

Bark v Kann

2007 NY Slip Op 33950(U)

November 29, 2007

Supreme Court, Nassau County

Docket Number: 2433-07/

Judge: William R. LaMarca

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SHORT FORM ORDER

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

**PRESENT: HON. WILLIAM R. LaMARCA
Justice.**

JIM BARK,

Plaintiff,

-against-

**STEVEN KANN and JENNIFER KANN and
"JOHN DOE #1" through "JOHN DOE #10",
the last en names being fictitious and
unknown to the Plaintiff, the person or
parties being person or parties, if any,
having or claiming an interest in or lien
upon the mortgage premises described
in the Complaint,**

Defendants.

**Motion Sequence #1
Submitted September 7, 2007**

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The following papers were read on this motion:

Notice of Motion.....	1
Memorandum of Law in Support.....	2
Plaintiff's "Response".....	3
Reply Affirmation.....	4

Requested Relief

Counsel for defendants, STEVEN KANN and JENNIFER KANN, moves for an order, pursuant to CPLR §6514 canceling and/or vacating a Notice of Pendency filed with the Clerk of Nassau County, dated July 17, 2007, with respect to real property located at 36

Thelma Street, Roslyn Heights, New York (hereinafter referred to as the "residence"). Plaintiff, JIM BARK, opposes the motion which is determined as follows:

Background

This litigation arises from a contract of sale for the KANN residence, entered into by plaintiff, BARK, on February 26, 2007 and, thereafter, by defendants on March 6, 2007. A down payment of \$24,350.00 was provided by plaintiff, to be held in escrow by the defendants' attorney. The contract provided for closing "on or about" April 9, 2007 and required the KANNS to provide a "valid and subsisting Certificate of Occupancy" for the residence as a condition to closing, all to occur prior to the expiration of the plaintiffs' mortgage commitment.

Counsel for defendants states that the necessary Certificate of Occupancy was obtained prior to the expiration of the plaintiffs' mortgage commitment and a closing date was set, but that plaintiff refused to appear at the closing. It is the defendants' position that the plaintiff defaulted under the terms of the contract and, thereafter, commenced the within action, on July 17, 2007, with the filing of a summons and verified complaint, seeking the return of his contract deposit and other monetary damages as a result of the alleged breach by the KANN defendants. A Notice of Pendency, dated July 17, 2007, was filed simultaneously with the commencement of the action.

In support of the motion, counsel for defendants points out that the action is, essentially, one for money damages and does not seek specific performance or the transfer of title to plaintiff. Counsel argues that the action is not one in which a Notice of Pendency can be properly secured because it does not effect title, use, possession or enjoyment of real property and merely seeks the return of his down payment and casts a

pall over the KANN's attempt to resell the residence. A review of the verified complaint reflects plaintiff's allegations that defendants did not provide the required certificates for closing of title and that plaintiff's mortgage commitment expired and that plaintiff is entitled to the refund of his down payment and other damages including attorney's fees.

In opposition to the motion, counsel for plaintiff reiterates the KANNs' failure to produce the required Certificate of Occupancy prior to July 6, 2007, the final closing date and the date on which plaintiff's mortgage commitment would expire. Counsel states that plaintiff still wishes to proceed with the contract but, as a result of defendants' failure to timely cure the defect in title, plaintiff lost his mortgage commitment and seeks damages so that he can reapply for the same mortgage and complete the closing. Additionally, plaintiff submits the affirmation of James D. Schwartz, Esq., the attorney who represented him in the purchase of the residence, who relates the numerous delays in closing caused by defendants' inability to obtain a Certificate of Occupancy prior to the expiration of plaintiff's mortgage commitment, and his repeated requests for the return of plaintiff's down payment. An affidavit of JIM BARK asserts that his locked in interest rate of 5.87% expired on May 18, 2007 and to postpone or leave open the expiration date of the locked in rate would require an extra \$1,500.00 and 6 extra points. He claims that defendants inability to produce the required Certificate of Occupancy resulted in the expiration of his mortgage commitment and an increase in the interest rate. Plaintiff states that he still wishes to proceed with the purchase of the residence if defendants will undertake the expenses incurred and pay for the 6 extra points. In his affidavit he demands that defendants return to the closing table and tender title and bear the extra expenses incurred by him. Said demands are not part of the pleadings.

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."

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.

* * *

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).

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. 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, plaintiff does not lose his right to sue for damages on the contract. However, given plaintiff's alleged interest in completing the purchase of the residence, the Court encourages counsel herein to use their good offices to reach a compromise with respect to the increased expenses incurred as a result of the delay in timely closing title.

Conclusion

Based on the foregoing, it is hereby

ORDERED, that defendants' motion is granted and 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 down-payment in the amount of \$24,350.00 shall continue to remain in escrow until disposition of this action by settlement or judgment; and it is further


ORDERED, that the parties shall appear for a Preliminary Conference on January 9, 2008, 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: November 29, 2007



WILLIAM R. LaMARCA, J.S.C.

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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE

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