Westwood Bldrs., Inc. v Hebrew Academy of Nassau County
2010 NY Slip Op 32358(U)
August 24, 2010
Sup Ct,, Nassau County
Docket Number: 013249/2009
Judge: Ira B. Warshawsky
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SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

WESTWOOD BUILDERS, INC.,
Plaintiff,

-against-

HEBREW ACADEMY OF NASSAU COUNTY,

Defendant.

INDEX NO.: 013249/2009
MOTION DATE: 06/07/2010
MOTION SEQUENCE: 002

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed 1
Defendant Hebrew Academy of Nassau County's Memorandum of Law in Opposition to Plaintiff's Motion for Leave to Reargue and to Renew 2
Affirmation of Erica J. Goodstein in Support of HANC's Memorandum of Law in Opposition to Plaintiff's Motion for Leave to Reargue and to Renew & Exhibits Annexed 3
Plaintiff's Reply Memorandum of Law in Further Support of its Motion to Reargue and Renew 4
Reply Affirmation of Andrew M. Fallek 5

PRELIMINARY STATEMENT

Plaintiff moves for an order pursuant to CPLR § 2221 (d) granting leave to reargue defendant's motion to dismiss and cancel the lis pendens, and also for an order pursuant to CPLR § 2221 (e) for renewal of the same motion.

BACKGROUND

This action arises from a November 16, 2005 contract of sale between Westwood Builders, Inc. ("Westwood"), as purchaser, and Hebrew Academy of Nassau County ("HANC"), as seller, of nine vacant residential parcels of land in Plainview, New York. The purchase price

was $3,200,000, with $320,000 paid on contract. The closing was adjourned on 10 occasions, with increases in the purchase price and down payment. Eventually, the down payment was expanded to $405,000, and purchaser made additional payments of $126,000, none of which were credited to the purchase price, in return for adjournments.

By agreement of March 31, 2008, Westwood authorized the release of the $405,000 escrow to seller. On or before that date, counsel for seller, acting as escrow agent, improperly withdrew from the escrow account for his own benefit. The complaint alleges that defendant was under a duty to convey the fact of defalcation to plaintiff, who would then have exercised its right to cancel the contract.

On or about June 26, 2008 the closing was adjourned to August 27, 2008, with the sale price increased by $90,000 and purchaser paying an additional $72,000 not credited to the purchase price. Closing dates were further extended by letter agreements dated August 28, 2008, September 11, 2008 and September 25, 2008, resulting in further payments by purchaser to seller, not credited to the purchase price, of $16,000, $16,000 and $22,500 respectively.

By January 12, 2009 parties had agreed to complete a closing on Lot 9, and for further provisions for the closing on Lots 1 — 8. Title to Lot 9 closed, but the others did not. Plaintiff brought this action, contending that they would have cancelled the contract, and not expended an additional $126,000 for extensions had they known of the theft of escrow funds when defendant first learned of them.

Plaintiff contends in its First Cause of Action that, had it known of the defalcation as of March 31, 2008, it would not have continued with the contract, and would have declared defendant in default. They claim entitlement to the refund of the $405,000 paid on account of the contract, with accumulated interest, as well as additional payments of $126,500 with interest and costs. The Second Cause of Action alleges breach of contract, causing damages in the amount of $405,000, plus interest, $126,000 in additional payments and an amount to be determined at trial for damages sustained for searches of title, property searches, inspections and other items.

The Third Cause of Action alleges Fraud, Fraudulent Inducement and Fraudulent Concealment, in order to induce Plaintiff to enter into a new March 31, 2008 Agreement, together with ensuing Letter Agreements. It claims that had it know of these breaches as of

March 31, 2008 they would have declared the contract in default, obtained the return of $405,000 paid into escrow, and would not have expended an additional $126,500 for further adjournments of the closing dates.

The Fourth Cause of Action alleges that even if defendant had only learned of their attorney's misconduct after March 31, 2008, they were under an obligation to inform plaintiff of the theft of money in which they had an interest, but they continued to conceal the fact from plaintiff in order to avoid plaintiff from declaring a breach of the contract. Plaintiff seeks damages of $546,500 on this Cause of Action.

The Fifth and last Cause of Action seeks to foreclose a lien, relying on the language of ¶ 12 of the Rider to Contract of Sale, which provides that "(a)ll money paid on account of this contract is hereby made a lien on the Premises and collectible out of the Premises, but such lien shall not continue after default by Purchaser under this contract".

By Decision and Order dated March 1, 2010 the Court granted the motion to dismiss and to vacate the lis pendens filed by plaintiffs. Movant claims on this motion to reargue that the Court substituted its own opinion as to what the plaintiff's president would have done had he known of the defalcation. They also seek to renew on the basis of "new facts" encapsulated in the affidavit of Robert Preston, to the effect that plaintiff was very much seeking to disengage itself from the contract; and did not adopt a litigious posture until after defendant declared them in default. Plaintiff claims that if this knowledge had been made known to the Court, the outcome of their motion would have differed.

The Court disagrees. The theft of escrow funds was not a breach of the contract between the parties. Aside from the fact that plaintiff authorized the transfer of escrow funds directly to defendant on March 31, 2008. If under some unforseen circumstances, plaintiff was entitled to the refund of its earnest money, this would be the obligation of seller to comply. They would certainly have a claim over against the escrowee, but they would be primarily responsible for the refund.

As to the "new facts", they are not new facts for the purpose of a motion to renew. Westwood's efforts to extricate themselves from the terms of the contract, and their involvement of Mohring as the "de facto" developer, was certainly known to them at the time of

their original motion. Their claim that they did not wish to burden the Court with complications with respect to their search for a purchaser of the contract is hardly a valid excuse for not raising it in the original motion. The fact is, however, that even if they had made their desire to avoid their obligations under the contract known, it would hardly cause the Court to arrive at a different conclusion as to the viability of the contract, their breach under its terms, and the lack of their entitlement to declare the contract in default because seller was unwittingly victimized by its counsel.

Motion to Reargue

A motion to reargue is based solely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the Court. (*James v. Nestor,* 120 A.D.2d 442 (1st Dept. 1986). It is left to the sound discretion of the court and may be granted upon a showing that the court overlooked relevant facts or misapplied or misapprehended the applicable law or for some other reason improperly decided the prior motion. (*Carillo v. PM Realty Group,* 16 A.D.3d 611 (2d Dept. 2005).

While plaintiff obviously believes that the action of counsel for the defendant was adequate to grant them a basis for canceling the contract, the Court does not agree. A motion to reargue is not a means by which an unsuccessful party can obtain a second opportunity to argue the same issues decided in the prior motion. (*Gellert & Rodner v. Gem Community Mgt., Inc.,* 20 A.D.3d 388 (2d Dept. 2005). The claim that the Court undertook to assess the credibility of plaintiff is simply without merit. Credibility had no bearing on the determination that defendant had no duty to notify plaintiff of the theft of the funds, because it would not have created a basis upon which plaintiff could declare a default.

The motion to reargue is denied. The Court did not overlook or misapprehend any questions of law or fact which would have resulted in a different determination.

Motion to Renew

"New facts" for the purpose of a motion to renew are facts, though in existence at the time of the original motion, were not known to the party when the original motion was made. Generally, the party seeking to raise new facts must affirmatively establish justifiable cause for not including them in the original motion. As a matter of discretion, the Court may

permit the inclusion of facts known to the movant at the time of the original motion, but not included, but only upon a showing of a reasonable excuse for its failure to include them originally. (*Surdo v. Levittown Public School District,* 41 A.D.3d 486 (2d Dept. 2007).

Plaintiff offers essentially no reason for not including its efforts to locate a purchaser of the contract in the original motion, except for a desire to avoid confusion. Whether plaintiff was anxious to conclude the transaction, or to extricate itself from the contract is not relevant to the issue before the Court. The difficulties they may have encountered in obtaining financing for the project may well have led them to wish they had not entered into the agreement of purchase. They do not alter their obligations under the agreement. They may well have been pleased to encounter some breach on the part of defendant which would entitle them to cancel and demand repayment of the down payment. The chicanery of the escrow agent was no such breach.

Plaintiff's motion to renew is denied.

This constitutes the Decision and Order of the Court.

Dated: August 24, 2010

J.S.C.

ENTERED
AUG 27 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE