Walz v Kaval
2009 NY Slip Op 32090(U)
June 30, 2009
Supreme Court, Nassau County
Docket Number: 09-000886
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 6
NASSAU COUNTY

CHARLENE WALZ
N/K/A CHARLENE MARTIN

Plaintiff,

MOTION DATE: 6/30/09

- against -

MOTION SEQ. NO.: 001
INDEX NO.: 09-000886

KEITH KAVAL

Defendant.

The following papers have been read on the motion:

Notice of Motion....................................1

In this action for breach of a real estate contract, plaintiff moves for summary judgment pursuant to **CPLR §3212** on the grounds that there is no valid defense to the plaintiff's cause of action. The motion is unopposed. The Court automatically adjourns all motions that are submitted without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

On September 15, 2008, plaintiff Charlene Walz, as seller ("Seller"), and defendant Keith Kaval, as purchaser ("Purchaser"), entered into a contract (the "Contract of Sale") for the purchase and sale of the residential real property known as 45 Chestnut Street, Garden City, New York (the "Premises"). The purchase price was one million, one hundred thousand ($1,100,000.00) dollars. A down payment of one hundred ten thousand ($110,000.00) dollars (the "Down Payment") was paid to Seller by Purchaser, pursuant to the Contract of Sale. This money was to be held in escrow by Seller's attorney in an IOLA account until the closing or termination of the Contract of Sale [Rider to Contract of Sale ("Rider") ¶ 32]. The sum is currently held by the law firm of Minerva & D'Agostino, P.C. in an IOLA account.

The Contract of Sale stated that the Premises was to be sold in "as is" condition [Rider ¶25(a)], that no representations or warranties were made by the Seller [Rider

¶25(c)], and that the Purchaser did not rely on the Seller or agents as to the zoning classifications, condition of the Premises, or compliance with any applicable codes, laws, regulations, statutes, ordinances, covenants, or restrictions [Rider ¶ 25(b)(vii-xi)].

Seller claims that her attorneys attempted to schedule a closing several times, but Purchaser failed to agree to a closing date. On November 20, 2008, Seller's attorneys served a "time of the essence" notice on Purchaser's real estate attorneys, scheduling the time of closing as December 15, 2008. The notice stated that Purchaser's failure to appear at the closing would constitute a breach of contract and that Seller would seek damages, including retention of the Down Payment. In response, Purchaser's real estate attorney sent a letter dated December 10, 2008 demanding that Seller provide Certificates of Occupancy for certain improvements on the Premises, including a vinyl shed, wooden platform, hot tub, and bricks surrounding said hot tub (the "Structures"), or a written letter from the Village of Garden City Building Department indicating that no Certificate of Occupancy was required for the Structures. The letter stated that until Seller resolved those issues, it was "evident" that Seller was not ready to close on December 15, 2008.

On or about December 11, 2008, Seller's attorney sent a letter to Purchaser's attorney stating that no Certificates of Occupancy were required for the Structures and that Seller had already provided a Certificate of Occupancy for the home, despite the fact that it was not required by the Contract of Sale.

On December 15, 2008, Seller's attorney was present to tender title to Purchaser. Purchaser's attorney appeared, but Purchaser did not appear and the closing did not take place. Seller's attorney advised Purchaser's attorney that Purchaser's failure to close constituted a default on the Contract, and that Seller has demanded the release of the Down Payment. Purchaser's attorney objected to the release of the Down Payment on the ground that the lack of Certificates of Occupancy for the Structures meant that Seller was not ready and able to close on December 15, 2008.

Seller claims that, in reliance upon the anticipated sale of the Premises, Seller sold her furniture and entered into a contract to purchase another residence. As a result of Purchaser's failure to close, Seller claims that she was required to forfeit her down payment on the new residence.

On January 16, 2009, Seller initiated the present action for breach of contract and requested an order releasing the Down Payment to Seller as liquidated damages. Purchaser responded with a verified answer, which included affirmative defenses of failure to state a claim, the doctrine of unclean hands, that the contract violates public policy, that Seller's injuries were caused by persons other than the Purchaser, that Seller

failed to mitigate damages, that Seller did not sustain any ascertainable money damages, that Seller was negligent, and that Seller's damages are offset by the damages sustained by Purchaser. Purchaser also interposed counterclaims for breach of contract and misrepresentation and fraud. The present motion for summary judgment was filed on March 30, 2009, and marked submitted without opposition on May 30, 2009.

In support of her motion, Seller submits: (1) the summons and complaint filed on January 16, 2009 [Motion Exhibit A]; (2) the Contract of Sale [Motion Exhibit B]; (3) the Time of the Essence Notice dated November 20, 2008 [Motion Exhibit C]; (4) A letter from Purchaser's real estate attorney to Seller's attorney dated December 10, 2008 [Motion Exhibit D]; (5) a Certificate of Occupancy Report for the Premises [Motion Exhibit E]; (6) A letter from Seller's attorney to Purchaser's real estate attorney dated December 11, 2008 [Motion Exhibit F]; (7) Documents signed by Seller at the Closing [Motion Exhibit G]; (8) A letter from Seller's attorney to Purchaser's real estate attorney, dated December 17, 2008, notifying Purchaser that Seller has requested that the Down Payment be released; (9) A letter dated December 22, 2009 from Purchaser's real estate attorney to Seller's attorney objecting to the release of the Down Payment to Seller; and (10) A letter, dated December 23, 2008, from Seller's attorney to Purchaser's real estate attorney regarding the release of the Down Payment.

As required by **CPLR §3212,** Seller has included an Affidavit in Support of Summary Judgment as well as copies of all pleadings filed to date (including the Summons and Verified Complaint, the Verified Answer, and the Verified Reply to Counterclaims). Additionally an Affirmation in Support of Summary Judgment signed by Seller's attorney is attached.

Turning to the merits of Seller's *prima facie* case, the Court finds that the Purchaser breached the contract by failing to close on the specified "time of the essence" closing date. *See* **Moray v. DBAG, 305 AD2d 472; Guippone v. Gaias, 13 AD3d 339; Savitsky v. Sukenik, 240 AD2d 557.** Purchaser's performance was not excused by prior breach on the part of Seller.

The Seller did not breach the contract by failing to provide Certificates of Occupancy as demanded by Purchaser. First, the Contract of Sale did not require Seller to provide Certificates of Occupancy for the Structures. ***See*** **Piano 230 N. Corp v. 230 N. Realty, 304 AD2d 544; R.L. Friedland Realty v. Modern Cabinets Corp., 194 AD2d 657.** Even if such an obligation existed, the purported defect was curable. Given a reasonable time to do so, the Seller could have obtained the Certificates of Occupancy, provided written assurance that they were not required, or removed the Structures from the Premises. In the face of a readily curable defect, a buyer is obligated to tender

performance on the closing date and permit the seller a reasonable opportunity to cure. ***See*** **Hegner v. Reed, 2 AD3d 683, 685**. Purchaser demanded the Certificates of Occupancy only five days before the scheduled closing date. Seller's failure to comply with such demand did not constitute a wilful breach, particularly since there was no contractual requirement to do so prior to the closing date. ***See*** **R.L. Friedland Realty, 194 AD2d 657.**

Second, the lack of Certificates of Occupancy for the Structures did not render the title unmarketable. The test of marketability of title is "whether there is an objection thereto such as would interfere with a sale or with the market value of the property." **Voorheesville Rod & Gun Club, Inc. v. E.W. Tompkins Company, Inc., 82 NY2d 564, 571.** A zoning regulation or requirement, which pertains only to the use of the property, generally is not an encumbrance making the title unmarketable. **Id.** When a buyer purchases property "subject to" existing laws or ordinances, he or she generally cannot refuse to take title because of such restrictions. An exception exists where the seller represents and warrants that the property and its structures will not be in violation of any zoning ordinance or regulation. In those circumstances, when it reasonably appears that the purchaser will be "plagued by zoning problems" a title defect does exist which the seller must cure in order to compel the buyer's performance. ***See*** **Pamerqua Realty Corp. v. Dollar Service Corp., 93 AD2d 249, 251.** In this case, however, the Contract of Sale expressly disclaims any such representation or warranty.

In view of Purchaser's refusal to close, Seller was entitled to retain the deposit as liquidated damages pursuant to the Contract of Sale. Parties may insert a liquidated damages clause into a contract to constitute compensation in the event of a breach by one of the parties. The sum must be a reasonable estimate of damages in event of a breach. **Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., 21 NY2d 420**. A liquidated damages clause is enforceable so long as it not unconscionable, disproportionate to the injury (a penalty), or in violation of public policy. **Mosler Safe Co. v. Maiden Lane Safe Deposit, Co., 199 NY 479**; *See also* **Hegner v. Reed, 2 AD3d 683, 685.** In the present case, the Court does not find that the liquidated damages clause in the Contract of Sale constitutes a penalty or violates public policy. It is well settled in New York that when a purchaser defaults on a real estate contract, he is not entitled to recovery of his down payment. **Maxton Builders, Inc. v. Galbo, 68 NY2d 373; Lawrence v. Miller, 86 NY 131.** Retention of the down payment does not constitute unjust enrichment. *See* **Ittleson v. Barnett, 304 AD2d 526;** *See also* **Maxton Builders, Inc. v. Galbo, 68 NY2d 373; Lawrence v. Miller, 86 NY 131.**

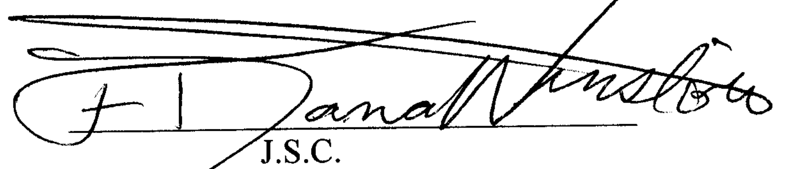
On the totality of the evidence the Court finds that Seller has established *prima facie* entitlement to summary judgment pursuant to **CPLR §3212**. In the absence of opposition, the Court finds no issue of material fact requiring a trial.

On the basis of the foregoing, it is

ORDERED, that the motion by plaintiff CHARLENE WALZ for summary judgment against defendant KEITH KAVAL pursuant to **CPLR §3212** is **granted.** Plaintiff is directed to submit judgment on 15 days notice.

This constitutes the Order of the Court. Plaintiff shall serve a copy of this Order on Defendant, with Notice of Entry, within 15 days of entry in the records of the Nassau County Clerk.

Dated: June 30, 2009



J.S.C.

ENTERED

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