Short Form Order

Index Number: 09874-2005

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:
HON. EMILY PINES
J. S. C.

X

RICHARD COHEN and RICHARD BERMAN,

Plaintiffs,

-against-

METROPOLITAN SWITCHBOARD COMPANY, INC., d/b/a METROPOLITAN ELECTRIC MANUFACTURING,

Defendants.

X

Attorney for Plaintiffs
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DECISION AFTER TRIAL

This case came before the Court for trial on February 4, 2008 and post-trial memorandum were submitted by counsel on February 19, 2008. The action seeks recovery of a down payment on a real estate contract for the purchase of real property located at 200 Dixon Avenue, Copiague, New York (the "subject premises"). Plaintiffs were the purchasers and defendant was the seller of the subject premises pursuant to a contract executed in or about March of 2005. Pursuant to the contract, plaintiffs paid the defendant an initial down payment of $71,250.00 with a subsequent down payment of $78,750.00 to be paid within five (5) days after the due diligence cutoff date.

At the commencement of the trial, counsel for the respective parties stipulated to the submission of certain documents into evidence, including, but not limited to, the contract of sale for the subject premises (Plaintiffs' Exhibit "1"), a survey of the subject premises (Plaintiffs' Exhibit "2"), and a title report for the subject premises (Plaintiff's Exhibit "3).

The contract, together with two riders annexed thereto, provided that the property to be sold was 200 Dixon Avenue, Copiague, New York and was designated on the Suffolk County Tax Map as 0100-168.00003-00015.001 and "p/o lot 14.3".[1] The contract contained the following provisions, relevant to the case at bar:

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[1]The "p/o lot 14.3" is contained in Rider II, ¶1.

Paragraph 4:

> SELLER shall give and PURCHASER shall accept such title as any reputable title insurance company, a member of the New York Board of Title Underwriters, will be willing to approve and insure in accordance with the standard form of title policy, subject only to the matters provided in this contract.

Paragraph 9 of Rider:

> In the event the report of a reputable title company shows objections and exceptions, the Seller shall, after receiving prior written notice from the Purchaser of such defects or objections of title, have the right at Seller's option to cure the defect or objections in title within thirty (30) days from the date such notice is received and the date for the closing of title shall be adjourned accordingly. The Seller shall not be required to bring any action or proceeding or otherwise incur any expense to render the title to the premises marketable. The Purchaser may, nevertheless accept such title as the Seller may be able to convey, without reduction of the purchase price or any credit or allowance against the same without any other liability on the part of the Seller.

Paragraph 18 of Rider II:

> Seller warrants and represents that:
> c. The Seller is the sole owner of the Premises.

The survey of the subject premises, dated February 7, 2004, contained the following note:

> 7. THE PART OF TAX LOT No. 14.3 SHOWN IN THIS SURVEY APPEARS TO BE OCCUPIED BY THE ADJOINER TO THE NORTH.

The title report dated April 18, 2005, prepared by Commonwealth Land Title Insurance, Company, certified title to lot 14.3 in "Stephen S. Kahn, LLC" and moreover found that the description for the subject premises did not close. Thus, the title company rendered exceptions to title in defendant as to lot 14.3. By letter dated April 19, 2005 (Plaintiff's Exhibit "12"), plaintiffs' counsel advised defendant's counsel to the exceptions to title and demanded that they be removed. Defendant's counsel did not respond to the letter, but subsequently, obtained a Correction Deed, eliminating that portion of lot 14.3 as depicted in the survey and on November 8, 2005 conveyed the subject premises to a third person. The within action then ensued by plaintiffs for recovery of their down payment.

THE TESTIMONY

Peter Curry

Peter Curry ("Curry"), the attorney who represented plaintiffs in the real estate transaction for the subject premises testified on behalf of plaintiffs. Curry testified that he received the initial draft from defendant's counsel, marked it with his comments and prepared a rider (Rider II) and sent it back to defendant's counsel. He testified that the first rider was prepared by defendant's counsel. Curry testified that the provision in Rider II, paragraph 1 that "p/o lot 14.3" was included in the contract was derived from the survey dated February 7, 2004. He stated that defendant's counsel did not object to the inclusion of lot 14.3 in the contract and there were no discussions regarding this change. Curry testified that at the time of the execution of the contract, he was not aware that defendants did not own lot 14.3. Curry also testified that defendant's counsel did not object to the insertion of the warranties contained in paragraph 18c. Curry stated that he then ordered and subsequently received the title report containing the items regarding insurable title and ownership of lot 14.3. He wrote to defendant's counsel (Plaintiff's Exhibit "12"), regarding these title issues but did not receive a response. Curry testified that he was aware that defendant obtained a correction deed for the subject premises and observed that the correction deed had a different metes and bounds description and did not include any part of lot 14.3.

On cross-examination, Curry testified that the second deposit of $78,750 would be paid to the escrow agent within five business days after the due diligence cut-off date, which was after the Phase I environmental assessment was completed. He stated that although the five days after receipt of the environmental assessment would have been April 18, 2004, the $78,750 was not forwarded to defendant's counsel.[2] Curry testified that although he did not send a "time of the essence" letter to defendant's counsel regarding the cure of the title issue, such issue was not a condition that could be "cured". Rather, Curry testified that the contract contained a representation that defendant had title, and such was not merely a condition of closing. He states that defendant represented that he owned and was capable of selling the property listed in the contract, and the fact that he did not own a certain portion, was a breach of said representation.

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[2]Although Curry also testified on cross-examination regarding certain correspondence sent to defendant's counsel regarding the condition of the roof, plaintiffs appear only to be seeking cancellation of the contract based on the failure of title.

Louis Silvestre

Louis Silvestre ("Silvestre"), president of defendant corporation testified on behalf of defendant. Silvestre testified that defendant purchased the subject premises from a receiver, but he was uncertain of the date of the acquisition. He stated that when defendant purchased the property, it obtained title insurance and had a loan on the property for one million dollars. Silvestre stated that the taxes on the property were approximately $60,000.00 per year and the interest on the loan was ten percent. He stated that at some point defendant decided to sell the subject premises and engaged Breslin Realty to attempt to find a purchaser. Silvestre testified that at some point Russell Lico, the broker from Breslin Realty, brought plaintiff, Richard Cohen ("Cohen") to the property and a contract was eventually signed. Silvestre stated that after the contract was signed, Cohen called and asked him if he could put a sign up on the building that said "For Sale, Breslin Realty". He said that when Cohen put the sign up, it said
"Ashlin Properties" and that he (Cohen) continually asked to bring people in to show them through the building so he could sell the building. Silvestre further testified that the roof was not leaking and did not leak up until the time defendant vacated the building at the end of 2007.

On cross-examination, Silvestre admitted that the contract between the parties stated that purchaser had not dealt with any other broker except Ashlin Properties and Breslin Realty and that there was thus a basis for the sign to be hung and it was not inconsistent with the contract.

Russell Lico

Russell Lico ("Lico"), testified on behalf of defendant. He stated that he is a commercial real estate broker and was the exclusive broker for the subject premises. He stated that he was approached by Cohen in or about February of 2004, and as a result, he received an offer letter for the subject premises. Such letter (Defendant's Exhibit "A") contained conditions that the roof would be free of leaks, there would be clear title, the property would be delivered in broom clean condition, and an environmental study would be completed. Lico testified that meetings took place between Cohen, Silvestre and himself prior to the execution of the contract, during which the property, the closing and the condition of the property were discussed. Lico stated that although there had been prior offers to purchase the subject premises, the offer from plaintiffs was most acceptable because it was an all cash offer, not subject to a mortgage, with a 60-day closing. He testified that the 60-day provision was important because defendant needed the money quickly to satisfy the outstanding loan.

On cross-examination, Lico testified that he was not aware the time set forth for closing was changed in the contract to 90 days.

DISCUSSION

By Order (HUDSON, J.) dated November 10, 2005, Plaintiff's motion for summary judgment was granted on the issue of the title defect. The Court found that based upon the contract, seller had thirty (30) days from April 19, 2005 to cure the title defect and failed to do so. Thus, the Court found that defendant breached the contract and plaintiffs were entitled to a refund of their down payment. Subsequently, however, the Court granted reargument, based upon the representation by defendant that it was relieved of its obligation to respond to the title defect because plaintiffs breached first in failing to make the second down payment. Plaintiffs argued they were justified in not making the second down payment because defendants materially breached the contract by failing to fulfill its warranty where it represented it was the sole owner of the property and there were no encumbrances to title. Based on these issues, the Court found there were issues of fact as to whether there was a material breach of the contract, who breached the contract first, and whether one of the parties rightfully withheld performance as a response to an anticipatory breach. Thus, the Court granted defendant's motion for reargument and upon reargument denied plaintiffs' motion for summary judgment in its entirety.

It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." ***Salerno v. Odoardi,*** 41 A.D.3d 574, 838 N.Y.S.2d 156 (2d Dept. 2007) (internal citations omitted). A contract is unambiguous if the language it uses has a "definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion." ***Norma Reynolds Realty, Inc., v. Edelman,*** 29 A.D.3d 969, 817 N.Y.S.2d 85 (2d Dept. 2006).

In the case at bar, the contract between the parties was clear and unambiguous on its face; to wit, it provided defendant would convey lot 15.1 and "p/o lot 14.3", defendant would convey marketable title and that defendant was the sole owner of the subject premises. In the face of such clear, unambiguous language, the Court may not look to extrinsic evidence of the parties' intent. ***Geothermal Energy Corp. v. Caithness Corp.,*** 34 A.D.3d 420, 825 N.Y.S.2d 485 (2d Dept. 2006). It is also well established that when a contract requires that a seller shall convey such title as a title company will approve and insure, the seller assumes the burden of delivering a title which such title company shall approve and insure unconditionally and without exceptions. ***Newmark v. Weingrad,*** 43 A.D.2d 983, 352 N.Y.S.2d 660 (2d Dept. 1974). Indisputably,

defendant did not have title to lot 14.3 as represented in the contract, thus, was unable to deliver marketable title to plaintiffs as required by the contract. ***See, Linehan v. A & L Homes, Inc,*** 261 A.D. 840, 24 N.Y.S.2d 895 (2d Dept. 1941). Plaintiffs' counsel on the real estate transaction testified that when he obtained the title report containing the exceptions regarding title to lot 14.3, he wrote to defendant's counsel and never received a response. Assuming *arguendo,* defendant had the right to cure the title objection pursuant to Paragraph 9 of the Rider, it wholly failed to do so, and in fact, could not do so, since it never owned any part of lot 14.3. Such is evidenced by the correction deed obtained by defendant which eliminated any reference to lot 14.3 as being part of the property owned by defendant. Defendant's claim that the provision for the transfer of "p/o lot 14.3" is *de minimis* is without merit. As aptly stated by Justice Hogan in the Supreme Court, Queens County, "the contract called for the delivery of title to this parcel and defendant is unable to perform according to its terms. While the *'de minimis* rule' may be applied where *specific performance* is sought, it may not be followed in an action of this nature"(seeking a refund of a downpayment). ***Wates v. Crandall,*** 144 N.Y.S.2d 211 (Queens Sup. Ct. 1955)(emphasis added). ***See also, Rosenberg v. Centre Davis Corp.,*** 209 N.Y.S.2d 19 (Sup. Ct. Westchester 1960). Defendant has not offered any authority to counter this position.

Finally, defendant's argument that it was relieved of performing because of plaintiffs' failure to tender the second down payment also must fail. Unquestionably, defendant's title as represented in the contract was defective, and the Court will not hold that plaintiff was required to tender the balance of the down payment under these circumstances. ***Iannelli Bros., Inc., v. Muscarella,*** 30 A.D.2d 698, 291 N.Y.S.2d 851 (2d Dept. 1968).

Based upon the foregoing, and upon application of the principles set forth herein above, the Court finds plaintiffs have met their burden of demonstrating entitlement to refund of their down payment. The uncontroverted submissions and testimony reflect that defendants were unable to perform their obligations under the contract and in fact, made representations in the contract regarding ownership that were erroneous. Accordingly, for the reasons set forth herein, plaintiffs are entitled to a refund of their down payment. ***See, Nowak v. Rametta,*** 43 A.D.3d 1120, 843 N.Y.S.2d 150 (2d Dept. 2007); ***Linehan supra.***

Submit Judgment on fifteen (15) days Notice of Settlement.

Dated: March 28, 2008
Riverhead, New York

EMILY PINES
J. S. C.