

**Williams v Rose Dev. Corp.**

2008 NY Slip Op 30026(U)

January 2, 2008

Supreme Court, New York County

Docket Number: 0105394/2004

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 105394/2004

WILLIAMS, BERKELEY CARRINGTON

vs

ROSE DEVELOPMENT

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

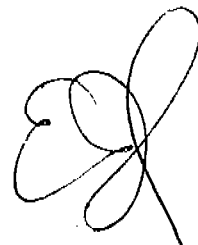
Upon the foregoing papers, It is ordered that this motion

*is decided as attached*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
JAN 10 2008  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: 1/2/08



**EMILY JANE GOODMAN** J.S.C.  
 NON-FINAL DISPOSITION

Check one:  FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 17

-----X  
BERKELEY CARRINGTON WILLIAMS and  
MARIAMNA WILLIAMS, his wife,

Plaintiffs,

-against-

Index No. 105394/04

ROSE DEVELOPMENT CORP. and STEPHEN S.  
WEINTRAUB as Escrow Agent only,

Defendants.

-----X  
EMILY JANE GOODMAN, J.:

**FILED**  
JAN 10 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs Berkeley Carrington Williams and his wife, Mariamna Williams, move for summary judgment on their complaint and for an order granting specific performance of their contract to purchase the building at 543 West 147<sup>th</sup> Street, New York, New York (the premises). Defendants Rose Development Corp. (Rose) and Stephen S. Weintraub, as Escrow Agent only, oppose plaintiffs' motion and ask the court to grant summary judgment in favor of defendants dismissing the case and canceling the lis pendens filed by plaintiffs.

On March 21, 2003, plaintiffs and defendant Rose entered into a contract for the sale of the premises, for the sum of \$739,000.00 (Contract of Sale). Pursuant to the contract, plaintiffs agreed to obtain a mortgage loan, or a package of first and second mortgage loans. Rose, as seller, agreed to deliver a final certificate of occupancy for the premises at the closing, and remove "liens or encumbrances that seller is obligated to pay or discharge" by using the purchase price to

discharge them or by depositing "sufficient monies with the title insurance company employed by Purchaser acceptable to and required by it to assure against their enforcement out of the Premises and will insure Purchaser's Institutional Lender clear of such matters." Contract of Sale, ¶ 20. The contract also requires that the property be delivered free and clear of certain violations. *Id.* at ¶ 10. Further, it provides that "Seller shall give and Pruchaser (sic) shall accept such title as any reputable title company licensed to insure titles in the state of New York other than J.C. Land and Home Abstract and Lex Terrae, shall be willing to approve and insure in accordance with its standard form of title policy...." *Id.* at ¶ 13.

On April 16, 2003, plaintiffs obtained a Report of Title from Horizon Land Services, LLC (Horizon), as Agent for First American Title Insurance Company of New York, which reported, inter alia, several parking violation judgments and Environmental Control Board liens against the prior owners of the property, Michael Saunders and Mary Saunders, as well as numerous Environmental Control Board liens against Rose. In addition, the Horizon report indicated that there were two notices of pendency filed by the City of New York for an unsafe building, as well as Emergency Repair Liens.

On September 4, 2003, plaintiffs obtained a mortgage commitment from Bank of New York Mortgage Company (BNY) for

\* 4 ]  
\$499,300.00.

On January 29, 2004, defendants obtained a temporary certificate of occupancy for the building.

On February 2, 2004, Stephen S. Weintraub, attorney for defendants, wrote to Christina Burks Lee, attorney for plaintiffs stating that Housing Preservation and Development (HPD) violations had been dismissed and asking that the closing be scheduled as soon as possible.

On March 8, 2004, Weintraub wrote to Lee indicating that he understood that plaintiffs' title company refused to close title to the property because of the ECB violations against Rose. Rose requested, pursuant to paragraph 13 of the contract, that plaintiffs agree to use Millennium Abstract Corporation which had agreed to insure the title despite the ECB violations. Weintraub enclosed a March 4, 2004 letter from Millennium stating that Millennium is "aware of the ECB's against Rose Development Corp. and we will insure title without exception to them as Agent of Fidelity National Title Insurance of New York (Fidelity)." Letter to Stephen Weintraub, dated March 4, 2004. Millennium's willingness was apparently based on an alleged oral agreement between Millennium and Rose that Millennium would accept a \$10,000.00 escrow to cover the violations. Weintraub further stated that, if plaintiffs failed to agree to close title with Millennium within five days of his letter and failed to schedule

a closing date, Rose had instructed him to cancel the contract and return plaintiffs' down payment.

On March 11, 2004, Lee wrote to Weintraub rejecting defendant's request to use Millennium, and stating that she had spoken with Fidelity and had been informed that Fidelity had not authorized Millennium to close and bind Fidelity.

On March 25, 2004, Weintraub responded that, since plaintiffs had insisted that title insurance could only be cleared through Horizon, and since Rose had not been able to clear all objections to title to Horizon's satisfaction, Rose had elected to cancel the contract pursuant to "paragraph (b) (1)" and return plaintiffs' deposit of \$30,000.00.<sup>1</sup>

On April 7, 2004, attorneys for BNY wrote to Lee, indicating that several things had to be done before title was clear to close on the property, including but not limited to clearing a number of outstanding judgments, ECB liens, emergency repair liens and tax liens against the premises.

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<sup>1</sup> Weintraub was presumably referring to paragraph 21 (b) (1) which states that "[i]f at the date of Closing Seller is unable to transfer title to Purchaser in accordance with this contract ... Seller shall have the right, at Seller's sole election either to take such actions as Seller may deem advisable to remove, remedy discharge or comply with such Defects or to cancel this contract." Contract of Sale, ¶ 21 (b) (1). However, as plaintiffs note, to trigger this provision, a seller must act in good faith to cure any title defects, and the provision contemplates the existence of a situation that is beyond the control of the parties. See *Naso v Haque*, 289 AD2d 309 [2d Dept 2001]).

Apparently plaintiffs' efforts to purchase the building continued, and on October 15, 2004, Horizon wrote to Jerry Dicker, attorney for Rose, with a copy to Lee, calculating that it considered an escrow of \$350,500.00 to be necessary to cover outstanding judgments of \$184,031.00 against Michael and Mary Saunders and Rose.

On October 20, 2004, BNY sent a fax to plaintiffs asking them to contact their attorney and find out if title to the property had yet been cleared. At that point, although a number of the judgments had been cleared, a large number of ECB violations remained.

On October 29, 2005, Rose obtained a final certificate of occupancy for the premises.

Plaintiffs argue that there was nothing preventing defendants from clearing title to the property, and, rather, they had chosen not to pay the fines that would render the title clear. Plaintiffs refer to the deposition of Joseph Davoudzadeh, president and director of Rose, who testified that Rose considered a large number of the ECB violations unjustified, particularly those which were issued on property other than the premises. Davoudzadeh further testified that Rose, therefore, wanted to obtain hearings on all of the violations, but the agency would not agree to conduct hearings on groups of violations, insisting on individual hearings for each violation,

and Davoudzadeh was not able to find expeditors that were willing to do the work necessary to obtain hearings on all of the judgments in order to clear them. As a result, Rose wished to proceed by using Millennium, which agreed to insure the title in spite of the pending ECB violations.

Plaintiffs argue that Rose was not "unable" to clear the violations and could have cleared them by paying the outstanding fines, since the total did not and do not exceed the purchase price for the property, and could be paid by defendants out of the proceeds of sale, as contemplated by the contract. Plaintiffs further contend that Millennium did not have the authority to represent Fidelity and that the sum that Millennium purportedly agreed to accept as escrow to cover the outstanding ECB violations was not a sufficient amount, as required by the contract. Plaintiffs base their argument concerning the size of an adequate escrow on Lee's view as an experienced real estate attorney that title insurance companies required a far greater sum in escrow in order to insure title where there were existing judgments and liens against the title, and on Horizon's memo of October 15, 2004 to counsel to Rose, calculating what Horizon considered to be adequate escrows to cover outstanding judgments. See Memo from Fern Epstein to Jerry Decker concluding, inter alia, that an escrow of \$265,000.00 was necessary to cover ECB judgments in the amount of \$137,000.00. Finally, referring to

\* 8 ]  
alleged settlement discussions conducted by the parties, plaintiffs contend that Rose told them that it had another party that was willing to use Millennium as title insurer and pay \$1,050,000 for the property and that Rose was willing to go forward and sell the property to plaintiffs if they increased their offer by \$150,000.

According to plaintiffs, Rose's unwillingness to clear the title and its insistence on using Millennium as the title insurer, constitutes a breach of the contract. Plaintiffs further contend that they are and have been ready, willing, and able to close on the property, and, therefore, they are entitled to specific performance of the contract.

In opposition, defendant first argues that the statements by Lee regarding the usual practice in the title clearance process must be disregarded, since counsel may not properly provide evidence as an expert witness. Defendant further argues that Lee's reference to statements made by defendant during settlement discussions is improper, pursuant to CPLR 4547. Defendant argues that, for these reasons alone, plaintiffs' motion for summary judgment should be denied.

On the merits, defendant argues that plaintiffs have failed to show that they were ready, willing and able to close at the time required by the contract and that, therefore, plaintiff's motion for summary judgment must be denied. *See Goller Place*

*Corp. v Cacase*, 251 AD2d 287, 287-288 [2d Dept 1998] ["Before specific performance of a contract for the sale of real property may be granted, a plaintiff must demonstrate that he was ready, willing, and able to perform on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter"]. According to defendant, pursuant to paragraph 15 of the contract, the closing date was 30 days after the issuance to the purchaser of the mortgage commitment, which was issued by BNY on September 4, 2003. Thus, defendant maintains that the closing date was October 4, 2003 and that in order to bring an action for specific performance, plaintiffs were required to show that they were ready, willing and able to close by that date (that they had \$731,000.00 in place with no conditions attached). Defendant argues that the mortgage commitment from BNY was for \$499,300.00 and that plaintiffs have not provided documentation of having obtained the second mortgage of \$231,000.00 contemplated in the contract. Defendants cite the provision in the BNY mortgage commitment requiring that the purchaser provide subordinate financing documents for a second mortgage of \$218,000. Defendants quote the testimony of plaintiff Berkeley Carrington Williams that it was his understanding that BNY, not he, applied for the second mortgage commitment with Neighborhood Housing Services (NHS); however, he was not aware of ever having received

a copy of that commitment. Testimony of Berkeley Carrington Williams, at 17-18. Defendant also argues that plaintiffs have failed to show that they had the necessary funds to cover closing costs at the time of closing. Finally, defendant argues that, since plaintiffs have failed to show that they were ready, willing and able to close, the court should, pursuant to CPLR 3212 (b), grant summary judgment in defendants' favor, without the filing of an additional motion, and dismiss the action.

In response, plaintiffs contend that, because neither party sent a time of the essence letter, the parties acquiesced in a delay of the closing. Plaintiffs contend that initially, BNY wished to proceed to closing shortly after giving the mortgage commitment in September 2003, but defendant failed to remove the various judgments that prevented plaintiffs from obtaining a clear title to the property. In fact, according to plaintiffs, defendant did not even begin the process of clearing title until mid-February 2004, did not provide a final certificate of occupancy until November 29, 2005, and still have not cleared the bulk of the ECB violations, many of which were incurred after the signing of the contract in September 2003. Furthermore, according to plaintiffs, they only need show that they had "substantially" performed the "material" obligations of the contract of which they were capable of performance when the action began and that they are willing and able to perform the

balance of them. Finally, Williams states in his affidavit in support of his motion for summary judgment that, in late 2006, the BNY loan officer told him that, because of a change in guidelines, plaintiffs should be able to borrow sufficient funds from BNY to finance the purchase without relying on a second mortgage from NHS.

Before addressing the arguments of the parties, the court notes that, pursuant to CPLR 3212 (b), a party moving for summary judgment must provide copies of the pleadings. See *Ayer v Sky Club, Inc.*, 70 AD2d 863 (1<sup>st</sup> Dept 1979); *Krasner v Transcontinental Equities, Inc.*, 64 AD2d 551 (1<sup>st</sup> Dept 1978). Here both parties are seeking summary judgment in their favor and neither have supplied the pleadings. The absence of the pleadings is particularly troublesome here, since on the basis of the submissions of both parties, the court could have mistakenly concluded that the only relief sought by plaintiffs in this action is specific performance. Though the court could deny the motion and then permit movant to supplement the record, because the pleadings were available in the file in the County Clerk's office, and plaintiffs' motion is denied on the merits, the court will not follow that course. However, in the future, counsel should take better care to comply with the mandates of the CPLR in filing motions for summary judgment.

Of course, plaintiffs as movants, have the burden to show

that they are entitled to summary judgment as a matter of law, and that there are no outstanding questions of fact. Here they have failed to do that. Although plaintiffs submitted evidence of their mortgage commitment from BNY, they failed to submit similar evidence of their purported mortgage commitment from NHS. Williams's statement in his affidavit that he believes that BNY is now prepared to loan the full amount that was originally to be covered by the first and second mortgages is an insufficient basis on which to grant summary judgment and plaintiffs' motion is denied. Thus, the court need not reach the question of whether, under the contract, plaintiffs were justified in refusing to accept Millennium as the title insurer. Nor need the court consider Lee's hearsay assertions in her affidavit regarding whether Millennium was authorized to offer title insurance on behalf of Fidelity, the customary size of escrow accounts to properly cover outstanding judgments against title, or her assertions concerning what was allegedly said by defendants in settlement negotiations. Finally, the court need not determine whether Rose could merely decide not to pay the outstanding ECB judgments and cancel the contract, pursuant to paragraph 21 (c) (1) and (c) (2).<sup>2</sup>

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<sup>2</sup>Defendant's ECB argument is only viable if defendant opted to cancel the contract based on liens or encumbrances which constitute "Defects," which are defined, among other things, as liens or encumbrances "other than those which Seller has herein expressly agreed to remove." Contract ¶21 (b) (1).

The court denies defendant's request for summary judgment in its favor, pursuant to CPLR 3212 (b), with respect to dismissal of the causes of action for breach of contract and breach of the covenant of good faith and fair dealing (which have not been addressed in any way by the parties) and holds in abeyance the motion regarding dismissal of the specific performance claim, pending further submissions.

Citing *Internet Homes, Inc. v Vitulli* (8 AD3d 438 [2d Dept 2004]), defendant argues that in order to obtain specific performance, plaintiffs must show that they had the financial ability to purchase the property. As the Court in *Internet Homes, Inc.* held, even where the defendants improperly cancelled the contract, the plaintiff's unsubstantiated assertions are insufficient to satisfy his burden to establish that financial ability, and, therefore, the Supreme Court properly searched the record and granted summary judgment dismissing the complaint.

Citing *Piga v Rubin* (300 AD2d 68 [1<sup>st</sup> Dept 2002]), plaintiffs respond that they need only show that they had "substantially performed" their obligations under the contract. According to plaintiffs, under the contract, their obligation was to move the loan along, which they had done, and it was Rose's delay in clearing title and obtaining a final certificate of occupancy which prevented plaintiffs from being able to close.

Contrary to plaintiffs' argument, they have not

"substantially performed" their obligations under the contract based on the previously secured BNY commitment for \$231,000 less than the contract price, and based on the potential for obtaining the entire loan from BNY.

Here, it is undisputed that neither party has sent a time of the essence closing letter. Absent such a letter, defendant must establish that plaintiffs were not financially able to close within a reasonable time after a non-time of the essence closing. See *28 Properties, Inc. v Akleh Realty Corp.*, 22 AD3d 432 [1st Dep 2005] [citing *Internet Homes, Inc.* with approval]). Contrary to defendant's argument, it has not established that October 4, 2003 is the closing date by which the court must measure plaintiffs' financial ability given defendant's March, 2004 letter--five months thereafter--advising plaintiffs to schedule a closing date in March, 2004. Apart from the issue of the closing date, the parties have not briefed the issue of what constitutes a reasonable period of time after the closing date to ascertain plaintiffs' financial ability. See *28 Properties, Inc.*, 22 AD3d 432, *supra* (after bench trial, the trial court correctly held that plaintiff was not entitled to specific performance because it could not demonstrate its financial ability to close until some four years after the original closing date).

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is

denied; and it is further

ORDERED that defendant's request for summary judgment, pursuant to CPLR 3212 (b) is denied with respect to the causes of action for breach of contract and breach of the covenant of good faith and fair dealing, and is held in abeyance with respect to dismissal of the claim for specific performance pending submission of additional legal memorandum, by January 31, 2008, establishing (1) whether a closing was ever scheduled, and if so, when, (2) what constitutes a reasonable period of time after that date to ascertain whether plaintiffs were financially able to close, and (3) whether an issue of fact exists as to whether plaintiff was financially able to close within that reasonable period of time.

**This Constitutes the Decision and Order of the Court.**

Dated: January 2, 2008

ENTER:

  
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J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
JAN 10 2008  
NEW YORK  
COUNTY CLERK'S OFFICE