

Bergson v Glantz

2010 NY Slip Op 31605(U)

June 23, 2010

Supreme Court, Suffolk County

Docket Number: 09-27187

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 12-3-09
ADJ. DATE 2-18-10
Mot. Seq. # 001 - MD

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ERIC J. BERGSON,	:	LEONARD J. SHORE, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	366 Veterans Memorial Highway
	:	Commack, New York 11725
- against -	:	
	:	LINDA TOGA, ESQ.
LOUISE GLANTZ and LINDA TOGA,	:	Attorney for Defendants
	:	175 Main Street
Defendants.	:	East Setauket, New York 11733
-----X		

Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 23; Replying Affidavits and supporting papers 24 - 26; Other ___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by the plaintiff for summary judgment of the complaint in his favor is denied.

The instant action arises from a real estate transaction involving the sale of real property located at 10 North Ridge Road in Setauket, New York (hereinafter the premises). Defendant Louise Glantz (hereinafter the seller) was the owner and seller of the premises, the plaintiff Eric Bergson was a prospective purchaser of the premises, and defendant Linda Toga (hereinafter Toga) was the attorney representing the seller in the real estate transaction with plaintiff. On or about June 22, 2009, Toga, on behalf of the seller, delivered an unsigned proposed contract of sale for the premises to the plaintiff at his attorney's office. The contract included one rider. Upon receipt and review of the document, the plaintiff and his counsel made numerous handwritten changes to the document, including the addition of a second rider concerning the removal of an underground fuel tank, which was annexed to the contract and expressly incorporated therein. Specifically, the rider provided that the seller would either credit the plaintiff with \$1,500 at closing, in lieu of abandoning the oil tank at the premises, or place \$1,500 in escrow to be released to the purchaser upon presentation of evidence that said tank had been abandoned.

On or about June 25, 2009, the plaintiff executed the revised contract, including both riders. On or about June 26, 2009, the executed documents were delivered to Toga, along with a down payment check in the sum of \$73,000, payable to Toga as escrow agent. The second rider to the revised contract was removed by Toga. Thereafter, the revised contract, with the exception of the second rider, was executed by the seller. Toga returned the signed document to the plaintiff's counsel and deposited the down payment check into her escrow account. Thereafter, the plaintiff demanded return of his down payment and the defendants refused.

The plaintiff commenced the instant action on July 31, 2009, seeking a judgment declaring that the documents signed by him and unilaterally modified by the defendants is a nullity, that there is no binding contract in existence between the parties with respect to the purchase of the premises, and that he is entitled to the return of his down payment. Specifically, he contends that the removal of the second rider from the revised contract constituted a rejection of the offer to purchase and created a new offer to sell upon different terms and conditions. He contends that this counter-offer was never accepted in a manner required by the General Obligations Law as there was never the required meeting of the minds for the creation of a binding contract. By separate answers the defendants refute the allegations of the complaint. The seller also asserts counterclaims against the plaintiff alleging, among other things, the existence of a binding agreement and her entitlement to retain the down payment as damages for the plaintiff's breach of such agreement. The plaintiff now moves for summary judgment in his favor.

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 (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see, Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

In support of his motion for summary judgment, the plaintiff submitted, *inter alia*, his affidavit, the pleadings, the revised contract of sale signed by the plaintiff, including the second rider, a letter from Stephanie Carollo to the plaintiff dated June 25, 2009, a letter from Toga to the plaintiff's counsel dated June 26, 2009, a letter from the plaintiff's counsel to Toga dated June 30, 2009, e-mail correspondence between the plaintiff and Stephanie Carollo dated July 10, 2009, and an email from the plaintiff's father and attorney to Toga dated July 20, 2009.

In his affidavit, the plaintiff asserts that on or about June 10, 2009, his attorneys received a proposed contract from the seller with respect to possible purchase of the subject property consisting of a form contract, a lead disclosure form, and a five-page typed rider. On or about June 26, 2009, he met with one of his attorneys and signed a modified contract document regarding the purchase of the property, which included numerous handwritten changes and a handwritten second rider. The second rider was attached to the document and incorporated before he signed. It dealt with the environmental

issue of the removal of a buried oil tank on the property. It was incorporated to insure that the seller would be responsible to either remove the underground oil tank or for the expenses related to its removal. After he signed the document, it was delivered to Toga, along with a check in the sum of \$73,000 payable to her. After receiving the revised contract, Toga removed the second rider, had the contract signed by seller, and deposited the down payment into her escrow account. The plaintiff noted that a cover letter from Toga admitted that she removed the second rider. The plaintiff asserts that the modification caused by the removal of the second rider was never agreed to in writing. He avers that he never gave his attorneys written authority to agree to any modification of the document and that he never signed to accept any counteroffers. On July 16, 2009, one of the plaintiff's attorneys called Toga to inform her that the contract did not meet the Statute of Frauds and to demand that the down payment be returned. The conversation was followed by an e-mail. Thereafter, the instant action was commenced.

As is relevant to the instant motion, the verified counterclaims asserted by the seller allege, *inter alia*, that on or about June 14, 2009, the seller and the plaintiff reached an agreement as to the price plaintiff would pay to purchase the premises. After the agreement as to price, the parties continued to negotiate, among other things, who would cover the cost of abandoning the oil tank at the premises and whether the seller would be required to provide certificates of occupancy for a number of sheds at the premises. On June 23, 2009, the plaintiff agreed to accept \$1,500 from Shea & Sanders Realtors to cover the cost of abandoning the oil tank at the premises and written confirmation of this fact was delivered to the plaintiff via a letter from Shea & Sanders. Thereafter, on June 26, 2009, the plaintiff executed four copies of the contract of sale that had been previously delivered to his attorneys' office. The executed contracts were sent to defendants along with a letter from the plaintiff's attorney, Anthony W. Mercep, and a down payment check. An undated, handwritten second rider was attached to the contract which contradicted the prior agreement regarding the abandonment of the oil tank at the premises. Immediately upon receipt, Toga called the plaintiff's counsel regarding the second rider and it was agreed that it did not accurately reflect the agreement between the plaintiff and the seller with respect to the abandonment of the oil tank. The plaintiff's attorney agreed that the second rider to the contract, which had been prepared during earlier negotiations, was mistakenly attached, and should be removed. Based on this conversation Toga removed the second rider. On June 27, 2009, two fully executed contracts were hand-delivered to the plaintiff's attorney, along with a cover letter confirming that the seller was not responsible for paying for the abandonment of the oil tank and was not responsible for providing other certificates of occupancy. On June 30, 2009, the plaintiff's counsel sent a letter to Toga requesting confirmation that the seller would be responsible for providing certificates of occupancy for all structures on the premises, except for the three sheds. This letter did not object to removal of the second rider or demand return of the down payment, but confirmed the plaintiff's acceptance of the contract. Based on this, the seller took the premises off the market. On June 30, 2009, the plaintiff's counsel asked for confirmation that the down payment was being held in escrow and ordered a title report. On such date, the plaintiff also caused an inspection for the presence of termites to be conducted at the premises. On July 1, 2009, the plaintiff caused the premises to be inspected as part of his lender's appraisal process. Thereafter, on July 10, 2009, the plaintiff's attorney called Toga about the possibility of the plaintiff backing out of contract for personal reasons. Toga was told that, if defendant seller was unwilling to accept \$25,000 in exchange for relieving plaintiff of his contractual obligations, the plaintiff would likely proceed with the purchase of the premises. On July 13, 2009, the plaintiff met with architects and contractors at the premises to plan renovations. On July 14, 2009, the

seller advised the plaintiff that she would not relieve him of the contract. On July 16, 2009, the plaintiff's father, acting as his attorney, contacted Toga and demanded a full refund of the down payment on the grounds that the purported real estate contract did not comply with the Statute of Frauds.

A letter dated June 25, 2009 from Stephanie Carollo to the plaintiff stated that such letter served as conformation that Shea & Sanders Realtors would provide the plaintiff buyer with a \$1,500 credit from their earned commissions upon the closing of title to the premises.

A letter dated June 26, 2009 from Toga to the plaintiff's counsel asserts that two fully executed copies of the contract of sale were enclosed. It asserts that the letter "shall confirm the fact that my client is not bound by paragraph 15(a) of the Contract and that my client is not responsible for paying any money or reducing the purchase price in connection with the abandonment of the oil tank." "In light of the latter, I have removed the Second Rider to the Contract that was attached to the copies of the Contract when they were delivered to me."

A letter, dated June 30, 2009, from the plaintiff's counsel, Anthony W. Mercep, to Toga states that it was in response to her cover letter dated June 26, 2009. It notes that, in the cover letter, Toga stated that her client would not be bound by paragraph 15a, and that the buyer will not agree to that. It states "[s]o as to avoid any possible misunderstanding: Your client is responsible for providing C/Os or equal for ALL structures requiring same on the premises EXCEPT the three sheds." "In the event you and your client do not understand or agree to this, we herewith demand immediate return of the down payment as we are rejecting your counteroffer and withdrawing our offer to purchase." "To acknowledge your client's agreement to be bound by Paragraph 15a except for the sheds, please sign below and return a copy of this letter to our office this date. Failing that, we shall expect immediate return of our down payment check." Toga's signature is found under the typed words "agreed to."

E-mail correspondence between Stephanie Carollo, a real estate agent, and the buyer is dated July 10, 2009. It documents Carollo asking the plaintiff why he wanted out of the contract and the plaintiff's response that it had to do with issues coming up with his girlfriend's divorce and children. It states that they will see if the defendants will "take some money and move on."

An e-mail from Howard Bergson, the plaintiff's attorney and father, to Toga, dated July 20, 2009, formally demands the return of all funds paid to her as escrow agent. It asserts that the unilateral alteration of the contract constituted a rejection and a counteroffer to sell the property on different terms, and that there is no binding contract in that this counteroffer was never accepted by the plaintiff in writing.

The evidence submitted by the plaintiff failed to make a prima facie showing of his entitlement to summary judgment in his favor as a matter of law. A contract is unenforceable where there is no meeting of the minds between the parties regarding a material element thereof (*see, Computer Assocs. Int'l, Inc. v U.S. Balloon Mfg. Co.*, 10 AD3d 699, 782 NYS2d 117 [2004]; *see also, Nesbitt v Penalver*, 40 AD3d 596, 835 NYS2d 426 [2007]). Hence, "[i]t is a fundamental principle of contract law that a valid acceptance must comply with the terms of the offer . . . and, if qualified with conditions it is equivalent to a rejection and counteroffer" (*Woodward v Tan Holding Corp.*, 32 AD3d 467, 820 NYS2d

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126 [2006]; *Roer v Cross County Med. Ctr. Corp.*, 83 AD2d 861, 861, 441 NYS2d 844 [1981]; *see also, Dodsworth v Christoffer Hannevig, Inc.*, 184 AD 539, 172 NYS 572 [1918]). Here, the plaintiff's acceptance of the contract of sale was expressly conditioned upon the plaintiff's agreement to the terms set forth in the second rider. Thus, the seller's subsequent execution of the agreement, without the second rider, constituted a counteroffer (*see, Nwauwa v Mamos*, 53 AD3d 646, 862 NYS2d 110 [2008]; *Kling Real Estate, Ltd. v DePalma*, 306 AD2d 445, 762 NYS2d 256 [2003]; *Winiarski v Duryea Assocs., LLC*, 14 AD3d 697, 789 NYS2d 510 [2d Dept 2005]; *Woodward v Tan Holding Corp.*, 32 AD3d 467, 820 NYS2d 126 [2006]).

Generally, intent to accept an offer may not be inferred from silence. However, "a party's silence will be deemed an acquiescence where he or she is under such duty to speak that his or her 'conduct, accompanied by silence, would be deceptive and beguiling' and failure to speak therefore mislead the other party" (*Russell v Raynes Assoc. P'ship*, 166 AD2d 6, 569 NYS2d 409 [1991] quoting *Brennan v National Equitable Inv. Co.*, 247 NY 486, 490 [1928] [internal citations omitted]; *see, Josephine & Anthony Corp. v Horwitz*, 58 AD2d 643, 396 NYS2d 53 [1977]; *but see, Gottlieb v Gurrieri*, 5 Misc3d 1004A, 798 NYS2d 709 [NY Sup Ct 2004]). "Such a duty may be created by a course of conduct, or, as here, by an explicit statement by the offeree which gives the offeror reason to understand that silence will constitute acceptance" (*Russell v Raynes Assoc. P'ship, supra*; *see, Daimon v Fridman*, 5 AD3d 426, 773 NYS2d 441 [2004]; *Eldor Contr. Corp. v County of Nassau*, 272 AD2d 509, 708 NYS2d 447 [2d Dept 2000]). "While it is the responsibility of the court to interpret written agreements, when a finding as to whether the acts of the parties constituted an assent is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises" (*Russell v Raynes Assoc. P'ship, supra*). Under the circumstances of this case, there exist triable issues of fact as to whether the plaintiff buyer accepted the terms of the counteroffer (*see, Nwauwa v Mamos, supra; Russell v Raynes Assoc. P'ship*, 166 AD2d 6, 569 NYS2d 409 [1991]; *compare, Woodward v Tan Holding Corp., supra; Winiarski v Duryea Assocs., LLC, supra*).

Based on the foregoing, the motion by the plaintiff for summary judgment in his favor is denied.

Dated: _____

6/23/10

 J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION