

Bandachowicz v McFarland

2009 NY Slip Op 32012(U)

September 3, 2009

Supreme Court, New York County

Docket Number: 116409/2008

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Bandachawicz

INDEX NO. 116409/08

- v -

MOTION DATE 4/20/09

McFarland

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 14 were read on this motion to/for summary judgment

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

PAPERS NUMBERED

1-4

Answering Affidavits — Exhibits _____

5-11

Replying Affidavits _____

12-14

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision, order and declaratory judgment.

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/3/09



JANE S. SOLOMON
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; PART 55

-----X
DANIEL BANDACHOWICZ and
KATARZYNA BANDACHOWICZ,

Index No.: 116409/2008

Plaintiffs,

DECISION, ORDER and
DECLARATORY JUDGMENT

-against-

GAVIN MCFARLAND, HANNAH GRISWOLD-
MCFARLAND, and SCOTT SEGAL,

Defendants.
-----X

SOLOMON, J.:

This lawsuit arises in connection with a failed residential real estate transaction in which plaintiffs Daniel and Katarzyna Bandachowicz (husband and wife) were the buyers, and defendants Gavin McFarland and Hannah Grisold-McFarland (husband and wife) were the sellers. Scott Segal was defendants' attorney, and he is named as an additional defendant in this action because he is the escrow agent holding the down payment posted by plaintiffs in connection with the transaction.

Plaintiffs' complaint alleges that defendants breached the sales contract by failing to allow for a pre-closing inspection and failing to vacate the premises on the closing date. The complaint seeks to recover the down payment. In their answer, defendants generally deny the allegations and assert various counterclaims, including prima facie tort, malicious prosecution and slander of title. Defendants also seek a declaratory judgment that plaintiffs breached the contract by

failing to close, which entitles them to keep the down payment.

Both parties move for summary judgment in their favor. For the reasons set forth herein, plaintiffs' motion is denied, defendants' cross motion for a declaratory judgment is granted, but the other counterclaims are dismissed.

Background

On or about March 11, 2008, plaintiffs and defendants entered into a written contract, whereby defendants agreed to sell, and plaintiffs agreed to buy, an apartment in the building known as Millenium Point Condominium located at 10 West Street, New York, New York (the Premises), for a purchase price of \$5.8 million (the Contract). A copy of the Contract is annexed as Exhibit 1 to the Affidavit of Scott Segal (the Segal Affidavit). Pursuant to the Contract, plaintiffs made a down payment in the amount of \$580,000 (the Down Payment). The Contract provides that the closing date for the transaction was June 2, 2008, time of the essence. Article 31 of the Contract provides, in relevant part, that "either party shall have a one time right to adjourn the [time of the essence] closing date of [June 2, 2008] to June 6, 2008 provided said [adjourned] date shall be time of the essence with respect to the party requesting the adjournment."

On May 28, 2008, defendants' counsel wrote to plaintiffs' counsel indicating, among other things, that the closing would occur pursuant to the Contract's outside time of

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the essence closing date of June 6, 2008. Segal Affidavit, Exhibit 2. Defendants chose to close on June 6, 2008 because they had contracted to buy a new apartment and the closing date on that transaction was on or about June 12, 2008, and they intended to use the sale proceeds from the Premises to help fund their new purchase. Segal Affidavit, ¶¶ 6-8. On May 29, 2008, defendants' counsel e-mailed plaintiffs' counsel to confirm the adjourned closing date and the logistics. Segal Affidavit, Exhibit 3.

On June 4, 2008, defendants' counsel e-mailed plaintiffs' counsel to inquire whether plaintiffs were prepared to close on June 6, 2008. In the reply e-mail, plaintiffs' counsel stated that plaintiffs would not pay more than \$5.2 million for the Premises. Segal Affidavit, Exhibit 4 ("Scott, I just heard from my client. He will not increase his offer of \$5,200,000.00"). Nevertheless, plaintiffs' counsel asked defendants' counsel to arrange for a pre-closing inspection of the Premises pursuant to Article 12 of the Contract, which states that "[p]urchaser shall have 48-hour period immediately preceding the Closing [to conduct the inspection]." Segal Affidavit, ¶ 21. Defendants' counsel believed that a pre-closing inspection would be inappropriate, as plaintiffs did not want to pay the Contract price. *Id.*, ¶ 22.

On June 5, 2008, plaintiff Daniel Bandachowicz flew

from Europe to New York. Lazar Affidavit, Exhibits H and S. However, neither he nor his counsel appeared at the office of defendants' counsel for the scheduled closing on June 6, 2008. Segal Affidavit, ¶ 25. Later that day, defendants' counsel wrote to plaintiffs' counsel indicating that plaintiffs had breached the Contract by failing to appear for the closing, and that the Down Payment would be released to defendants. Segal Affidavit, ¶¶ 27-28; Exhibit 6. On June 9, 2008, plaintiffs' counsel wrote a letter to defendants' counsel denying that plaintiffs were in default. Segal Affidavit, Exhibit 7. The letter alleged that defendants were in default of the Contract by failing to allow for a pre-closing inspection and to timely vacate the premises; the letter also objected to the release of the deposit. *Id.*

Thereafter, even though there were negotiations between the lawyers, no final agreement was reached. Segal Affidavit, ¶ 33. In late June 2008, plaintiffs commenced an action in this court (the Prior Action, index number 108830/2008), for specific performance of an oral modification of the Contract, and damages for breach of the oral agreement. Segal Affidavit, ¶ 34. In connection with the Prior Action, plaintiffs filed a notice of pendency against the Premises. Segal Affidavit, ¶ 34; Exhibit 10. The Prior Action was dismissed because the oral modification of the Contract was unenforceable, and the court directed that the notice of pendency be canceled. Segal Affidavit, Exhibits 12

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and 13. Defendants then sold the Premises to a third party in October 2008. McFarland Affidavit, ¶ 34.

Discussion

In stating the standards for granting or denying a summary judgment motion pursuant to CPLR 3212, the Court of Appeals noted in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]):

As we have stated frequently, the 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 demonstrate the absence of any material issues of fact. Failure to make such ... showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the Court of Appeals' guidance, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief should be granted or denied. *Giandana v Providence Rest Nursing Home*, 32 AD3d 126, 148 (1st Dept 2006) (because summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues") (citations omitted), *revd on other grounds* 8 NY3d 859 (2007); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in considering a

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summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (citations omitted). However, general allegations of a conclusory nature unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 324-325.

The Breach Of Contract Claim

To prevail on a breach of contract claim, a plaintiff must establish the following elements: (1) existence of a valid contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) resulting damages. See e.g. *Noise in Attic Productions, Inc. v London Records*, 10 AD3d 303 (1st Dept 2004); *Furia v Furia*, 116 AD2d 694 (2d Dept 1986). Plaintiffs contend that defendants breached the Contract by failing to allow for a pre-closing inspection of the Premises, and by failing to vacate the Premises on the closing date, while defendants contend that it was plaintiffs who breached the Contract by failing to show up for the closing and refusing to pay the negotiated Contract price. Defendants argue that these material breaches of the Contract entitled them to terminate the Contract and keep the Down Payment as damages.

Plaintiffs argue that their refusal to increase their last-minute \$5.2 million offer was merely "part of the 'back-and-forth' over a possible reduction in the purchase price," and that they "did not in any way threaten not to close if the McFarland

defendants did not consent thereto." Lazar Reply Affidavit, ¶ 5. This argument is not convincing. Based on the undisputed facts, it is evident that plaintiffs intended to renege on the Contract and renegotiate the agreed-to Contract price of \$5.8 million; when that failed, they did not appear for the closing. They did not allege, until three days after the closing date, that defendants were in breach of the Contract by not allowing an inspection, and they did so after defendants declared that plaintiffs were in default and that the Down Payment would be retained as liquidated damages.

Notably, the cases relied upon by plaintiffs to support the claim that they were excused from closing due to defendants' failure to vacate the Premises or to allow for an inspection, are inapposite and distinguishable. See e.g. *Grace v Nappa*, 46 NY2d 560 (1979) (seller was obligated to return deposit to buyer when seller failed to obtain a mortgage estoppel certificate showing outstanding balance of the mortgage where buyer was to buy property subject to the mortgage; failure was a material breach of the contract); *Rhodes v Astro-Pac, Inc.*, 51 AD2d 656 (4th Dept 1976) (buyer was entitled to refund of the deposit because seller was unable to deliver marketable title on property by closing), *affd* 41 NY2d 919 (1977).; *Terzo v Stratford*, 104 NYS2d 278 (Sup Ct, Kings County 1951) (buyer entitled to recovery of deposit when seller told buyer in advance that he was unable to perform

the contract because his tenant was still in possession of premises, but contract required delivery of vacant premises; buyer's failure to appear at closing and tender performance did not preclude recovery). Plaintiffs' reliance on these cases is misplaced because they all involved material breaches of the contract by the sellers, and such breaches were not readily curable by the sellers.

Even if defendants' failure to permit an inspection or to vacate the premises before the closing constituted breaches of the contract, they were not material because they could be readily cured within a reasonable time. The case of *Hegner v Reed* (2 AD3d 683 [2nd Dept 2003]) is on point and instructive. In *Hegner*, the buyers failed to appear at a "time of the essence" closing and later brought an action for the return of their deposit. The buyers argued that, because the premises were not in a "broom clean" or vacant condition on the closing day, as required by the contract, they were excused from performance of the contract. The motion court ruled that the sellers were entitled to retain only a portion of the deposit, even though the contract provided that if the buyers were in default, the sellers were entitled to keep the entire deposit. *Id.* at 684. The Appellate Court reversed, and held that the sellers were entitled to keep the entire deposit as liquidated damages. The Appellate Court observed that the sellers could treat the buyers as having

anticipatorily breached the contract. *Id.* at 684-85. In particular, the Appellate Court held that:

Moreover, even assuming that the sellers were in breach of the contract on the day of the closing because the premises were not vacant, this alleged defect was curable within a reasonable time and thus the buyers were obligated to tender performance and permit the sellers the opportunity to cure ... The buyers' failure to do so bars them from recovering their deposit

Id. at 685 (internal citations omitted). Here, although defendants could have treated plaintiffs' insistence on a lower price as an anticipatory breach, they did not cancel the Contract pre-closing, hoping instead that plaintiffs would appear at the scheduled closing. Thus, plaintiffs were obligated to tender performance pursuant to the Contract, and their failure to do so bars them from recovering the Down Payment.

In an attempt to distinguish *Hegner*, plaintiffs argue that the Article 31 to the Contract made the adjourned closing date time of the essence only as to defendants. Plaintiffs argue that they were not obligated to attend the June 6, 2008 closing.

Plaintiffs' argument is not persuasive for various reasons. First, in an e-mail sent to plaintiffs' counsel on May 28, 2008, defendants' counsel wrote:

I've e-mailed and left you several messages without the courtesy of a reply so that we could confirm closing logistics. The contract provides for an outside time of the essence closing date of June 6. Accordingly, you are hereby advised

that the closing will occur on June 6 at 9:00 A.M. in my office. "TIME IS OF THE ESSENCE" with respect to said closing date. The failure of your clients to appear ready, willing and able to close will result in the forfeiture of their contract deposit, as and for liquidated damages

Segal Affidavit, Exhibit 2. Because plaintiffs' counsel did not respond to this e-mail, on May 29th, defendants' counsel sent another e-mail indicating that plaintiffs should deliver three official bank checks at the June 6th closing. *Id.*, Exhibit 3.

The record shows that both parties ignored the June 2 date, and plaintiffs did not object to the June 6th closing as time of the essence until they commenced a lawsuit against defendants. Indeed, no mention of the issue is raised in the letter by plaintiffs' counsel to defendants' counsel, dated June 9, 2008, which was sent three days after the closing. Lazar Affidavit, Exhibit K. In fact, the June 9th letter alleged that defendants were in breach by, among other things, failing "to timely appear at [the June 6th] closing ready, willing and able to close the transaction" (*Id.*), seemingly acknowledging that the parties were obligated to attend the closing on June 6th. In any event, "[a]s a general rule, when a party to a contract for the sale of real property declares that time is of the essence, 'each party must tender performance on law day unless the time of performance is extended by mutual agreement.'" *Rufeh v Schwartz*,

50 AD3d 1000, 1001 (2nd Dept 2008) (citation omitted). Plaintiffs do not dispute this general rule, as they cited to *Rufeh* as one of the cases in support of their position. Plaintiffs' Reply Brief, at 5, 8.

Plaintiffs proffer a tenuous argument that under Article 31 they were not required to attend the June 6th closing because the adjournment was requested by defendants. Article 31 should be construed to give effect to the time of the essence closing requirement of the Contract, particularly in light of the facts and circumstances of this case. Indeed, "each provision of the [agreement] must be read in the context of the entire agreement, not in isolation, in order to determine the intent of the parties." *Long Island Lighting Co. v Allianz Underwriters Insurance Co.*, 301 AD2d 23, 30 (1st Dept 2002); *Barnan Associates v 196 Owners Corp.*, 56 AD3d 309, 311 (1st Dept 2008) (same). It is undisputed that the June 2nd closing date was time of the essence to all parties. It would be counterintuitive if the "outside" June 6th closing date would not also be time of the essence to all parties, especially where, as here, plaintiffs failed to respond to repeated requests for closing logistics, as well as to the May 28th and May 29th e-mails from defendants' counsel, as discussed above. Segal Affidavit, ¶¶ 5-11; Exhibits 2 and 3. *Friedman v O'Brien*, 287 AD2d 311 (1st Dept 2001) (sellers entitled to retain deposit, because buyers failed

to object to sellers' notice of time of the essence adjourned closing and failed to timely comply with their contractual obligations). In addition, the equities of this case favor defendants. Because of plaintiffs' material breach of the Contract, defendants incurred, among other things, the expense of carrying the mortgages and maintenance charges for two apartments for about four months (from June to October 2008), and defendants ended up selling the Premises to a third party at a reduced price due to a deteriorating real estate market.

In light of the foregoing, plaintiffs' motion for summary judgment for a return of the Down Payment is denied. Conversely, defendants' cross motion for summary judgment on their first counterclaim (i.e., a declaratory judgment that they are entitled to retain the Down Payment as liquidated damages) is granted.

The Other Counterclaims

Defendants assert four other counterclaims against plaintiffs, including prima facie tort (second counterclaim), malicious prosecution (third and fourth counterclaims), and slander of title (fifth counterclaim).

Prima Facie Tort and Slander Of Title Counterclaims

In support of the prima facie tort and slander of title counterclaims, defendants allege, among other things, that plaintiffs commenced the Prior Action asserting invalid and

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frivolous claims; that plaintiffs sought to appeal and re-argue prior adverse decisions and orders of this court; and that they filed a notice of pendency against the Premises, and refused to cancel such notice despite this court's expressed intent to order such cancellation. Defendants allege that plaintiffs' acts and/or omissions effectively clouded the title of the Premises, rendered it difficult to sell for an extended period of time, and resulted in special damages to defendants.

"The key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful." *Metromedia, Inc. v Mandel*, 21 AD2d 219, 222 (1st Dept), *affd* 15 NY2d 616 (1964) (citation omitted). Also, "[p]rima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy" *Curiano v Suozzi*, 63 NY2d 113, 118 (1984). Based on the record before this court, it appears that plaintiffs' commencement of the Prior Action for specific performance of an oral modification to the Contract was not motivated by an intent to inflict intentional harm on defendants. Moreover, it has been observed by the Court of Appeals that "New York courts have consistently refused to allow retaliatory lawsuits based on prima facie tort predicated on the malicious institution of a prior action." *Id.*, 63 NY2d at 118 (citations

omitted). Further, the Court of Appeals has noted that "even assuming an action for malicious prosecution lies ..., [claimant] should not be allowed to plead prima facie tort in the alternative. It should not become a catch-all alternative for every cause of action which cannot stand on its legs." *Id.* (citations and internal quotation marks omitted). Because the prima facie tort is primarily based upon plaintiffs' commencement of the Prior Action, this counterclaim should be dismissed.

With respect to the slander of title counterclaim, the courts have held that "a notice of pendency is an 'undeniably true statement,' and that therefore the filing of a notice of pendency does not give rise to a cause of action for slander of title." *35-45 May Associates v Mayloc Associates*, 162 AD2d 389, 389 (1st Dept 1990) (citations omitted); *Alexander v Scott*, 286 AD2d 692, 693 (2nd Dept 2001) ("[a] notice of pendency does not give rise to a cause of action sounding in slander of title") (citations omitted). Thus, plaintiffs' filing of the notice of pendency does not give rise to the slander of title counterclaim. Further, it appears that the filing of the notice of pendency was not an act of malice, because plaintiffs believed that they might have an interest in the Premises based on the oral contract, as explained above. In such regard, it has been held that

[w]hile defendant's other claim is styled as prima facie tort, it is clear that the only actionable wrong which may arise from the improper filing of a notice of pendency is a cause of action for

malicious prosecution ... [because] defendant had not established that plaintiff acted out of malice in filing the notice of pendency ... we affirm the judgment dismissing its counterclaims.

35-45 *May Associates*, 162 AD2d at 390 (internal citations omitted).

Malicious Prosecution Counterclaims

A claim sounding in malicious prosecution requires proof of the commencement or continuation of a proceeding by a plaintiff against a defendant, termination of the proceeding in favor of the defendant, absence of probable cause for the proceeding, and actual malice. *Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 (1st Dept 2005).

Notably, defendants' malicious prosecution counterclaims (third and fourth counterclaims) are based substantially upon the same alleged facts and plaintiffs' course of conduct as those alleged for the prima facie tort and slander of title claims. Based on the record before me, defendants have not shown that the Prior Action "was filed with a purpose other than the adjudication of a claim, and that there was an entire lack of probable cause in the prior proceeding." *Engel*, 93 NY2d at 204. Also, it would be an exaggeration to characterize the Prior Action as brought by plaintiffs with "conscious falsity." *Hornstein v Wolf*, 109 AD2d 129, 133 (2nd Dept 1985) (malice was defined as "conscious falsity," and malicious prosecution claim was dismissed because the moving papers failed to set forth the

factual basis in support of the claim), *affd* 67 NY2d 721 (1986).

In light of the rulings herein and the rationales therefor, it is unnecessary to address the remaining issues raised by the parties. Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is denied; and it further is

ORDERED that defendants' cross motion for a summary judgment on their first counterclaim hereby is granted, but their other counterclaims (the second, third, fourth and fifth counterclaims) are dismissed; and it further is

ORDERED that plaintiffs' complaint is dismissed; and it further is

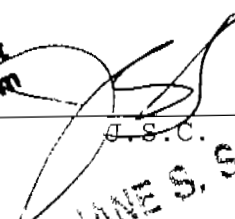
ADJUDGED AND DECLARED that plaintiffs breached the contract of sale between the parties, and that defendants are entitled to the Down Payment of \$580,000 as liquidated damages; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly, with costs and disbursements to defendants as taxed.

Dated: September 3, 2009

ENTER:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).


J.S.C.
JANE S. SOLOMON