

Knight v Barteau

2008 NY Slip Op 31038(U)

March 27, 2008

Supreme Court, Nassau County

Docket Number: 6546-06/

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**RICHARD G. KNIGHT, as Trustee, and on behalf
of the RGK COMPUTER ASSOCIATES, INC.
PENSION PLAN**

**TRIAL/IAS, PART 7
NASSAU COUNTY**

Plaintiff,

-against-

JON W. BARTEAU and KIM P. BARTEAU

INDEX NO.: 016546/06

Defendants.

MOTION DATE: 12/05/07

MOTION SEQ.: 001

The following papers having been read on the motion (numbered 1-3):

- Notice of Motion.....1**
- Notice of Cross Motion.....2**
- Reply Affirmation.....3**

Motion by plaintiff, Richard G. Knight, as Trustee and on behalf of the RGK Computer Associates, Inc. Pension Plan, pursuant to CPLR 3212, for an Order, granting it summary judgment; and,

Cross motion by defendants, Jon W. Barteau and Kim P. Barteau, pursuant to CPLR 3212, for an Order, granting them summary judgment and dismissing the complaint of the plaintiff; the motions are determined as herein set forth below. The Court hereby withdraws its Order, dated March 3, 2008.

This is an action which seeks the return of a down payment in the amount of \$46,500 made in connection with a contract between the plaintiff, as purchaser, and the defendants, as sellers, for the transfer of residential real property commonly known as 3 Charles Place, Bayville, New York (the "subject property").

On or about March 3, 2006, plaintiff as "RGK Computer Associates, Inc.

Pension Plan” entered into a residential contract of sale with the defendants, Jon W. Barteau and Kim P. Barteau. Pursuant to the terms of the contract, plaintiff advanced a down payment in the amount of \$46,500, representing 10% of the total purchase price, \$465,000. Paragraph 21(b) of the contract states, in pertinent part, as follows:

21. Title Examination; Seller’s Inability to Convey; Limitations of Liability.

(b) (I) If at the date of Closing Seller is unable to transfer title to Purchaser in accordance with this contract, or Purchaser has other valid grounds for refusing to close, whether by reason of liens, encumbrances or other objections to title or otherwise (herein collectively called “Defects”), other than those subject to which Purchaser is obligated to accept title hereunder or which Purchaser may have waived and other than those which Seller has herein expressly agreed to remove, remedy or discharge and if Purchaser shall be unwilling to waive the same and to close title without abatement of the purchase price, then, except as hereinafter set forth, Seller shall have the right, at Seller’s sole election, either to take such action as Seller may deem advisable to remove, remedy, discharge or comply with such Defects or to cancel this contract; (ii) *if Seller elects to take action to remove, remedy or comply with such Defects, Seller shall be entitled from time to time, upon Notice to Purchaser, to adjourn the date for Closing hereunder for a period or periods not exceeding 60 days in the aggregate (but not extending beyond te date*

upon which Purchaser's mortgage commitment, if any, shall expire), and the date for Closing shall be adjourned to a date specified by Seller not beyond such period. *If for any reason whatsoever, Seller shall not have succeeded in removing, remedying or complying with such Defects at the expiration of such adjournment(s), and if Purchaser shall still be unwilling to waive the same and to close title without abatement of the purchase price, then either party may cancel this contract* by Notice to the other given within 10 days after such adjourned date; (iii) notwithstanding the foregoing, the existing mortgage (unless this sale is subject to the same) and any matter created by Seller after the date hereof shall be released, discharged or otherwise cured by Seller at or prior to Closing (*Motion, Ex. A [Contract of Sale with Rider] [Emphasis Added]*).

Annexed to the contract of sale was a Rider which states, in pertinent part, as follows:

This Rider is executed simultaneously with the contract of sale to which it is annexed. Any inconsistencies between the two documents shall be in favor of this rider, which shall, for all purposes, be deemed paramount and controlling.

* * *

2. In addition to the provisions set forth in the printed portion of the contract, the premises are sold and shall be conveyed subject to:
 - (I) Any state of facts an accurate survey may disclose, provided that such facts do not render title unmarketable.

* * *

4. The parties agree that if for any reason whatsoever, except Seller's willful default, Seller is unable to deliver to Purchaser a good and marketable title in accordance with the provisions of this Contract, and subject to the matters set forth in the Contract, Seller shall not be required to bring any action or proceeding or otherwise incur any expense to render the title to the Premises marketable, and if Purchaser shall refuse same, Seller may rescind this Contract and upon returning to the Purchaser the downpayment paid on the signing of this Contract, all further liability on the part of the Seller hereunder shall cease and terminate and this Contract shall become and be canceled and of no further force and effect and the Seller shall not be liable for any other costs or damages whatsoever.

(*Motion*, Ex. A [Contract of Sale with Rider]).

The contract also provided a closing date of on or about March 31, 2006.

Following the execution and delivery of the contract, plaintiff's real estate attorney, Jerald J. DeSocio, Esq., ordered a new survey of the premises. On March 30, 2006, based upon a reading of the survey, plaintiff's title insurance company, informed the buyer's attorney, as follows:

Survey made by Apolonio Q. Agujo, dated March 20, 2006, shows no encroachments, violations of deed restrictions or variations with lot lines affecting title except for the following:

- a) Chain link fence westerly line on line;
- b) Chain link fence northwesterly line;

- c) Chain link fence easterly line generally on line;
- d) Shed in rear encroaches approximately 1 foot west of northwesterly line;
- e) Stockade fence up to 9 feet west of northwesterly line encroaches northwest corner for undetermined distance;
- f) Building encroaches approximately 0.2 feet west of northwesterly line (*Motion*, Ex. B [March 30 letter]).

Notwithstanding receipt of these exceptions to the title, on April 7, 2006, counsel for both parties scheduled a closing date for April 26, 2006 (*Jon Barteau Affidavit*, ¶7). On April 25, the day before the scheduled closing, plaintiff's attorney adjourned the closing based upon his claim that defendants were unable to convey marketable title (*Id.*, ¶8).

Subsequently, on or about May 4, 2006, the buyer's attorney, notified defendants' attorney of the title issues raised by the survey and stated that, as a result of these encroachments, defendants could not deliver marketable title to the subject premises and thus, the contract was null and void. Plaintiff requested the return of its \$46,500 down payment.

In response thereto, defendants' attorney notified counsel for the plaintiff that they were rejecting the purchaser's demand for the return of the down payment. Notwithstanding plaintiff's rejection of defendants' proposal to remove the encroaching corner of the building as an acceptable solution to curing some of the title defects, on or about May 8, 2006, defendants' attorney advised the buyer's attorney that the encroaching corner of the building had in fact been removed and he demanded the scheduling of a closing.

Plaintiff admits, in its reply to defendants' counterclaim, that even after learning of the defendants' inability to convey marketable title, he and his counsel, both, communicated to the defendants' attorney that he was still interested in purchasing the subject premises pursuant to the terms of the contract and that he was willing to work with the defendants to resolve the purported title issues (*Verified Reply*, ¶5). In fact, on May 12, 2006, in response to the foregoing correspondence exchanged between counsel for the contracting parties, the buyer's attorney again wrote a letter to the seller's attorney, stating as follows:

At the outset, I must repeat what was stated earlier by us both by letter and telephone conversation; the purchasers cannot and will not accept title to these premises in the condition in which it now exists. This is so for two reasons, both discussed below.

To begin with, the house itself encroaches on the property to the northwest two inches. A corner of the house, consisting of both the foundation and the wall of the house encroaches two inches onto such property. Any attempt to remove such two inches can only cause damage to the house and as such any proposed alleged corrective work is unacceptable to the purchasers.

However, just as unacceptable is the 9 foot encroachment of a fence, walkway and gravel area by these premises onto the same premises to the northwest, in the same area, as the two inch encroachment referred to above. This encroachment is substantial. It is well beyond the accepted industry standard of one foot or less as to variations between fences and record lines of title. It is also material in that it is a unique 9 foot triangle. Without this

nine foot section, these [sic] is no access to the rear yard of the premises around the western side of the house. No repairs, painting or improvements can be made to this areas of the house if the 9 foot triangle were removed.

Furthermore, it is not at all unlikely that a problem will arise in regards to this section in the future. In fact, it is quite certain such a problem will occur. Sooner or later the property owner to the northwest will sell or refinance those premises. That will require a new survey on their part. That will reveal to them they are out of possession of this triangle. They will then have to either approach the then owner of the Barteau property to this triangle, or they may just unilaterally attempt to move the fence themselves. To avoid either of these outcomes, the owner of the Barteau property would have to commence or defend a lawsuit asserting ownership to this triangle asserting adverse possession. Short of working out a solution to this problem now with the adjoining landowner, litigation is the only way title to this disputed triangle can be resolved. Case law is definitive that the owner of a property (the Barteau's) cannot compel a purchaser to accept such title as it is likely to result in this litigation. Not only is litigation likely, it is inevitable. The seller cannot force the purchaser to fix his title problems. Case law is clear on this also.

For all of the above reasons, we cannot and will not accept such defective title. As such, I hereby renew and repeat that you return to me the purchasers' contract deposit.

Sooner or later, the sellers are going to have to resolve this problem. Even if we litigate the issue of whether the seller can compel the purchaser to accept such title as presently exists [sic], the encroachment problem will remain. ***If you will recall, I stated to you that the purchasers are willing to work with your clients to resolve these issues. I propose again to you that we approach the owner of the premises to the northwest to have them execute a boundary line agreement, or such other document as will cause such owner to settle forever the present location of the fence. Furthermore, the purchaser is willing to split a payment to the adjoining landowner, up to the amount of \$2,500.00, if such payment has to be made. This will give the sellers \$5,000.00 to work with to settle this issue. I would think the sellers would be better off attempting to resolve this problem with our help as opposed to litigating with us, incurring such litigation expenses and trying to work out the problem later by themselves.***

I urge you to talk to your clients to try to work this out.

In the alternative, we demand the return of the contract deposit or we are fully prepared to litigate this issue (*Motion*, Ex. K [Emphasis Added]).

Defendants maintain that, thereafter, plaintiff's title company confirmed to them that receipt of a fully executed boundary line agreement from the adjoining property owners would, in fact, fully resolve any and all of plaintiff's purported claims that defendants were not able to convey marketable title to the subject premises (*Verified Answer with Counter claim*, ¶¶57-59).

On June 27, 2006, plaintiff's attorney and title company approved the terms and conditions of a proposed boundary line agreement. In fact, on June 27, 2006, the buyer's attorney not only made revisions to the proposed boundary line agreement, but also affirmatively stated that the plaintiff would close immediately upon receipt of same, once it was fully executed (*Cross Motion*, Ex. D).

Notwithstanding the assurances made by the plaintiff and his attorney, by letter dated August 23, 2006, plaintiff's attorney notified counsel for the defendants that the buyer elected to terminate the contract and demanded the return of the down payment deposit. Specifically, the August 23, 2006 letter stated:

"...[I]nasmuch as the sellers have been unable to resolve the outstanding title issues that exist at the premises, and which were detailed in our letter of May 12, 2006, and, in excess of 60 days have elapsed since notice of same was given to seller, the purchasers have no alternative but to terminate this contract [sic] and demand the return of their contract deposit" (*Motion*, Ex. L).

By letter dated August 31, 2006, the seller's attorney replied, in pertinent part, as follows:

It is our clients' position that they are ready, willing and able to convey title to the premises in accordance with the terms of the contract of sale and that your client's objection does not and has never authorized the termination of the contract. Therefore, they have objected to your request for the return of the downpayment.

In a good faith attempt to amicably resolve this matter, my clients, at the request of your client, are in the process of having the boundary line

agreement signed by the owners of the adjacent premises, which we have been advised by the attorneys for such parties has been approved and will be delivered shortly. ***

Therefore, if your client does not promptly rescind his purported attempt to cancel the contract, my clients will have no alternative but to unilaterally schedule a closing date, **time being of the essence** (*Motion*, Ex. M [Emphasis in Original]).

On September 18, 2006, defendants obtained a fully executed boundary line agreement. On the same day, the sellers' attorney forwarded a copy of the agreement to the buyer's attorney and stated that if the sellers did not receive a closing date from the buyer's attorney by the end of that week, the sellers "will have no alternative but to unilaterally schedule a closing date, **time being of the essence**" (*Motion*, Ex. O [Emphasis in Original]). In accordance therewith, on September 29, 2006, defendants' attorney (by letter) scheduled the closing for October 11, 2006 at 10:00 a.m. Plaintiff failed to appear on this date.

Instead, on the eve of the October 11 closing, plaintiff commenced this action seeking, a declaration that the seller defendants breached the contract by providing unmarketable title and awarding the return of his contract deposit plus the costs of the title examination, survey fees and legal fees.

Thereafter, the seller defendants interposed an answer and asserted a counterclaim that as a result of the plaintiff's default in not appearing at the scheduled closing on October 11, 2006 and not accepting title to the subject premises, plaintiff breached the contract. Defendants maintained that as a result of

plaintiff's breach they are entitled to retain the plaintiff's down payment as liquidated damages.

Upon the instant motion and cross motion, the parties each seek summary judgment on their respective claims.

Based upon the papers submitted for this Court's consideration, and in accordance with the well-settled principles of summary judgment law, this Court finds that plaintiff, purchaser, has failed to make a prima facie showing of entitlement to judgment as a matter of law in his action to recover the down payment he advanced for the purchase of the subject property (*see Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Plaintiff has failed to show that it did not breach the contract herein by refusing to accept marketable title to the property. Thus, this Court is compelled to deny plaintiff's motion for summary judgment.

In support of his motion, plaintiff submits, *inter alia*, a letter from its title company indicating the various title defects as well as the extensive correspondence back and forth between counsel for the contracting parties. Plaintiff argues that when the defendants entered into the contract of sale, the seller defendants could not deliver marketable title as required, and after having more than sufficient time to clear any marketability problems, they simply failed to do so. However, the documentary evidence submitted herein confirms otherwise.

It is true that the subject property was initially rendered unmarketable. However, plaintiff has failed to demonstrate that the changes made to the property, including removal of the 0.2 feet building encroachment and the boundary line agreement as a result of which the title insurance company was ultimately willing

to insure the premises, still rendered the title unmarketable.

Plaintiff has also failed to demonstrate that it, at any point, had any legal grounds to withdraw from the transaction. It is plainly clear that the contract - specifically, paragraph 21(b) - provided the sellers with an opportunity to cure any defects to title within 60 days of notice of same. The time line of the various events in this case is as follows: the title company conducted a survey of the property on March 20, 2006. Ten days later, on March 30, 2006, the title company notified the buyer of the flaws in title. The buyer then notified the sellers on April 25, 2006 (eve of the scheduled closing) of defendants' inability to convey marketable title. Pursuant to paragraph 21(b) of the contract, the sellers were permitted to remove or cure the title defects within 60 days of notice of same. Thus, the seller defendants had until June 25, 2006 to remove or remedy the defective title conditions thereby rendering it marketable. During this time period, the plaintiff purchaser made two attempts to renege on his obligation to purchase the property: once on May 4, 2006 and again on May 7, 2006. These requests to cancel the contract based on the sellers' inability to convey marketable title were clearly ineffective pursuant to the contract itself - specifically, paragraph 21(b) which gave the sellers an opportunity to cure. On May 12, 2006 (also during the sellers' time to cure), the plaintiff sent another letter in which he again attempted to cancel the contract, but also "propose[d]" a boundary line agreement as a resolution to the title issues, offered to split a \$5,000 payment to the adjoining landowners to settle the title defects, and requested that the defendants' counsel talk to the sellers "to try to work this out." Based upon a simple and plain reading of the language of the May 12th letter, this Court finds that not only was plaintiff's attempt to cancel the contract again, ineffective (because it was made during the defendants' 60 day time period to cure

the defects), but also the purchaser clearly advanced a new “offer” to the sellers, in an attempt, to consummate the real estate transaction.

An offer is an act on the part of one party that gives to the other the power to accept it and thereby create a legally binding contract between the parties (*Express Industries and Terminal Corp. v. New York State Dept. Of Transp.*, 93 NY2d 584 [1999]). To give rise to an enforceable agreement, the offer must be definite and certain (*Ahlstrom Machinery Inc. v. Associated Airfreight Inc.*, 272 AD2d 739, 740-41 [3rd Dept 2000]; *Concilla v. May*, 214 AD2d 848, 849 [3rd Dept 1995]). A unilateral offer may be accepted by the other party’s conduct and thereby give rise to contractual obligations (*Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 573 [2nd Cir. 1993]).

Guided by these principles, this Court finds that plaintiff’s May 12th letter - despite the use of the word “proposal” - constitutes another - a “new” - offer to purchase the property subject to a new contingency of a boundary line agreement. This letter, which plaintiff’s counsel herein claims in his affirmation was “an attempt at accommodation” (*Aff in Support of Motion*, ¶17), not only establishes plaintiff’s willingness to purchase the property from the defendants, but also sets forth sufficiently definite and certain terms so that the acceptance of those terms by the recipient would give rise to contractual obligations. There exists ample evidence that the terms of this letter, if deemed acceptable by the sellers, was intended by the buyer to be a binding modification to the real estate contract. The tone of plaintiff’s letter is not simply informational or exploratory. Rather, the letter expressly and unambiguously sets forth terms of a proposed resolution which are “definite and certain”, and by including an offer to split a sum of \$5,000 and including language to the effect of “*in the alternative* we demand the return of the

contract deposit”, demonstrates the requisite “willingness to enter into a bargain” of an offer (*US Fidelity and Guar. Co. v. Delmar Development Partners, LLC*, 14 AD3d 836 [3rd Dept. 2005]).

Under New York law, the existence of a contract may be established through conduct of the parties recognizing the contract (*Brown Bros. Elec. Constrs. v. Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]; *Wright v. Ford Motor Co.*, 111 AD2d 810 [2nd Dept. 1985]). In looking to see whether the language contained in the letter was intended to be binding, this Court must look to extrinsic evidence relevant to the parties’ intent (*Greenfield v. Philles Records*, 98 NY2d 562, 569 [2002]) and in doing so “the subsequent conduct of the parties [may] be used to indicate their intent” (*Innophos, Inc. v. Rhodia, S.A.*, 38 AD3d 368 [1st Dept. 2007]). In this case, it is undisputed and abundantly clear that after the May 12th letter was transmitted to the sellers, the parties worked together and with the title insurance company to acquire a fully executed boundary line agreement in an attempt to fully and finally resolve all of the outstanding title issues. In fact, the buyer, in a letter dated June 27, 2006, made minor revisions to the proposed boundary line agreement and in a letter of the same date clearly stated “We would prefer this agreement to be used and that it be signed and notarized in recordable form.” Thus, weighing all of the factors surrounding plaintiff’s May 12th letter, including plaintiff’s admitted willingness to work with the defendants to resolve the purported title issues (*Verified Reply*, ¶5), and plaintiff’s subsequent efforts to reach a resolution with the boundary line agreement, this Court finds that letter clearly contained a “new” offer to purchase the subject property pursuant to the contingencies of obtaining a fully executed boundary line agreement and a resolution of the various title issues (*Concilla v. May*, 214 AD2d 848 [3rd Dept.

1995]).

Moreover, based upon the documentary evidence submitted herein, it is abundantly clear that the seller defendants unconditionally accepted the terms and ultimately, on September 18, 2006, acquired the boundary line agreement, which was deemed sufficient and acceptable by plaintiff's title company. Thus, plaintiff's argument that the seller defendants could not deliver marketable title is entirely meritless.

Similarly, plaintiff's argument that while the sellers were permitted to remove the defects within 60 days of notice of same, their failure to cure within the contracted time entitles them to a cancellation of the contract, is also unavailing. As stated above, a new offer was advanced by the purchaser on May 12th 2006. The terms of this offer, once accepted by the sellers, superseded the inconsistent terms in the original offer (*Caulfield v. Improved Risk Mutuals, Inc.*, 66 NY2d 793 [1985]; *Holland v. Ryan*, 307 AD2d 723 [4th Dept. 2003]). Thus the sellers 60 day window to cure the title defects (originally due to expire on June 25, 2006) was superseded by the sellers' good faith obligation to acquire a fully executed boundary line agreement in a reasonable time frame.

Certainly, a party is entitled to timely performance; however, a promisor's tender of performance in good faith in compliance with the contract usually will avoid the breach and bind the promisee to the contract (*Tayeh v. Intercoastal Capital Corp.*, 176 AD2d 719 [2nd Dept. 1991]). In this case, plaintiff has failed to demonstrate that the defendant sellers' tender of performance in getting the signatures from all the neighbors including some that lived out of state, was not done so in good faith or in a timely manner given the circumstances. In fact, a full and complete reading of the record confirms that the sellers performed their

obligation to resolve the title defects (via the boundary line agreement) in, given the circumstances, a reasonable and timely manner - on September 18, 2006.

This Court cannot overlook the fact that on August 23, 2006, plaintiff, despite working closely with the sellers and the title company to resolve the outstanding title issues, again, expressed a desire to terminate the contract based on the sellers purported inability to deliver the subject premises subject to marketable title. However, given the circumstances, it is clear that the plaintiff, on this date, had no grounds to unilaterally terminate the contract. The buyer was still obligated to purchase the property. As stated above, plaintiff has failed to show that the defendants were not performing their end of the bargain in breach of their good faith obligations.

As a result of plaintiff's failure to demonstrate a prima facie entitlement to judgment as a matter of law, its motion for summary judgment is **denied**.

Furthermore, as a result of plaintiff's inability to raise an issue of fact that it did not breach its contractual obligations, defendants' cross motion for summary judgment is herewith **granted** and plaintiff's complaint is **dismissed**.

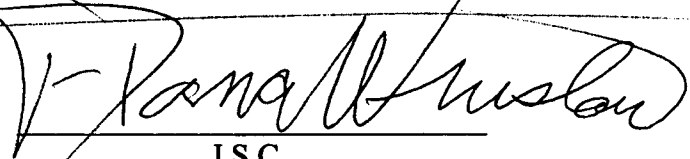
Submit judgment on notice.

This constitutes the Order of the Court.

Dated:

3/27/08

ENTER:



J.S.C.

ENTERED

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