

Diggy's LLC v Prato

2009 NY Slip Op 31628(U)

July 22, 2009

Supreme Court, Richmond County

Docket Number: 102208/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:102208/07
Motion No.:003**

DIGGY'S LLC,

Plaintiff

against

**ALFREDO PRATO, JR.,
KATHRYN PRATO, *and*
ANGELA DOMANSKI**

DECISION & ORDER

HON. JOSEPH J. MALTESE

Defendants

The following items were considered in the review of this motion to renew and reargue.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Answering Affidavits	3
Exhibits	Attached to Papers

The defendants move pursuant to *CPLR* § 2221 for renewal and reargument. Upon reargument, however, this court adheres to its decision and order dated April 2, 2009.

Facts

This is an action by the Plaintiff-Buyer Diggy's L.L.C. for the recovery of a \$50,000 down payment from the Defendants-Sellers Alfred and Kathryn Prato on a contract of sale for the premises at 124 Ocean Avenue, Staten Island, New York, commonly known as the Surf Club. The contract for the purchase of the Surf Club was contingent upon the financing of another building owned by the plaintiff, which is located at 862 Huguenot Avenue, Staten Island, New York ("the Huguenot Property"). Paragraph 2 of the Rider to Contract of Sale states the following:

Mortgage Contingency. (a) The obligations of Purchaser hereunder are conditioned upon issuance on or before 45 days from the date of this contract (the "Commitment Date") of a written commitment

from any Institutional Lender pursuant to which such Institutional Lender agrees to make a first mortgage loan, other than a VA, FHA or other governmentally insured loan, to Purchaser, at Purchaser's sole cost and expense, of \$800,000.00 or such lesser sum as Purchaser shall be willing to accept, at the prevailing rate of interest chargeable at the time of closing for a term of at least 15/30 years and on other customary commitment terms, whether or not conditional upon any factors other than an appraisal satisfactory to the Institutional Lender.¹

The mortgage contingency allowed an initial expiration date of September 29, 2006, but the sellers permitted an extension to October 6, 2006.² It is uncontroverted that the plaintiff failed to secure a mortgage commitment by October 6, 2006.

A fire engulfed the Huguenot property on October 13, 2006, causing a casualty loss of \$295,872.75.³ Shortly after, on October 25, 2006, the plaintiff's attorney sent a letter to defendants' attorney, Angela Domanski, requesting an extension through November 5, 2006.

The letter, in part, stated the following:

My client sincerely wants to purchase the property but again due to the nature of the transaction, obtaining financing is lengthier than [sic] either party had anticipated, in the contract of sale. With that said my client would be prepared to cover your client's reasonable legal fees if the extension is granted. If your client is unwilling to agree to an extension, we will elect to cancel the contract and expect to receive our down payment returned to my client.⁴

The following day, on October 26, 2006, defendants' attorney responded,

I will take no action with regard to setting a closing date until after November 15, 2006, and my client may be willing to extend the

¹ Defendants' exhibit B.

² *Id.*

³ Affidavit of John Piscopo, ¶ 14.

⁴ Defendants' exhibit B

mortgage commitment period until November 15, 2006, provided that your client provides sufficient documentation that he has acted in good faith to obtain a mortgage commitment for the sum of \$800,000.00.⁵

On November 15, 2006, the parties met at Angela Domanski's office. The plaintiff avers that the defendants had agreed to extend the mortgage contingency period, while the defendants deny this allegation. Soon after this meeting, the plaintiff applied for mortgage financing on the Huguenot property through Liberty Capital Mortgage Brokers for a loan through Flushing Savings Bank.⁶ Liberty Capital indicated that Flushing Savings Bank would lend \$450,000 for the Huguenot property. The plaintiffs argue that this was an insufficient amount to finance the purchase of the premises, making their performance on the contract impossible. The plaintiff alleges that in January 2007 his attorney informed defendants' attorney of the plaintiff's inability to obtain the mortgage financing and reminded her that the plaintiff stood by his October 25, 2006 cancellation of the contract.⁷

The defendants submitted a letter dated May 8, 2007 declaring time of the essence and re-setting May 31, 2007 as the time of closing.⁸ The letter also advised that failure to appear would result in the forfeiture of the deposit payment pursuant to the contract of sale. The plaintiff did not appear at the closing on May 31, 2007.

⁵ *Id.*

⁶ Defendants' exhibit C.

⁷ Affidavit of Sigismondo F. Renda ¶ 18, 19.

⁸ Defendants' exhibit F.

Discussion

Motion to Reargue

A motion denominated by the moving party as one to renew and reargue is most accurately characterized as one solely to reargue where it raises no new matters which were previously unknown.⁹

To reargue, the party must allege and explain matters of fact or law allegedly overlooked or misapprehended by the court in its prior decision, but shall not present any matters not offered on the prior motion.¹⁰ A motion to reargue “is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented.”¹¹

This court’s prior decision declared that there was an issue of fact regarding the existence of a New York City building code violation, disproving the defendants’ ability and readiness to deliver marketable title on the premises. The Court overlooked that a search conducted on July 27, 2006 by the City of New York’s Department of Buildings found no violations in the Premises.¹² In addition, the Court misapprehended the nature of the October 6, 2006 date as the closing date, when in fact, that was the expiration of the mortgage contingency period.

⁹ *Rivera v. Cambridge Mutual Insurance Co.*, 136 AD2d 688 [2d Dept 1988].

¹⁰ CPLR § 2221(d).

¹¹ *Gellert & Rodner v. Gem Community Management, Inc.*, 20 AD3d 388 [2d Dept 2005].

¹² Defendants’ exhibit C.

Mortgage Contingency

A mortgage contingency clause is a condition precedent to the sale of real property. It allows the cancellation of a real estate contract if the purchaser is unable to obtain a loan or mortgage commitment within a specified time.¹³ If a purchaser cannot comply with the conditions within the provided time period, he or she is entitled to the return of the down payment pursuant to the terms of the contract.¹⁴

Notwithstanding this court's misapprehension of facts in its prior decision, there are still remaining issues of fact to be resolved. Principally, it is unclear whether a mortgage contingency was extended, allowing the plaintiff to further seek financing and to reserve his right to cancel the contract. The plaintiff's letter dated October 6, 2006 stated that he would elect to cancel the contract if the defendants were unwilling to agree to an extension. In response, the defendants maintained that they would allow such extension if the plaintiff provides documentation that he acted in good faith to obtain the mortgage commitment. The plaintiff's prior cross-motion included a copy a letter from Liberty Capital advising the plaintiff that FSB Flushing would be willing to secure the first mortgage lien in the amount of \$450,000. In addition, the plaintiff enclosed a copy of the mortgage denial letter from Liberty Capital, based upon failure of the premises to appraise at the purchase price.¹⁵ It is therefore unclear whether the contingency was extended, since the plaintiff continued to seek financing. If such extension was granted, the plaintiff may have had the right to cancel the contract at the time he received the appraisal letter from Liberty Capital. However, there is no evidence that the extension was actually granted and that the plaintiff unequivocally elected to cancel the contract. Multiple issues of fact therefore

¹³ *Sheinkerman v. 3111 Ocean Parkway Assoc.*, 259 AD2d 480 [2d Dept 1999]; *Bobrowsky v. Landes*, 124 AD2d 618 [2d Dept 1986]; *Byrne v. Collins*, 142 AD2d 661 [2d Dept 1988].

¹⁴ *Severini v. Wallace*, 13 AD3d 434 [2d Dept 2004].

¹⁵ Plaintiff's exhibit K.

remain, which should be best decided at a trial.

Conclusion

This court's prior decision and order dated April 2, 2009 misinterpreted certain issues of fact. Nevertheless, the defendants have still failed to demonstrate their prima facie entitlement to judgment as a matter of law because it is not clear whether the mortgage contingency period was extended, which would have allowed the plaintiff to cancel the contract and obtain a return of the \$50,000 down payment.

Accordingly, it is hereby:

ORDERED, that the defendants Alfredo Prato, Jr., Kathryn Prato, and Angela Domanski's motion to reargue pursuant to *CPLR* § 2221 is granted; and it is further

ORDERED, that upon reargument this court finds that there are still issues of fact that must be resolved at a trial; and it is further

ORDERED, that the defendants Alfredo Prato, Jr., Kathryn Prato, and Angela Domanski's motion for summary judgment on their counterclaims to obtain the \$50,000 down payment as liquidated damages is denied; and it is further

ORDERED, that the plaintiff's cross-motion for summary judgment on its complaint seeking to obtain the return of the \$50,000 down payment is also denied; and it is further

ORDERED, that all parties shall return to DCM Part 3 on Monday, August 20, 2009 at 9:30am for a Preliminary Conference.

ENTER,

DATED: July 22, 2009

Joseph J. Maltese
Justice of the Supreme Court