

**Garfinkle Ltd. Partnership II v 1 Mecox Bay Inn,
Inc.**

2008 NY Slip Op 32278(U)

August 4, 2008

Supreme Court, Suffolk County

Docket Number: 0025430/2005

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
 Justice of the Supreme Court

MOTION DATE 3/21/08
 ADJ. DATE 6/18/08
 Mot. Seq. # 003 - MD
 # 004 - XMD

-----X		
GARFINKLE LIMITED PARTNERSHIP II,	:	ESSEKS, HEFTER & ANGEL, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	108 East Main Street, P.O. Box 279
	:	Riverhead, New York 11901-0279
- against -	:	
	:	FREDRICK P. STERN & ASSOCIATES
11 MECOX BAY INN, INC.,	:	Attorneys for Defendant
	:	2163 Sunrise Highway
Defendant.	:	Islip, New York 11751
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Upon the following papers numbered 1 to 84 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; Notice of Cross Motion and supporting papers 25 - 80; Answering Affidavits and supporting papers 81 - 82; Replying Affidavits and supporting papers 83 - 84; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and canceling the notice of pendency filed in this action and for costs, disbursements and attorneys fees is denied; and it is further

ORDERED that the cross-motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment on its complaint for specific performance is denied.

The plaintiff, the prospective purchaser of a parcel of vacant land known as Lot 4 on the subdivision map of Thomas H. James and Lorraine Klugh, located at 1361 Montauk Highway in Water Mill, Town of Southampton, New York, commenced this action for specific performance against the defendant, the owner of said parcel. The plaintiff had entered into two separate agreements on October 8, 2003, one to purchase the land and one for the construction of a home, garage, swimming pool and tennis court on said land.

The plaintiff, by its principal Norton Garfinkle (Mr. Garfinkle), had entered into the Land Contract with the defendant, by its president Carol Konner, to purchase Lot 4 from the defendant for \$850,000.00. The plaintiff, by its principal Mr. Garfinkle, had entered into the Construction Contract with non-party Moon Bay Development Corp. (Moon Bay), a developer of luxury single family homes, by its president John Chiarelli (Mr. Chiarelli), to construct a house, a garage, a tennis court and a swimming pool on the property for \$1,000,000.00. Both contracts contained cross-default provisions that a default under one would constitute a default under the other contract.

At the time that said contracts were being executed, Moon Bay and the defendant already had a Joint Venture Agreement dated June 2003 pursuant to which Moon Bay would construct homes on properties owned by the defendant and they would share in the profits of the construction and land sales. Pursuant to the Land Contract's terms, the plaintiff had deposited the sum of \$85,000.00 in escrow as a down payment with the defendant's attorneys.

The Construction Contract provided that Moon Bay would arrange to have architectural plans and specifications prepared reflecting the parties agreement to enlarge the house to approximately 6,600 square feet of living space, not including the garage and basement, and that upon the parties' mutual agreement of the plans and specifications, they would be incorporated into the contract. In addition, said contract provided that the plaintiff could order changes in the work consisting of additions, deletions or modifications, without invalidating the contract, with the contract price being adjusted accordingly. Said changes would be authorized by written Change Order signed by the plaintiff, Moon Bay and the architect, or by written Construction Change Directive signed by the plaintiff and the architect. The Construction Contract also indicated that its date of commencement was the issuance of a building permit for construction or the date that the plaintiff took title to the premises, whichever occurred later.

Paragraph 11 of the Rider to the Land Contract contained the conditions precedent to the plaintiff's obligation to close title. Under subdivision (a), Moon Bay was to have obtained all building permits, approvals and consents from the Town of Southampton and any other governmental agency for the construction of a one family house, pool and tennis court in accordance with the Construction Contract between the plaintiff and Moon Bay "and the plans, specifications and surveys to be mutually agreed to by both parties" Pursuant to subdivision (b), the defendant Seller was to obtain a full unrestricted and unconditional release from the Covenant and Agreement Restricting Development dated April 9, 1992 between the prior owners of the subject parcel, James and Klugh, and the Town of Southampton¹. In the event that either Moon Bay was unable to perform under subdivision (a) or the defendant was unable to perform under subdivision (b) within ninety (90) days of the execution of the Land Contract, the plaintiff Purchaser would have the right to terminate the Land Contract and receive a refund of the down payment, including any interest which accrued thereon.

¹Said agreement allowed James and Klugh to subdivide their property into four lots in consideration of which certain restrictions and covenants were imposed on the lots, including that any construction or other site activity within areas documented as being archaeologically sensitive to Native American resources would be subject to and in conformance with the Covenant and Agreement Restricting Development filed in the Suffolk County Clerk's Office.

The Land Contract indicated that the closing would take place within two weeks after the defendant seller obtained the permits and approvals as provided in paragraph 11 of the rider or, upon reasonable notice (by telephone or otherwise) by the plaintiff purchaser.

By letter dated September 8, 2005, the plaintiff's attorney had contacted the defendant's attorney seeking to schedule a closing date based on an advisement that the required permits and approvals as a condition to closing had been obtained. The defendant's attorney responded by letter dated September 13, 2005 that he had been advised by the defendant that the Construction Contract had been abrogated constituting a default under both contracts and that the defendant had elected to terminate the Land Contract and to return the plaintiff's downpayment with accrued interest. By letter dated September 15, 2005, the plaintiff's attorney challenged the default claims and gave notice that the plaintiff was ready, willing and able to close upon the transaction, time being of the essence for a closing, on October 18, 2005 at 11:00 a.m. at the offices of the defendant's attorneys. The defendant thereafter retained a new attorney who responded by letter dated October 7, 2005 that the defendant was relieved of performance under the Land Contract due to the failure of performance under the Construction Contract and that the defendant would not accept the plaintiff's tender and would not convey the property to the plaintiff. On October 17, 2005, the plaintiff wired the sum of \$765,000.00 into its attorney's escrow account to pay the balance of the purchase price and any other transfer taxes and expenses at the closing. The closing never took place.

By its complaint, the plaintiff alleges a first cause of action for specific performance by the defendant of its obligations under the Land Contract and transfer of title to the plaintiff as well as providing the plaintiff with an easement pursuant to paragraph 12 of the rider to the Land Contract. In addition, plaintiff alleges a second cause of action for costs and disbursements, including reasonable attorneys fees, due to the defendant's intentional and willful breach of its contractual obligations.

By its amended answer, defendant asserts five affirmative defenses. The first affirmative defense alleges that the plaintiff breached the Construction Contract by demanding extensive changes to the plans and specifications incorporated therein and the fourth affirmative defense alleges that the complaint fails to state a cause of action inasmuch as there are conditions precedent to the Land Contract between the plaintiff and the defendant and the Construction Contract between the plaintiff and Moon Bay which have not yet been fulfilled; and the fifth affirmative defense alleges that the plaintiff cannot maintain an action for specific performance and/or breach of the Land Contract inasmuch as the plaintiff has anticipatorily breached said Land Contract. The defendant also asserts a counterclaim against the plaintiff for anticipatory breach of the Land Contract and the Construction Contract and seeks to recover the plaintiff's down payment as well as costs, disbursements and attorneys fees.

The defendant now moves for summary judgment dismissing the complaint and canceling the notice of pendency filed in this action and for costs, disbursements and attorneys fees. The defendant asserts that the plaintiff defaulted under both contracts by anticipatory breach, first of the Construction Contract, by making substantial changes to the construction plans that were not envisioned at contract signing and not reflected in the construction price and second, of the Land Contract, inasmuch as the mutual agreement of the plaintiff and Moon Bay on the construction plans was a separate and distinct condition precedent to the Land Contract. In addition, the defendant argues to the effect that the

plaintiff's continued refusal to approve plans rendered the defendant's performance under the Land Contract impossible, inasmuch as approved plans are a prerequisite to an application for a building permit from the Town of Southampton.

In opposition to the motion, the plaintiff contends, among other things, that there is no evidence of any anticipatory breach on its part in the form of an unequivocal and final statement of absolute repudiation of its obligations under the Construction Contract and that any negotiations in furtherance of the Construction Contract or of its modification would not constitute an anticipatory breach. In addition, the plaintiff contends that the defendant cannot evade its obligation to perform under the Land Contract by relying on contingencies inserted solely for the plaintiff purchaser's benefit; that the plaintiff's announcement that it was ready, willing and able to close constituted a waiver of unfulfilled conditions; and that in any event, the time to announce a waiver was at closing such that the defendant prematurely attempted to cancel the Land Contract. The plaintiff also contends that it performed its sole obligation under the Construction Contract up to this time, which was to advance up to \$20,000.00 to the architect; and that archaeological certification from the State is unnecessary to obtain a building permit inasmuch as the archaeologically sensitive area of Lot 4 is not located near the area of planned construction.

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 defendant submits affidavits from the architect, John Bruscella, and the defendant's president, Mr. Chiarelli, indicating that the Construction Contract provided for the construction of a 6600 square foot single family home known as "The Chantal" based on plans from Moon Bay at a price of one million dollars and that shortly after entering into said contract, Mr. Garfinkle sought to revise said plans and did so without any consultation with Moon Bay or the defendant. According to said affidavits, the final set of proposed revised plans signed off by Mr. Garfinkle contemplated a forty percent larger and more elaborate home, completely different from "The Chantal" model. Mr. Chiarelli states in his affidavit that after reviewing said revised plans in October 2004, he notified Mr. Garfinkle that Moon Bay would not construct the proposed home for the original contract price and that given the additional square footage, bathrooms, windows and upgraded specifications, Moon Bay would have to significantly increase the price. According to Mr. Chiarelli, Mr. Garfinkle refused to pay any additional monies and told Mr. Chiarelli that he was no longer interested in the originally planned home. Mr. Chiarelli asserts that the plaintiff is attempting to force the defendant to sell the property at a drastically reduced price in order to construct the plaintiff's elaborate home for a fraction of its real cost, all to the detriment of Moon Bay and the defendant. He estimates that the home in the revised plans would cost at least four million dollars and asserts that the plaintiff's action of seeking specific performance of the Land Contract demonstrates that the plaintiff never had any intention of using Moon Bay to construct the home.

The defendant also submits the affidavit of Mr. Garfinkle, which had been submitted in

opposition to the defendant's prior motion to dismiss, who points out that the Land Contract referenced the Construction Contract and made the execution of the Construction Contract a condition of the Land Contract and that the Land Contract gave a right of cancellation to the plaintiff in the event that the plaintiff was entitled to cancel the Construction Contract but no such right to the defendant. In addition, he points out that other than the provision in the Land Contract that a default under the Construction Contract constituted a default under the Land Contract, both contracts were separate agreements. Mr. Garfinkle explains that since the plaintiff was entitled under the terms of the Construction Contract to request additions and upgrades to the originally contemplated home, and since the plaintiff was effectively paying for the architectural plans instead of the contractor, Mr. Garfinkle asked the architect to prepare a first set of plans showing a larger dwelling. He admits that the architect prepared plans for a structure that was approximately forty percent larger than the originally contemplated home and states that he was fully aware that the plaintiff and Moon Bay would have to agree to a new, higher price for the larger home. Mr. Garfinkle disagrees with Mr. Chiarelli's characterization of subsequent events, indicating that he never refused to pay additional monies and that Mr. Chiarelli never told him how much the increase in price should be to reflect the upgrades to the home in the architect's plans and never provided him with plans for the home contemplated in the Construction Contract. He adds that he only had one meeting with Mr. Chiarelli to discuss plans and thereafter had trouble contacting him. Mr. Garfinkle states that on September 8, 2005 he directed his attorney to send a letter to the defendant's attorney seeking to schedule a closing.

When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see, W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; *Costello v Casale*, 281 AD2d 581, 583, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]).

Initially, the Court notes that although both contracts contain cross-default provisions, neither contract expressly indicates whether the failure to come to a mutual agreement on architectural plans would constitute a default under their terms. In addition, neither the Construction Contract nor the Land Contract contain a specific time limitation for the mutual agreement of the plaintiff and Moon Bay concerning the architectural plans. However, the terms of the two contracts clearly indicate that they were closely interrelated and intertwined in purpose and, as the defendant asserts, the mutual agreement of the plaintiff and Moon Bay concerning the architectural plans was a condition precedent to the condition precedent to the plaintiff's obligation to close under subdivision (a), paragraph 11 of the Rider to the Land Contract (*see generally, Shutter v Hillside Medical Investor Corp.*, 192 AD2d 699, 597 NYS2d 114 [2d Dept 1993]). Once a mutual agreement was reached between the plaintiff and Moon Bay on the architectural plans, then Moon Bay was required to proceed in good faith to receive building permits, consents and approvals from the Town (*see, Brockway-Smith Co. v Greene*, 179 AD2d 922, 923, 578 NYS2d 700 [3d Dept 1992]; *Savino v DeLeyer*, 160 AD2d 989, 990, 554 NYS2d 710 [2d Dept 1990]). The defendant's submissions reveal that two years after the execution of the Construction and Land Contracts, the plaintiff and Moon Bay had not yet reached a mutual agreement on architectural plans. The Court notes that a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition precedent (*see, Crown Plastering Corp. v Elite Associates, Inc.*, 166 AD2d 495, 560 NYS2d 694 [2d Dept 1990]; *see*

also, *Kooleraire Serv. & Installation Corp v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106, 320 NYS2d 46 [1971]; *Sunshine Steak, Salad & Seafood v W.I.M. Realty*, 135 AD2d 891, 522 NYS2d 292 [3d Dept 1987]). The affidavits raise questions of fact regarding the credibility of the parties concerning who was responsible for the failure to reach a mutual agreement (see, *S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]).

As for the defendant's claims of anticipatory breach by the plaintiff, before a party may invoke the doctrine of anticipatory repudiation, "there must be a definite and final communication of the intention to forego performance before the anticipated breach may be the subject of legal action" (see, *Rachmani Corp. v 9 East 96th Street Apartment Corp.*, 211 AD2d 262, 266, 629 NYS2d 382, 385 [1st Dept 1995]). The affidavits and other proof submitted by the defendant fail to indicate that either Moon Bay or the defendant ever made a sufficient demand for performance, that is, for an agreement upon a final set of architectural plans, upon the plaintiff prior to the commencement of this action (see, *D'Abreau v Smith*, 240 AD2d 616, 659 NYS2d 503 [2d Dept 1997]). Such a demand by one of the parties is required to cause the other party to be in default (see, *id.*). Nor is there evidence of an unequivocal, definite and final repudiation by the plaintiff of either the Construction Contract or the Land Contract (see, *Coney Island Exhaust, Inc. v Mobil Oil Corp.*, 304 AD2d 706, 758 NYS2d 389 [2d Dept 2003]).

Neither of the conditions precedent were fulfilled and the plaintiff had possessed the right to terminate the Land Contract since ninety days after its execution. The Land Contract unambiguously conferred upon the plaintiff purchaser the right to terminate the contract if either contingency was not timely met (compare, *Oak Bee Corp. v N.E. Blankman & Co., Inc.*, 154 AD2d 3, 551 NYS2d 559 [2d Dept 1990]). However, the plaintiff does not seek to exercise said right and instead seeks to close and obtain title to the land, despite the absence of the condition precedent events which would have obligated the plaintiff to take title. The instant matter is distinguishable from the cases cited by the defendant inasmuch as those cases involved contracts that contained conditions precedent to the seller's performance which were not fulfilled and the buyer nevertheless sought specific performance whereas here the Land Contract contains conditions precedent to the buyer's performance and it is the buyer who is seeking specific performance (cf. *Morse v Ted Cadillac, Inc.*, 146 AD2d 756, 537 NYS2d 239 [2d Dept 1989]). In any event, "[w]hen a contract for the sale of real property contains a clause specifically setting forth the remedies available to the buyer if the seller is unable to satisfy a stated condition, fundamental rules of contract construction and enforcement require that we limit the buyer to the remedies for which it provided in the sale contract" (*101123 LLC v Solis Realty LLC*, 23 AD3d 107, 108, 801 NYS2d 31 [1st Dept 2005]; see also, *Arker Companies v State Urban Development Corp.*, 47 AD3d 739, 849 NYS2d 660 [2d Dept 2008]). It so follows that under the terms of the Land Contract, the plaintiff is limited to the remedy of the right to terminate the Land Contract and receive a refund of the down payment, including any interest which accrued thereon, not title to the land. Also, the plaintiff essentially granted Moon Bay and the plaintiff an indeterminate extension of time beyond the ninety day limit of paragraph 11 of the Rider to the Land Contract within which to procure the building permits and release from the Covenant and Agreement Restricting Development, and it was improper for the plaintiff to suddenly notify the defendant that time was of the essence based on purported information that the required permits and approvals as a condition to closing had been obtained, without any actual proof that the conditions precedent had been satisfied (see generally, *Tucek v Hoffman*, 161 AD2d 588, 555

NYS2d 167 [2d Dept 1990]).

When, as here, a contract for the sale of real property does not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date for performance (*see, Savitsky v Sukenik*, 240 AD2d 557, 659 NYS2d 48 [2d Dept 1997]). What constitutes a reasonable time to perform turns on the facts and circumstances of the case (*see, id.*). Even where the parties specify a particular date for closing, absent a provision that time is of the essence, the court will still allow the parties a reasonable time within which to perform their respective obligations under their contract (*see, Lieberman Properties, Inc. v Braunstein*, 134 AD2d 55, 522 NYS2d 874 [2d Dept 1987]). The defendant's submissions raise issues of fact as to whether the failure to reach a mutual agreement concerning the architectural plans within a reasonable time constituted a "default" that "abrogated" one or both of the agreements (*see generally, Guiliano v Carlisle*, 237 AD2d 569, 655 NYS2d 997 [2d Dept 1997]). Also, the submissions raise issues of fact as to whether the plaintiff can be deemed to have substantially performed its contractual obligations under both contracts, without having reached a mutual agreement on the architectural plans, within a reasonable time so as to be entitled to specific performance of the Land Contract (*see, Johnson v Phelan*, 281 AD2d 394, 721 NYS2d 378 [2d Dept 2001]; *Lieberman Properties, Inc. v Braunstein, supra*).

With respect to the defendant's assertions that a release from the restrictive covenant could not be obtained under subdivision (b) of paragraph 11 of the Rider to the Land Contract or that the defendant incurred unexpected costs while attempting to obtain said release, the Court notes that the Land Contract did not include any provisions freeing the defendant of its obligations under those circumstances. Even where a contingency has been omitted, the Court will not necessarily imply a term since " 'courts may not by construction add or excise terms, nor distort the meaning of those used and thereby 'make a new contract for the parties under the guise of interpreting the writing' " (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199, 738 NYS2d 658, 661 [2001]; *Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157, 468 NYS2d 649, 654 [2d Dept 1983], quoting *Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19, 210 NYS2d 516 [1961]).

The defendant further asserts that in any event, the State Office of Parks, Recreation and Historic Preservation's refusal to issue the required certification that there are no archaeological human remains on the site and the finding, subsequent to the execution of the contracts, of ancient human remains of Shinnecock Indian ancestry on the site precludes the issuance of a building permit from the Town. The defendant adds that the subject property has undergone lengthy archaeological examinations at the direction of the State at great expense to the defendant, which expenses were not contemplated by the parties when they entered into the Land Contract.

To the extent that the defendant is arguing impossibility of performance of the Land Contract due to the unforeseen circumstance of archaeological discoveries at the subject site, the defendant's submissions reveal that it was aware at the time of contract signing that the land had been the subject of archaeological research since at least 1990 and the discovery of human remains at the site occurred one year after the plaintiff's proposed closing date. The vitiation of a contract based upon impossibility of performance is rarely imposed and will be applicable only in those circumstances "when the destruction

of the subject matter * * * or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract” (see, *Lagarenne v Ingber*, 273 AD2d 735, 710 NYS2d 425 [3d Dept 2000] citing *Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]). Furthermore, financial disadvantage by circumstances unforeseen by the parties at the time of a contract’s making is not a basis for reliance upon the impossibility of performance doctrine (see, *General Elec. Co. v Metals Resources Group Ltd.*, 293 AD2d 417, 741 NYS2d 218 [1st Dept 2002]).

The affirmation of the defendant’s attorney with respect to certain prerequisites to the development of the subject property, John F. Klucsik, indicates that the subject property located at Hayground, Town of Southampton, is part of a larger parcel of property once owned by Thomas H. James and Lorraine Klugh. Mr. Klucsik explains that James and Klugh obtained approval from the Town to subdivide their property into four lots and on April 9, 1992 they entered into an agreement restricting development in a portion of the property determined by the Town to be archaeologically sensitive as to Native American resources. Mr. Klucsik indicates that under said agreement, the owners agreed to restrain from any activity in the archaeologically sensitive area until a professional data retrieval program was completed and accepted by the Town and by the New York State Office of Parks, Recreation and Historic Preservation (OPRHP). He adds that the James and Klugh property has undergone numerous archaeological investigations at considerable expense to the property owners, listing those occurring in 1990, 1991, 2004, 2005 and 2006.

Having known that the property had been under numerous archaeological investigations over the years, the defendant failed to include a contingency in the Land Contract in the event that it did not obtain the certification from the State or that it became costly to do so. Notably, the defendant does not provide any information as to when it purchased the subject property, the actual location on the property determined by the Town to be archaeologically sensitive, and whether the defendant disclosed to the plaintiff that said property was under archaeological investigation at the time that they entered into the subject contracts. In addition, there is no evidence that the defendant notified the plaintiff that it was having difficulty satisfying the condition precedent under the Land Contract of obtaining a release from said restrictive covenant due to the discovery of archaeological human remains on the property in November 2006.

Thus, the defendant has failed to meet its burden of establishing that the Land Contract has been terminated under its terms by the plaintiff’s anticipatory breach of both contracts in failing to approve construction plans and due to unforeseen circumstances beyond the control of the parties created by the archaeological findings. Therefore, the defendant’s motion must be denied, regardless of the sufficiency of the opposition papers (see, *Winegrad v New York Univ. Med. Ctr.*, *supra*).

The plaintiff now cross-moves for summary judgment on its complaint for specific performance on the grounds that the plaintiff has performed its obligations under the Land Contract and was and is ready, willing and able to close on said contract. The plaintiff admits that the cross-motion has been interposed more than 120 days after the filing of the note of issue but seeks consideration of its cross-motion based on the timely motion for summary judgment on the plaintiff’s claims.

Garfinkle v 11 Mecox Bay Inn

Index No. 05-25430

Page 9

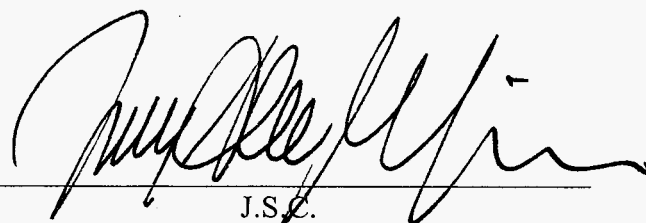
CPLR 3212 (a) requires that a motion for summary judgment be made within 120 days after the filing of a note of issue, except with leave of court on good cause shown (*see*, CPLR 3212 [a]). The plaintiff made its cross motion on March 17, 2008 as indicated in the affidavit of service of the cross motion, which is which is 26 days after February 20, 2008, the 120-day deadline following the filing of the note of issue thereby rendering the cross motion untimely (*see*, CPLR 3212[a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Notably, the plaintiff did not seek leave to file a late motion for summary judgment in its notice of cross-motion (*see e.g.* ***Welch v City of Glen Cove***, 273 AD2d 302, 708 NYS2d 475 [2d Dept 2000]). In addition, counsel for the plaintiff has provided no explanation or “good cause” for serving the cross motion 26 days late, and thus, the Court has no discretion to entertain it on the merits (*see*, ***Brill v City of New York***, *supra*; ***Rivers v City of New York***, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]).

Moreover, contrary to the plaintiff’s assertions, the cross-motion does not fall under the exception where a timely motion for summary judgment was made on nearly identical grounds and the issues are already properly before the Court (*see e.g.*, ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; ***James v Jamie Towers Hous. Co.***, 294 AD2d 268, 743 NYS2d 85 [1st Dept 2002], *affd* 99 NY2d 639, 760 NYS2d 718 [2003]). The motion seeks summary judgment on the defendant’s counterclaim against the plaintiff for anticipatory breach of the Land Contract and the Construction Contract and to recover the plaintiff’s down payment as well as costs, disbursements and attorneys fees whereas the cross-motion seeks summary judgment on the plaintiff’s first cause of action for specific performance of the Land Contract. The motion and the cross-motion are not nearly identical and do not seek similar relief such that the untimely cross-motion cannot be considered by the Court (*see*, ***Bickelman v Herrill Bowling Corp.***, 49 AD3d 578, 853 NYS2d 383 [2d Dept 2008]). In any event, there are issues of fact as to whether the plaintiff can be deemed to have substantially performed its contractual obligations under both contracts, without having reached a mutual agreement on the architectural plans, within a reasonable time so as to be entitled to specific performance of the Land Contract, in the form of a return of its downpayment, and whether the failure to reach a mutual agreement concerning the architectural plans within a reasonable time constituted a “default” that “abrogated” one or both of the agreements (*see*, ***Johnson v Phelan***, *supra*; ***Lieberman Properties, Inc. v Braunstein***, *supra*; *see generally*, ***Guiliano v Carlisle***, *supra*). Therefore, the cross-motion is denied.

Accordingly, the motion and cross-motion are denied.

AUG 04 2008

Dated: _____



J.S.C.

HON. JEFFREY ARLEN SPINNER
NON-FINAL DISPOSITION

____ FINAL DISPOSITION

X