

Hall v 1885-93 7th Ave. HDFC

2008 NY Slip Op 31265(U)

April 25, 2008

Supreme Court, New York County

Docket Number: 0116963/2005

Judge: Barbara Kapnick

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

PRESENT: **HON. BARBARA R. KAPNICK**
Justice

PART 12

Index Number : 116963/2005

INDEX NO.

116963/05

HALL, MELISSA

MOTION DATE

vs

1885-93 7TH AVENUE HDFC

MOTION SEQ. NO.

003

Sequence Number : 003

MOTION CAL. NO.

SUMMARY JUDGMENT

s motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*and cross-motion
are decided in accordance with
the accompanying memorandum decision
Settle Order*

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

Dated: 4/25/08


BARBARA R. KAPNICK *S.C.*

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 12

-----x
MELISSA HALL,

Plaintiff,

- against -

1885-93 7TH AVENUE HDFC and JOHN DOE
and/or JANE DOE,

Defendants.

-----x
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 116963/05
Motion Seq. No. 003

In or about June 2003, plaintiff Melissa Hall and defendant 1885-93 7th Avenue HDFC entered into a contract, by which plaintiff was to purchase apartment 2B in the cooperative building owned by the defendant at 1893 7th Avenue, New York, New York. Plaintiff claims that she was told by the Coop's board members that she should apply for a mortgage with Homesteaders Federal Credit Union because it was familiar with HDFC's, such as defendant. However, plaintiff claims she was unable to obtain financing because defendant failed to provide her with financial statements and/or documentation indicating that it had paid the applicable real estate taxes.

Paragraph 24.1 of the Contract specifically provides that "[t]he Parties shall each cooperate with the other, the Corporation and Purchaser's Institutional Lender and title company, if any, and obtain, execute and deliver such documents as are reasonably necessary to consummate this sale."

Plaintiff's initial Complaint sought a judgment: (a) enjoining defendant from conveying the apartment to John Doe and/or Jane Doe or any third party; (b) directing defendant to provide plaintiff with a financial statement and/or statements of proof of payment of taxes; (c) in the event that the apartment had been conveyed to John Doe/Jane Doe or any third party, a judgment setting aside said conveyance; (d) in the alternative, money damages equal to the difference between the sales price under the Contract and the market price of the apartment; and (e) awarding attorneys' fees and the costs and disbursements of this action.

Defendant moved to dismiss the Complaint and for a declaratory judgment directing the release of the contract deposit in the amount of \$9,000.00 currently being held in escrow to the defendant as liquidated damages.

By Decision/Order dated August 1, 2006, this Court denied the motion finding "that there are issues of fact as to what documents exist and/or which documents the defendant could reasonably be expected to provide to plaintiff in accordance with its obligations under the Contract, and as to whether plaintiff's failure to perform under the Contract was solely the result of defendant's own breach of its obligations under the Contract."

However, defendant now admits that it did not previously maintain such documents and records, and claims to still be working with its accountant to prepare such records. Although plaintiff admitted at her deposition that she was told before she signed the Contract "that the financial statements were being worked on," she claims she "had no reason to believe they wouldn't be produced." In fact, a Legal Assistant for the defendant's prior attorneys notified plaintiff's counsel by letter dated August 7, 2003 "that the financial statements will follow shortly."

Plaintiff claims that between June 2003 and the summer of 2005, she contacted defendant's representatives on a monthly basis to inquire about the status of the financial reports, and was told on each occasion that they were being prepared and were forthcoming. This action was commenced in December 2005 after plaintiff learned that the Coop was considering selling the apartment to a third party.

Plaintiff claims that "[w]hen it became clear during this action that the defendant would or could not provide the financial statements, I tried a different approach", and thus obtained funds from another source in or about May 2007. Her attorneys then sent a letter dated May 21, 2007 to defendant and its attorneys

indicating that she was "ready willing and able to tender performance under the Contract" with "TIME BEING OF THE ESSENCE."

Counsel further stated that

In the event that the Seller does not perform its obligations under the Contract by conveying the shares and the lease to the Apartment on June 26, 2007, in such event the Seller shall be in breach of the Contract and shall be deemed in default and the Buyer will either commence or continue prosecution of an action for specific performance in which the Buyer will seek an order or judgment directing that the Seller convey the shares and lease for the Apartment to her.

By letter dated May 24, 2007, defendant's counsel wrote to plaintiff's counsel stating that they considered the Contract terminated for well over a year as a result of plaintiff's default, as indicated in a letter to plaintiff's counsel dated February 2, 2006.

Pursuant to Stipulation dated July 5, 2007, plaintiff then served an Amended Complaint seeking a judgment granting specific performance and directing the defendant to convey the shares to her, or, in the alternative, granting money damages, attorneys' fees and the costs and disbursements of this action.

Plaintiff now moves for an order: (i) pursuant to CPLR § 3212(a) granting summary judgment in its favor; (ii) pursuant to

CPLR § 3211(b) dismissing the affirmative defenses in defendant's answer; and (iii) setting the action down for a hearing on attorneys' fees.

Plaintiff argues that a) she did not fail to perform under the Contract because the defendant prevented her from closing by not providing the financial statements needed by the potential lender; b) the February 2, 2006 letter did not meet the requirements of a time of the essence letter and, therefore, she was not properly placed in default and the Contract was not validly terminated (see, ADC Orange, Inc., v. Coyote Acres, 7 N.Y.3d 484 [2006]) and c) she notified the defendant on May 21, 2007 that she was ready willing and able to perform and the Coop defaulted by refusing to close.

Defendant opposes the motion and cross-moves for summary judgment dismissing the Amended Complaint in its entirety and awarding defendant liquidated damages.

The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law (citation omitted).

* * *

Generally, the equitable remedy of specific performance is routinely awarded in contract actions involving real

property, on the premise that each parcel of real property is unique (citation omitted). The court has discretion to deny such relief "as equity and justice seem to demand in the light of the circumstances of each case" (citation omitted), and the available equitable defenses include serious unfairness, undue hardship, and laches, or unreasonable prejudicial delay (citation omitted). But, "the court's discretion to grant or deny specific performance of a contract for the sale of realty is not unlimited; unless the court finds that granting a decree of specific performance would be a drastic or harsh remedy, or work injustice, the court must direct specific performance" (citation omitted).

EMF General Contracting Corp. v. Bisbee, 6 A.D.3d 45, 51-52 (1st Dep't 2004), *lv denied* 3 N.Y.3d 607 (2004).

"It is fundamental that where a contract for the sale of real property fails to designate a closing date, the court will construe the contract to require that the closing be held within a reasonable time (citations omitted)." Lieberman Props. v. Braunstein, 134 A.D.2d 55, 59 (2nd Dep't 1987). Thus, "[a] party who seeks specific performance must prove that he has substantially performed his obligations within the time specified in the contract or within a reasonable time thereafter and that he is ready, willing and able to perform those obligations not yet performed (citation omitted)." Id at 60.

In the instant case, defendant argues that plaintiff defaulted as a matter of law by failing to perform under the contract within a reasonable period of time and that it has been prejudiced as a

result of the delay because no maintenance has been paid on the unit which has remained vacant during this entire period. See, 28 Props., Inc. v. Akleh Realty Corp., 22 A.D.3d 432 (1st Dep't 2005), *lv denied* 6 N.Y.3d 714 (2006), in which the Appellate Division, First Department held that the "plaintiff did not meet its burden to demonstrate that it was, within a reasonable time after the non-time of the essence closing date, ready, willing and able to tender performance of its obligations as purchaser under the parties' real estate contract", since "[p]laintiff failed to demonstrate until some four years subsequent to the original closing date that it was financially able to close."

Here, however, plaintiff's failure to obtain the financing was caused not by unreasonable prejudicial delay on the part of the plaintiff; rather, the delay was the result of defendant's own failure to provide plaintiff with the financial documents sought by the mortgage lender, as well as defendant's lack of candor as to when said documents would be produced.

Accordingly, based on the papers submitted and the oral argument held on the record on February 13, 2008, this Court finds that plaintiff did not default as a matter of law and that defendant has failed to demonstrate that the granting of specific performance "'would cause unreasonable hardship or injustice'


(citations omitted).” Cheemanlall v. Toolsee, 17 A.D.3d 392, 393 (2nd Dep’t 2005).

However, plaintiff has not shown that she is entitled to attorneys’ fees under Paragraph 13.3 of the Contract of Sale, which does not apply to the facts presented in this case.

Plaintiff’s motion for summary judgment to the extent of granting her specific performance and dismissing defendant’s affirmative defenses is, therefore, granted and defendant’s cross-motion for summary judgment is denied. That portion of plaintiff’s motion seeking summary judgment on her second cause of action for attorneys’ fees is also denied.

Settle Order.

Dated: April 25, 2008



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.