

S&S Mgt. LLC v Berk

2008 NY Slip Op 31547(U)

May 21, 2008

Supreme Court, Nassau County

Docket Number: 6866-07/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----x
S&S MANAGEMENT LLC and TASHLIK, KREUTZER,
GOLDWYN & CRANDELL, P.C.,

Plaintiffs,

-against-

GEORGE E. BERK and PENELOPE BERK,

Defendants.
-----x

**MICHELE M. WOODARD
J.S.C.**

TRIAL/IAS Part 16

Index No.: 16866/07

Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

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Motion by Defendants George E. Berk and Penelope Berk for an order pursuant to CPLR §3212 granting them Summary Judgment declaring, *inter alia*, that the down payment of \$210,000.00 (hereinafter referred to as the "contract deposit") which was paid by Defendants to Plaintiff Tashlik, Kreutzer, Goldwyn & Crandell, P.C. (hereinafter referred to as "TKG&C") and thereafter deposited by TKG&C in its attorney trust account on August 21, 2007, as escrowee and as attorneys for Plaintiff S & S, be returned to Defendants, is granted. Cross-motion by Plaintiffs for an order pursuant to CPLR §3212 granting them summary judgment declaring that S & S Management LLC (hereinafter referred to as "S&S") is entitled to retain the contract deposit is denied.

In the complaint, Plaintiffs seek: damages based upon breach of contract and an order permitting TKG&C to pay over to S & S the entire contract deposit of \$210,000, plus interest. In their amended answer with counterclaims, the Berks request, *inter alia*, that a judgment be entered

declaring the subject contract of sale void *ab initio*; directing Plaintiff TKG&C to pay the contract deposit over to Defendants; and adjudging Plaintiffs liable to Defendant for interest on the contract deposit, as well as the costs and disbursements of the action.

On or about August 20, 2007, S & S, as seller, and Defendants, as purchasers, entered into a contract of sale for the premises known as 269 Stone Hill Road, Pound Ridge, New York. The purchase price was \$2,100,000.00 and a down payment in the amount of \$210,000 was to be held in escrow by TKG&C, the attorneys for S & S. The contract of sale contained no financing contingency. The contract provided that the closing was to take place on or about sixty days from August 20, 2007, the date of the execution of the contract. The contract also contained the following specific provisions:

11. Seller's Representations:

(a) Seller represents and warrants to Purchaser that * * *

II. Seller is the sole owner of the Premises and has the full right, power and authority to sell, convey and transfer the same in accordance with the terms of this contract;

* * *

(b) Seller covenants and warrants that all of the representations and warranties set forth in this contract shall be true and correct at Closing.

* * *

16. Conditions to Closing. This Contract and Purchaser's obligation to purchase the Premises are also subject to and conditioned upon the fulfillment of the following conditions precedent:

(a) The accuracy, as of the date of Closing, of the representations and warranties made in this contract. * * *"

* * *

21. Title Examination: Seller's Inability to Convey; Limitations of Liability. * * *

(c) If this contract is cancelled pursuant to its terms, other than as a result of Purchaser's default, this contract shall terminate and come to an end, and neither party shall have any further rights, obligations or liabilities against or to the other hereunder or otherwise, except that: (i) Seller shall promptly refund or cause the Escrowee to refund

the Down payment to Purchaser and, unless cancelled as a result of Purchaser's default * * *, to reimburse Purchaser for the net cost of examination of title, including any appropriate additional charges related thereto, and the net cost, if actually paid or incurred by Purchaser for updating the survey of the Premises or of a new survey * * *.

28. Miscellaneous. * * *

(h) This contract is intended for the exclusive benefit of the parties * * * and shall not be for the benefit of, and shall not create any rights in, or be enforceable by any other person or entity.

* * *

59. In the event the Seller cannot close title in accordance with the provisions of this Contract by September 12, 2007, time being of the essence, due to no fault of Purchasers, then Purchasers shall have the right to cancel the Contract, the Down payment shall be promptly refunded to Purchasers, the Contract shall terminate and either party shall have any further claim against the other by reason of this Contract.

On or about August 22, 2007, Albert A. Capellini, the Berks' transactional attorney, received a report from Fidelity National Title Company, the proposed title insurer. The title report disclosed that an entity other than S & S was the titled owner of the premises. Mr. Capellini subsequently learned that the reported owner of the premises, R & R 269 LLC, had acquired title by deed from S & S which was apparently prepared by TKG&C. There was some connection or relationship between S & S and R & R 269 LLC (hereinafter referred to as "R & R").

On August 22, 2007, Mr. Capellini faxed a memorandum to TKG&C noting that the seller as certified in the title report was R & R and not S & S; and "the pool requires a fence which has to be installed before the closing or the lack of the fence will constitute a [municipal] violation of record."

On September 5, 2007, the Berks and counsel for the parties (no representative of S & S being present) met and endeavored to complete the transaction contemplated by the Agreement and

to close title to the premises. At closing, Mr. Capellini learned that title to the premises remained in R & R 269 LLC, rather than being in S & S. The proposed title insurer's representative advised that TKG&C had given him a proposed deed from R & R 269 LLC to the Berks. No proposed contract signed by R & R 269 LLC, however, was ever presented to the Berks.

Mr. Capellini further learned that neither the pool's nor the pool house's plumbing system was in good working order. No mutually agreed escrow agreement (relating to the condition of the swimming pool and of the condition of the pool house) was signed. Additionally, the Berks were not satisfied with the terms of a second mortgage that their proposed lender had presented. The parties and counsel departed the meeting room, although there were expressions of the possibility of again meeting a few days thereafter.

Following the difficulties of September 5, 2007, Mr. Capellini wrote to TKG&C on September 7, 2007 advising, *inter alia*, that the Berks demanded the return of their down payment because: (a) S & S's representations of ownership of the premises had proven to be false when made; (b) those representations continued to be false and would remain false on September 12, 2007; (c) S & S did not have (and, on September 12, 2007, would not have) the ability to convey title to the premises to the Berks; and (d) S & S's false representations were a material breach of the Agreement.

By letter dated September 10, 2007, Ms. Lynne Steinberg of TKG&C advised Mr. Capellini that her client, "R & R 269 LLC, [was] ready, willing and able to transfer title to the premises known as 269 Stone Hill Road, Pound Ridge, New York to Dr. George Berk and Penelope Smith-Berk by no later than September 12, 2007 pursuant to that certain contract of sale dated August 20, 2007." By letter dated September 10, 2007, Mr. Martin Goldwyn of TKG&C also advised Mr.

Capellini that “on September 5, 2007, our client, R & R 269 LLC was ready * * * to deliver the deed.” The Goldwyn letter further stated, *inter alia*, that “the pool and pool house would be in working order by September 12, 2007; that if the Berks did not close title by that date then we would hold your clients in breach of the contract and retain the down payment.”

By letter dated September 12, 2007, Mr. Capellini advised Mr. Goldwyn of the following:

“ . . .our clients did not enter into any contract with R & R, and that S & S Management LLC (S & S), the entity that claimed to be in title, has no such title. It is shocking that you would characterize a material misrepresentation in a real estate contract and a complete failure of title in the contract vendor as spurious issues. Obviously, there were significant issues underlying your clients’ decision to misrepresent (hopefully without the knowledge of members of your firm) the status of the title to the premises. It is hardly frivolous for our clients, after reflection, to conclude that they—who are ignorant of your clients’ true motivations and intentions with regard to what the transaction records show—could be prejudiced by overlooking this situation, and to refuse to tolerate it. You cannot unilaterally substitute one of these distinct legal entities for the other as their owners and their counsel feel is convenient. The Berks cannot be bound to accept title from a stranger to their contract, and they refuse to do so.

* * *

Notwithstanding your threat, our clients do not intend to appear for closing, since the purported contract is void and unenforceable. Further, the seller, S & S, has, through your letter, clearly demonstrated its inability and refusal to perform as required by the contract.”

* * *

In conclusion, our clients repeat their demand for the immediate return of their deposit of \$210,000.00.”

The “time is of the essence” date of September 12, 2007 passed without a closing being held.

On September 21, 2007, Plaintiffs commenced this action seeking an order awarding S & S

the down payment and for an order permitting TKG&C as escrowee to pay the down payment to S & S. Defendants served an amended answer dated November 14, 2007 containing counterclaims essentially requesting rescission of the contract of sale. Plaintiffs then served a reply denying the allegations of the counterclaims.

In support of their motion for summary judgment, the Berks argue, *inter alia*, that it is undisputable that S & S was not the owner of the subject realty and hence, it was incapable of conveying the property in accordance with the contract of sale. It is equally significant and axiomatic that, because S & S did not own the subject realty, S & S was incapable of sustaining any damages by virtue of any alleged breach of the agreement by the Berks. In addition, the Berks assert that since the contract was predicated upon material misrepresentations, relied upon by the Berks—representations which were not only false when made but which also were known (or should have been known) by both S & S and TKG&C to have been false when made—the agreement was void *ab initio*.

In support of their cross-motion and in opposition to Defendants' motion, Plaintiffs contend that Defendants are not entitled to rescission of the contract as the alleged misrepresentation that the purchasers are utilizing as an excuse not to close is immaterial in that the seller was ready, willing and able to have good title transferred on September 5, 2007. Plaintiffs further assert that assuming *arguendo* that there was a title defect that was not cured to purchasers' satisfaction at the September 5, 2007 scheduled closing, it would have been easy for S & S to cure such issues prior to the September 12, 2007 Law Day. Furthermore, Defendants were required to afford seller an opportunity to cure the alleged defect pursuant to paragraph 21 of the contract of sale.

Generally, the rights of the seller may be forfeited pursuant to a provision in the contract to

the effect that the contract may be terminated by the purchaser if certain specified conditions are not met by the seller.” *130-164 Ravine Avenue, Inc. v Ravine Associates*, 139 AD2d 716 (2d Dept 1988). While S & S asserts that the defect could have been easily cured by S & S prior to the law day of September 12, 2007 by a simple transfer deed from R & R 269 LLC to S & S, this assertion does not negate the fact that the seller made various representations in the contract that were inaccurate and could not be complied with.

“An action for rescission of a contract based on fraud, unlike a cause of action for damages on the same ground, does not require that scienter either be pleaded or proved” (*Albany Motor Inn & Restaurant v Watkins*, 85 AD2d 797 [3d Dept 1981], *app denied*, 56 NY2d 508 [1982]). Even innocent misrepresentations are sufficient to make a contract voidable (*see Rosenchein v McNally*, 17 AD2d 834 [2d Dept 1962]; *see also Mix v Neff*, 99 AD2d 180 [3d Dept 1984]).

Applying these principles to the case at bar, an examination of the record establishes that the Berks are entitled to rescission of the contract of sale based upon the seller’s misrepresentations (*see Rosenchein v McNally, supra*). Accordingly, the down payment in the amount of \$210,000.00 should be returned to the Berks.

The branch of Defendants’ motion which seeks costs and sanctions pursuant to 22 NYCRR 130-1.1 is denied.

Pursuant to 22 NYCRR 130-1.1 this court has the discretion to render an award of costs or sanctions for frivolous conduct (*One Beacon Insurance Co. v Bloch*, 298 AD2d 522 [2d Dept 2002]). Frivolous conduct has been defined in any of the following three manners: “the conduct is without legal merit; is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false” (22 NYCRR § 130-

1.1[c]; *Levy v Carol Management Corp.*, 260 AD2d 27, 34 [1st Dept 1999]). Attorney's fees and sanctions are permitted by Rule 130.1(d) and CPLR §8303-a to penalize specific frivolous conduct, and such sanctions are within the court's discretion (*Yankee Trails, Inc. v Jardine Ins. Brokers, Inc.*, 145 Misc.2d 282 [Sup. Ct. Renselaer County, 1989]).

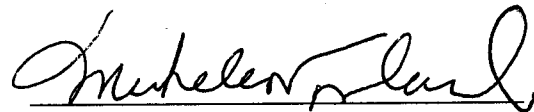
Under the circumstances extant, Defendants have not established that an award of sanctions is justified here.

In view of the foregoing, the motion is granted and the cross-motion is **denied**.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: May 21, 2008
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

ENTERED

MAY 29 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE