Tarlovsky v Falk

2011 NY Slip Op 30101(U)

January 14, 2011

Supreme Court, New York County

Docket Number: 100584/2009

Judge: Louis B. York

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SCANNED ON 1/19/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 100584/2009

TARLOVSKY, NIR

vs.

FALK, HELEN

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

JAN 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/14/11

LOUIS B. YORK
J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

NIR TARLOVSKY

Plaintiff,

Index No. 100584/2009

-against-

FILED

JAN 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

HELEN FALK,

Defendant.

LOUIS B. YORK, J.:

In this motion for summary judgment, Plaintiff Nir Tarlovsky ("Tarlovsky") requests relief against the Defendant for liquidated damages. Defendant Helen Falk ("Falk") cross-moves for reimbursement of the down payment on a condominium apartment. For the reasons below, the Court grants Plaintiff's motion and denies Defendants' cross-motion.

On May 14, 2007, Defendant entered into a contract ("Contract") with Plaintiff to purchase a condominium unit located at 160 Central Park South, New York, New York for $2,030,000. A provision required Defendant to provide notice to Plaintiff within five business days of July 2, 2007 to cancel the Contract if she could not obtain financing or to proceed with the purchase; if Defendant did not provide notice of cancellation, she would waive her right to cancel the Contract and receive a refund of her down payment. The Contract provided a closing date of July 23, 2007 but did not state that time was of the essence. Falk paid the $203,000 down payment, which, pursuant to the Contract terms, is being held in escrow by Plaintiff's counsel.

Defendant was unable to obtain a mortgage under the terms set forth in the Contract but did not notify Plaintiff that she intended to cancel the purchase. Despite informing Plaintiff that she "ha[d] every intention to proceed to closing," Defendant failed to close on the Contract closing date and also failed to close on an extended closing date of August 8, 2007. On October 10, 2007, Plaintiff Tarlovsky informed Defendant Falk that there would be a final closing date extension to

October 31, 2007 or, if and only if Falk paid certain costs which Tarlovsky had incurred as of November 7, 2007. The letter further stated that "TIME [WAS] OF THE ESSENCE," explaining that due to the rapidly deteriorating real estate market, Tarlovsky was highly exposed to financial losses and the down payment would only partially compensate him for the damages he had incurred due to the closing delays. Therefore, if Defendant did not close on the specified date, Plaintiff would have no choice but to retain the down payment and remarket the apartment.

On October 30, 2007, Defendant's counsel objected to the unilateral setting of an October 31, 2007 closing date with time being of the essence, but requested that Plaintiff provide "seller financing" if Defendant was unable to obtain mortgage financing by November 15, 2007. Defendant informed Plaintiff on December 22, 2007 that she was still unable to obtain a mortgage. Plaintiff informed Defendant that he was willing to provide her "seller financing" for a limited time, subject to specific conditions. Plaintiff Tarlovsky attempted to give further concessions to Defendant, including a July 30, 2008 offer to give Falk $28,000 from the $203,000 down payment.

On August 25, 2008, over a year after the contracted closing date, Plaintiff notified Defendant that he was cancelling the Contract and demanded that the down payment be remitted to him. Defendant objected to the disbursement of the down payment to Plaintiff on September 8, 2008, noting that "[Defendant] will continue to defend her rights under the Contract and waives no rights thereunder by delivery of this letter." (Correspondence from Defendant's Counsel dated September 8, 2008). Plaintiff brought this action on January 14, 2009. Defendant served an answer and counterclaims on March 20, 2009.

ANALYSIS

To prevail on summary judgment, "the burden rests with the moving party to establish its claim sufficiently to enable a court to conclude that it is entitled to judgment as a matter of law." (*see Finding Group, Inc., v. Water Chef, Inc.*, 19 Misc 3d 483, 486, 852 NYS2d 736, 739 [Sup. Ct. N.Y. Cty. 2008]). If the moving party makes a prima facie showing of entitlement to judgment, the

burden shifts to the opposing party to provide evidence of material issues of fact. (*see Ferluckaj v. Goldman Sachs & Co.*, 12 NY3d 316, 320, 880 NYS2d 869, 871 [Ct. App. 2009]). Therefore, to prevail here, Plaintiff Tarlovsky must establish a prima facie case that Defendant Falk defaulted on her real estate contract with Plaintiff without lawful excuse. (*see Friedman v. O'Brien*, 287 A.D.2d 311, 312, 731 N.Y.S.2d 164, 166 [1st Dept. 2001]).

Plaintiff Tarlovsky made out a prima facie case when he showed that Defendant Falk defaulted on the Contract. A purchaser who defaults on a real estate contract without lawful excuse cannot recover his or her down payment. (*see Uzan v. 845 UN Ltd. P'ship*, 10 AD3d 230, 236, 778 NYS2d 171, 175 [1st Dept. 2004]). If a purchaser neglects to notify a seller about a contract cancellation in accordance with a contingency provision and unsuccessfully proceeds to closing, she must relinquish the down payment to the seller (*see Diaz v. Rodriguez*, 11 AD3d 258, 782 NYS2d 448 [1st Dept. 2004]). A seller is entitled to retain the down payment if a purchaser defaults by failing to close on a real estate transaction within a reasonable time. (*see Almedia v. Glick Development Affiliates*, 171 AD2d 423, 423, 567 NYS2d 3, 4 [1st Dept. 1991]). Furthermore, where "time is of the essence," a purchaser has defaulted on a real estate contract if he fails to close on or before the designated closing date. (*see Liba Estates, Inc. v. Edryn Corp.*, 178 AD2d 152, 153, 577 NYS2d 19, 20 [1st Dept. 1991]). A party does not need to state that "time is of the essence;" she only needs to put the counterparty on notice that the counterparty is being granted a final adjournment. (*Bellamy v. Estate of Efros*, 209 AD2d 182, 182, 618 NYS2d 274, 275 [1st Dept 1994]). If a contract does not originally state that "time is of the essence," a party may unilaterally designate "time is of the essence" so long as such notice is clear, distinct and unequivocal and sets a reasonable closing date (*see Liba Estates, Inc.*, 178 AD2d at 153, 577 NYS2d at 20). When a party to a contract for the sale of real property declares that time is of the essence, each party must tender performance on that law day. (*Gray v. Wallman & Kramer*, 184 AD2d 409, 412, 585 NYS2d 46, 48 [1st Dept 1992]).

Plaintiff Tarlovsky has established a prima facie case that Defendant Falk defaulted on a real estate contract without lawful excuse. First, Defendant did not obtain financing pursuant to the Contract's terms. Second, she waived her right to cancel the Contract because she did not give notice within five business days of July 2, 2007 as the Contract required. Third, Defendant failed to close even after Plaintiff put her on notice that "time was of the essence" in his October 10, 2007 correspondence; the letter stated in all capital letters "TIME OF THE ESSENCE" and contained language including "our last extension," "final date to close," and "we simply cannot tolerate any further delays." Fourth, Defendant Falk was given more than a reasonable amount of time to close on the purchase. Plaintiff has presented evidence that Defendant received many extensions and accommodations to enable her to perform under the Contract when it became apparent that she would not be able to close on the original closing date. The final closing dates of October 31, 2007 or November 7, 2007 were both over three months after the original closing date and six months after the Contract was executed. Nevertheless, Defendant did not close on either of the dates.

Defendant, who has the burden to show evidence of material issues of fact, has not done so. First, Defendant argues that Plaintiff failed to establish that "time was of the essence" with regard to the closing dates in both the Contract and the October 10, 2007 letter. However, "where time is not made of the essence in the original contract, one party may unilaterally give subsequent notice to that effect...provided such notice is clear, distinct and unequivocal, fixes a reasonable time within which to perform and informs the other party that a failure to perform by that date will be considered a default;" no specific words are required. (*see Liba Estates, Inc.*, 178 AD2d at 153, 577 NYS2d at 20; *Bellamy*, 209 AD2d at 182, 618 NYS2d at 275). "What constitutes a reasonable time to close depends on the facts and circumstances of the particular case," such as "the nature and object of the contract, the parties' previous conduct, the presence or absence of good faith, the possibility of hardship or prejudice to either party, as well as the specific number of days provided for the performance." (*see Miller v. Almquist*, 241 AD2d 181, 185, 671 NYS2d 746, 749 [1st Dept. 1998]). Although the Contract did not specifically state as such, Plaintiff's counsel subsequently

made it clear in his correspondence that time was of the essence. The October 10, 2007 letter expressly stated that "[Plaintiff agrees] to extend the Closing Date to October 31, 2007, subject to the condition that this closing date and the Contract of Sale are now 'TIME OF THE ESSENCE.'" Although Defendant claims that the letter does not warn her that her failure to appear at closing would render her in default of the Contract because it did not use the word "default" or similar language, Plaintiff clearly notes that "if a closing does not take place on or before October 31st, we will have no choice but to exercise Mr. Tarlovsky's right to cancel the Contract of Sale, retain the full 10% deposit and remarket the apartment." The October 10, 2007 notice also contained language such as "our last extension" and "final date to close." While Defendant argues that the letter is ambiguous because it gives Falk the option on two different dates, the letter unambiguously states that Defendant would have the option to close on November 7, 2007 "if and only if all closing adjustments will be made as of October 1, 2007 to cover [Plaintiff's] additional costs."

Second, Defendant argues that Plaintiff's continued negotiations with Defendant after the closing dates stipulated in the October 10, 2007 letter waives Plaintiff's claim that Defendant defaulted on the Contract. In an action at law to recover the down payment or for damages upon breach of an agreement, it is generally held that the time for performance stipulated in the contract is of the essence unless a contrary intent appears, either from the agreement or the conduct of the parties. (*GDJS Corp. v. 917 Properties, Inc.*, 99 A.D.2d 998, 998, 473 NYS2d 453, 455 [1st Dept. 1984]). If the parties show intent that time not be of the essence by their conduct, a refusal to grant a reasonable adjournment may constitute a repudiation of the agreement. (*Id.*). Plaintiff showed intent that time not be of the essence by offering multiple concessions to and negotiating with Defendant for nearly five months after the closing dates stipulated in the October 10, 2007 letter. However, Plaintiff did not waive his claim that Defendant defaulted on the Contract because he offered Defendant a reasonable adjournment to enable her to obtain financing under the Contract terms; Plaintiff only cancelled the Contract on August 25, 2008, several months after the scheduled

closing dates in the October 10, 2007 notice and over a year after the closing date in the Contract. (*see Miller*, 241 AD2d at 185; 671 NYS2d at 749 [1st Dept. 1998] ("When a contract for sale of real property does not specify that time is of the essence, either party is entitled to a reasonable adjournment of the closing date")).

Third, Defendant contends that Plaintiff failed to tender performance because he and his attorney did not appear at closing during the specified times. This argument is unavailing. If a party declares that material obligations imposed by contract will not be performed, the other party is relieved of any duty to perform obligations similarly imposed by the contract. (*Stadtmauer v. Brel Assocs. IV, L.P.*, 270 A.D.2d 59, 60, 704 NYS2d 237, 238 [1st Dept. 2000]). While Defendant Falk did have until the end of the day to close, she informed Plaintiff prior to each scheduled date that she had not been able to obtain financing under the Contract terms and would not be able to close on the scheduled dates. (*see Gray v. Wallman & Kramer*, 224 AD2d 275, 276, 638 NYS2d 18, 19-20 [1st Dept. 1992]). Therefore, it would have been futile for Plaintiff and his attorney to show up.

Fourth, Defendant maintains that Plaintiff committed an anticipatory breach by terminating and cancelling the contract in his August 25, 2008 letter. This argument is also without merit. To establish an anticipatory breach claim, there must be an unqualified and clear refusal to perform with respect to the entire contract, which may take the form of an unequivocal statement or act." (*see Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266, 629 NYS2d 382, 384 [1st Dept. 1995]). A purchaser, however, cannot recover her down payment if she defaults on a real estate contract without lawful excuse and the seller did not initiate the breach. (*see Rivera v. Konkol*, 48 AD3d 347, 348, 851 NYS2d 537, 538 [1st Dept. 2008]). As Defendant notes, Plaintiff's August 25, 2008 letter is an unqualified and clear termination of the Contract. Nevertheless, her argument fails because the letter was in response to Defendant's defaults on the contract, her failure to close on all scheduled closing dates and her failure to obtain financing pursuant to the terms of the Contract. (*see Rivera v. Konkol*, 48 AD3d 347, 348, 851 NYS2d 537,

538 [1st Dept. 2008]). As Plaintiff established that he was ready, willing and able to close on each of the closing dates and Defendant did not demonstrate a lawful excuse for her failure to close, Plaintiff is entitled to retain the contract down payment. (*Diplomat Props., L.P. v Komar Five Assoc., LLC*, 72 AD3d 596, 600, 899 NYS2d 237, 240 [1st Dept. 2010]).

This Court has considered Defendant's remaining contentions and finds them unavailing.

Based on the above, therefore it is

ORDERED that the motion for summary judgment on the complaint herein is granted; and it is further

ORDERED that the down payment deposit be released from escrow to Plaintiff; and it is further

ORDERED that Plaintiff be awarded with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk enter judgment accordingly.

Dated: 1\14\11

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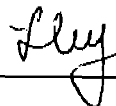

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