Belmont Washington LP v Oliver LLC
2010 NY Slip Op 33496(U)
December 7, 2010
Supreme Court, Nassau County
Docket Number: 001638/2010
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

BELMONT WASHINGTON LP,

Plaintiff,

-against-

OLIVER LLC and IZAK SENBAHAR,

Defendants.

INDEX NO.: 001638/2010
MOTION DATE: 9/24/10
SEQUENCE NO.: 01

The following papers were read on this matter:

Motion to Declare Defendant in Default of Purchase Agreement and For Summary Judgment in Favor of Plaintiff 1
Memorandum of Law in Support of Motion for Summary Judgment 2
Affidavit of Izak Senbahar in Opposition to Motion 3
Defendants' Memorandum of Law in Opposition to Motion 4
Reply Memorandum of Law in Support of Motion 5

PRELIMINARY STATEMENT

Plaintiff Belmont Washington LP ("Belmont") contracted to sell to Defendant Oliver LLC ("Oliver") Section 421-a Certificates. Oliver's obligations under the contract were guaranteed by defendant Izak Senbahar ("Senbahar"). These Certificates are issued by New York City Department of Housing Preservation and Development ("HPD") and authorize a holder to real property tax exemption benefits. They are negotiable and can enable affordable housing developers to sell the Negotiable Certificates to developers of "market rate" housing.

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In this instance Belmont called upon Oliver to close title on the Certificates on a date certain, but Oliver did not appear. Plaintiff alleges by this motion that defendant defaulted on its obligation to take title to the Certificates, while defendants contend that plaintiffs do not allege that they were ready, willing and able to convey the Certificates free from the encumbrance of an obligation to Bank of America, and that they were in fact unable to do so. Plaintiff asserts that they appeared on the "law date", at which time they produced all necessary documentation to effectuate a closing, and that the only reason why Oliver did not appear was their inability to raise the requisite financing.

BACKGROUND

The 421-a Purchase Agreement between Belmont and Oliver (Exh. "C" to Motion) is dated December 18, 2007. It reflects the fact that Oliver intended to develop a project at 957 — 961 First Avenue, New York, NY and Belmont intended to improve property at 2261 — 2273 Wasington Avenue, Bronx, NY. The latter would constitute affordable housing as described in Section 6-08 of the Rules and Regulations of the Department of Housing Preservation and Development of the City of New York governing tax exemptions pursuant to Section 421-a of the Real Property Tax Law and Section 11-245 of the Administrative Code of the City of New York, and, as a result of developing the project in the Bronx, Belmont expects to be awarded Negotiable Certificates.

The agreement provided that the closing date would be the earlier of "(i) December 31, 2009 or (ii) fifteen (15) days after Notice to Purchaser that the Negotiable Certificates have been issued by the Department". There are also provisions for an "Extended Closing Date" and an "Outside Closing Date" of May 30, 2010. Under cover of letter dated October 27, 2009, Seiden & Schein, P.C., the escrow agent under the contract, provided AIA Form G702 which indicated that Seller's premises were approximately 90.83% completed.

By letter dated November 25, 2009 Seiden & Schein, PC advised defendants that "the 421-a Negotiable Certificates have been issued by the Department and Seller is

ready, willing and able to close". This letter notes that it was delivered by facsimile and by messenger, and scheduled closing for December 10, 2010 at 11:00 a.m., "which date is at least fifteen (15) days after the date on which this notice is given. Seller is ready, willing and able to close at a mutually agreeable earlier date upon request of Purchaser". Defendants' counsel responded by letter dated December 9, 2010, and claimed that "(a)s reflected in the enclosed UCC filing statement, the anticipated Negotiable Certificates . . . to be delivered under the Purchase Agreement are evidently encumbered, and not 'free and clear' as called for by the Purchase Agreement".

By letter dated December 15, 2009 Seiden & Schein, P.C. declared Oliver in default for failure to appear at the closing on December 10, 2009. Pursuant to § 10 (a) of the Agreement, they claimed that if the default continued for 10 days, (the "Cure Period"), time being of the essence with regard to such date, Seller will direct the Escrow Agent to release the deposit to Seller. They acknowledged receipt of the December 9, 2009 correspondence from Oliver's counsel, but rejected it as untimely and took issue with the assertions that Belmont was not ready, willing and able to close on December 10, 2009 because of the lien on the Negotiable Certificates, contending that they were only required to remove any lien at closing, not before.

A December 17, 2010 further response from purchaser's counsel again disputes that seller was ready, willing and able to close on December 10, 2010. Counsel also raises as an issue, that given the lead time which Bank of America requires, it would have been reasonable to expect Belmont to advise Oliver in advance of the closing so they could be assured that the closing would, in fact, proceed as scheduled. By letter dated December 23, 2010, Seiden & Schein, P.C. rescheduled the closing for January 8, 2009.

By correspondence dated January 5, 2010, counsel for Oliver advised that Bank of America "has not as yet responded fully to Purchaser's requests for funds to close the purchase of the certificates, . . .". They also claim that the UCC-3 previously provided is inadequate because, among other things, it does not properly identify the certificates to be

released. In addition to a "corrected" UCC-3, counsel insisted on written confirmation form New York State Housing and Finance Agency and Bank of America, N.A. that it claims no lien against the certificates, and written authorization for Oliver to file termination or release statements, in the forms annexed, with the Secretary of State and Bronx County Register. Lastly, they rejected the selection of January 8, 2010 for closing, claiming that it was "inappropriate and unreasonable under the surrounding circumstances."

By letter dated January 12, 2010 Belmont's counsel again declared Oliver in default, stating that on January 8, 2010 they appeared for the closing, and produced all required documentation, including UCC-3 amendments releasing the Certificates from all UCC-1 claims, identifying the filing numbers, a letter from the secured parties authorizing the filing of the UCC-3. Seller's attorney reiterated the willingness of the Seller to proceed and established another 10-day Cure Period.

Correspondence of the same date from Edwards, Angell, Palmer & Dodge, LLP on behalf of Bank of America included five UCC-3 Financing Statement Amendments and set as conditions acknowledgment from Seiden & Schein that they have received proceeds in the amount of $4,200,000 and that they have received a fully executed copy of the escrow letter via facsimile or electronic transmission.

In the last letter in this series of correspondences , dated January 12, 2010, Belmont's counsel essentially debunked the objections previously raised by counsel for Oliver, and claims that the January 5 correspondence was simply a delay tactic, generated by the acknowledged inability to obtain the necessary financing to complete the purchase.

DISCUSSION

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v.*

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Globe Mfg. Corp. 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

Defendants contend that plaintiff was not ready, willing and able to convey the Certificates at closing "free and clear of any and all liens and encumbrances" as required under ¶ 4 (a) of the Purchase Agreement. This contention is without merit. Despite the fact that they were not obligated to do so, Seller modified the UCC-3's to specifically identify the Certificates to which the lien modification applied. The clear language of the Agreement did not require advance notice to Purchaser that the holders of the liens had

authorized the filing of the release documents. Seller was required to produce satisfactory documentation at the closing, and not before.

Defendants' initial objection to the form of the UCC-3's, that is, that they were unsigned, fails to recognize the fact that no signature has been called for on such documents for almost a decade. The possibility of fraudulent filing is certainly enhanced by the lack of a requirement for a signature; but it is clearly moderated by the provision of correspondence from the holders of the liens that filing of the UCC-3 is authorized.

Seller has performed its obligations under the terms of the Agreement, produced proof of more than 90% completion of the Bronx project in a timely fashion, and appeared at the closing on January 8, 2010 with all the requisite documents to convey the Section 421-a Certificates free and clear from any and all liens and encumbrances. It goes without saying that purchaser experienced difficulty in obtaining financing for a "market-rate" development on First Avenue in 2009 and 2010. The general collapse of the housing market, exacerbated by the deep involvement of Bank of America in the debacle which ensued, is self-evident. Unfortunately, Agreements such as those upon which this action is brought have not historically been sensitive to situations which developed after the execution of the Agreement.

Plaintiff's motion for summary judgment against defendants Oliver LLC and Izak Senbahar, the unconditional guarantor, jointly and severally, for the retention of the $420,000 initial cash deposit, jointly and severally for liquidated damages in the amount of $1,680,000 as provided for in the Agreement, and for reasonable attorneys' fees and disbursements is granted.

Defendants raise an issue as to whether or not plaintiffs have waived their entitlement to $1,680,000. ¶ 3 (d) of the Agreement calls for Purchaser to deliver to Seller a Letter of Credit or a written Set-Aside Agreement for either 40% or 50% of the Purchase Price from proceeds of a construction loan. Oliver did not produce such a document, but plaintiff nevertheless seeks to recover 40% of $4,200,000 as liquidated

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damages.

The Purchase Agreement provides at ¶ 18 (f) that the "Agreement may not be modified, changed, or supplemented except by a written instrument signed by the party against whom enforcement is sought or by its agent duly authorized in writing". ¶ 18(g) states that "(a)ny waiver by Seller or Purchaser of any term, covenant or condition contained in this Agreement must be in writing".

The failure of plaintiff to insist on the issuance of a Letter of Credit or Set-Aside Agreement does not constitute a waiver of its entitlement in the face of such non-merger clauses. The "intent to waive a right must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act". (*Orange Steel Erectors v. Newburgh Steel Prods.*, 225 A.D.2d 1010, 1012 (1st Dept. 1996). Plaintiff did not waive its right to claim as liquidated damages 40% of the purchase price.

Pursuant to ¶ 10 (e) the Agreement, the prevailing party in any litigation , or other proceeding is "entitled to seek , claim and receive from the non-prevailing party reasonable attorneys' fees and disbursements, including court costs through all appeals, incurred by the prevailing party with respect thereto". Plaintiff is the prevailing party.

The parties are directed to Court Attorney/Referee Thomas Dana, Esq. For a hearing to determine "reasonable attorneys' fees and disbursements". Plaintiff is to file a Note of Issue within 20 days of the date of this Decision. The parties are directed to contact Mr. Dana to set a hearing date in January, 2011. Plaintiff is to file with defendant an affirmation of attorneys' fees and disbursements no later than 10 days prior to the hearing date, with a copy to Mr. Dana.

This constitutes the Decision and Order of the Court.

Dated: December 7, 2010

J.S.C.

ENTERED

DEC 15 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE