

Helsing v Greene

2008 NY Slip Op 30437(U)

February 7, 2008

Supreme Court, Nassau County

Docket Number: 6083-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

SUSAN HELSINGER,
Plaintiff,

TRIAL / IAS PART 32
NASSAU COUNTY

- against -

Index No. 16083/07

DOLORES GREENE,
Defendant.

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment to the plaintiff declaring the plaintiff's entitlement to rescind a certain contract of sale for real property, and for a further judgment declaring the plaintiff entitled to the return of the plaintiff's \$30,000.00 down payment. The defendant opposes the motion.

The parties entered into a contract of sale for 115 Hampton Way, Merrick, New York. The contract provided for a purchase price with a \$30,000.00 down payment to be held in escrow by the seller's attorney, and a closing date. The down payment was made, and held in an IOLA escrow account. Paragraph 11 (a) (iv) of the contract of sale states, in relevant part: "Seller represents and warrants to purchaser that the premises are not

affected by any exemptions or abatements of taxes. Paragraph 16 (a) of the contract of sale provides, in relevant part: "This contract and Purchaser's obligation to purchase the premises are also subject to and conditioned upon the fulfillment of the following conditions precedent: The accuracy, as of the date of closing of the representations and warranties of Seller made in this contract."

The plaintiff's attorney states, in a supporting affirmation dated December 4, 2007, the Fidelity National Title Insurance Company's title report obtained by the purchaser's then attorney in preparation for the closing revealed contrary to the seller's representation and warranty there was an exemption or abatement affecting the premises, and in a substantial amount. The plaintiff's attorney points to the general information sheet and the tax search appended to Fidelity National Title Insurance Company's report indicates a \$1,034.00 Star exemption under the New York State Tax Relief Program against the school taxes. The plaintiff's attorney indicates the tax search indicated school taxes without the exemption to be \$7,179.60, and with the exemption \$6,145.52, a difference of 14.4%. The plaintiff's attorney avers such an undisclosed exemption or abatement is hardly insignificant, and notes the plaintiff's accompanying affidavit dated December 4, 2007, indicates the plaintiff purchased the premises at a time the plaintiff's income was very limited, and when the plaintiff's disposable income was considered before signing the contract of sale. The plaintiff's attorney asserts it was the plaintiff's understanding the school taxes were \$6,145.52, but subject to a reduction for the Star exemption under

the New York State Tax Relief Program which would reduce those taxes by about an additional \$1,000.00. The plaintiff's attorney points to the plaintiff's statement where the plaintiff states first learning of the default in the seller's representation and warranty upon reviewing the plaintiff's closing costs and tax adjustments with the plaintiff's attorney shortly before scheduling the closing. The plaintiff's attorney notes a "Star" exemption is a New York State school tax abatement which is available to owner occupied homes upon application to the tax assessor, so such a tax reduction is a tax exemption or abatement. The plaintiff's attorney alleges, immediately upon discovering the defendant's representation and warranty were false, the plaintiff's then attorney, Edwin A. Molloy, Esq. by letter dated August 27, 2007, directed to the defendant's attorney, Alan H. Weinreb, Esq. notified that attorney the plaintiff elected to cancel the contract, and demanded the return of the plaintiff's down payment. The plaintiff's attorney states Weinreb replied by letter on September 11, 2007, to Molloy, and stated he paid the down payment to the seller, but Weinreb has since advised he still holds the down payment, and deems the contract between the parties to be terminated. The plaintiff's attorney contends, given the express language in the contract of sale, the plaintiff has every legal right to rescind the contract, and demand the return of her down payment upon the simple determination the seller's representation and warranty were false. The plaintiff's attorney asserts, because there can be no dispute between the parties that an abatement or exemption of taxes applied to the premises in question, the defense attorney, after

demand, refused to return the plaintiff's down payment, the plaintiff is entitled to the relief sought, and for a judgment foreclosing the plaintiff's vendee lien as provided in paragraph 24 of the contract of sale.

The defense attorney states, in an opposing affirmation dated January 3, 2008, the plaintiff and the defendant on May 2, 2007, entered into a contract for the sale of the subject premises for \$550,000.00, with a closing date of on or before August 1, 2007. The defense attorney states the plaintiff received a title report and tax report from Fidelity National Trust on or about May 21, 2007. The defense attorney states, in contemplation of closing costs, this affirmant contacted Molloy to set a mutually agreeable closing date on August 26, 2007, after Molloy previously agreed to set the closing date. The defense attorney claims receiving a letter on August 29, 2007, from Molloy stating due to a material misrepresentation by the seller, the purchaser elected to cancel the contract. The defense attorney asserts the defendant on September 4, 2007, having relied upon the upcoming closing, and having made plans to relocate her residence in Florida, relocate to Florida. The defense attorney avers the defendant resold the subject premises to Douglas S. Greco and Cyd C. Greco on December 6, 2007, for \$520,000.00, and the defense attorney continues to hold \$36,000.00 in escrow representing the \$30,000.00 down payment, plus an additional \$6,000.00. The defense attorney contends there is an factual issue of waiver requiring determination by the trier of fact as to the existence of the Nassau County Star Exemption disclosed to the plaintiff. The defense attorney argues the

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plaintiff waived the right to object to the existence of the Nassau County Star Exemption when the plaintiff agreed with the defendant on or about August 15, 2007, to set a closing date prior to its default without mention of the Nassau County Star Exemption. The defense attorney maintains the defendant relied upon the plaintiff's proceeding to schedule a closing with knowledge of the Nassau County Star Exemption in hand for the entire summer, to wit three months, and relocated to Florida, so the plaintiff should be estopped from attempting to cancel the contract of sale. The defense attorney indicates the materiality of the alleged breach is now an issue of fact which cannot be determined by this motion.

The plaintiff's attorney states, in a reply affirmation dated January 7, 2008, the language in the contract of sale is not in dispute, and submits the documentary evidence shows the defendant represented and warranted there were no abatements nor exemptions of taxes affecting the property when, in fact, such existed. The plaintiff's attorney reiterates the plaintiff's contentions and legal arguments and counters the defense assertions, in detail, in this affirmation. The plaintiff's attorney requests an order granting to the plaintiff summary judgment declaring the plaintiff's entitlement to rescind the contract of sale, and for a judgment declaring the plaintiff entitled to the return of the down payment.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The

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motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

This Court has carefully reviewed and considered all of the parties' papers with

respect to this motion. The Court finds there are facts sufficient to require a trial.

Accordingly, the motion is denied.

So ordered.

Dated: February 7, 2008

ENTER:



J. S. C.

HON. ANTONIO I. BRANDVEEEN

FINAL DISPOSITION

NON FINAL DISPOSITION

ENTERED

FEB 13 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE