

Beard v Edward Lee Cave, Inc.
2008 NY Slip Op 33698(U)
April 10, 2008
Supreme Court, New York County
Docket Number: 113932/06
Judge: Edward H. Lehner
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
ANSON H. BEARD, VERONICA M. BEARD
and JEAN J. BEARD,

Plaintiffs,

INDEX NO.
113932/06

- against -

EDWARD LEE CAVE, INC., DENNIS
DILORENZO and KENT KNUTSON,

Defendants.

-----X
EDWARD H. LEHNER, J.;

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NEW YORK
COUNTY CLERKS OFFICE

This is an action by plaintiffs for specific performance of a contract for the purchase of the condominium apartment owned by defendants (the "Apartment") at 1 Morton Square in Manhattan. The tort claims set forth in the counterclaims have been severed.

The subject contract dated April 4, 2006 (the "Contract") provides for a purchase price of \$3,050,000, of which \$305,000 was paid to defendants as a down payment, which monies are being held in escrow by defendants' attorney, Jeffrey Lewisohn. By letter dated May 17, 2006, the condominium waived its right of first refusal. The sale was contingent on plaintiffs acquiring title to the adjoining unit, which closing occurred in May 2006. It was the intention of plaintiffs to combine the two units into one large unit of approximately 4,000 square feet.

The closing was scheduled for September 25, 2006 because defendants did not wish to close until that time for tax reasons. Hence, to enable plaintiffs to be able to commence construction work in July 2006, defendants agreed to allow plaintiffs to take possession of the Apartment "on or about July 1, 2006," the pertinent provisions of the Contract rider being the following:

13. Upon closing of the transaction with regard to Unit 14AW, Purchasers shall be entitled to take possession on or about July 1, 2006. Purchasers' obligations with regard to taking possession at that time shall be to maintain a policy of liability insurance naming the Sellers as additional insured in an amount not less than three million (\$3,000,000) dollars. In addition, the Purchasers must submit at the time of possession the names of the contractors and/or individuals who are being proposed to make alterations to the Unit, that they have obtained permission of the condominium, [Sellers agree to take all reasonable steps to cooperate in obtaining said approval (including filing the alteration application with the condominium to the New York City department of Buildings in his name) and will take all reasonable steps to assist in obtaining any permits (at purchasers sole expense)], and provide all required insurance included but not limited to liability, Worker's Comp., and disability in an amount satisfactory to the condominium's managing agent ... All contractors' certificates of insurance must name Sellers as additional insureds.

14. In addition to the foregoing, the Purchasers agree to indemnify and hold harmless Sellers from any and all liability arising from Purchasers' occupancy of the premises or commencing construction upon the premises after delivery of possession, and any damages occasioned by Purchasers' use, occupancy, and/or construction upon the premises on or after the date of delivery of possession. Such damages shall include but not be limited to reasonable attorney's fees and other judgments and costs arising therefrom.

15. As part of this transaction, the parties agree to enter into a pre-closing possession agreement wherein Purchasers shall take possession on or about July 1, 2006. Up to the date of closing, Purchasers shall pay a monthly charge of eight thousand (\$8,000) dollars to Sellers commencing with the date of possession through the date of closing. Payment shall be made in advance with a twenty-four thousand (\$24,000) dollar payment made at time of possession for the three (3) month period up to the date of closing. Utilities will be transferred to purchasers at the time of possession.

16. At the time of delivery of possession, Purchasers shall forward to Sellers' attorney, for maintenance in escrow an additional 5% of the purchase price. Thereafter, at closing, the balance shall be due by certified and/or bank check as of the date of closing. In the event Purchasers fail to close for whatever reason, through no fault of Sellers, Purchasers shall be liable for the original 10% deposit plus reasonable costs of returning the premises to its prepossession condition. Purchasers authorize release of additional funds from escrow to return the premises to its prepossession condition. In the event that sufficient funds are not available in escrow, Purchasers shall issue payment to Sellers within thirty (30) days of demand of same, for funds necessary to complete said construction.

17. In the event that the Sellers fail to give possession on or about July 1, 2006, Purchasers shall be entitled to damages in the amount of five hundred (\$500) dollars per day through July 5th, 2006, and one thousand (\$1,000) dollars per day thereafter (as July 1 represents the commencement of the holiday week-end) for every day that they are not permitted access. Same shall be credited to Purchasers at closing. If this transaction fails to close due solely to Sellers acts the amount due and owing under this section shall be part of any damages due Purchasers by Sellers.

18. In the event Sellers fail to close the transaction through no fault of Purchasers, Purchasers shall have all their remedies at law including but not limited to specific performance.

Although plaintiffs tendered defendants' counsel a check for \$152,200 as the sum provided for in paragraph 16, that check was never cashed as a dispute ensued as to the party or parties at fault in possession not being delivered in the beginning of July. Regrettably, the basic reason the closing never occurred and this litigation ensued was a dispute as to whether plaintiffs were liable for the \$24,000 referred to in paragraph 15.

Although defendants have denied receiving a signed alteration agreement (the "Agreement") from the plaintiffs in June, the court finds that the Agreement was delivered to said defendants' counsel on June 29, 2006, executed by both Veronica and Anson Beard, and further finds that defendants did not respond to plaintiffs' demands in July to deliver possession of the Apartment to them. The failure of plaintiff Jean Beard, the mother of plaintiff Anson Beard, to execute the Agreement was of no practical consequence as the indemnity provided therein ran in favor of the condominium, which had approved the unusual transaction of permitting a contract vendee into possession prior to closing in order to make alterations. Protection to defendants was afforded by the indemnity provisions of paragraph 14 of the Contract, as well as the delivery of the liability policy required by paragraph 13, and the down payment of \$305,000.

While paragraph 15 states that the "parties agree to enter into a pre-closing possession agreement," no such agreement was ever prepared or executed, the parties agreeing that all contractual provisions relating to such possession are set forth in the Contract.

By letter dated June 20, 2006, Mr. Lewisohn stated that his clients would turn over the keys to the Apartment on or about July 1 provided plaintiffs complied with the provisions of paragraph 13, which required them to provide defendants with the names of the persons who will be performing the alterations. By letter dated June 29, said attorney acknowledged receipt of a package from plaintiffs' then attorney, Scott Segal, but stated that the delivery "fails to comply with the requirements of the Contract." However, the only specific non-compliance stated was the failure to enclose the check for \$24,000 referred to in paragraph 15. It is noted that in such letter counsel does not deny receipt of the Agreement, which the court has found was delivered to him on June 29. On July 10, Mr. Segal advised Mr. Lewisohn that the Building Department permit applications had been signed by the condominium and he requested that defendants execute the Agreement.

While there was much discussion and correspondence during July, defendants remained in possession of the Apartment until August 16, their attorney having notified Mr. Segal by letter dated August 9 of his clients' intention to vacate on said

date. However, said letter reiterated a demand made in counsel's August 2 letter that at closing plaintiffs would be required to pay the aforesaid \$24,000 even though possession had not been delivered on July 1. By mid-August, plaintiffs no longer had a desire for possession prior to closing.

The closing scheduled for September 25 was adjourned on consent to September 26. However, it never took place since defendants still demanded the aforesaid \$24,000, as a closing adjustment, and plaintiffs were then demanding many thousands of dollars pursuant to the \$1,000 per day charge provided in paragraph 17. Instead, Mr. Lewisohn sent a letter that day to plaintiffs' current attorneys setting a "time of the essence" closing for October 26. The next day (September 27) plaintiffs commenced the instant action. In light of the foregoing, neither party appeared at a closing on October 26, nor is there any evidence of any writing terminating the Contract.

While the Contract does not contain any provision requiring plaintiffs to obtain defendants' consent to the nature of the alterations to be made to the Apartment during the pre-closing period, the court finds that plaintiffs committed technical breaches in not having Jean Beard sign the Agreement and in not timely providing defendants with the names of persons who plaintiffs intended to have perform the alterations. However, neither breach is of a substantial nature so as to warrant

defendants asserting the breaches as a ground for failing to perform their obligations under the Contract to deliver possession in early July.

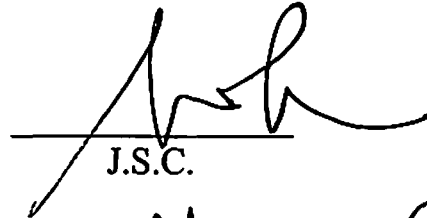
Accordingly, the court grants plaintiffs' request for specific performance of the provisions of the Contract and directs that a closing under the Contract take place on May 15, 2008 at 10 a.m. at the office of defendants' counsel or at plaintiffs' lending institution as provided in paragraph 4 of the Contract, or at such other time and place as the parties may agree in writing. The only adjustments at closing shall be those provided in paragraph 7 of the Contract. Plaintiffs are not entitled to the charges referred to in paragraph 17 due to their aforesaid breaches, and defendants are not entitled to any portion of the \$24,000 referred to in paragraph 15 (which was to be paid at the time possession was delivered) in light of their failure to vacate the Apartment until August 16. Thus, other than the cause of action for specific performance, all contractual claims asserted in the pleadings, including those for attorneys' fees, are dismissed.

In connection with the above, the court notes the decision of the First Department in *EMF General Contracting Corp. v. Bisbee*, 6 AD3d 45 (2004), where the court referred to the finding of the trial court "that both parties came to court with unclean hands, and that the relief of specific performance would provide a windfall to (plaintiff) in view of the enormous increase in the value of the property." The

Appellate Division disagreed, finding "that no equitable considerations warrant the denial of specific performance here," quoting from 91 NY Jur 2d § 204, that a "court's discretion to grant or deny specific performance of a contract for the sale of realty is not unlimited; (and that) unless the court finds the granting of a decree of specific performance would be a drastic or harsh remedy, or work injustice, the court must direct specific performance" (pp. 51-52). Here, the court finds that the grant of specific performance is in accordance with the equities.

This decision constitutes the order and judgment of the court, and the Clerk shall enter judgment accordingly, severing the heretofore severed tort claims.

Dated: April 10, 2008



 J.S.C.

Norman Cremona
 Clerk.

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 APR 23 2008
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