augustus C. Agate, J.S.C.