

551 W. Chelsea Partners LLC v 556 Holding LLC

2008 NY Slip Op 33585(U)

February 7, 2008

Supreme Court, New York County

Docket Number: 602306/06

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 54

Justitia

Index Number : 602306/2006

551 WEST CHELSEA PARTNERS LLC,

VS.

556 HOLDING LLC,

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/17/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

NO
MOTION
FILED

FILED
FEB 20 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/7/08



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
551 WEST CHELSEA PARTNERS LLC,

Plaintiff,

Index No: 602306/06

-against-

556 HOLDING LLC,

Defendant.

DECISION AND ORDER

FILED

FEB 20 2008

NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE III, J:

This dispute arises out of a real estate transaction between 556 Holding LLC (“Seller”) and 551 West Chelsea Partners LLC (“Buyer”). Buyer seeks, among other things, specific performance of a contract by which Seller agreed to sell and Buyer agreed to purchase rights owned by Seller. Seller moves for summary judgment dismissing the complaint.

BACKGROUND

Seller is the owner of property located at 556 West 22nd Street, New York, New York. Buyer is a developer seeking development rights in connection with developing a parcel adjacent to Seller’s property. Buyer and Seller entered into a “Zoning Lot Merger Purchase and Sale Agreement,” dated November 12, 2005 (the “Agreement”).

The alleged purpose of the transaction was for Seller to receive \$8.5 million in exchange for approximately 4500 square feet of the excess floor area development rights appurtenant to Seller’s property, including an easement for light and air over the Seller’s property, an easement for shared use (between Buyer and Seller) of the roof on Seller’s property, an easement to install and maintain balconies, and a Right of First Offer (as the term is defined in the Agreement).

Pursuant to the Agreement, the parties agreed to execute confirmatory and supplemental documents and to take further action consistent with the transaction as reasonably may be required to effectuate the purpose of the Agreement.

Under the Agreement, the parties agreed to close the transaction on April 30, 2006.

On April 26, 2006, Buyer sought an extension to the April 30, 2006 closing date. Seller denied Buyer's request and responded that April 17, 2006 was the last day to seek an extension because the Agreement required at least a 15-day notice. The transaction did not close on April 30, 2006.

On May 11, 2006 Seller declared Buyer in default. Seller claims that Buyer was informed that Seller's mortgage was scheduled to come due on May 11, 2006. Having not closed on the transaction by May 11, 2006, Seller sent to Buyer a notice of material default, indicating Seller's intent to terminate the Agreement. Buyer claims that Seller repudiated the Agreement by failing to negotiate in good faith and take action reasonably required to effectuate the purpose of the Agreement and by purporting to terminate the Agreement for failure to close on May 11, 2006.

Notwithstanding, Seller attempted to schedule a closing date. On June 5, 2006, Seller set a new date of June 20, 2006 to close the transaction. On June 16, 2006, Seller declared the June 21, 2006 closing date as a time of the essence closing date.

On June 21, 2006, Seller attempted to close on the transaction. The transaction did not close and Seller purported to record Buyer's default.

On June 29, 2006, Buyer commenced this action, asserting causes of action for declaratory action, breach of contract, breach of warranty, specific performance, and a permanent injunction. On September 11, 2007, Seller offered to set a date to close the transaction on

October 11, 2007, time being of the essence. Again, the transaction did not close. Seller now moves pursuant to CPLR 3212 for summary judgment dismissing the Complaint on the ground that Buyer is not entitled to specific performance because it is not ready, willing and able to close on the transaction.

DISCUSSION

Summary Judgment

It is well established that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). The party opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 560). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]).

“Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment ” (*American Exp. Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990]). “On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied” (*American Exp. Bank Ltd.*, 164 AD2d at 277]).

Specific Performance

To obtain specific performance, the party seeking such relief must show that it was ready, willing and able to fulfill its contractual obligations (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006]).

Asserting principally three independent grounds for dismissal, Seller argues that Buyer was not ready, willing and able to close on the transaction as a matter of law. First, Seller argues that Buyer was not ready, willing, and able because Buyer failed to close on numerous dates. Second, Seller argues that Buyer was not ready, willing, and able because Buyer failed to satisfy a condition precedent under the Agreement which requires that Buyer have title to certain parcels of land. Third, Seller argues that Buyer was not ready, willing, and able because Buyer seeks to modify the Agreement and close on an agreement other than the one agreed upon.

As a threshold matter, Buyer responds that it is not required to demonstrate that it was ready, willing, able to close on the transaction because Seller's anticipatory breach eliminated the need to tender performance. Indeed, at least one court has stated that "[a]lthough purchasers who seek specific performance must ordinarily show that they are ready, willing, and able to perform, such proof is not required where the necessity for such a tender was obviated by acts of the other party amounting to an anticipatory breach of the contract" (*Moray v DBAG, Inc.*, 305 AD2d 472, 473 [2d Dept 2003]). The rule that Buyer cites, however, refers to a pleading requirement. A showing of readiness, willingness, and ability is not required when opposing a motion to dismiss under CPLR 3211 (*see Moray*, 305 AD2d at 463 [defendant not entitled to dismissal pursuant to CPLR 3211(a)(7) on the ground that the plaintiff failed to demonstrate that he was ready, willing, and able to close before the commencement of this action]; *Sunrise Assoc. v Pilot Realty Co.*,

170 AD2d 214, 214 [1st Dept 1991] [same]). Moreover, even a failure to plead readiness, willingness and ability to perform may be cured by an affidavit stating that it had obtained financing (*Sunrise Assoc.*, 170 AD2d at 214, citing *Rovello v Orofino Realty Corp.*, 40 NY2d 633). Nevertheless, the plaintiff [] remain[s] obligated to prove *at trial* that it was ready, willing and able to perform its obligations under the contract (*L.I.C. Commercial Corp. v Zirinsky*, 142 AD2d 713, 715 [2d Dept 1988] [emphasis added]).

Outside the context of a motion to dismiss under CPLR 3211, the Court of Appeals has held that even “[t]hough defendant seller’s anticipatory breach of contract relieved plaintiff purchaser of its obligation to tender performance, this [does] not discharge plaintiff’s obligation to show that it was ready and able to perform its own contractual undertakings on the closing date, in order to secure specific performance” (*Huntington Mining Holdings, Inc. v Cottontail Plaza, Inc.*, 60 NY2d 997, 998 [1983]). Indeed, courts have uniformly held that dismissal of specific performance causes of action was warranted, even when the plaintiff’s tender of performance was excused by the defendant’s anticipatory breach of the contract, because the plaintiff was nevertheless required to demonstrate that it was ready, willing and able to perform its obligations under the contract prior to the commencement of the action (*see e.g. Mehlman v 592-600 Union Ave. Corp.*, 2007 NY Slip Op 9911, *3 [1st Dept 2007]; *3M Holding Corp. v Wagner*, 166 AD2d 580 [2d Dept 1990] [“While the defendants’ improper cancellation of the contract excused the plaintiff from its duty to tender its own performance, it was still the plaintiff’s burden upon trial to show that it was ready, willing and able to perform its obligations under the contract in order to obtain the relief of specific performance.”]; *Jewell v Rowe*, 119 AD2d 634, 635 [2d Dept 1986]; *Huntington Mining Holdings, Inc. v Cottontail Plaza, Inc.*, 96

AD2d 526 [2d Dept 1983] [although the defendant acted unilaterally in canceling the subject contract and plaintiff was excused from its duty to tender its own performance, the plaintiff bore the burden of showing that it was ready, willing, and able to perform its own obligations under the contract in order to obtain the relief of specific performance]; *Madison Invest., Inc. v Cohoes Assoc.*, 176 AD2d 1021, 1021-22 [3d Dept 1991] [even though the plaintiff was relieved of its obligation to tender performance, plaintiff was nevertheless required to show that it was ready, willing and able to perform under the contract at some point prior to the commencement of this action]; *Scull v Sicoli*, 247 AD2d 852, 854 [4th Dept 1998]).

Furthermore, bald and conclusory allegations of readiness, willingness and ability will fail to create a triable issue of fact. Addressing the quantum of proof needed to oppose a motion for summary judgment, the court in *Madison* stated that “[i]n the absence of any proof in evidentiary form by plaintiff establishing that it had the financial capacity, at any point, to purchase the property, the bare, unsupported assertion in the affidavit of plaintiff’s president that a closely related corporation would supply the funds necessary to purchase the property, and the conclusory allegations in its opposing papers that it was ready, willing and able to perform, were insufficient to satisfy its burden” (176 AD2d at 1021-22).

However, a motion for summary judgment dismissing a cause of action for specific performance does not shift the entire burden upon the plaintiff. It is basic that a movant for summary judgment must demonstrate entitlement to judgment as a matter of law (*Zuckerman*, 49 NY2d at 562). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d at 325, quoting *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851). Even in the context of specific performance, the movant

must carry its burden before the burden shifts to the opponent to raise a triable issue of fact (*compare Sansol Indus. v 345 E. 56th St. Owners, Inc.*, 276 AD2d 370 [1st Dept 2000] [defendant made out a prima facie case of entitlement to judgment as a matter of law and plaintiff, in opposition to the motion, failed to present evidence in admissible form sufficient to raise a triable issue of fact that it had tendered performance of its obligations under the contract or was ready, willing and able to do so]; *Scull*, 247 AD2d at 854 [defendants had carried their burden, and that plaintiffs failed to raise an issue of fact in response]; with *Gray v Wallman & Kramer*, 224 AD2d 275 [1st Dept 1996] [affirming the trial court's determination that summary judgment for the defendant was not warranted, stating that "[u]nder these sharply differing versions of the events which transpired at the closing, the matter could not properly be resolved on a motion for summary judgment, and the motion was properly denied"]).

Thus, guided by these principles, the Court must first determine whether Seller has carried its burden in establishing prima facie entitlement to judgment as a matter of law. Next, if Seller has carried its burden, the Court must determine if Buyer has sufficiently raised a triable issue of fact that it was ready, willing and able, even if Seller's alleged anticipatory breach obviated the need for Buyer to tender performance.

Moving to the substance of the motion for summary judgment, Seller's first argument incorporates several issues. One issue is whether the failure to close the transaction on April 30, 2006, June 21, 2006, or October 11, 2007 constitutes a material breach of the Agreement. Whether the failure to close on any date constitutes a material breach depends on whether time was of the essence with respect to either of those dates (*ADC Orange*, 7 NY3d at 489). If time was not of the essence, the issue turns on whether there was a failure to close the transaction,

within a reasonable amount of time after the specified date of April 30, 2006 (*id.*; *Levine v Sarbello*, 112 AD2d 197, 200 [2d Dept 1985])[where a contract for the sale of real property does not provide that time is of the essence, both the vendor and the purchaser are entitled to a reasonable adjournment beyond the closing date to perform the contract].

Contracts for the sale of land are “not ordinarily of the essence unless the agreement so provides” (*ADC Orange*, 7 NY3d at 489). Nevertheless, “it is possible for the seller to convert a non-time-of-the-essence contract into one making time of the essence” (*id.*). However, “the mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract” (*id.*). In order to do so, the seller must give the buyer proper notice (*Levine*, 112 AD2d at 200). Proper notice means “‘clear, unequivocal notice’ and a reasonable time to perform” (*id.*; *ADC Orange*, 7 NY3d at 489). “What constitutes a reasonable time depends on the facts and circumstances of the particular case” (*Zev v Merman*, 134 AD2d 555, 558 [2d Dept 1987]). “Included within a court’s determination of reasonableness are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance” (*Zev v Merman*, 73 NY2d 781, 783 [1988], affirming 134 AD2d 555).

Here, Seller argues that Buyer was presented with three dates on which to close the transaction: April 30, 2006, June 21, 2006, and October 11, 2007.

As to the April 30, 2006 closing date, the Agreement did not provide that time was of the essence, thus, failure to close on that date does not constitute a material breach of the Agreement.

Although the Agreement did not make time of the essence, the Court must determine if

time was later made of the essence with respect to the other purported closing dates. In another attempt to close the transaction, on June 5, 2006, Seller set a new date of June 20, 2006 to close the transaction. On June 15, 2006, Buyer alleges that the letter was rejected because it was unreasonable under the circumstances. Buyer argues that the letter was not properly served under the Agreement and it did not afford Buyer sufficient time to complete preparation of documents necessary to effectuate the closing. Moreover, Buyer alleges that Seller continued to take the position that the contract was terminated. On June 16, 2006, Seller rescheduled the closing date to June 21, 2006 and declared the closing time of the essence. Because Seller designated the closing date time of the essence only five days before the closing date, Seller fails to demonstrate that it provided proper notice that time was of the essence by giving Buyer a reasonable time within which to close. Accordingly, Seller fails to demonstrate that the failure to close on June 21, 2006 constitutes a material breach of the Agreement.

In yet another attempt to close the transaction, on September 11, 2007, Seller offered to set a date to close the transaction on October 11, 2007, time being of the essence. Again, the time expired without the transaction closing. Buyer argues that Seller prevented its attempts to consummate the transaction by refusing to execute the documents needed to effectuate the closing (*see Carson Affirmation*, at 2 [documents that were attachments to the contract continued to be negotiated and drafted thereafter]). Buyer further alleges that the Agreement included a Further Assurances clause because “the transaction was complicated and involved the implementation of new zoning regulations” and because Buyer was “advancing and releasing a substantial sum of money” (*Carson Affirmation*, at 3). Even assuming that this closing date successfully made time of the essence, “[i]t is also a long held general rule that a party to a

contract cannot rely on the failure of another to perform when he or she has frustrated or prevented the performance” (*Kooleraire Service & Installation Corp. v Board of Ed. of City of New York*, 28 NY2d 101, 106 [1971]). Thus, even if time were of the essence, Seller’s alleged frustration or prevention of Buyer’s performance would prevent Seller from entitlement to summary judgment.

With respect to the April 30, 2006 and the June 21, 2006 closing dates, where time was not of the essence, the Court must make one additional inquiry. The Court must also determine whether the transaction has failed to close within a reasonable amount of time from the proposed closing dates. Such determinations require the Court to inquire into the facts and circumstances of this case, e.g., the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, and the specific number of days provided for performance. Given the passage of time between the execution of the Agreement and the last proposed closing date and the ongoing litigation for over a year, Seller fails to demonstrate that this period was either reasonable or unreasonable as a matter of law. Accordingly, under the facts and circumstances presented, the Court finds that a determination of whether the closing dates occurred within a reasonable amount of time cannot be determined as a matter of law at this stage and, thus, is not appropriate for summary judgment.

Viewing the facts in the light most favorable to Buyer, the non-moving party, Seller fails to establish prima facie entitlement to summary judgment (*see Fundamental Portfolio Advisors v Tocqueville Asset Management*, 7 NY3d 96, 106 [2006]).

Next, Seller argues that Buyer was not ready, willing and able because Buyer failed to

satisfy a condition precedent. Section 4B of the Agreement reads: “It shall be a condition to Closing hereunder that Developer [Buyer] shall have acquired fee title to Developer’s Land or, in the alternative, that the fee owner of Developer’s property at the Date of closing shall have ratified this Agreement and agreed to execute” related documents (Lewis Affirmation Ex 1, at 9). Seller reads the section as a condition precedent, which Buyer has not met and which demonstrates that Buyer is not ready, willing, and able to close on the transaction. Buyer responds that the section constitutes a condition for the benefit of Buyer, which may be waived. Because Buyer had not yet acquired the parcel adjacent to Seller’s property, Buyer alleges that the condition was inserted solely for the benefit of Buyer to ensure that Buyer could benefit from the rights it sought to purchase from Seller.

Generally, a condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises (*Oppenheimer & Co. v Oppenheim*, 86 NY2d 685, 690 [1995]). A party for whose sole benefit a condition is included in a contract may waive the condition prior to expiration of the time period set forth in the contract and accept the subject property “as is” (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; cf. *Israel v Charnews*, 2007 NY Slip Op 10105, *2 [2d Dept 2007]).

Thus, Buyer’s factual assertions that the condition was for the sole benefit of Buyer and that the condition was waived, which are not disputed here, would defeat Seller’s motion for summary judgment. Accordingly, as to its second ground asserted for summary judgment, Seller fails to establish prima facie entitlement to summary judgment.

Lastly, Seller argues that Buyer was not ready, willing, and able because Buyer seeks to

modify the Agreement and close on an agreement other than the one agreed upon. Relying on correspondences by Buyer, Seller argues that Buyer demonstrates that it has no intention of closing on the existing contract because it demands that the parties meet to modify the agreement.

To support its argument, Seller cites *Stadtmauer v Brel Assocs. IV, L.P.* for the rule that the declaration by one party that material obligations imposed by contract will not be performed relieves the other party of any duty to perform obligations similarly imposed by the contract (270 AD2d 59, 60 [1st Dept 2000]). In arriving at its conclusion, the court reasoned that “[i]t is apparent from the record that plaintiff purchaser never expressed her willingness to proceed to closing upon the terms and conditions of the contract of sale, that is, without performance of the demanded maintenance and repairs” (*id.*). “Taken together, the various letters sent to defendant comprise notice that plaintiff would not close the sale because of the damage to the premises” (*id.*).

Here, the Court finds the application of *Stadtmauer* inapposite. Again, viewing the facts in the light most favorable to Buyer (*Tocqueville Asset Management*, 7 NY3d at 106), the correspondences relied upon by Seller do not rise to the level of a declaration by Buyer that it would not perform its material obligation under the contract. Here, Seller seeks compliance with the Further Assurances provision contained in the Agreement. In contrast, the buyer in *Stadtmauer* sought compliance with a modification to the contract. Just as Seller argues that Buyer’s assertions are conclusory because Buyer does not attach or describe the contract terms that it wishes to add, Seller makes that conclusory assertion that such terms fall beyond the scope of the Agreement. Indeed, Seller’s assertion that the purported additional terms are not part of

the contract is belied by its own assertion that Buyer has neither attached nor described such terms. Accordingly, as to its third ground asserted for summary judgment, Seller fails to establish prima facie entitlement to summary judgment.

Remaining Causes of Action

With hardly a citation to controlling authority or application of the law to relevant facts, Seller urges the Court to dismiss the balance of Buyer's causes of action for a declaratory judgment, breach of contract, fraud, and injunctive relief. The Court finds no occasion to further address Seller's arguments with respect to the remaining causes of action (*Winegrad*, 64 NY2d at 852).

CONCLUSION

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied.

Dated: February 7, 2008

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