SHORT FORM ORDER

INDEX No. 07-17377

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 12/12/07
CAL. DATE 2/27/08
MNEMONIC: 001 - MD

FREDRICK P. STERN,

Plaintiff,

- against -

LESTER KORNFELD, JOANNE D. KORNFELD and HAROLD I. GUBERMAN, as escrow agent,

Defendants.

FREDRICK P. STERN & ASSOCIATES
Attorneys for Plaintiff
2163 Sunrise Highway
Islip, New York 11751

HAROLD I. GUBERMAN, ESQ.
Attorney for Defendants
35 Pinelawn Road, Suite 218E
Melville, New York 11747

Upon the following papers numbered 1 to 21 read on this motion for summary judgment and to cancel the notice of pendency; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross-Motion and supporting papers _____; Answering Affidavits and supporting papers 15 - 19; Replying Affidavits and supporting papers 20 - 21; Other _____; and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion by the defendants for an order pursuant to CPLR 3212 granting partial summary judgment in their favor dismissing the complaint and awarding to the defendants the sums presently held in trust by the attorney for the defendants; pursuant to CPLR 6514 (b) directing the Suffolk County Clerk to cancel the notice of pendency filed by the plaintiff against the premises known as 54 West Main Street, East Islip, New York; assessing costs and legal fees pursuant to CPLR 6514 (c) against the plaintiff and/or the plaintiff's attorney, Patricia Stern, Esq. in the sum of $3,000.00 for the improper filing of the notice of pendency; and imposing sanctions against the plaintiff and/or his attorney pursuant to 22 NYCRR 130 -1.1 for the improper filing of the notice of pendency and refusal to cancel the notice of pendency, is denied.

This is an action for breach of a contract of sale, dated November 2005, of real property located at 54 West Main Street, East Islip, New York. Said property consists of a two-story building with commercial/business/office space on the ground floor and a residential apartment on the second floor. The property is owned by the defendants Lester Kornfeld and

Joanne D. Kornfeld (hereinafter "the Kornfelds"). The rider attached to said contract of sale contains the provisions that are the subject of this action.

The rider indicates that the purchase price was $790,000.00, to be paid as follows: $35,000.00 to be paid at the contract signing; twelve monthly payments of $5,000.00 to commence on January 10, 2006; $20,000.00 to be paid on June 10, 2006; and a balance to be paid at closing of $675,000.00. The contract of sale indicates that the closing was to occur on or about January 15, 2007.

In addition, the rider provides that the plaintiff would enter into possession and occupancy of the ground floor as a licensee of the Kornfelds on January 1, 2006 at which time the plaintiff was to place all the utilities in his name and was responsible for their payment as well as for all snow removal and landscaping services and for all repairs to the subject premises, excluding non-structural repairs in the second-floor apartment.

The rider also indicates that the defendants had a tenant on the second floor pursuant to a lease that expired in August 2006 and that pursuant to paragraph 34 (a), the Kornfelds would be entitled to all rents due from the tenant on the second floor until the end of the tenant's lease on August 10, 2006. Prior to the end of said lease, but no later than July 1, 2006, the plaintiff was to inform the Kornfelds whether the plaintiff desired the tenant to remain at the expiration of the lease or was to vacate and the Kornfelds would notify the tenant. Pursuant to paragraph 34 (b) of the rider, on August 1, 2006 the plaintiff was to pay to the Kornfelds the sum of $1,500.00 and was to continue to do so on the first of each month thereafter until closing. Those sums were not to be applied to the purchase price. Paragraph 35 (c) of the rider provides that until August 2, 2006 the Kornfelds were to reimburse the plaintiff 25% of the oil bill for the premises. Pursuant to paragraph 34 (b) of the rider, after August 3, 2006, the plaintiff would have possession of the second-floor apartment and would be entitled to keep the rent collected for it, if any; and pursuant to paragraph 35 (c), the plaintiff would be responsible to pay the full electric, oil and water bills for the premises and would become responsible for any repairs needed in the second-floor apartment.

The plaintiff paid the initial contract deposit and then paid $5,000.00 per month during his use of the premises. The defendant Harold I. Guberman, Esq. (hereinafter "Guberman"), as the attorney for the Kornfelds, deposited certain sums to be held in escrow in his IOLA account. The plaintiff occupied the first floor on or about January 1, 2006, at which time a non-party tenant leased the second-floor apartment with a lease term that was to expire in August 2006.

By agreement (modification agreement), dated August 9, 2006, on the plaintiff's own letterhead, the plaintiff and the Kornfelds' modified the contract of sale to indicate, among other things, that the "$20,000.00 payment originally due on June 10 will be due on October 10, 2006" and that "[r]ent paid by the tenant *** will continue to be paid directly to the seller. Purchaser's monthly payments between August 1-December 1 shall be reduced to $5,000.00".

The agreement indicated in bold letters that all other terms of the contract of sale would remain in full force and effect.

The closing of title did not take place in January 2007 as contemplated in the contract of sale. Instead the closing was scheduled for March 30, 2007. Shortly after the execution of the contract of sale, the Kornfelds moved to Florida. Guberman appeared at the closing on behalf of the Kornfelds. The plaintiff tendered $675,000.00, which represented the balance of the purchase price. Guberman told the plaintiff that in addition to the purchase price, the plaintiff owed the defendants $4,500.00 for the use and occupancy of the vacant second-floor apartment from January 2007 through the closing date in accordance with the modification agreement. The plaintiff rejected paying said amount, and the closing was never completed. The plaintiff subsequently vacated the premises on or about May 4, 2007.

The plaintiff, in his complaint, alleges a first cause of action as against the Kornfelds to recover his $115,000.00 down payment, based on breach of the contract of sale; a second cause of action as against the Kornfelds to recover the sum of $2000.00 expended in furtherance of the contract of sale; a third cause of action as against the Kornfelds for foreclosure of vendee's liens against the subject property in the amount of $2,000.00; a fourth cause of action as against the Kornfelds for rescission of the contract of sale and the modification agreement; and a fifth cause of action as against Guberman, as escrowee, to turn over to the plaintiff any monies held by Guberman in escrow for the plaintiff's benefit. The plaintiff also filed a notice of pendency on June 5, 2007 at the Office of the Clerk of Suffolk County.

By their answer, the defendants assert general denials to the allegations in the complaint and allege a first counterclaim that the plaintiff breached the contract of sale as he was not ready, willing and able to close title on or about January 15, 2007 in accordance with its terms; that the defendants sent the plaintiff a letter setting a firm date, time and place for the closing with time being of the essence; that the plaintiff failed to appear and that the defendants are entitled to liquidated damages of all the sums being held in escrow under the terms of the contract of sale. The defendants allege a second counterclaim that despite the plaintiff's breach of contract, the defendants, through their attorney, appeared for a closing on March 31, 2007; that the defendants were ready, willing and able to close title but that the plaintiff refused to close title in accordance with the terms of the contract of sale and that the defendants have been damaged and are entitled to liquidated damages of all the sums being held in escrow under the terms of the contract of sale. As a third counterclaim, the defendants allege that subsequent to December 2006 the plaintiff breached the portion of the contract agreeing to pay $5,000.00 per month to be applied toward the purchase price of the premises from January 1, 2006 until closing and to pay $1,500.00 per month from January 1, 2007 until closing, which was not to be applied toward the purchase price, such that the plaintiff owed the defendants $32,500.00. As a fourth counterclaim, the defendants allege that the plaintiff damaged the subject premises during his period of occupancy and that, as a result, the defendants have been damaged in the sum of approximately $50,000.00.

The court's computer records indicate that no note of issue has been filed in this action.

The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiff breached the contract of sale by refusing to pay at the closing the sum of $4,500.00, constituting outstanding rental payments for the second-floor apartment from January 1, 2007 until the closing in March 2007 pursuant to the contract of sale and the modification agreement. In addition, the defendants seek to cancel the notice of pendency filed by the plaintiff against the premises, and seek the assessment of costs and legal fees and the imposition of sanctions for the improper filing and refusal to cancel said notice of pendency on the grounds that this action does not affect title, use or possession of the premises.

In opposition to the motion for summary judgment, the plaintiff contends that it was the defendants who breached the contract of sale by insisting that the plaintiff pay an additional $4,500.00 purportedly as rent for the vacant second-floor apartment and that the closing was never completed due to the actions of Guberman in packing up his papers and walking out when the plaintiff refused to make the additional payment. According to the plaintiff, the contract of sale was modified to allow his request to make the lump sum payment of $20,000.00 at a later date in exchange for the request of the Kornfelds that they continue to be permitted to receive the rental payments directly from the second-floor tenant, who had notified the Kornfelds that he desired to continue to rent the second-floor apartment on the same terms.

The plaintiff refers to a letter, dated July 31, 2006, from Guberman, stating that "[t]he rent from the upstairs tenant that was to be paid to you commencing August 1, 2006 will continue to be paid directly to the Sellers until closing of title" to support his contention that the plaintiff was not required to pay the second-floor tenant's rent of $1,500.00 per month at any time after August 1, 2006. The plaintiff adds that in any event, the defendants never notified him that the second-floor tenant would be vacating the premises in December 2006. Instead the plaintiff learned of it from the tenant in early December, and no notice was given by the defendants to the plaintiff at any time during the three and a half months between the tenant's departure and the closing that the plaintiff was expected to pay the rent of the second-floor apartment. Moreover, the plaintiff contends that he made numerous requests of Guberman between mid-January 2007 and mid-February 2007 for permission to offer a written lease to a potential tenant that he had found for the ground floor office in contemplation of moving his own office to the second floor and that he never received a response.

A party seeking summary judgment must establish his or her position by evidentiary proof in admissible form sufficient to warrant judgment to that party as a matter of law (see, **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (see, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (**Greenfield v Philles Records**, 98 NY2d 562, 569, 750 NYS2d 565 [2002]). When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms (**W.W.W. Assoc., Inc. v Giancontieri**, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (id.). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (**Greenfield v Philles Records**, supra). "The test for determining whether contract language is ambiguous is 'whether the agreement on its face is reasonably susceptible of more than one interpretation' " (**McCabe v Witteveen**, 34 AD3d 652, 654, 825 NYS2d 499 [2nd Dept 2006], quoting **Chimart Assoc. v Paul**, 66 NY2d 570, 573, 498 NYS2d 344 [1986]).

Here, the proof offered by the defendants was insufficient to satisfy their prima facie burden since the proof raised issues of fact (see generally, **Diamond v Scudder**, 45 AD3d 630, 845 NYS2d 452 [2nd Dept 2007]). The subject contract of sale together with the modification agreement are neither clear nor complete as to the plaintiff's obligations concerning the second floor apartment after December 1, 2006 (see, **Henrich v Phazar Antenna Corp.**, 33 AD3d 864, 867, 827 NYS2d 58 [2nd Dept 2006]). Although the modification agreement indicated that all other terms of the contract of sale would remain in full force and effect, the relevant terms of the rider were dependent on dates that had already passed by December 1, 2006. The plaintiff's obligations concerning the second floor apartment under paragraphs 34 (b) and 35 (c) of the rider did not commence at an event, such as the expiration date of the tenant's lease, but rather did so on dates close to the old expiration date of the lease, i.e., August 1, 2, and 3, 2006. Neither the contract of sale, the rider nor the modification agreement made provision whether the second floor apartment would remain vacant, whether the plaintiff would then have possession of the second floor apartment, whether the plaintiff would be able to lease the second floor apartment, and if so, whether the plaintiff would pay to the Kornfelds the sum of $1,500.00 per month, in the event that the closing did not take place on or about January 15, 2007. Where, as here, the terms of a contract are incomplete, parol evidence may be considered in order to ascertain the parties' intent (see, id). The Court notes that the note of issue has not been filed in this action and no depositions have been conducted. Therefore, the branch of the defendants' motion for summary judgment dismissing the complaint is also denied as premature (see, **Hall Enterprises, Inc. v Liberty Mgt. & Constr., Ltd.**, 37 AD3d 658, 830 NYS2d 346 [2nd Dept 2007]).

With respect to that branch of the defendants' motion concerning cancellation of the notice of pendency, inasmuch as the complaint seeks, among other things, to foreclose a vendee's lien to recover a down payment made on a contract for the sale of real property, the action is one in which the judgment demanded would affect the title to the real property and therefore falls within the scope of CPLR 6501 (see, **Wilson v Power House Dev. Corp.**, 12 AD3d 505, 783 NYS2d 858 [2nd Dept 2004]; **Macho Assets, Inc. v Spring Corp.**, 128 AD2d 680, 513 NYS2d 180 [2nd Dept 1987], appeal denied 69 NY2d 609, 516 NYS2d 1025 [1987]).

Therefore, that branch of the defendants' motion to cancel the notice of pendency pursuant to CPLR 6514 (b) and to assess costs and legal fees pursuant to CPLR 6514 (c) against the plaintiff and/or the plaintiff's attorney is denied (see, id.). In addition, that branch of the defendants' motion for the imposition of sanctions against the plaintiff and/or his attorney pursuant to 22 NYCRR 130 -1.1 for the improper filing of the notice of pendency and refusal to cancel the notice of pendency is denied.

Dated: MAY 16 2008

J.S.C.

_____ **FINAL DISPOSITION** ___X__ **NON-FINAL DISPOSITION**