

Elm Sea Realty Corp. v Chicoy

2008 NY Slip Op 33047(U)

November 5, 2008

Supreme Court, Nassau County

Docket Number: 008946/2008

Judge: Ira B. Warshawsky

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SCAN

SHORT FORM ORDER

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

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

ELM SEA REALTY CORP.,

Plaintiff,

**INDEX NO.: 008946/2008
MOTION DATE: 09/04/2008
MOTION SEQUENCE: 001 and 002**

-against-

**EMILY CHICOY, CHRISTOPHER JAY CHICOY
and MATTHEW A. TEDONE, ESQ., as escrowee, only,**

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavits & Exhibits Annexed	1
Notice of Cross-Motion, Affirmation & Exhibits Annexed	2
Affirmation of Austin Graff, Esq. in Opposition & Exhibits Annexed	3
Reply Affirmation of Warren S. Dank, Esq. in Further Support & Exhibits Annexed	4
Reply Affirmation in Further Support of Cross-Motion for Partial Summary	
Judgment of Francis X. Schroeder & Exhibits Annexed	5
Memorandum of Law in Support of the Defendants' Motion to Dismiss	6
Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment	7
Memorandum of Law in Further Support of the Defendants' Motion to Dismiss	8

Motion by defendants Emily and Christopher Jay Chicoy pursuant to CPLR 3211(a)(1) and 3211(a)(7) for an order dismissing the complaint is denied. Cross-motion for partial summary judgment is granted and plaintiff Elm Sea Realty is awarded judgment for sums held

in escrow under the “Escrow Agreement for Certificate of Completion” in the amount of \$65,000, and Matthew A. Tedone is directed to release to plaintiff the funds held in escrow for the Certificates of Completion.

This action was commenced by plaintiff Elm Sea Realty Corp. to recover funds held in escrow from the sale of a residence located at 31 Summit Road, Port Washington, New York, owned by Elm Sea and sold to defendants Emily Chicoy and Christopher Jay Chicoy (hereafter defendants). Matthew A. Tedone, Esq. is the escrowee who holds \$90,000 of the purchase price, \$65,000 pending delivery of Certificates of Completion for renovations to the premises, and \$25,000 pending completion of a punch list. Plaintiff is not a licensed contractor, and although defendants closed on the residence after substantial improvements had been made by plaintiff, they refused to release the escrowed funds upon completion of the agreed upon conditions. Defendants assert that plaintiff, having transferred ownership of the premises, must be licensed to complete the home improvement work. Indeed defendants contend that plaintiff was never an owner as contemplated under Nassau County Administrative Code § 21-11.1, 7.

The contract of sale, dated February 1, 2007, provides for a purchase price of \$1,499,000.00 (one million four hundred ninety-nine thousand dollars). A rider to the contract addresses “a renovation is being completed under Building Permit Number 20063514” and provides that closing is conditioned upon the seller’s completion of the work except for “punch list” items which the seller “shall complete within thirty (30) days of closing pursuant to a punch list to be executed at closing.” The contract permitted the buyers to request extras and permitted the seller to provide same with the purchaser immediately depositing the cost thereof. Extras, which required a writing to be signed by the parties, were described as “separate and distinct” from the contract of sale and costs were in addition to the base purchase price. Elm Sea and Emily and Christopher Chicoy closed on the purchase on August 12, 2007, and entered into the two escrow agreements, one pending completion of the punch list and the second pending delivery of certificates of completion.

The “Escrow Agreement for Certificate of Completion” provided that the sum of

\$65,000 be held in escrow “pending receipt by Keyvan Ghaytanchi, Esq. (counsel for the Chicoy) of Certificates of Completion or like documents for all renovations and improvements done by Sellers at the premises . . .” There is no dispute that certificates of completion have been delivered in accordance with the escrow agreement.

The “Escrow Agreement for Punchlist” provided that the sum of \$25,000 be held in escrow pending completion of an attached punchlist. The sellers agreed to make all “good faith efforts” to complete the items in a good and workmanlike fashion at their sole cost and expense.

When plaintiff attempted to collect the escrow for the delivered Certificates of Completion, defendants Chicoy objected. Plaintiff then commenced this suit to recover the sums held in escrow.

Defendants lodged a complaint with the Nassau County Office of Consumer Affairs, averring that plaintiff was a contractor who had done construction work on their premises without a license. After a hearing held on June 19, 2008 the hearing officer fined plaintiff \$500. The Commissioner of Consumer Affairs denied plaintiff’s appeal, finding that Elm Sea, without a home improvement license, “promised to undertake and complete significant and substantial amounts of home improvement work for the buyer after the closing of the sale.” The Commissioner rejected Elm Sea’s claim that it did not need a license because the work was done in connection with a real estate contract.

Addressing defendants’ motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, such motion will be denied if, from the “four corners” of the pleadings, there are factual allegations which “manifest any cause of action cognizable at law.”

(*Maldonado v. Olympia Mechanical Piping & Heating Corp.*, 8 AD3d 348, 350 [2nd Dept 2004]). The court must accept pleaded facts as true, and must afford the plaintiff “the benefit of every possible favorable inference.” (*Id.*). “Dismissal is warranted only when the stated allegations do not, together with all reasonable supporting inferences, state a legally cognizable claim for relief.” (*CAE Indus. Ltd. v. KPMG Peat Marwick*, 193 AD2d 470, 472 [1st Dept 1993]). “The inquiry is not into whether the validity of the claim has been in any measure

demonstrated; it is rather confined to whether the relevant allegations of the complaint liberally construed state a theory upon which relief can be granted.” (*Id.*).

Defendant’s motion to dismiss for failure to state a cause of action is denied. An escrow is a “written agreement” defining a legal obligation by the promisor to deposit “an instrument or property” with a third party which is to be delivered to the promisee upon “the performance of a condition or the happening of an event.” (*National Union Fire Ins. Co. Pittsburgh, Pa. v. Proskauer Rose Goetz & Mendelsohn*, 165 Misc.2d 539, 614 [Sup. Ct., N.Y. Cty. 1994], *aff’d* 227 AD2d 106 [1st Dept 1996]). “The purpose of an escrow is to assure the carrying out of an obligation already contracted for and in furtherance of the obligation the promisor deposits money, goods, or documents to an escrow agent who agrees to part with it only on a specified condition.” (*Id.*).

Here the escrow agreements operate to insure that the terms of the contract of sale are carried out, i.e., delivery of Certificates of Completion and completion of a renovation punch list. The complaint states a viable cause of action against defendants for breach of the escrow agreement by their refusal to release the escrow. Defendants’ arguments addressed to the merits of plaintiff’s complaint are unsuited to a motion to dismiss for failure to state a cause of action.

Nor do defendants establish that the doctrine of collateral estoppel operates to preclude plaintiff’s claims. “Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling.” (*Buechel v. Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 U.S. 1096 [2002]). The doctrine is a flexible one and the named elements are merely a “framework, not a substitute for a case by case analysis of the facts and realities.” (*Buechel v. Bain, supra at p 304*). Depending upon the nature of the proceedings, the factors to be considered in determining whether relitigation should be permitted include “fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results.” (*Id.*).

Here it appears that the Hearing Officer failed to consider documentary evidence

submitted by plaintiff, including the escrow agreements and the contract of sale. On appeal, the Commissioner found that the punch list required plaintiff to complete “significant and substantial” amounts of home improvement work for the buyer after the closing.

The court finds that questions exist as to whether the quantity of items remaining to be done under the punch list may permit labeling them as a separate home improvement contract requiring a license on the part of the seller to complete contractual obligations, or whether such improvements remained a part of the contract of sale by the owner, which in no way falls within the definition of a home improvement contract, and mandated that Elm Sea complete the renovation punch list after closing.

The nature of the hearing held before the Commission raises a question as to whether plaintiff had a full and fair opportunity to defend. An investigator for the Commission reported to the hearing officer *ex parte*. On the merits, the Escrow agreement provided that plaintiff was to complete the punch list at its own expense. Thus the fund held in escrow until completion was part of the purchase price under the contract of sale, and does not appear to constitute payment for completion of the work. As noted above the contracts and escrow agreements were not read by the hearing officer before delivering a determination. Accordingly, collateral estoppel may be rejected in this case based upon the foregoing, and the defendants’ motion to dismiss is denied.

Turning to the plaintiff’s motion for partial summary judgment regarding the Certificate of Completion, said motion is premature as issue has not been joined. Counsel for plaintiff avers that service of defendants’ answer is not necessary, that the motion to dismiss joined issue in this case. While the court does not accept such reasoning, (*see Chelsea Electric Corporation v. Ornstein*, 131 Misc. 849 [App.Term 1st Dept 1928]; Siegel, *New York Practice*, 4th ed., § 279 [“The soonest a motion for summary judgment may be made is after the joinder of issue which occurs when the answer is served . . . ”]), there is authority that the motion may be entertained, notwithstanding that it is premature. In *TST/Impreso, Inc. v. Cosmos Forms, Ltd.* (202 AD2d 493, 494 [2d Dept 1994]), the court at special term granted the plaintiff’s motion for summary judgment after denying the defendants’ motion to dismiss for failure to state a cause of action.

The Second Department, in affirming, stated:

CPLR 3211(c) permits a motion pursuant to CPLR 3211 to be treated as one for summary judgment where “adequate notice” has been given to the parties. In this case, before interposing an answer, the appellant moved to dismiss the complaint for failure to state a cause of action (see, CPLR 3211[a][7]), and the plaintiff then cross-moved for summary judgment in its favor. Accordingly, the appellant cannot claim that she lacked adequate notice that the issue of summary judgment was before the court particularly when the motion papers indicate that the parties were “deliberately charting a summary judgment course”

(*TST/Impreso v. Cosmos Forms, Ltd.*, 202 AD2d 493, 494 [2d Dept 1994] supra). It appears that *TST/Impreso* required only that the plaintiff chart a summary judgment course which provided defendant with the necessary notice. The same circumstances are present here and plaintiff’s motion is, therefore, entertained. Indeed the legal issue is ripe for judgment.

Answering the merits, defendants aver that plaintiff misrepresented itself as the owner of the premises and should not be rewarded for its deception. Defendants’ contention rests upon an erroneous legal premise. Defendants aver that plaintiff never lived or intended to live at 31 Summit Road in Port Washington, and therefore is not an owner under Nassau County Administrative Code § 21-11.1, 7. The Nassau County ordinance defines an owner as “any homeowner, tenant, or any other person who orders, contracts for, or purchases the home improvement services of a contractor ... pursuant to a home improvement contract” (Nassau County Administrative Code § 21-11.1, 7.) A “home improvement contract” is defined as “an agreement between a contractor and an owner for the performance of a home improvement, and includes all labor, services and materials to be furnished and performed thereunder” (Nassau County Administrative Code § 21-11.1, 4.).

Defendants rely upon *Routier v. Waldeck*, 184 Misc.2d 487 [Dist.Ct. First District 2000]). That reliance is misplaced, as *Routier* did not address the Nassau County Code. In *Routier*, because the issue concerned the New York City Administrative Code, the court held that owners “as defined in Home Improvement Business provisions of the New York City Administrative Code applies to individuals who reside in the subject premises and those who

intend to reside in the subject premises after the home improvements are completed.” (*Routier v. Waldeck*, 184 Misc.2d 487 [Dist.Ct. First District 2000]; *see also B & G Mechanical Corp. v. Vista of New York, Inc.*, 18 Misc.3d 1146(A) [Supreme Court, New York County 2008]). It is not a violation of the Nassau County Code for an owner to renovate without a license even if he does not reside or intend to reside at the premises. (*People v. Biegler*, 17 Misc.3d 1139(A) [Dist.Ct. First District Nassau 2007]). As held in *People v. Biegler*:

due to the very broad definition of the term “owner”, coupled with the lack of any restriction of the term “home improvement contract” to the actual place of residence or intended residence of a tenant or owner, there is no requirement under the Nassau County home improvement ordinance . . . that the “owner” of the premises . . . actually reside at or intend to reside at the place where the home improvement was performed . . .

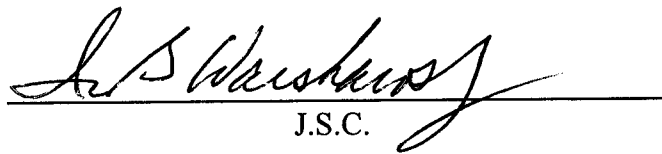
(*People v. Biegler*, 17 Misc.3d 1139(A) [Dist.Ct. First District Nassau 2007]). As plaintiff was an owner of the residence under the Nassau Code at the time the work was performed (*People v. Biegler, supra*) there is no foundation for defendants’ claim that the lack of intention to reside at the premises “is the controlling factor” negating plaintiff’s ownership when it renovated the Premises. There was no fraud with regard to plaintiff’s representation of ownership to the Building Department, and thus there is no foundation for the asserted fraud defense to plaintiff’s claim for the funds held in escrow for the Certificates of Completion.

Defendants aver that the final decision of the Commissioner of the Nassau County Department of Consumer Affairs estopps plaintiff from claiming that he did not perform unlicensed work. Plaintiff has not moved for summary judgment with respect to the work performed on the punch list after closing, and the Commissioner held only the post closing work unlawful, implicitly and necessarily rejecting defendants’ argument that prior to closing plaintiff was not an owner under the Nassau ordinance. Based upon the Commissioner’s restriction of the license issue to post closing improvements, estoppel is relevant only to the post closing improvements, not plaintiff’s ownership or procurement of the Certificates of Completion. Accordingly, partial summary judgment is awarded to plaintiff.

A Preliminary Conference (see NYCRR 202.12) shall be held on December 17, 2008, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

Dated: November 5, 2008


J.S.C.

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