

Shah v Gold

2009 NY Slip Op 31415(U)

June 17, 2009

Supreme Court, New York County

Docket Number: 017512/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

BIREN J. SHAH and URJITA B. SHAH,

Plaintiffs,

INDEX No. 017512/08

MOTION DATE: April 17, 2009
Motion Sequence # 001

-against-

JAMES M. GOLD and CERTILMAN BALIN
ADLER & HYMAN, LLP,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X

This motion, by plaintiffs, for an order granting plaintiff summary judgment pursuant to CPLR §3212 against defendant Gold on the second cause of action, and judgment on liability on the third cause of action against said defendant and setting plaintiff's claim down for an inquest, and for such other and further relief that the Court may deem just, appropriate and proper, is determined as hereinafter set forth.

FACTS

This matter involves a post-closing escrow agreement (the "Agreement") in connection with the sale of the property located at 54 Lake Drive, Manhasset, New York

by Mr. Gold to the plaintiffs, which closed on March 9, 2007. The parties agreed to close on the sale without the necessary certificates of occupancy from the Town of North Hempstead (the "Town") for improvements such as construction and placement of the deck, the air conditioners, the kitchen extension including the plumbing and electrical work, and the enclosure of the garage to form a living room.

The Agreement provides that unless Mr. Gold, with the help of expediter Robert Bonnie, obtains the necessary certificates of occupancy by March 1, 2008, \$30,000 escrow deposit is remitted to the plaintiffs. The Agreement also provides that if the cost of obtaining the certificates of occupancy exceeds the \$30,000 escrow deposit Mr. Gold agrees to be responsible for and pay any additional sums required. In addition, the Agreement provides that the plaintiffs agree to fully cooperate with Mr. Gold and the Town in furtherance of obtaining the certificates of occupancy. The parties agree that such cooperation shall include, but is not limited to, permitting town inspectors, workmen, and other necessary parties to have access to the property at reasonable times and upon reasonable notice.

Mr. Bonnie filed applications for permits in Mr. Shah's name on June 29, 2007 for the preexisting deck and the inside alterations made by Mr. Gold. Three months later, four top employees at the Town's Building Department were arrested on allegations of corruption, fraud and theft, leaving the Building Department in disarray. On December 19, 2007, the Town issued a letter addressed to the plaintiffs denying Mr. Bonnie's application because the deck and air conditioner units left less than the requisite ten feet of side yard. On December 20, 2007, the Town issued another letter addressed to the plaintiffs describing four violations that had to be corrected before the Town would resume reviewing the application. On September 15, 2008, the plaintiffs commenced this action against the defendants for failing to obtain the necessary certificates of occupancy and for failing to release the \$30,000 escrow deposit.

PLAINTIFFS' CONTENTIONS

The plaintiffs contend that summary judgment is appropriate because Mr. Gold made material alterations to his house in violation of the Town's building requirements and now the defendant cannot obtain the certificates of occupancy as required by the parties' Agreement; and that the Agreement clearly and unambiguously states that if Mr. Gold fails to obtain the certificates of occupancy then the plaintiffs are entitled to the \$30,000 escrow deposit and Mr. Gold is liable for any costs exceeding the \$30,000

escrow deposit necessary to obtain the certificates of occupancy. The plaintiffs also argue that the arrests of the Town's Building Department's employees may have delayed Mr. Gold's performance, but it does not make performance impossible. Consequently, the defendants' impossibility defense is without merit.

The plaintiffs also contend that they fully cooperated with Mr. Gold. For example, Mr. Shah left a hole in his living room ceiling as per Mr. Bonnie's request, granted access to his home to whomever he was asked to give it, and took full days off to wait for Mr. Gold's electricians and plumbers. In addition, the plaintiffs contend that the violations listed by the Town do not involve the plaintiff and therefore the plaintiffs have not obstructed Mr. Gold's efforts to obtain the certificates of occupancy. As a result, the defendants' argument that the plaintiffs breached the contract by not fully cooperating is also without merit.

DEFENDANTS' CONTENTIONS

The defendants contend that summary judgment is improper because the agreement could not be performed. Mr. Gold deposited \$30,000 in escrow in good faith and made every diligent attempt to comply with the Town's requirements and procedures and obtain the certificates of occupancy, but the widely publicized scandal concerning the Town's Building Department created astronomical and unforeseen delays that made performance within the designated time period impossible.

The defendants also contend that summary judgment is premature because there are material facts in dispute as to whether the plaintiffs intentionally withheld communications they received from the Town from Mr. Gold and Mr. Bonnie, such as the denial and omission letters, which further delayed progress. The defendants assert that the plaintiffs did not act in good faith and refused to cooperate as the parties' Agreement requires. Thus, the plaintiffs breached the Agreement.

The defendants argue that the plaintiffs made renovations to the property after they purchased it which included electrical work. Summary judgment is improper, therefore, because it is impossible to determine at this early stage whether work that remains to be done and reviewed and/or approved by the Town was done by the plaintiffs or Mr. Gold. Because Mr. Gold is not responsible for obtaining certificates of occupancy for work done by the plaintiffs, the defendants contend that they should be entitled to ascertain the material facts, many of which are known only by the plaintiffs and the Town. Without

discovery, the defendants claim they cannot adequately defend themselves in this action.

DECISION

On a motion for summary judgment, the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties. Summary judgment is inappropriate where questions of fact or credibility are raised that require a trial. (Nicklas v. Tedlen Realty Corp. 305 A.D.2d 385 2nd Dept., 2003).

The evidence presented by the defendants, relative to outstanding discovery issues that warrants denial of summary judgment, is not relevant to discovery that prevents summary judgment herein, only the issue of damages. The sole admissible assertions submitted on behalf of the defendants do not relate to the certificates of occupancy for the air conditioning units and the deck, which form the basis for the delay purportedly engendered by the scandal in the Building Department of the Town of North Hempstead; the allegations relative to interior electrical work are relevant only to the damage computations, which may be part of the hearing on damages hereinafter scheduled.

In opposition to the plaintiffs' motion for summary judgment, the defendants assert that several triable issues exist, such as whether impossibility excuses Mr. Gold's obligations under the Agreement. Once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome. Because the purpose of contract law is to allocate the risks that might affect performance, that performance should be excused only in extreme circumstances. (Kel Kim Corp. v. Central Markets, Inc. 70 N.Y.2d 900, 519 N.E.2d 295, 1987). Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. In addition, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.

In this case, although the delays in the Town's Building Department have unquestionably hindered Mr. Gold's ability to obtain the necessary certificates of occupancy, it has not rendered performance impossible as a matter of law. Further, if plaintiffs failed to forward the communications they received from the Town to Mr. Gold and Mr. Bonnie, it does not amount to a refusal to fully cooperate or a breach of plaintiffs' duty of good faith. Consequently, the plaintiffs' motion for summary judgment on the second cause of action is **granted** and Mr. Gold is liable to the plaintiffs for the \$30,000 **without** interest as per the parties' Agreement, and the escrow agent is directed to remit the escrow balance to the plaintiff within 20 days after service of a copy of this

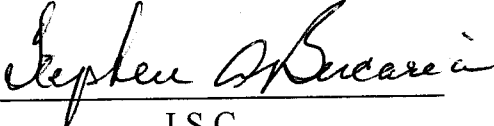
order upon defendants' counsel. The plaintiffs' motion for summary judgment on liability on the third cause of action against the defendants is **granted** and there will be an inquest as to damages.

This matter is referred to the Calendar Control Part (CCP), for a hearing on the issue of damages to be held on July 15, 2009 at 9:30 a.m. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Counsel is directed to attach a copy of this Order with his Note of Issue when served upon the Calendar Clerk.

So Ordered.

Dated JUN 17 2009


J.S.C.

ENTERED
JUN 22 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE