

Langione v Podesta

2010 NY Slip Op 31044(U)

April 29, 2010

Sup Ct, NY County

Docket Number: 111299/2009

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

SIMONETTA LANGIONE,

Plaintiff,

Index No.: 111299/2009

Motion Date: 03/09/10

- v -

JOHN PODESTA,

Defendant.

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment directing specific performance.

FILED

APR 30 2010

NEW YORK
COUNTY CLERK'S OFFICE

Order to Show Cause - Affidavits - Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers,

On May 18, 2009, plaintiff and defendant entered into a contract of sale in which plaintiff agreed to purchase condominium unit 7C ("Unit") at 26 East 63rd Street, New York, New York ("Condominium") from the defendant for \$1,131,000.00 (the "Contract"). Both defendant and plaintiff were represented by legal counsel at the time they entered into the Contract. Plaintiff tendered \$113,100.00 as the Down Payment.

There is no dispute that pursuant to Paragraph 8 of the Contract, plaintiff timely submitted to the Condominium's Board of Directors (the "Board") the application regarding the Condominium's right of first refusal, which right the Board

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

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

promptly waived.

The Contract provided for the closing to be held on July 31, 2009. Plaintiff's counsel affirms that he made several unsuccessful attempts to schedule the closing for that date. According to plaintiff's counsel on or about August 31, 2009, defendant's attorney called and stated that defendant was unwilling to close because his bills would not be covered by the purchase price and that he would close only if plaintiff agreed to increase the purchase price by \$300,000. Plaintiff refused defendant's demand.

By letter dated September 3, 2009, defendant, through his attorney, advised plaintiff's counsel that defendant "is unable to close ... at this time. Accordingly, I am returning your client's down payment check in the amount of \$131,100.00. The contract of sale is hereby cancelled and null and void."

Plaintiff, by her attorney, responded that she rejected the cancelation and upon defendant's refusal to proceed to close, "holds [defendant] in wilful breach and default under the contract." She advised that she "is ready, and has been, ready, willing and able to close on the contract" and "intends to pursue all available remedies including but not limited to the filing for a lis pendens, bringing an action for specific performance and for damages."

[3]

After defendant failed to respond, plaintiff commenced the action at bar seeking specific performance, and alternatively, money damages. Plaintiff alleges that defendant refused to perform his obligations and wrongfully returned plaintiff's down payment.

Plaintiff now moves for summary judgment dismissing the affirmative defenses asserted by defendant and for an order granting specific performance as sought in her Complaint.

In opposing the motion, defendant, who now appears pro se, raises no issue of fact or law with respect to certain affirmative defenses, which are that the complaint fails to state a cause of action, the court lacks personal jurisdiction over him, the defendant has unclean hands or made false representations or impossibility of performance related to the Certificate of Occupancy. Therefore, the court shall grant plaintiff's motion and shall dismiss the first, second, third, fifth and sixth affirmative defenses of the Answer.

As his fourth affirmative defense, defendant claims "Defendant was entitled to cancel the contract of sale pursuant to paragraph 18(d); rider paragraph C and other terms of the contract of sale as Defendant was unable to convey title and is not required to expend any sums or take any actions to cure any defect, or objection. Defendant's sole obligation was to return the down payment deposit." In opposing the motion, defendant

* 4]

contends that it is impossible for him to convey the Unit at this time because

I do not have the necessary financial resources to execute the closing. The current sale price of my apartment is \$1,133,000.00. Between money owed on the mortgage, the home equity line of credit, closing costs, lawyers fees, arrearage in maintenance and real estate broker fees, I would have deficiency at closing of over \$100,000. At this point I do not even have \$10,000, let alone \$100,000. I have sold many of my and my family's personal possessions in the past six months just to cover food and living expenses for my wife and twin three year old children.

Both the mortgage and the home equity line of credit existed at the time the Contract was executed, and I already had been unemployed...

Paragraph 18(d) of the Contract provides, in pertinent part, as follows:

Notwithstanding any other provisions of this contract, express or implied, or any contrary rule of law or custom, if seller shall be unable to convey the Unit in accordance with this Contract (*provided that Seller shall release, discharge or otherwise cure at or prior to Closing any matter created by Seller after the date hereof and any existing mortgage, unless this sale is subject to it*) and if Purchaser elects not to complete this transaction without abatement of the Purchase Price, the sole obligation and liability of the Seller shall be to refund the Downpayment to Purchaser, together with the reasonable cost of the examination of title to, and environmental violation searches in respect of, the Unit, and upon the making of such refund and payment, this Contract shall be deemed cancelled and of no further force or effect and neither party shall have any further rights, obligations or liabilities to, the other by reason of this Contract. However, nothing contained in this subpara. 18(d) shall be construed to relieve Seller from liability due to a willful default. (Italics supplied.)

The Contract Rider, at paragraph C, provides, as follows:

Pursuant to paragraph 18 of the contract, in no event shall Seller be required to expend any money or commence any action in

order to cure any purported defect or objection or to deliver title to the premises to Purchaser pursuant hereto.

Defendant argues that as his financial circumstances require his expenditure of money in order to close, the foregoing provisions limit his liability to the return of the down payment and reimbursement of plaintiff's expenditures for title and departmental searches. Plaintiff counters that defendant's financial difficulties are not examples of a defect or objection or inability to convey the Unit as contemplated or intended by the parties that provide a basis for limiting liability under paragraph C of the Contract Rider. Plaintiff argues that defendant's refusal constitutes a wilful default, which may not be relieved under paragraph 18(d) of the Contract.

A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. Greenfield v. Philles Records, Inc., 98 NY2d 562 (2002). The law is settled that parties to a contract for the sale of real property may agree to restrict liability consequent to a breach, provided the parties act in good faith and the default is not wilful or deliberate. Mancini-Ciolo, Inc. v. Scaramellino, 118 AD2d 761 (2d Dept. 1986). Courts have also held that the event causing the inability to convey title must be "beyond the control of the parties". Mokar Property Corp. v. Hall, 6 AD2d 536, 539 (1st Dept. 1958).

The Court is unable to determine whether defendant's

inability to close was sufficiently outside his control to allow enforcement of the damage limitation provisions of the Contract. Neither party appends documents that show the dates or amounts of the existing mortgage and home equity credit liens that defendant purports were present at the time the parties executed the Contract. Without such records, there remains an issue of fact whether the proceeds of monies payable at the closing under paragraph 18(b) of the Contract were insufficient to cover such liens, thus relieving defendant of any liability beyond the return of the down payment and reimbursement to plaintiff of her title search related charges.

For the foregoing reasons, it is

ORDERED that plaintiff's motion for summary judgment is GRANTED only to the extent that the first, second, third, fifth and sixth affirmative defenses of the Answer are DISMISSED, but the motion is otherwise DENIED, and it is further

ORDERED that the parties shall appear at 111 Centre Street, Room 1254, New York, New York for a preliminary conference on May 18, 2010, 9:30 AM.

This constitutes the decision and order of this Court.

Dated: April 29, 2010

ENTER:

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Debra A. James
DEBRA A. JAMES

J.S.C.