

Del Pozo v Impressive Homes

2010 NY Slip Op 31219(U)

May 4, 2010

Supreme Court, Queens County

Docket Number: 5345/04

Judge: Orin R. Kitzes

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**PART 17
HON. ORIN R. KITZES**

-----X
GERMAN DEL POZO,

Plaintiffs,

-against-

**Index No. 5345/04
Motion Date: 4/28/10
Motion No. 23**

**IMPRESSIVE HOMES, CORONA GARDENS, INC.,
KFIR GROUP LLC, CAMBRIDGE FUNDING
GROUP LLC, AND REMARK DEVELOPMENT
CORP., MERCI ASTUDILLO, BOLIVAR ASTUDILLO,
BANK OF AMERICA, N.A. and NATIONAL CITY
CORPORATION, a/k/a NATIONAL CITY BANK,
Defendants.**

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The following papers numbered 1 to 9 read on this motion by defendants **CAMBRIDGE FUNDING GROUP LLC** (“Cambridge”) and **REMARK DEVELOPMENT CORP.** (“Remark”) (collectively, “defendants”) for an Order pursuant to CPLR §3212 for summary judgment in their favor and dismissing the complaint, as against them.

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Upon the foregoing papers it is ordered that this motion by defendants for an Order pursuant to CPLR §3212 for summary judgment in their favor and dismissing the complaint, as against them, is granted for the following reasons:

Based on the second amended complaint and the undisputed evidence, this action involves plaintiff, as the prospective purchaser, seeking specific performance of a contract, dated, June 7, 2002, for the purchase of a three-family house to be built upon real property located at 35-15 101st Street, Corona, New York, for alleged breach of contract. Plaintiff and defendant Impressive Homes entered into the contract of sale, whereby Impressive Homes agreed to sell the property to plaintiff for the purchase price of \$610,000 and plaintiffs made a down payment of \$10,000.00. The contract also provided that it was contingent on the buyers obtaining a mortgage of \$579,500.00 within 30 days of the contract, and a closing date of June 18, 2002 was provided in the contract. Plaintiff claims that the closing did not take place on that or any other date and Impressive Homes never sent any time of the essence notice to the plaintiff, demanding closing title with an unequivocal date to close title. Subsequently, on February 2, 2004,

Impressive Homes, through its attorney sent a letter together with a check in the amount of \$10,000.00 to the plaintiff's attorney, thereby canceling the contract.

Thereafter, plaintiff commenced the underlying action against Impressive seeking, among other things, specific performance of a purported Contract of Sale, and/or damages for breach of contract. On or about March 5, 2004, Plaintiff purportedly filed a Notice of Pendency against the property "known as Block 1742, Lot 49 (part of old lot 49) and also known as 35-15 101st Street, Corona, New York (the "Notice of Pendency"). However, as evidenced from the remarks in the County Clerk's Judgment Docket and Lien Book System, dated April 30, 2007, the "Notice of Pendency filed on 3/5/04" was "not entered in lien system on same date due to clerical oversight."

By Deed dated December 1, 2005, Impressive conveyed title to the Lot 49, which was identified in the metes and bounds description as 35-11 101st Street, Corona, New York, to Corona Gardens Inc. At that time, plaintiff's Notice of Pendency had not been entered in the lien system by the Queens County Clerk. By Deed dated April 27, 2006, and recorded in the Office of the City Register at CRFN 2006000338480, Corona conveyed title to Lot 49, which was identified as 35-11 101st Street, Corona, New York, to defendant KFIR Group LLC ("KFIR"). At that time, plaintiff's Notice of Pendency had "not [been] entered in [the] lien system." In connection with the same, and in order to finance certain construction on Lots 46 and 49, KFIR, as owner, made two mortgages to Cambridge, the first mortgage, in the principal sum of \$900,000.00, and the second, in the principal sum of \$600,000.00. The Cambridge Mortgages, were duly recorded in the Office of the City Register on June 15, 2006. At the time plaintiff's Notice of Pendency had not been entered and Cambridge claims it had no knowledge that one had been filed by plaintiff. A few months later, on August 3, 2006, KFIR made a mortgage to Remark, in the principal sum of \$400,000.00, which was duly recorded in the Office of the City Register on August 29, 2006. That mortgage was also secured against Lot 46 and Lot 49 and at the time Remark encumbered the property with its mortgage, plaintiff's Notice of Pendency had not been entered and Remark claims it had no knowledge that one had been filed by Plaintiff.

By deed dated December 15, 2006, KFIR conveyed the parcels it previously acquired from KFIR to Merci R. Astudillo. One parcel was sold for the purchase price of \$1,150,000.00, and the other for the purchase price of \$1,050,000.00. In or around December of 2006, KFIR repaid the Cambridge Mortgages in full. As such, on December 15, 2006, Cambridge executed two satisfactions of mortgage certifying payment in full of the Cambridge Mortgages, and further consenting to the discharge of the same of record, which were duly recorded in the Office of the City Register on or about January 17, 2007. In or around December of 2006, KFIR also paid the Remark Mortgage in full. As a result, Remark executed a satisfaction of mortgage

certifying payment in full of the Remark Mortgage, and further consenting to the discharge of the same, which was duly recorded in the Office of the City Register on or about January 17, 2007.

In December 2007, plaintiff filed a second amended complaint wherein he seeks specific performance of the contract of sale with Impressive Homes, Inc. and setting aside all subsequent conveyances and vacate all subsequent encumbrances against property Block 1742, Lot 49 (part of old lot 49).

Defendants now move for summary judgment in their favor and dismissing the complaint as against them. Plaintiff opposes this motion claiming that the notice of pendency became operative in favor of the plaintiff in the action from the time it was filed, without reference to whether the clerk performed his duty to index; and, if so, the subsequent mortgages were "destroyed". According to plaintiff, that the purchaser lacks actual knowledge of the filing of the Notice of Pendency is irrelevant since merely filing a notice of pendency, puts the world on notice of the plaintiff's potential rights in the action and warning all comers that if they then buy the realty or otherwise rely on defendant's right, they do so subject to whatever the action may establish as the plaintiff's right. Plaintiff notes that the notice of pendency was filed on March 5, 2004 and the county clerk did not index the notice of pendency until April 30, 2007. Since the defendants encumbrances were subsequent to the filing of the notice of pendency, those encumbrances will be subject to the plaintiff's right in the action. In essence, plaintiff claims the mere filing of the Notice of Pendency, despite it not being indexed, put defendants on constructive notice of the Notice of Pendency

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v. March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v. Johnson*, 147 AD2d 312 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

The facts set forth above have been shown by defendants' evidence and have also been acknowledged by plaintiff. Thus, this Court shall now consider these facts as they apply to the law concerning the causes of action and Notices of Pendency. The branch of the motion

seeking dismissal of the cause of action for specific performance is granted. Before specific performance of a contract for the sale of real property may be granted, a plaintiff must demonstrate that it was ready, willing, and able to perform its obligations under the contract to purchase, regardless of any alleged anticipatory breach by the defendants. Petrelli Assocs v Germano, 268 AD2d 513 (2d Dept. 2000.) Clearly, a plaintiff must also show that the defendant is able to perform its obligations and has no adequate remedy at law.

In the instant case, defendants are not able to give specific performance of the contract for sale of the property. Plaintiff does not deny that the Cambridge Mortgages and Remark Mortgage have been paid in full, extinguished, and discharged of record. As such, neither Cambridge, nor Remark, have any interest in the property and cannot provide plaintiff with the relief he is requesting in the Complaint, namely, fee title to the property. Furthermore, plaintiff has asserted a claim for money damages against Impressive resulting from Impressive's alleged breach of contract. Consequently, plaintiff has acknowledged that he has an adequate remedy at law, and therefore specific performance is improper. Accordingly, the branch of the motion seeking dismissal of the specific performance cause of action is granted.

The branch of the motion seeking to dismiss the cause of action for encumbering the property with knowledge of the Notice Of Pendency is granted. Plaintiff seeks an award of money damages against defendants on the grounds that they allegedly encumbered the property with "constructive" knowledge of the Notice of Pendency. Defendant has established and plaintiff concedes that, plaintiff's Notice of Pendency was not properly indexed against the property when he commenced his action, and, in fact was not indexed until April 30, 2007, more than three years after Plaintiff commenced his action. Accordingly, at the time the Property was encumbered by defendants' mortgages, there was no way for them to know that plaintiff claimed an interest in the property, and they cannot be deemed to have had any knowledge of Plaintiff's action for specific performance.

In any event, the mere filing of a notice of pendency does not create a substantive right, but rather, it merely preserves an existing right. Avila v. Arsada Corp., 34 A.D.3d 609 (2d Dep't 2006) This is so because the purpose of a lis pendens is a notice of a claim made in respect to property which is the subject of a pending suit, but it does not of itself create an encumbrance upon the property. Simon v Vanderveer, 155 N.Y. 377, 382 (1898). The purpose of a notice of pendency is to carry out the public policy that a plaintiff's action shall not be defeated by an alienation of the property during the course of the lawsuit. Mechanics Exchange Savings Bank v Chesterfield, 34 A.D.2d 111 (3rd Dept 1970). Its purpose is to afford constructive notice from the time of the filing so that any person who records a conveyance or encumbrance after that time becomes bound by all of the proceedings taken in the action. Corporation of Presiding Bishop

of Church of Jesus Christ of Latter-Day Saints v. Solow Bldg. Corp., 52 A.D.2d 533 (1st Dep't 1976.) Finally, the mere filing of a notice of pendency does not preclude a party from conveying or otherwise encumbering real property. Accordingly, to the extent plaintiff seeks to recover damages against defendants for their alleged encumbrance of the property with knowledge of the notice of pendency, such is dismissed.

The branch of the motion seeking dismissal of any fraud claim is granted. To prevail on a claim for fraud, a plaintiff has the burden to establish: (1) a representation of material fact; (2) the falsity of that representation; (3) knowledge by the party who made the representation that it was false; (4) justifiable reliance by the plaintiff; and (5) resulting injury. Lama Holding Co. v Smith Barney, 88 N.Y.2d 413 (1996.) Plaintiff admitted at his deposition that he had absolutely no communications with either Remark or Cambridge. He also admitted that he has no personal knowledge of any fraudulent scheme between Remark or Cambridge, and any of the other defendants in this action. As such, plaintiff cannot establish a representation of material fact by defendants to plaintiff, or reliance upon such representations and any cause of action against defendants sounding in fraud, is dismissed.

The branch of the motion seeking dismissal of the cause of action sounding in negligence is granted. Plaintiff claims that defendants were “negligent” in encumbering the property where they allegedly “knew” plaintiff had filed a notice of pendency. The essential elements of a negligence claim are: (1) a duty owed by defendant to plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury. Ingrassia v. Lividikos, 54 A.D.3d 721, 723(2d Dept. 2008.) The existence and scope of a tortfeasor's duty is, of course, a legal question for the courts, which “fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability” 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 N.Y.2d 280 (2001.) Plaintiff has not alleged, and cannot establish, that either Cambridge or Remark owed him an independent legal duty. Both defendants were lenders who provided construction financing to KFIR (not Plaintiff) who was the record owner of the property at the time it was encumbered. Plaintiff admits to having no communications with defendants and no dealings with them. Consequently, they owed no duty of care toward plaintiff. Finally, there is no claim that defendants acted in a negligent manner. Accordingly, the cause of action against defendants sounding in negligence is dismissed.

For the reasons set forth above, the motion by defendants Cambridge and Remark for an Order pursuant to CPLR §3212 for summary judgment in their favor and dismissing the complaint, as against them, is granted.

Dated: May 4, 2010

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ORIN R. KITZES, J.S.C.