

Rapid Recovery Enters., Inc. v AGC Realty, Inc.
2009 NY Slip Op 30511(U)
February 27, 2009
Supreme Court, Suffolk County
Docket Number: 17530-2003
Judge: Emily Pines
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Action #1

Original Motion Date: 12-18-2008
Motion Submit Date: 01-28-2009
Motion Sequence No's.: 004 MOTD

Action #2

Original Motion Date: 01-05-2009
Motion Submit Date: 01-21-2009
Motion Sequence No's.: 001 MOTD

X
RAPID RECOVERY ENTERPRISES, INC.,

Action #1
INDEX NUMBER: 17530-2003

Plaintiff,**-against-**

AGC REALTY, INC. and CLAIRE MASON,

Defendants.

X
JON COESTER,

Action #2
INDEX NUMBER: 29535-2003

Plaintiff,**-against-**

CLAIRE MASON,

Defendants.

X

Action #1

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Action #2

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These two interrelated actions concern the obligations of parties under the terms of written contracts. In **Rapid Recovery Enterprises, Inc v AGC, Inc and Claire Mason** ("Action # 1"), the

Plaintiff seeks an order, pursuant to CPLR § 3212, granting the Plaintiff Summary Judgment: 1) declaring the Plaintiff to possess a valid right of first refusal to purchase certain real property; 2) granting Plaintiff specific performance compelling the Defendants to convey such property to the Plaintiff; and 3) granting Plaintiff damages due to Defendants' willful actions. Defendants AGC Realty, Inc and Claire Mason oppose such motion, as does Jon Coester (Plaintiff in Action # 2) on the ground that questions of fact exist as to whether the Plaintiff in Action # 1 was, in fact, given the right of first refusal to purchase the subject parcel and refused to do so by making a different and lower counter-offer. Coester also asserts that there is no proof that Rapid Recovery was in a position to meet Coester's \$850,000 offer as a ready, willing and able purchaser.

In **Jon Coester v Claire Mason** ("Action # 2"), Defendant Mason moves for partial Summary Judgment, limiting the damages the Plaintiff therein can seek to the down payment made for the property as well as certain expenses with regard to title search and surveys. In this action, the Plaintiff, Coester, also seeks specific performance forcing conveyance of title to the same parcel of property as well as damages for fraud based on the allegation that Mason knew and did not reveal to Coester its conflicting obligations when it entered into a written contract of sale of the property with the Plaintiff in Action #2. Coester also opposes Mason's motion to limit damages based on the allegation that Mason's change of her position first that Rapid had no right of first refusal to her later supposed recognition of such right was done in bad faith and brings the parties outside the terms of their written agreement limiting damages. Coester asserts that Mason was aware that Coester was required to sell his residence in order to consummate the deal and despite such knowledge, never imparted to Coester the issue of the possible conflict with Rapid Recovery until after those parties had entered into a written agreement and Coester had arranged for the sale of his residence. Moreover, according to Coester, there exist conflicts between Mason and her real estate attorney over whether she was authorizing him to send letters to Rapid Recovery offering the property after she had already consummated the deal with Coester.

On November 1, 1996, Rapid Recovery (Tenant) and AGC Realty Inc and Claire Mason (Landlord) entered into a lease Agreement, for a term of five years.

A Rider to the lease Agreement between AGC and Rapid Recovery, dated June 4, 1997, states, in pertinent part:

"If Landlord, at any time during the term of this lease or any renewal or extension thereof, receives a bona fide offer to purchase all or part of the property of which the demised premises form a

part, which Landlord desires to accept, Landlord shall give Tenant twenty (20) days notice in writing of such bona fide offer, provided Tenant is not in default of this lease, setting forth the name and address of the proposed purchaser who has made the offer, the amount of the proposed purchase price, the terms of payment and all other relevant terms of such purchase. Tenant shall have the first option to purchase the premises or the part to be sold by delivering to landlord within such twenty (20) days of such notice his acceptance in writing of the price and terms of such offer, after which Landlord shall prepare a customary contract of sale for execution by the parties. If Tenant does not exercise its option to purchase the property . . . within the aforesaid period and such property . . . for any reason is not sold pursuant to the bona fide offer set forth in the notice . . . Tenant shall have, upon the same conditions of notice, the continuing first option to purchase the property . . . on the same terms of any subsequent bona fide offer or offers to purchase.”

“Lessee shall have the option to extend the term of this lease for a successive five (5) year period upon giving Lessor not less than sixty (60) days written notice prior to the expiration of the Term”

A second Rider to the lease states in part that:

“It is further understood and agreed that this lease shall be effective as of June 5, 1997. Accordingly, all dates contained in the Lease shall be deemed conformed with the commencement date of June 5, 1997”.

Attached to Rapid Recovery’s moving papers is a letter dated March 30, 2001, notifying Defendants and their counsel of Plaintiff’s decision to exercise its option to extend the lease for the subsequent five year period. Thereafter, through letters by counsel, Rapid Recovery and the Defendants disputed whether the lease had terminated or whether the option to extend the lease had, in fact, been exercised. However, after the Defendants signed a contract with Coester to purchase the property, Defendants’ attorney did send Rapid Recovery a letter, dated June 4, 2003, disclosing the existence of an “offer” to purchase the premises and inviting the Plaintiff in Action #1 to match the existing offer. The June 4, 2003 letter does inform Plaintiff’s counsel that the outstanding offer to purchase is in the amount of \$850,000.00. Thereafter, Plaintiff exercised its option and agreed in writing to purchase the subject property for \$850,000.00 by letter dated June 20, 2003. Thereafter, Defendants withdrew their offer to sell the property to Rapid Recovery by letter dated July 3, 2003, asserting again that there was no existing lease between the parties. In that letter, Mason rejects an alleged \$750,000.00 offer.

In response to Plaintiff's motion, the Defendants in Action # 1 now admit that Plaintiff did, in fact exercise its option to renew the Lease and , therefore, a Lease was in existence during the period of the contract negotiations with a third party. However, they assert that they were operating under the mistaken belief that such renewal had not occurred because it had been sent to the wrong address. Moreover, according to Mason, she received a telephone call from one Eric Lang, on behalf of Rapid Recovery in June 2003, stating he was calling on behalf of Rapid Recovery, demanding that Defendants sell the property to Rapid Recovery for \$750,000 as opposed to \$850,000 and threatening litigation if Defendants did not comply. It is Defendants' argument that the Lang offer and demand constitutes either a failure to exercise the option or a repudiation of the June 30, 2003 letter. In either case, Defendants assert that a question of fact remains concerning whether the Plaintiff in fact exercised its option, thus precluding Summary Judgment before trial. Coester raises the additional issue that Rapid has not demonstrated that it was ready, willing and able to consummate this deal and, that such is also a question of fact precluding Summary Judgment in Rapid Recovery's favor.

In Action # 2, the Contract of Sale between Claire Mason and Jon Coester for the sale of the identical parcel of property, dated May 16, 2003, states in paragraph 20 that:

"If SELLER is unable to transfer title to PURCHASER in accordance with this contract, SELLER'S sole liability shall be to refund all money paid on account of this contract, plus all charges made for: (i) examining the title; (ii) any appropriate additional searches made in accordance with this contract, and (iii) survey and survey inspection charges. Upon such refund and payment, this contract shall be considered canceled, and neither SELLER nor PURCHASER shall have any further rights against the other".

Plaintiff Coester in Action # 2 argues that its damages should not be limited to those set forth in the Contract of Sale, as Mason engaged in bad faith by not informing Coester of the Rapid Recovery issue; signing a contract with Coester which set forth that Coester was selling his residence; and changing her position after signing the contract, from first stating that Rapid Recovery had no right of first refusal to a complete about face after the contract with Coester was signed. Coester argues that it should be permitted to demonstrate at trial the existence of Mason's bad faith to relieve Coester from the limitations set forth in its Contract of Sale.

In Reply, Mason asserts that Coester's objections, even if true, are irrelevant because the cloud

on marketability existed at all times due to the claims of Rapid Recovery to the same parcel which the Supreme Court found to be colorable, in its issuance of a Preliminary Injunction (Emerson, J. 7/14/05) prohibiting the transfer of the parcel pendente lite.

To obtain Summary Judgment, the moving party must first make a prima facie showing of entitlement to Judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Goldberger v Brick & Ballerstein, Inc**, 217 AD 2d 682, 629 NYS 2d 813 (2d Dep't 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of Summary Judgment. **Zayas v Half Hollow Hills Cent. School Dist**, 226 AD 2d 713, 641 NYS 2d 701 (2d Dep't 1996).

It is well settled that a written agreement will generally be enforced in accordance with its terms. **See, Vermont Teddy Bear Co v 538 Maison Realty Co**, 1 NY 3d 470, 775 NYS 2d 765, 807 NE 2d 876 (2004). Accordingly when parties set down their agreement in a clear and complete document, their writing, as a rule, will be enforced as such. **Reiss v Financial Performance Corp**, 97 NY 2d 195, 738 NYS 2d 658, 764 NE 2d 958 (2001). Despite this general rule, a provision limiting damages in a real estate agreement will not be enforced where the opponent is able to demonstrate that the seller acted in bad faith in its failure and/or refusal to convey title to real property. **See, Narendra v Thieriot**, 41 AD 3d 442, 838 NYS 2d 131 (2d Dep't 2007).

An owner of land subject to a right of first refusal is obligated contractually to make an offer to the right holder; however, specific performance will not lie as a remedy for breach of such obligation unless and until the right holder is shown to be ready, willing and able to purchase the property both when the right ripens and when specific performance is ordered. **Cipriano v Glen Cove Lodge #1458 B.P.O.E. v Buffa**, 1 NY 3d 53, 769 NYS 2d 168, 801 NE 2d 53 (2003). Where the right holder retains its right of first refusal, it is not entitled to seek damages as long as the right of first refusal remains to be exercised. **Id.**

In the case at Bar, the Court is faced with two separate Agreements. They are both clear in relevant respects. The agreement between Rapid Recovery and AGC and Mason permitted the Plaintiff to extend its lease, which both parties now agree occurred in 2001. As the Lessee at the time Mason

received an offer from Coester to purchase the property , Rapid Recovery was entitled to notice of the offer and to meet such offer in writing. This clearly occurred as set forth in the June 20, 2003 letter from Rapid Recovery's counsel. Mason's assertions to the contrary, any discussions by telephone would not have been in compliance with the terms of the written Agreement and would not have been an exercise of the Right of First Refusal. The statements in Mason's deposition are also vague and insufficient to defeat the clear language of the exercise . Accordingly, Rapid Recovery is entitled to Summary Judgment, declaring that it is entitled to exercise its right of first refusal to purchase the property in question. However, as set forth by Coester's counsel, Rapid Recovery must demonstrate first that it was and is currently ready , willing and able to do so before it is entitled to the remedy of specific performance. **See, Cipriano, supra.** Although Plaintiff in Action # 1 set forth a request for damages in its Complaint, there is no discussion of such in its Summary Judgment papers. Moreover, as set forth in **Cipriano**, where the right of first refusal still remains, as it does in this case by virtue of the Court's decision, there is no claim for damages. Accordingly, the remaining causes of action in Action # 1 are dismissed.

With regard to the contract of sale in Action # 2, that is also clear in its limitation of damages for lack of marketability. There is no question, especially in light of the Court's determination herein, that the subject parcel was not marketable when Coester and Mason entered into their Agreement. However, Coester's claims of bad faith and knowledge of the problem while not revealing it to Coester, require the Court to deny the motion for limitation of damages and set down for trial the sole issue of whether Mason acted in bad faith in her dealings with Coester and, if so, the measure of Coester's damages.

Accordingly, Plaintiff's motion for Summary Judgment in Action # 1 is granted to the extent of granting its request for declaratory judgment , setting down for trial whether it is entitled to specific performance as a ready, willing and able purchaser and all remaining causes of action are dismissed. Defendant Mason's motion for partial Summary Judgment limiting damages is denied and remitted for trial on the issue of whether Mason acted in bad faith in her dealings with Coester and , if so, the extent of Coester's damages.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: February 21, 2009
Riverhead, New York



EMILY PINES
J. S. C.