

Bullaro v Lido Dunes, LLC

2010 NY Slip Op 32153(U)

July 27, 2010

Supreme Court, Nassau County

Docket Number: 1412/10

Judge: Roy S. Mahon

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SCM

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

LEONARD BULLARO & TRACY BULLARO,

TRIAL/IAS PART 7

Plaintiff(s),

INDEX NO. 1412/10

- against -

**MOTION SEQUENCE
NO. 1 & 2**

**LIDO DUNES, LLC, MICHELLE C. SCHNEIDER
and ACKERMAN, LEVINE, CULLEN, BRICKMAN
& LIMMER, LLP AS ESCROWEES,**

**MOTION SUBMISSION
DATE: May 12, 2010**

Defendant(s).

The following papers read on this motion:

- Notice of Motion** **X**
- Notice of Cross Motion** **X**
- Affidavit in Opposition** **X**
- Reply Affidavit** **X**

Upon the foregoing papers, the motion by plaintiff for an Order for summary judgment in favor of the plaintiff and against defendants as prayed for in the complaint pursuant to CPLR 3212, upon the ground that there are no triable issues of fact and that there are no defenses to the cause of action asserted in the complaint herein thereby warranting direction of judgment in favor of the plaintiff as a matter of law together with costs and disbursements and the cross motion by the defendant for an Order under CPLR 3212 awarding the defendants summary judgment on their counterclaim, for the relief demanded therein, on the grounds that no triable issue of fact exists and the defendants are entitled to such judgment as a matter of law, are both determined as hereinafter provided:

This action involves the purchase of a home located at 7 Kensington Street, Lido Beach, New York.

The plaintiffs entered into a contract dated June 22, 2009 with the defendant Lido Dunes, LLC for the purchase of a home located at 7 Kensington Street, Lido Beach, New York. The purchase price of the home was \$995,000.00 with a down payment due on signing of the contract of \$99,500.00 with the balance due at closing. The contract set forth a closing date of July 1, 2009.

Of significance to the instant action, the contract provided in paragraph 4:

"Short Sale Contingency. Purchaser acknowledges that there are presently two (2) mortgages affecting the Premises, both of which are in default and that foreclosure actions have commenced or may be commenced prior to Closing. If Seller is unable to obtain the approval and acceptance by the holders of such mortgages of short payoffs in an aggregate amount so that the net proceeds from the sale of the Premises (the "Proceeds"), after all expenses of Seller in connection with or related to the sale (including, without limitation, all transfer taxes, real estate taxes for the period prior to Closing together with interest and penalties, if any, assessments, if any, payment under the Property Condition Disclosure Act, the cost of removing all other liens and encumbrances required to be removed by Seller, brokerage commissions, and Seller's attorneys' fees (together, "Seller's Closing Costs", if the aggregate short payoffs plus Seller's Closing Costs exceed the Purchase Price, the amount in excess of the Purchase Price is referred to as the "Excess Costs"), are in an amount sufficient to cancel the existing mortgages affecting the Premises and pay and satisfy the underlying loans, then Seller, at Seller's sole option, by written notice to Seller given within the notice period of Seller's notice, may opt to purchase the Premises in which event Purchaser at Closing shall pay the Excess Costs on behalf of and for the benefit of Seller in addition to payment of the Purchase price and all amounts required by this Contract to be paid by Purchaser.

(b) Notwithstanding anything to the contrary set forth herein, if Seller has not obtained the approval and acceptance of the holders of such existing mortgages of aggregate short payoffs in the amount discussed in subsection (a), above, on or before the date of Closing, Seller, at Seller's sole option, may extend the date of Closing by up to one hundred eighty (180) days in order to continue to negotiate with such holders of the mortgages. Provided that Seller has been unsuccessful in Seller's negotiations with such holders of the mortgages, at any time during the one hundred eighty (180) day period Seller may cancel this Contract on written notice to Purchaser in the same manner as described in subsection (a), above; provided, however, that Purchaser shall have the same option to Purchase the Premises as described in subsection (a), above."

Pursuant to said provision, the defendant Ackernan, Levine, Cullen, Brickman & Limmer, LLP (hereinafter referred to as Ackerman) on July 9, 2009 advised that the closing was being adjourned with the respective parties ultimately agreeing after correspondence set forth in the respective submissions that the closing would occur on December 28, 2009. On that date the plaintiff brought a check for the balance of the contract notwithstanding that the defendants' contention that the balance be wired. At the closing, the defendants' contend plaintiffs title closer was unable to confirm that all of the conditions for approval of the short sale had been complied with necessitating a rescheduling of the closing for two days to December 30, 2009 while the plaintiffs' contend that the defendants were unable to convey good title. The defendants contend that pursuant to paragraph 21 of the contract the defendants adjourned the closing for two days to December 30, 2009. Said paragraph provides:

**"21. Title Examination; Seller's Inability to Convey; Limitations of Liability.
(a) Purchaser shall order an examination of title in respect of the Premises from a title company licensed or authorized to issue title insurance by the New York State Insurance Department or any agent for such title company**

promptly after the execution of this contract or, if this contract is subject to the mortgage contingency set forth in paragraph 8, after a mortgage commitment has been accepted by Purchaser. Purchaser shall cause a copy of the title report and of any additions thereto to be delivered to the attorney(s) for Seller promptly after receipt thereof.

(I) If at the date of Closing Seller is unable to transfer title to Purchaser in accordance with this contract, or Purchaser has other valid grounds for refusing to close, whether by reason of liens, encumbrances or other objections to title or otherwise (herein collectively called "Defects"), other than those subject to which Purchaser is obligated to accept title hereunder or which Purchaser may have waived and other than those which Seller has herein expressly agreed to remove, remedy or discharge and if Purchaser is obligated to accept title hereunder or which Purchaser may have waived and other than those which Seller has herein expressly agreed to remove, remedy or discharge and if Purchaser shall be unwilling to waive the same and to close title without abatement of the purchase price, then, except as hereinafter set forth, Seller shall have the right, at Seller's sole election, either to take such action as Seller may deem advisable to remove, remedy, discharge or comply with such Defects or to cancel this contract; (ii) if Seller elects to take action to remove, remedy or comply with such Defects, Seller shall be entitled from time to time, upon Notice to Purchase, to adjourn the date for Closing hereunder for a period or periods not exceeding 60 days in the aggregate (but not extending beyond the date upon which Purchaser's mortgage commitment, if any, shall expire), and the date for Closing shall be adjourned to a date specified by Seller not beyond such period. If for any reason whatsoever, Seller shall not have succeeded in removing, remedying or complying with such Defects at the expiration of such adjournment(s), and if Purchaser shall still be unwilling to waive the same and to close title without abatement of the purchase price, then either party may cancel this contract by Notice to the other given within 10 days after such adjourned date; (iii) notwithstanding, the foregoing, the existing mortgage (unless this sale is subject to the same) and any matter created by Seller after the date hereof shall be released, discharged or otherwise cured by Seller at or prior to Closing.

(ii) If this contract is cancelled pursuant to its terms, other than as a result of Purchaser's default, this contract shall terminate and come to an end, and neither party shall have any further rights, obligations or liabilities against or to the other hereunder or otherwise, except that: (I) Seller shall promptly refund or cause the Escrowee to refund pursuant to paragraph 8, to reimburse Purchaser for the net cost of examination of title, including any appropriate additional charges related thereto, and the net cost, if actually paid or incurred by Purchaser, for updating the existing survey of the Premises or of a new survey, and (ii) the obligations under paragraph 27 shall survive the termination of this contract."

The plaintiffs contend that the defendants improperly adjourned the closing to December 30, 2009 based upon the plaintiffs' contention that the provisions of paragraph 21 were inapplicable to the factual situation and as such declared through counsel that the defendants were in default and sought return of the

plaintiffs' down payment. The defendants considered the plaintiffs' to be in default and have declined to return the down payment and have retained the down payment as damages pursuant to the contract.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

A review of the respective submissions and the foregoing establishes that the defendants properly applied the provisions of paragraph 21 to adjourn the closing to December 30, 2009 and that the plaintiffs were in default of the contract by failing to appear for closing on the adjourned date. As such, to the extent that the plaintiffs seek an Order for summary judgment in favor of the plaintiff and against defendants as prayed for in the complaint pursuant to CPLR 3212, upon the ground that there are no triable issues of fact and that there are no defenses to the cause of action asserted in the complaint herein thereby warranting direction of judgment in favor of the plaintiff as a matter of law together with costs and disbursements, said application is **denied**. The defendants, however, have not established in the instant submission by proof in admissible form that the defendants could have provided good title to the property in issue on December 30, 2010 and in the absence of same have not made a prima facie showing to substantiate the requested relief. As such, the defendants application for an Order under CPLR 3212 awarding the defendants summary judgment on their counterclaim, for the relief demanded therein, on the grounds that no triable issue of fact exists and the defendants are entitled to such judgment as a matter of law, is **denied**.

SO ORDERED.

DATED: 7/27/2010

..... *Ray S. Malloy*
J.S.C.

ENTERED
AUG 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE