SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

PRESENT: HON. WILLIAM R. LaMARCA
Justice.

Scan

WOODSTOCK CONSTRUCTION GROUP LTD,

Plaintiff,

-against-

15 BERRY HILL ROAD LLC,

Defendant.

Motion Sequence # 001, # 002
Submitted August 6, 2007

INDEX NO: 10706/07

The following papers were read on this motion:

Notice of Motion/Order to Show Cause.....1
Notice of Cross-Motion.....2
Affirmation in Reply and Opposition to Cross-Motion.....3

Requested Relief

Counsel for defendant, 15 BERRY HILL ROAD, LLC (hereinafter referred to as "BERRY HILL"), moves for an order canceling a Notice of Pendency filed with the Clerk of Nassau County, on June 19, 2007, granting defendant summary judgment and dismissing the complaint or, in the alternative, directing plaintiff to file an undertaking herein. Plaintiff, WOODSTOCK CONSTRUCTION GROUP LTD (hereinafter referred to as "WOODSTOCK"), opposes the motion and cross-moves for an order dismissing the motion. The motion and cross-motion are determined as follows:

Background

This litigation revolves around demolition work and services WOODSTOCK, by its President, Andrew Woodstock, claims to have performed for defendant with respect to real property known as 15 Berry Hill Road, Oyster Bay, New York. The complaint alleges that, during the period commencing in 2004 until the end of 2005, Andrew Woodstock arranged for the issuance of variances and construction permits and performed demolition work on the property for the agreed price of $100,000.00. Woodstock states that, when the company was not paid for its work, he contacted his long time friend at BERRY HILL, one of its principals Alan Pesari, and told him WOODSTOCK would be filing a mechanics lien against the property and instituting a suit for breach of contract. Woodstock claims that Pesari assured him that his bill would be paid in full and contends that he requested that no lien be filed and no suit instituted. Indeed, WOODSTOCK annexes a letter from BERRY HILL, dated May 24, 2005, issued by Joseph D. Conway, its Managing Member, in which BERRY HILL seeks to allay WOODSTOCK's concerns about payment, which provides, as follows:

> In consideration of the efforts expended and to be extended by Woodstock Construction Group Ltd. in procuring the necessary variances and a building permit for the project, 15 Berry Hill Rd. LLC agrees to pay Woodstock Construction Group LLC a fee of $100,000 if, at any time commencing with the issuance of said permit, and terminating six months from said date, 15 Berry Hill Rd. LLC enters into a contract of sale for said property which results in a sale to the contracted party. This fee shall be payable at the closing of sale out of the proceeds and shall be personally guaranteed by Sidney Get, Joseph D. Conway and Alan Pesari.

Additionally, the letter states that "[b]ecause of the time constraints we have been saddled with, I will state our proposal in this letter and, assuming you are agreeable to the terms, you can sign it and fax it back to me and I can coordinate the other signatures". It appears

that Andrew Woodstock did sign said proposal letter and forwarded it back to BERRY HILL principal, Alan Pesari, on July 8, 2005, along with a letter of same date confirming the agreement that a $100,000.00 consulting/facilitating fee was still open. The proposal was never signed by the principals of BERRY HILL.

Sometime thereafter, Alan Pesari died but no action was taken by WOODSTOCK to collect said fee until June 2007, when Woodstock claims he learned from a potential buyer of the property who wanted to hire WOODSTOCK for construction services, that, without notice to WOODSTOCK, the property was being sold and that the closing was scheduled for the end of June 2007. At that time, Woodstock commenced the instant action for, *inter alia*, breach of contract, an equitable lien, a preliminary injunction, an account stated and fraud. Woodstock asserts that, after threats to him and his attorney, an agreement was negotiated with BERRY HILL wherein $100,000.00 would be held in escrow at closing, pending the determination of this action. Woodstock states that his attorney prepared the necessary documents, which were approved by the title company and counsel, but, at the closing, his attorney was kept waiting for 3 ½ hours outside the closing room, and then told that the negotiated escrow agreement would not be signed. Woodstock claims that BERRY HILL filed an undertaking with the title company but neither he nor his attorney were permitted to view said document.

On the instant motion, the remaining principals of BERRY HILL claim that no money is owed to WOODSTOCK but, rather, WOODSTOCK owes money to BERRY HILL because of WOODSTOCK's failure to obtain the contemplated variances and building permits and because of its delay and negligence in obtaining same. Moreover, BERRY HILL states that it closed title on the subject premises, on June 28, 2007, even though the

Notice of Pendency was in place, by entering into a written undertaking with the purchaser's title company holding it harmless with respect to the instant action. Counsel for BERRY HILL states that the undertaking contains strict terms and conditions regarding the time frame to move to cancel the Notice of Pendency, which counsel urges should be cancelled of record. It is BERRY HILL's position that cancellation of the Notice of Pendency is warranted as the action is not one which includes a demand for judgment which "would affect the title to, or the possession, use or enjoyment of real property", citing CPLR §6501. Counsel argues that plaintiff's complaint is a weak attempt to plead an equitable lien were none exists but is instead being used as a form of attachment, citing *Downs v Yeun,* 297 AD2d 251, 746 NYS2d 389 (1st Dept. 2002) and *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 486 NYS2d 877, 476 NE2d 276 (C.A.1984). Counsel contends that the action is in realty, one for the payment of money based upon an alleged breach of contract and that just because payment was allegedly to come from the proceeds of sale of said property an equitable lien is not created. Counsel states that "an equitable lien 'is dependant upon some agreement express or implied that there shall be a lien on specific property'". *Liselli v Liselli*, 263 AD2d 468, 693 NYS21d 195 (2nd Dept. 1999), and that no such agreement has been shown herein.

Counsel for BERRY HILL points out that the unsigned writing relied upon by WOODSTOCK was never finalized and, moreover, it proposed payment based upon certain conditions precedent being met which were not satisfied by WOODSTOCK. The building permit, not in the form sought, was issued on June 29, 2005 and the date of contract of sale was February 26, 2007, with closing on June 28, 2007, well beyond the time frame specified in the proposal. Additionally, the affidavit of Conway contends that

WOODSTOCK received payment to itself and its designees in the sum of $119,000.00 for services rendered and the additional $100,000.00 to be paid dealt with what would potentially happen if BERRY HILL did not hire WOODSTOCK to do the construction of the approved plans. Counsel urges that the account stated is defective on its face and attempts to create a contractual obligation that never came into existence.

In opposition to the motion, Woodstock highlights his reliance upon his friend, Alan Pesari, and his promise that WOODSTOCK would be paid in full from the proceeds of sale of the property. Woodstock states that, based upon said friendship, he did not exercise his right to file a mechanic's lien on the property and he believed that said property would be the source of his reimbursement/payment when sold. He claims that he did not move for a Temporary Restraining Order when he learned that the property was to be sold because he was informed that an escrow agreement had been reached and the sum of $100,000.00 would be withheld from the proceeds of sale pending determination of this action. He claims that he has been "duped" by BERRY HILL from engaging in certain legal proceedings and urges that the Notice of Pendency should remain on the property or that sufficient sums should be paid into the Court to secure payment of any judgment he might receive. Moreover, while acknowledging that the property has been transferred, he questions why the buyer of the property and the title company were not made parties to the action before defendant's motion was made and urges that defendant's motion be dismissed on said ground alone. It is WOODSTOCK's position that a Notice of Pendency may be filed in an action seeking to establish and impress an equitable lien, citing *Borrero v East Harlem Council for Human Services, Inc.*, 165 AD2d 807, 564 NYS2d 55 (1st Dept. 2006), and that BERRY HILL's motion to vacate the lis pendens and dismiss the action

should be denied.

The Law

> The authority and requirements for securing a valid notice of pendency against real estate are set forth in CPLR article 65. CPLR 6501 provides: "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property."
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> Once properly indexed, the notice acts as constructive notice to all subsequent purchasers or incumbrancers: "A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if he were a party"(CPLR 6501). It is this special consequence, resulting as a matter of law from the filing of the statutory notice of pendency which is the essence of the remedy afforded by the Legislature.
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> Critically, the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review . . . To counterbalance the ease with which a party may hinder another's right to transfer property, this court has required strict compliance with the statutory procedural requirements . . . In entertaining a motion to cancel, the court is essentially limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501 (citations omitted).

5303 Realty Corp. v O.& Y. Equity Corp., supra; see also, New York SMSA Limited Partnership d/b/a Verizon LLC., 8 Misc.3d 1019A, 803 NYS2d 19 (Supreme New York Co. 2005).

"'Whether or not the action is brought to recover a judgment affecting the title to real property must be determined by the allegations of the complaint, and if no fact is alleged which would justify such a judgment, and where the complaint, as a whole, shows that the action is brought merely to enforce a personal obligation of the defendant which has no relation to the real estate described, it would seem to be clear that such an action is not one brought to recover a judgment affecting the title to real property.' (*Brox v Riker,* 56

App. Div. 388, 391,67 NYS 772)." *Richards v Chuba*, 195 Misc.732, 91 NYS2d 197 (Rensselaer Co. 1949).

While " . . . a lis pendens may be filed in an action seeking to establish and impress an equitable lien, *Rosenberg v Ritter,* 229 NYS2d 766, 767, a lis pendens will be cancelled where the facts alleged in the complaint are insufficient in law to support an equitable lien. *Id.* At 767, 768". *Borrero v East Harlem Council for Human Services, Inc., supra.* "An equitable lien may be decreed upon proof of the expenditure of money in the improvement of real property by a person in a confidential relationship to the owner *(Peturkevich v Maksimovich,* 1 AD2d 786; *Marum v Marum,* 21 Misc 2d 474) or proof of an intention that the premises would be held as security for the obligation (*DiNiscia v Olsey*, 162 App. Div.154; *Conkling v First Nat. Bank of Olean*, 286 App. Div. 537; *see Towner v Berg* ,5 Ad2d 481)". *Billson Housing Corp. v William Harrison et al*, 26 Misc 2d 675, 205 NYS2d 387 (Supreme Suffolk Co.1960).

Discussion

After a careful reading of the submissions herein, it is the judgment of the Court that the complaint as a whole essentially asserts an action for the payment of money based upon an alleged breach of contract. "The Court of Appeals has observed that 'an equitable lien "is dependant upon some agreement express or implied that there shall be a lien on specific property". . . "Such a lien 'requires an express or implied contract concerning specific property wherein there is a clear intent between the parties that such property be held, given or transferred as security for an obligation. . .'" (citiations omitted) *Liselli v Liselli, supra.* While the second cause of action alleges that an equitable lien should be

granted in a sum not less than $100,000.00, plus interest, based upon Woodstock's reliance on his friend's promise of payment from the sale of the subject property, such factual assertions are insufficient to support an action for an equitable lien. *Cf., Richards v Chuba, supra*; *see also, Rosenberg v Ritter, supra*. No allegations are made as to a confidential relationship that has been abused or of promises to convey the property to plaintiff (*Peturkevich v Maksimovich,* 1 AD2d 786, 147 NYS2d 869 [2nd Dept. 1956]), nor is a clear intention shown that the property was to be held, given or transferred as security for the alleged obligation. *DiNiscia v Olsey*, 162 AD 154, 147 NYS 198 (2nd Dept. 1914). It is the Court's judgment that WOODSTOCK has a claim against the assets in the hands of BERRY HILL, including the proceeds of sale from the subject property herein, however, it appears to the Court that the plaintiff has a complete legal remedy without the interposition of equity to establish and collect its claim. *See, Hurdman v Kelly,* 167 Misc.945, 4 NYS2d 316 (Supreme Westchester Co. 1938). Despite the limited grounds for cancellation of a notice of pendency provided in CPLR 6514, the Court finds that the pleadings cannot be reasonably construed to affect the title to, or the possession, use or enjoyment of real property and the extraordinary remedy of a notice of pendency pursuant to CPLR 6501 is not available and must be canceled. *5303 Realty Corp. v O.& Y. Equity Corp., supra.* Notwithstanding same, WOODSTOCK does not lose its right to sue for damages on the contract or on the other causes of action in which questions of fact preclude the granting of summary judgment.

Conclusion

Based on the foregoing, it is hereby

ORDERED, that BERRY HILL's motion is granted to the extent that the second cause of action is dismissed, the lis pendens filed herein is vacated and the Clerk of Nassau County is directed to cancel same; and it is further

ORDERED, that the fifth cause of action for a preliminary injunction enjoining the sale of the subject property is dismissed as moot; and it is further

ORDERED, that the cross-motion for an order dismissing the motion is denied; and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on November 29, 2007, at 2:30 P.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 26, 2007

WILLIAM R. LaMARCA, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE

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