

Tran Dinh Truong v Webster Ave.Holding Corp. LLC

2008 NY Slip Op 31273(U)

April 28, 2008

Supreme Court, New York County

Docket Number: 0110087/2006

Judge: Barbara Kapnick

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

PART 12

Justice

Truong, Tran

INDEX NO. 110087106

- v -

MOTION DATE _____

Webster Ave

MOTION SEQ. NO. 04

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 ...

PAPERS NUMBERED

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.

FILED
MAY 05 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/28/08

BARBARA R. KAPNICK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

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

-----X

TRAN DINH TRUONG,

Plaintiff,

-against-

WEBSTER AVENUE HOLDING CORP.
LLC AND EXPRESS REAL ESTATE AUCTION
SERVICES,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

Plaintiff Tran Dinh Truong was the successful bidder on residential premises located at 2378-2380 Webster Avenue in the Bronx and entered into a Real Estate Auction Contract of Sale dated July 12, 2005 with the seller, defendant Webster Avenue Holding Corp., LLC ("Webster"), for the purchase price of \$1,760,000.00.

Defendant Express Real Estate Auction Services ("Express") was the auctioneer hired by defendant Webster to conduct the sale at auction of the premises.¹

The Contract called for the closing to take place within 30 or 60 days,² and declared time to be 'of the essence'. The closing,

¹ The case was discontinued against defendant Express by Stipulation dated January 4, 2007.

² There is a discrepancy between a handwritten change on the front page of the document and the typed body of the document.

however, was adjourned on consent, purportedly at plaintiff's request, to September 22, 2005. Plaintiff's counsel then notified defendant Webster the day before the closing that plaintiff was in the hospital, and defendant Webster consented to a further adjournment to October 6 or 11, 2005.

The closing did not take place on either of these dates allegedly because plaintiff had not yet marshalled the necessary funds, although plaintiff contends that this delay was not a result of any deliberate intent on his part not to close but solely because of his illness.

The closing was rescheduled for October 20, 2005, but plaintiff did not appear on the adjourned date. Plaintiff's counsel claims that his office called the day before the closing to represent that counsel was undergoing serious medical issues and was out of the office for three weeks.

By letters dated October 20, 2005 and October 24, 2005, defendant Webster declared plaintiff to be in default, declared the contract to be a nullity, and made a formal demand for retention of the down payment.

However, plaintiff's counsel thereafter advised defendant's counsel during a telephone conversation confirmed by letter dated

October 25, 2005 that "the purchaser is ready, willing an [sic.] able to schedule a closing date which is convenient for all parties."

The closing was rescheduled for November 14, 2005, but plaintiff's counsel allegedly called defendant's counsel on or about November 9, 2005 to indicate that he would not appear on that date.

By letter dated November 16, 2005, defendant Webster declared plaintiff to be in default and demanded "an immediate release to Seller from escrow the full deposit and additional deposit funds tendered by purchaser in accordance with the Agreement."

In or about April 2006, additional negotiations were held between the parties, which included a proposed \$50,000.00 increase in the purchase price, although no final resolution was ever reached. By letter dated May 3, 2006, plaintiff's counsel declared that the closing would take place on May 19, 2006 and that plaintiff would appear on that day "ready, willing and able to close."

One of defendant's attorneys apparently responded in writing by letter dated May 12, 2006. By letter dated May 22, 2006, plaintiff's counsel wrote, in relevant part, as follows:

Based on his correspondence my client has chosen not to file the Summons and Complaint at this time, but will attempt to resolve the dispute prior to commencing the litigation.

My correspondence of May 3, 2006 required a response no later than noon on May 9, 2006. That was not complied with. It has become impossible to have all persons involved with this closing to be present on May 19, 2006, assuming that we can reach an agreement regarding the demand for an increase in the gross purchase price and attorneys fees.

I have reviewed the documentation enclosed by Mr. Rowen. I have determined that the property is valued less today than it was at the time that the contract was entered into based on the fact that departments [sic.] 2S and 3N are vacant and have purported monthly rents more than allowable under the rent stabilization code...

* * *

Further a request for \$15,000 in attorney's fees is not appropriate pursuant to case law, statute, and has not been justified or documented. The Purchasers are willing to set a mutual date to close in accordance with the terms of the contract.

Please advise us to a date which is convenient for you.

By letter dated June 1, 2006, defendant's counsel agreed to a new closing date of June 28, 2006 based on the original terms of the contract, but warned plaintiff's counsel that his

client's failure to close in accordance herewith and the contract will be a default under the contract and shall be deemed a default by the Purchaser. No additional

extension of time to close will be required of the Seller and the down payment shall be deemed forfeited by Seller if the Seller does not close at the time and date set forth above.

By letter dated June 22, 2006, plaintiff's counsel notified defendant of eight open violations outstanding against the building, including four lead paint violations (one of which was issued in 1992), which were deemed defects in title which needed to be corrected prior to closing.³ Plaintiff further demanded "an indemnification and hold harmless agreement from the Seller due to the units associated with lead paint litigation."

The closing never took place and plaintiff thereafter commenced the instant action, seeking:

(i) an order rescinding the Contract of Sale for the premises (first cause of action);

(ii) the return of plaintiff's deposit in the amount of \$251,000.00, plus interest from July 1, 2005 based on defendant Webster's alleged breach of contract (second and third causes of action);

(iii) clarification by the Court of the terms of the contract to determine who has the obligation to pay transfer taxes (third 'alternative' cause of action); and

³ Defendant contends that this was the first time that plaintiff made any mention of these alleged Class "C" violations.

(iv) damages in the amount of \$1,000,000.00 for lost business opportunities due to defendant Webster's failure to close on the Contract of Sale (fourth cause of action).

Defendant Webster interposed a Verified Answer including a counterclaim in the amount of the down payment, claiming that plaintiff had no legitimate excuse for refusing to close on the premises and is in breach of the Contract.

Defendant Webster now moves for an order: (i) granting summary judgment dismissing plaintiff's Complaint; and (ii) granting summary judgment to defendant Webster on its counterclaim on the ground that plaintiff is in default of the contract because he was never ready, willing and able to close on the contract.⁴

Plaintiff opposes the motion and cross-moves for summary judgment on all his claims and dismissing defendant's counterclaim.

The front page of the Contract specifically provides that "Buyer is purchasing the property in 'AS IS, WHERE IS' condition without warranty of any nature, either expressed or implied."

⁴ The motion was granted on default by Decision/Order dated December 5, 2007, but that Decision/Order was vacated by Decision/Order dated January 11, 2008 (issued under motion sequence number 003) and this motion was restored to the calendar for oral argument on February 13, 2008.

The second page of the Contract provides, in relevant part, as follows:

NO WARRANTY: The property is being sold by seller in "AS IS, WHERE IS" condition, without warranty of any nature, either express or implied, including, but not limited to, the nature and/or condition of the property, its acreage and usage, and zoning (other than any representations and/or warranties required as a matter of law)... The sale of the property is, where applicable, subject to the Residential Property Disclaimer Statement and to the Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards for Housing Sales [emphasis supplied] (as to which bidder agrees to waive the opportunity to conduct a risk assessment or inspection for the presence of lead based paint and/or lead based paint hazards), and such other disclosures as may be required by law, all of which have been provided by Seller and should be obtained by the bidder from the auctioneer prior to the auction.

Defendant, however, contends that the provision regarding lead paint disclosure is not applicable because p. 2 of the Rider to the Contract, which is annexed to defendant's papers, provides as follows:

6. The Seller has not made and does not make any representations as to the physical condition, income, expense, operation or any other matter or thing affecting or related to the Premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made, and Purchaser further agrees to take the Premises "AS IS"... Anything to the contrary in the printed form of this contract or this rider to the contrary notwithstanding [emphasis supplied], it is understood

The paragraph is continued on p. 3 as follows:

the Purchaser is purchasing the Premises subject to all departmental violations of record.

However, although pages 3 and 5 of the Rider are initialized by the plaintiff, pages 1, 2 and 4 of the Rider are not initialized by the plaintiff and plaintiff denies that these pages were part of the document which he signed. Thus, plaintiff contends that the contract was expressly conditioned upon the lead-paint disclosure and argues that he is not barred from seeking rescission of the contract on the basis of the lead-paint violations.

Based on the papers submitted and the oral argument held on the record on February 13, 2008, this Court finds that there are triable issues of fact as to whether or not the sale of the property was made subject to the Residential Property Disclaimer Statement and to the Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards for Housing Sales.

Accordingly, those portions of defendant Webster's motion seeking to dismiss plaintiff's first, second and third causes of action and for summary judgment on its counterclaim and the cross-motion by plaintiff for summary judgment are denied.


That portion of the motion seeking to dismiss the fourth cause of action which seeks damages beyond the return of the down payment is, however, granted since the rider specifically provides on page 3

7. If, for any reason whatsoever, the Seller shall be unable to convey a marketable title upon the terms and conditions herein set forth, or be unable to comply with the commitments of the Seller as herein set forth, the Seller, at its option, shall be entitled to reasonable adjournments for the purpose of curing any defect in title or effecting compliance with any of the commitments of the Seller, and if the Seller (who is under no obligation to bring any action or proceeding or otherwise incur any expense whatsoever to cure such defect) is unable to cure such defect with an adjournment period, or if no adjournment is requested by the Seller, the Purchaser shall, at his election, have the right to purchase the property subject to such defect and pay the full consideration therefor without any claims on the part of the Purchaser for abatement, or the Purchaser shall have the right to rescind this contract, upon which rescission pursuant to this paragraph, the sole liability of the Seller will be to refund to the Purchaser the amount paid on account of the purchase price and to pay the net costs of examining the title,... [emphasis supplied].

This action is restored to the active IA Part 12 pre-note of issue calendar for a status conference to be held on May 14, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: April 28, 2008


Barbara R. Kapnick
J.S.C.

APR 28 2008
NEW YORK COUNTY CLERK

**BARBARA R. KAPNICK
J.S.C.**