

DeMarrais v Swinton

2007 NY Slip Op 34133(U)

November 29, 2007

Supreme Court, Nassau County

Docket Number: 5560-06/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

RONALD DEMARRAIS and LARRY DAVIS,

Plaintiff,

Index No. 015560/06

-against-

**MELISSA SWINTON and ROBERT SWINTON
and "JOHN DOE #1" THROUGH john doe #10",
the last names being fictitious and unknown to the
plaintiff's the person or parties intended being the
person or parties, if any, having or claiming an
interest in or lien upon the mortgaged premises
described in the complaint,**

**Motion Submitted: 9/5/07
Motion Sequence: 001**

Defendants.

x

The following papers read on this motion:

- Notice of Motion.....XX
- Answering Papers.....XX
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's Respondent's.....

Plaintiffs Ronald DeMarrais and Larry Davis move this court for an order pursuant to CPLR § 3212 granting plaintiff's summary judgment on their claims; dismissing defendants counterclaims with prejudice; appointing a referee for purposes of computing the total sum due and owing to the plaintiffs; and to amend the caption excising defendants John Doe # 1 through John Doe # 10. Defendants oppose the plaintiffs motion.

This action was commenced by the service of a Summons and Complaint and the filing of a Notice of Pendency by plaintiff.

On or about June 13, 2002, plaintiffs and defendants entered into a Residential Contract of Sale ("contract") in which the plaintiffs agreed to purchase and the defendants agreed to sell the premises located at 625 Derby Drive East, Oceanside, New York. Pursuant to the contract, the plaintiffs deposited with defendant's attorney, as escrowee, the sum of Sixty Thousand (\$60,000.00) Dollars, as the down payment of the purchase price. Pursuant to the Rider to the contract, the down payment was paid to the defendants and in exchange they executed Note and Mortgage in the sum of Sixty Thousand (\$60,000.00) Dollars which the plaintiff's attorney, who is also a plaintiff in this action was supposed to hold in escrow. The Rider provided; "In the event Sellers default, said mortgage may be recorded against the subject property".

By a letter dated August 7, 2002, plaintiff Davis requested a termination of the contract because; "at the time the Contract was entered into, I had envisioned a use for the premises which is prohibited by the covenants and restrictions". Thereafter, by a letter dated October 15, 2002, plaintiff Davis demanded defendant's attorney; "amend the Contract to make the transaction subject to the Purchaser's ability to obtain final conditional approval of an eight (8) lot subdivision within 18 months of the date of the amendment" or he would demand the down payment be returned to his office. He further threatened that if the changes to the contract were not made before November 1, 2002 he would file the mortgage which had been executed by the defendants. Defendant's attorney wrote to the plaintiff and advised

him that the defendants were under no obligation to amend the contract, and that Davis had an obligation as a fiduciary to hold the Mortgage in escrow. The correspondence between the two attorneys was provided as Exhibits to Defendant's Affidavit in Opposition.

Although the defendants do acknowledge the fact that the plaintiffs had discussed their idea of constructing additional single family residences on the premises, they maintain that they made no representations regarding if and how the premises could be developed, and they were under no duty to advise the plaintiffs as to whether their property could be developed in accordance with the way in which the plaintiffs had "envisioned" the property.

Plaintiff Davis claims he and plaintiff DeMarrias "intended to purchase the property for purposes of developing the property with additional and other residential structures"; "communicated this fact to the seller and counsel for the seller before the contract was signed"; and he "would not have entered into the agreement to purchase the property if there were covenants and restrictions against development". The contract is silent with regard to their plans to develop the property and whether or not they would take the property subject to covenants and restrictions.

"When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations" (*see Correnti v Allstate Properties, LLC*, 38 AD3d 588, quoting *Costello v Casale*, 281 AD2d 581, citing, *W.W.W. Assocs. v Del Col*, 174 AD2d 725, *affd'* 79 NY2d 1016). The rule is well settled that a court

may not, under the guise of interpretation, make a new contract for the parties if to do so would contradict the clearly expressed language of the contract (*see, Rodolitz v Neptune Paper Prods.*, 22 NY2d 383). The language suggested by the plaintiff in his October 15, 2002 letter is precisely the type of language that could have obviated the need for this litigation had it been included in the contract from the beginning. That language was not included in the contract and was not agreed to by the parties in the writing that the court is now asked to consider.

Where as here, the terms of a real estate contract are unambiguous, evidence outside the four corners of the document is inadmissible to add or vary the writing (*W.W.W. Assocs. i.d.* at 162) In the present matter, paragraph 28(a) of the Contract specifically states:

“All prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract. It completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this contract.”

The plaintiffs and their attorney had an obligation to research this matter and investigate the records of the County Clerk to determine if there were any covenants or restrictions that would prevent them from developing the property as they had “envisioned”. For whatever reason that does not appear to have been done by plaintiff’s attorney. It is also unclear to the court, after painstakingly reviewing the title report annexed to the plaintiff’s Notice of Motion as Exhibit 8, whether the covenants and restrictions actually prevented the

development of the premises or if they merely made the development more laborious and time consuming.

In addition, after examining the contract, it appears to the court that the contract was silent on the issue of existing covenants and restrictions that would prevent the development of the premises. Again, plaintiff's attorney failed to negotiate the proper language into the contract. Although plaintiff Davis argues the covenants and restrictions are defects on title, they are simply exceptions to title and they do not render the premises unmarketable. As such, it appears title has remained marketable and the defendants maintain that they have been ready, willing, and able to convey marketable title.

Defendants maintain that it was the plaintiffs who chose not to proceed with the closing and that they failed to fulfill their obligation under the contract. In addition defendants state plaintiff Davis had no right to record the mortgage and that he breached his fiduciary duty as an escrow agent by recording the Mortgage.

The plaintiff's have failed to meet their burden of making a prima facie showing of entitlement to summary judgment as a matter of law (*see, Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320; *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851). The proponent of a motion for summary judgment must tender evidence sufficient to eliminate any material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557). In the present case, both sides claim the other defaulted in this matter. As a result, questions of fact remain as to whether a covenant or restriction is a defect on title which would render title unmarketable and therefore undeliverable under the terms of the contract; and whether or not the plaintiff

agreed to take the property subject to covenants and restrictions given the fact that the contract was silent to that issue. These are significant issues of fact that remain unanswered and it appears this matter would benefit from continued pre-trial discovery and depositions.

Accordingly, plaintiff's motions for summary judgment; to strike the defendant's counterclaims, and appointing a referee for computation are all denied. Plaintiff's remaining motion to amend the caption to remove defendants John Doe # 1 through John Doe # 10 is granted. The amended Caption shall read as follows:

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TRIAL TERM, PART 51 NASSAU COUNTY**

PRESENT:

**Honorable James P. McCormack
Acting Justice of the Supreme Court**

RONALD DEMARRAIS and LARRY DAVIS,

Plaintiff,

-against-

MELISSA SWINTON and ROBERT SWINTON

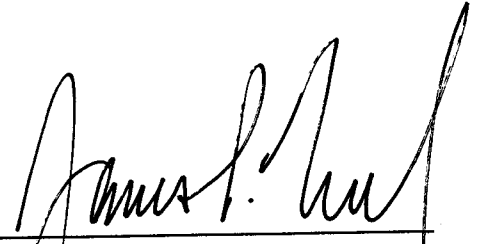
Defendants.

_____x

Index No.: 015560/06

The foregoing constitutes the decision and order of this court.

Dated: November 29, 2007
Mineola, N. Y.



James P. McCormack, A. J. S. C.

ENTERED

DEC 16 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**