INDEX NO. 40408-2008

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 005 MD

Present:
Hon. SANDRA L. SGROI

Adj. Date: 9-3-09
Return Date: 8-10-09

DENNIS ARDI and KAREN FORD,

Plaintiffs,

-against-

JOHN S. MARTIN and MARGARET C. MARTIN,

Defendants.

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Upon the following papers numbered 1 to 16 read on this Motion: Notice of Motion and supporting papers 1-6; Affirmation in opposition and supporting papers 12-14; Plaintiffs' Memoranda of Law 7-11; 15-16; it is,

ORDERED that the Plaintiffs' motion to reargue a decision of this Court granting the Defendants' motion for judgment dismissing the amended complaint and for cancellation of the notice of pendency and denying the Plaintiffs' cross motion for summary judgment is denied.

On this motion to reargue the Plaintiffs assert that the Court erred in granting the motion of the Defendants to dismiss the amended complaint and denying the motion of the Plaintiffs for summary judgment.

On or about August 12, 2008, the Defendants John S. Martin and Margaret C. Martin entered into a contract to sell real property to the Plaintiffs Dennis Ardi and Karen Ford. As part of the terms of the contract of sale, the Plaintiffs deposited $150,000.00 into an escrow account as the down payment for the purchase of this real property located at 83 Skimhampton Road, Amagansett, New York. Pursuant to this written contract of sale, the sellers were entitled to retain the amount of the down payment as liquidated damages if the purchasers defaulted on the purchase of the real property without justification.

On April 14, 2005, John S. Martin and Margaret C. Martin, the Defendants, and Veronica Coleman, the mother of the Defendant Margaret Martin and the mother-in-law of the Defendant John S. Martin, purchased the subject premises located at 83 Skimhampton Road in Amagansett, New York from Sandra Greer and Amy J. Greer. As noted in the previous decision, the 2005 deed wherein the real property was conveyed to the Martins and Coleman did not specifically list the respective ownership interests of the new owners. The 2005 deed did not indicate whether or not Coleman took an ownership interest of one-third or less than one third of the realty. This ambiguity concerning the respective ownership interests of the Defendants and Coleman evolved into one of the issues in this litigation.

On September 17, 2007, eleven months prior to the Plaintiffs and Defendants entering into the real property contract of sale, a deed between the Defendants and Coleman was executed that specifically stated the respective ownership interests of the Martins and Coleman in the real property and transferred all of Coleman's interest in the real property to the Martins. This September 2007 deed was subsequently filed and recorded with the County Clerk on October 11, 2007. That 2007 deed provided that Veronica Coleman had previously possessed a 1% fee ownership interest in the real property and the Defendants Margaret C. Martin and John S. Martin each had a 49.5% interest in the property. Pursuant to the 2007 deed, Coleman conveyed her entire interest in the realty to the Defendants. The 2007 deed was ***executed and recorded*** at least ten months prior to the signing of the contract of sale by Plaintiffs and the Defendants. After the 2007 deed was executed, Veronica Coleman had no remaining ownership interest in the property. Therefore, when the Martins signed the contract of sale with the Defendants, they had full ownership interest of the property and the contract of sale did not contain any misrepresentations with regard to that issue. The fact that the title company wished to clear up any potential confusion by requesting that a correction deed be filed does not change the language in the 2007 deed that clearly indicates that after the deed was executed by Coleman it was the intention of the parties that the new owners of the real property were only John S. Martin and Margaret C. Martin.

The Court, in denying the motion of the Plaintiffs for summary judgment and granting the Defendants' motion, held that the evidence submitted by the parties did not establish that the Defendants' representation in the contract that they owned the property was false and that the documentary evidence, the deeds themselves, proved prima facie that the Martins were the owners of the property in 2008.

The Plaintiffs' reliance upon certain language in ***People v. Tompkins-Kiel Marble Co.***, (269 N.Y. 77, 199 N.E. 10) to support their position that a 2008 deed establishes that the Martins were not the sole owners of the real property is misplaced. The Court of Appeals in ***People v. Tompkins-Kiel Marble Co.***, (supra) stated that "acceptance of a new grant is an admission that title to the property granted is in the grantor. It

is inconsistent with an assertion that the grantor had no power to make the grant." The Plaintiffs rely on this language to support their conclusion that when the contract was signed by the Defendants, those Defendants shared ownership with Veronica Coleman, Margaret Martin's mother.

An estoppel by deed may only arise as ***between the parties to the deed*** (see, 5-48 ***Warren's Weed New York Real Property*** § 48.10; ***Wilson v. Ford***, 148 A.D. 307, 1911 N.Y. App. Div. LEXIS 202, 133 N.Y.S. 33, *rev'd on other grounds*, 209 N.Y. 186, 102 N.E. 614 , *reargument denied*, 209 N.Y. 565, 103 N.E. 1135). The Plaintiffs in this action are not parties to the deeds from 2005 and 2007. Further, ***People v. Tompkins-Kiel Marble Co.***, (269 N.Y. 77, 199 N.E. 10) stands for the holding that "where a deed of correction has been obtained, the corrective deed will control and the title of the grantee will be determined by the new grant" (8-91 ***Warren's Weed New York Real Property*** § 91.18). The ***grantees*** in both the 2007 deed and the 2008 deed, John S. Martin and Margaret C. Martin, are the same and the holding herein is consistent with the language in those deeds. Additionally, the purpose of the September 2008 deed was not to modify or change the 2007 deed but to correct the original 2005 deed which did not properly list the ownership interests of Veronica Coleman, John S. Martin and Margaret C. Martin.

The contract of sale entered by the Plaintiffs and the Defendants in 2008 provided that a closing should take place on or about September 30, 2008. When that date passed and a closing had not been scheduled by the Plaintiffs' attorney, William J. Fleming, Esq., the attorney retained by the Defendants to represent them on the sale of their residence, sent a letter, dated October 7, 2008, by certified mail, return receipt requested that stated "***unless the closing occurs prior, the closing is hereby set for Wednesday, November 12, 2008, at 2 PM at this office, time is of the essence."(Affidavit of William Fleming, Esq. submitted on previous motion).

On or about October 17, 2008, after the letter from the Defendants' attorney was sent setting November 12, 2008, as the time of the essence date for the closing, James P. Cinque, Esq., the attorney for the Plaintiffs, sent a letter to William J. Fleming, Esq. attempting to cancel the contract of sale. This letter from the Plaintiffs' attorney stated although the sellers represented to the Plaintiffs in the contract of sale that they were the sole owners of the premises and "have full right, power and authority to sell, convey and transfer the same in accordance with the terms of the contract," they were not the sole owners of the property. It is important to note that there was no impediment at all on this date to close because it was clear that the Defendants were the sole owners of the real property.

Further, this letter from the Defendants' attorney stated that as a result of this inaccurate representation, "the contract of sale never had a valid inception and was void ab initio." This letter never mentioned that the Plaintiffs were raising any exception for fences listed in the title report as a reason for refusing to close title or as a reason for cancelling the contract of sale. No reason has ever been given to explain the failure to raise another alleged defense concerning marketability of title in the first letter from the attorney for the Plaintiff attempting to cancel the contract of sale.

On November 4, 2008, James P. Cinque, Esq. sent another letter to William Flemming, Esq. which stated:

> As you know, the contract of sale (which Purchaser nonetheless maintains was void ab initio) obligated your clients as Seller to deliver "marketable title" and to cure any defects at the latest by the date upon which Purchaser's mortgage commitment expired. Because

> Seller was unable to deliver "marketable title" on or before such date, Purchaser hereby formally demands (my having advised you by telephone previously) that Seller promptly refund Purchaser's $150,000.00 down payment and reimburse Purchaser the net cost of examination of title.

However, by letter dated October 16, 2008, the title company omitted the exception in the title report that provided that Veronica Coleman was required to convey her alleged interest in the property prior to the closing, thus rendering the Plaintiffs' subsequent objection to title first expressed in November 2008, moot.

The Court of Appeals has stated that "the rights of the seller may be forfeited pursuant to a provision in the contract to the effect that the contract may be terminated by the purchaser if certain specified conditions are not met by the seller." (***130- 164 Ravine Avenue, Inc. v Ravine Associates***, 139 AD2d 716, 527 N.Y.S.2d 469 citing ***Abrams v. Thompson***, 251 N.Y. 79, 167 N.E. 178; ***Leme Realty Corp. v. Kings Mercantile Co.***, 19 A.D.2d 844, 244 N.Y.S. 2d 741). Absent clauses in the contract of sale acting as a condition subsequent or precedent, "[i]n order to place the vendor of realty under a contract of sale in default for a claimed failure to provide clear title, the purchaser normally must first tender performance himself and demand good title" (***Capozzola v. Oxman***, 216 A.D.2d 509, 510, 628 N.Y.S.2d 777, quoting ***Ilemar Corp. v. Krochmal***, 44 N.Y.2d 702, 703, 405 N.Y.S.2d 444, 376 N.E.2d 917; see also, ***Cohen v. Kranz***, 12 N.Y.2d 242, 238 N.Y.S.2d 928, 189 N.E.2d 473; ***Oxford Funding Corp. v. James H. Northrup, Inc.***, 130 A.D.2d 722, 516 N.Y.S.2d 33).

Even if the Defendants did not have the ability to convey full ownership as of the date the contract of sale was signed, the contract for the sale of the property did not provide that it would be voided or voidable if the representation by the sellers concerning ownership was either intentionally or inadvertently false. In any event, not only did the Defendants have the ability to convey the property on the date of closing, they also had ownership when the contract was signed.

The requirement of the "tender of performance," referred to above, on behalf of the purchasers is excused only where the title defect is not curable and the tendering of performance would be an "idle and useless ceremony" (see, ***Ilemar Corp. v. Krochmal***, supra; ***Anderson v. Meador***, 56 A.D.3d 1030, 869 N.Y.S.2d 233). While the Plaintiffs could have avoided the need to have tendered performance if the Defendants lacked full ownership of the real property on the date of closing, that is not the fact situation herein. In fact, the documentary evidence submitted by the Defendants establishes that they had full ownership interest of the property both on the date that the contract was signed and on the time of the essence date.

Under the facts of this case, the Plaintiffs failed to establish (1) that the sellers' representation as to ownership was false, (2) that if the representation of ownership was in error on the date made, (3) that such misrepresentation voided the contract and (4) that there were any defects in insurable title that were incurable and were not cured on the date established to convey title (see, ***91 New York Jurisprudence 2d, Real Property Sales and Exchanges,*** § 145).

The 2008 contract of sale signed by the Plaintiffs and Defendants did not state that the Defendants must provide marketable title and, instead, it provided that the Defendants must deliver insurable title. There is a difference between insurable title and marketable title (***Voorheesville Rod and Gun Club, Inc. v. E.W. Tompkins Co. Inc.***, 82 N.Y.2d 564, 606 N.Y.S.2d 132, 626 N.E.2d 917; ***Laba v. Carey***, 29 N.Y.2d 302, 327

N.Y.S.2d 613, 277 N.E.2d 641). Marketable title is title that is free from encumbrances and any doubt as to its validity and it is title that a reasonably intelligent person, who is well informed of the facts and the legal implications of those facts, would be willing to accept from the sellers. Insurable title is title that a reputable title insurance company is willing to insure.

The Defendants in these papers have shown that they were able to tender insurable title on the date set for the closing. Although the title that they conveyed was not required to have been marketable title, they also were able to convey marketable title, as that term has been defined by the cases.

The Plaintiffs also allege that substantial portions of the subject premises were out of the Defendants' possession as a result of fencing that was located on three sides of the property and that this also justifies their refusal to close title.

It does not appear that the subject of the fences were raised as a reason to cancel the contract of sale in the letter dated October 17, 2008 sent from the attorney for the Plaintiffs to the attorney for the Defendants. However, in any event, the fence did not prevent the Defendants from tendering insurable title to the Plaintiffs. The title report indicates that the exception concerning the fencing was omitted on October 16, 2008 (Defendants Exhibit "G", motion sequence # 003).

The Parties are required to lay bear their proof on a motion for summary judgment. The decision to grant or deny summary judgment is based on the facts in the entire record before the Court and not simply the pleadings (see, ***McIntyre v State,*** 142 AD2d 856, 530 NYS2d 898). Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of a triable issue of fact(see, ***Alvarez v Prospect Hospital,*** 68 NY2d 320, 508 NYS2d 923; ***Bennett v Knipfing,*** 262 AD2d 260, 692 NYS2d 403). If material facts are in dispute or if different inferences may reasonably be drawn from the facts that create a triable issue, the motion will be denied (see, ***Gusek v Compass Transp. Corp.,*** 266 AD2d 923, 697 NYS2d 886; ***McShane v Foster,*** 235 AD2d 462, 652 NYS2d 1004; ***Morris v Lenox Hill Hosp.,*** 232 AD2d 184, 647 NYS2d 753, *aff'd* 90 NY2d 953, 665 NYS2d 399). However, surmise and speculation cannot defeat a motion for summary judgment (see, ***Tom Jones Realty Corp. v. Frick***, 144 A.D.2d 451, 533 N.Y.S.2d 995, appeal dismissed 74 N.Y.2d 715, 541 N.E.2d 430, 543 N.Y.S.2d 401). The Plaintiffs objections to marketability of title, after a review of the facts, consist of conjecture and speculation and are not supported by the evidence in the record (see, ***Singer v. Neri***, 31 A.D.3d 738, 820 N.Y.S.2d 96).

According to the affidavit of William J. Fleming, Esq, the fences on the property were all constructed by the Defendants after they purchased the realty in 2005, and therefore, the prescriptive period for adverse possession had not run. No evidence has been submitted to dispute this. It was not alleged that the Plaintiffs provided a survey of the property to the title company that was not current, and therefore, the title company had the relevant facts before it prior to omitting the exception. The Martins, in their successful effort to remove the exception concerning the fences from the title report, submitted an affidavit executed on October 24, 2008 to the title company stating that they "constructed the pool fence in May of 2006" and "the fence along the easterly border was moved on October 16, 2008 to the property line." This affidavit stated that "(d)uring the period from May 2006 until October 16, 2008, no one cultivated that area nor made any claim of right, title or interest to the area between the fence and the easterly property line." (see Exhibit "H" attached to affidavit or William Fleming, Esq. on prior motions) On November 4, 2008, the title objections addressed and directed to the fencing on the property contained in the title report were omitted

by the company Absolute Abstract (Defendants Exhibit "F", motion sequence # 003).

The treatise ***New York Jurisprudence 2d*** states:

> Where the seller's action with respect to the property that is the subject of a purchase agreement does not render the seller unable to perform the contract or establish an incurable defect in the title, the prospective purchaser, who does not tender performance or demand good title, is not entitled to rescind and recover the down payment, but rather commits an anticipatory breach by making an advance rejection of the title and demand for return of the down payment. (***91 New York Jurisprudence 2d, Real Property Sales and Exchanges*** § 186).

The Plaintiffs have been given ample opportunity to present any evidence challenging the affidavits and other evidence submitted by the Defendants concerning the fence issue, but the Court has received no documentation supporting the allegation of the Plaintiffs that the fences on the property were a cloud on the title.

Since the sellers established their prima facie entitlement to judgment as a matter of law by submitting documentary evidence showing that they were ready, willing, and able to perform on the day set for the closing and that the purchasers failed to appear at the closing and accept title (see, ***Pinhas v. Comperchio***, 50 A.D.3d 1117, 857 N.Y.S.2d 616; ***Engelhardt v. McGinnis***, 2 A.D.3d 572, 769 N.Y.S.2d 297) and the purchasers did not raise a triable issue of fact(see, ***Cohen v. Kranz***, 12 N.Y.2d 242, 238 N.Y.S.2d 928, 189 N.E.2d 473; ***Hegner v. Reed***, 2 A.D.3d 683, 770 N.Y.S.2d 87; ***R.C.P.S. Assoc. v. Karam Devs.***, 258 A.D.2d 510, 685 N.Y.S.2d 261), this Court granted the motion of the Defendants for summary judgment and denied the motion of the Plaintiffs.

"It has been well settled in this State that a vendee who defaults on a real estate contact without lawful excuse, cannot recover the down payment." (***Maxton Builders v. Lo Galbo***, 68 N.Y.2d 373, 378, 509 N.Y.S. 2d 507, 502 N.E.2d 184; see generally, ***Di Blanda v. ADC Pinebrook, PC*** 44 AD3d 702, 843 N.Y.S.2d 429) Pursuant to the terms of the contract of sale, the sellers are entitled to the amount of the down payment as liquidated damages.

Dated: 10-9-09

SANDRA L. SGROI, J. S. C.