

Dorritie v Buoscio

2008 NY Slip Op 31604(U)

June 12, 2008

Supreme Court, Greene County

Docket Number: 0020082/0210

Judge: Joseph C. Teresi

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SATE OF NEW YORK
SUPREME COURT
JOHN DORRITIE and DANIELLE DORRITIE

COUNTY OF GREENE

Plaintiff,

DECISION and ORDER
INDEX NO. 08-202
RJI NO. 19-08-3457

-against-

NICOLINO BUOSCIO, MARIA BUOSCIO,
LAWYER'S TITLE INSURANCE CORPORATION,
SANTO ASSOCIATES LAND SURVEYING AND
ENGINEERING, P.C., LAKE AND MOUNTAIN
REALTY, LLC and CENTURY 21 HEARTLAND
REALTY,

Defendants.

Supreme Court Greene County All Purpose Term, April 18, 2008

APPEARANCES:

Philips & Millman, LLP
Attorneys for Plaintiffs
Frank J. Phillips, Esq. of Counsel
50 Route 9W
Stony Point, New York 10980

Rapport, Meyers, Whitbeck, Shaw & Rodenhausen, LLP
Attorneys for Defendants Buoscio
Jason L. Shaw, Esq. of Counsel
436 Union Street
Hudson, New York 12828

Hiscock & Barclay
Attorneys for Century 21 Heartland Realty
David B. Cabaniss, Esq. of Counsel
50 Beaver Street
Albany, New York 12207

Deily & Schaefer
Attorneys for Santo Associates Land Surveying & Engineering, P.C.
Robert J. Deily, Esq. of Counsel
One Bridge Street
Catskill, New York 12414

John Connor, Esq.
Attorney For Defendant Lawyer's Title Insurance Corporation
76 Green Street
Hudson, New York 12534

James Kleinbaum, Esq.
Attorney for Defendant Lake & Mountain Realty
18 Park Row
Chatham, New York 12037

TERESI, J.:

Plaintiffs seeks an order for summary judgment pursuant to CPLR 3212. Plaintiffs seek to rescind the contract for the purchase of real property located in Athens, New York and a refund of the purchase price along with costs, disbursements and attorney fees. The plaintiffs also seek a preliminary injunction pursuant to CPLR § 6313 preventing the transfer of any monies received as a result of the closing of the property. All defendants oppose plaintiff's motions. Defendants oppose the motion. Defendants Nicolino Buoscio, Maria Buoscio and Q & E Realty, Inc. d/b/a Century 21 Heartland Realty cross-move and seek the dismissal of the complaint pursuant to CPLR 3016 and CPLR 3211(a)(1) and (a)(7). Plaintiffs also submitted an Amended Answer.

The Buoscio defendants owned vacant lakefront land on Sleepy Hollow Lake in Athens, New York. In 1999, their adjoining owners, Pilosoph commenced a lawsuit against the defendants, and another owner alleging a dock and retaining wall encroached on their property at the waterfront. (Pilosoph v. Hedges, Supreme Court, Greene County) The Homeowner Association was named a defendant and charged with violating the guidelines of the

Environmental Control Committee for permitting the construction. A settlement was attained by the parties and placed on the record in Supreme Court on January 24, 2005. The agreement resulted in no diminishment of shoreline owned by the Buoscios. The agreement permitted the plaintiffs in that action would restore the area to the same condition before the construction in 1998.

In the summer of 2006, the defendants allege they decided to place the land for sale. On September 20, 2006 they listed the property for sale with Dolores Gori of Century 21 Heart Land Realty. Ms. Gori maintains the Buoscios told her there were issues regarding the dock which had been resolved. The MLS listing indicated the property was a "beautiful waterfront lot in private lake community." The plaintiffs made an offer to purchase the property for \$92,500.00 and a contract for sale was signed on November 1, 2006. The closing took place on December 14, 2006.

The plaintiffs commenced this action for recession, breach of contract, fraud, injunctive relief and negligent misrepresentation. The plaintiffs maintain the defendants fraudulently misrepresented that the property had lakefront right and failed to disclose the pending litigation. The plaintiffs contend the stipulation eliminated the property lakefront rights. Plaintiffs claim the other defendants knew or should have known about the litigation and the purported elimination of their lakefront rights. Plaintiffs seek to rescind the sale, have the purchase price of \$92,500.00 restored to them and the payment of \$15,000.00 for attorney fees, costs and disbursements.

The Buoscios contend the contract made no representations pertaining to any frontage or lake access. The defendants maintain with minimal diligence the plaintiffs would have discovered the lawsuit and the settlement. The Buoscios allege their neighbor, Pilossoph, had to

submit engineer plans to plaintiffs and restore the lakefront to the same condition prior to October 23, 1998.

The other defendants denied the allegations in the complaint. The title company claims there was no Notice of Pendency on file with the County Clerk and the claims of the plaintiffs are not covered by the title insurance policy. The real estate agents claim there were no misrepresentations and they had no knowledge of the litigation. The surveyor contends the survey was accurate and it did not certify that there were any lakefront rights. The defendants allege the motion for summary judgment is premature as no discovery has been exchanged and no depositions of any of the parties have been held.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” Napierski v. Finn, 229 AD2d 869, 870 (3rd Dept., 1996). In deciding whether summary judgment is warranted, the Court’s main function is issue identification, not issue determination. See, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law. See, Winegard v. New York Univ. Med. Ctr., 64 NY2d 851, 953 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See, Dykstra v. Winridge Condominium One, 175 AD2d 482, 483 (3rd Dept., 1991). In order to defeat a motion for summary judgment the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. See, Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

Defendants maintain plaintiff’s motion for summary judgment is premature as discovery

is not complete and none of the parties to the action have been deposed.

CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated. See, Amico v. Melville Volunteer Fire Co. Inc., 39 AD 3d 784 (2nd Dept. 2007]). A summary judgment motion is properly denied as premature when the nonmoving party has not been given a reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant or co-defendant. See, Juseinoski v. New York Hosp. Medical Center of Queens, 29 AD 3d 636 (2nd Dept. 2006); Metichecchia v. Palmeri, 23 AD 3d 894 (3rd Dept. 2005)). This motion is premature as there has been no discovery and depositions of parties and witnesses have not been conducted. “Even assuming the movant made a prima facie showing of its entitlement to judgment as a matter of law, the court providently exercised its discretion in denying the motion as premature, with leave to renew following discovery. See, CPLR 3212(f); State Farm Fire & Cas. Ins. Co. v. Meiss, 23 AD 3d 372 (2nd Dept. 2005). Since relevant discovery has not been completed, plaintiff’s motion for summary judgment is denied but may be renewed once discovery has been concluded. All cross-motions to dismiss the complaint pursuant to CPLR 3016 and CPLR 3211 by the co-defendants are also denied subject to renewal after the completion of discovery.

Plaintiffs also seek a preliminary injunction restraining the funds paid to the defendants at the December 14, 2006 closing.

It is well settled that in order to prevail on a motion for a preliminary injunction, the movant has the burden of demonstrating (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the

equities favors the movant's position. See, CPLR § 6301; Aetna Insurance Co. v. Capasso, 75 NY2d 860 (1990); W.T. Grant Co. v. Sgroi, 52 NY2d 496 (1981). Moreover, the irreparable harm must be shown by the moving party to be imminent, not remote or speculative. See, Golden v. Steam Heat, Inc., 216 AD2d 440 (2nd Dept. 1995). The drastic remedy of a preliminary injunction is not to be granted unless the moving papers establish a clear and undisputed right to relief. See, Graziano v. Turiano, 231 AD2d 674 (2nd Dept. 1996).

The plaintiffs have failed to meet their burden entitling them to a preliminary injunction. At closing on December 14, 2006, the plaintiffs paid from proceeds closing costs such as a title insurance fee, real estate commissions, surveyor costs and the balance of the proceeds to the Buoscios. Those funds were disbursed at closing and are not currently available to be restrained.

Plaintiffs submitted a proposed Amended Answer without leave of Court in their opposition papers to defendants' cross-motions. CPLR 3025(b) requires that an amendment to a pleading must be made with leave of court or by stipulation of all parties. Leave must be freely given and will generally be granted as long as the opponent is not surprised or prejudiced by the proposed amendment and the proposed amendment appears meritorious. See, Paolano v. Southside Hosp., 3 AD 3d 524 (2nd Dept. 2004). Leave to serve an amended complaint rests within the sound discretion of the court. See, Ciarelli v. Lynch, 46 AD 3d 1039 (3rd Dept. 2007). Plaintiff never moved for leave of court to amend the complaint. The amended complaint was attached to opposition papers as an exhibit. Plaintiffs must move to amend the complaint in compliance with the requirements of CPLR 3025 on notice to the defendants.

All papers, including this Decision and Order are being returned to the attorneys for the Buoscio defendants. The signing of this Decision and Order shall not constitute entry or filing

under CPLR 2220. Counsel are not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
June 12, 2008



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated February 13, 2008;
2. Affirmation of Frank J. Phillips, Esq. dated January 21, 2008 with attached exhibits A-N;
3. Affidavit of John Dorritie dated January 30, 2008;
4. Affirmation of James Kleinbaum, Esq. dated March 10, 2008;
5. Affidavit of Patricia Meyers dated March 7, 2008;
6. Affidavit of Nicolino Buoscio dated March 12, 2008 with attached exhibits A-D;
7. Notice of Cross-Motion dated March 13, 2008 with attached exhibits A & B;
8. Defendant Buoscios' Memorandum of Law dated March 13, 2008;
9. Verified Answer of Lawyer's Title Insurance Corporation dated March 11, 2008;
10. Affidavit of John Connor, Jr. Esq. dated March 14, 2008;
11. Affidavit of John Barone, Esq. undated with attached exhibits A-E;
12. Affidavit of Alton P. MacDonald, Jr. dated April 2, 2008 with attached exhibits A-C;
13. Notice of Cross-Motion dated April 3, 2008;
14. Affidavit of David B. Cabaniss, Esq. dated April 3, 2008 with attached Exhibits A & B;
15. Affidavit of Dolores Gori dated April 2, 2008 with attached exhibits A-D;
16. Defendant Century 21 Memorandum of Law dated April 3, 2008;
17. Affirmation of Frank J. Philips dated April 16, 2008 with attached exhibit 1;
18. Plaintiff Memorandum of Law dated April 16, 2008 with attached exhibit 2.