

**Amraly v Whalen Contr. Corp.**

2011 NY Slip Op 30136(U)

January 5, 2011

Supreme Court, Suffolk County

Docket Number: 13295/2010

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 13295/2010

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_\_  
STEFAN AMRALY,

Plaintiff,

-against-

WHALEN CONTRACTING CORP.,

Defendant.

ORIG. RETURN DATE: MAY 26, 2010  
FINAL SUBMISSION DATE: MAY 27, 2010  
MTN. SEQ. #: 001  
MOTION: MG

PLTF'S/PET'S ATTORNEY:  
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Upon the following papers numbered 1 to 6 read on this motion \_\_\_\_\_  
TO DISMISS

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Replying Affirmation 6; it is,

**ORDERED** that this motion by defendant WHALEN CONTRACTING CORP. ("defendant") for an Order:

(1) pursuant to CPLR 3211 (a) (1), dismissing the complaint based on documentary evidence;

(2) pursuant to CPLR 3211 (a) (5), dismissing the complaint due to the existence of a release;

(3) pursuant to CPLR 3211 (a) (7), dismissing the complaint because the complaint fails to set forth a cause of action upon which relief can be granted; and

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(4) pursuant to CPLR 6514 (b), if the lawsuit is dismissed, vacating the Notice of Pendency filed on or about April 7, 2010,

is hereby **GRANTED** as set forth hereinafter. The Court has received opposition hereto from plaintiff.

On or about June 10, 2009, plaintiff, as buyer, and defendant, as seller, entered into a contract of sale ("Contract"), wherein plaintiff agreed to purchase and defendant agreed to sell a newly constructed home located at 4 Powers Drive, Southampton, New York ("Premises") for the sum of \$754,000, with a \$60,000 down payment. Also on or about June 10, 2009, plaintiff and defendant entered into a lease agreement ("Lease") which permitted plaintiff to move into the Premises pending the closing of the Contract, which according to the Contract, was to take place on or before July 31, 2009. The Lease provided a three-month tenancy for the period of June through August 2009. Defendant alleges that pursuant to the Contract, there was to be no purchase money mortgage obtained by plaintiff in connection with the purchase of the Premises.

Defendant indicates that paragraph 5 of the Rider to the Contract provided that "[f]or any reason the transfer of title does not close by September 15, 2009, the [plaintiff] will vacate the premises with no further obligations by either the [plaintiff] or [defendant]." Defendant alleges that the closing did not take place by July 31, 2009, or by September 15, 2009. As such, defendant commenced a summary landlord/tenant proceeding against plaintiff, which was resolved by Stipulation of Settlement entered into on the record in open court on or about December 28, 2009 ("Stipulation"). The Stipulation provided that plaintiff would vacate the Premises by February 5, 2010, and that if he did so vacate, defendant would waive the \$35,000 due defendant from plaintiff for use and occupancy for the months of September through December 2009, and would credit plaintiff the amount of \$2,500. However, the Stipulation also indicated that if plaintiff closed on or before February 15, 2010, the deed to the Premises would be tendered to plaintiff for the purchase price of \$770,000, minus a credit to plaintiff of \$72,500 for monies already paid. Notably, the Stipulation further provided at paragraph 4 that:

In consideration of [defendant] waiving his rights to fair use and occupancy of the premises, which were contractually agreed to by [plaintiff] per the Contract of Sale between the parties, [plaintiff] agrees [to] waive any

and all rights, claims, etc. that he may have under the Lease and Contract between the parties dated June 10, 2009 in this or any other jurisdiction and or Court whether it be at the State, County or town level, including rights to monies already paid to [defendant].

Defendant informs the Court that the closing did not take place on or before February 15, 2010 pursuant to the Stipulation.

Thereafter, defendant contends that plaintiff's counsel contacted him on or about March 10, 2010, advising that plaintiff's wife had been approved for a mortgage loan and that if defendant did not amend the Contract to substitute or add her as a purchaser it would constitute bad faith and a default under the Contract. However, as discussed, the Contract contained no mortgage contingency, and plaintiff's wife was not the purchaser thereunder. Moreover, at that time, defendant alleges that plaintiff was not only in default under the Contract, but under the Stipulation as well, and therefore defendant refused to agree to the amendment. Apparently, such bad faith claims formed a basis for the instant action, which seeks specific performance of the Contract or a return of all monies paid by plaintiff to defendant, alleged to be in the amount of \$112,500.

Defendant has now filed the instant motion to dismiss plaintiff's verified complaint in its entirety based upon the terms of the Contract and the release contained in the Stipulation. In support thereof, defendant has submitted, among other things, an affidavit of Bryan Whalen, a principal of defendant; an affidavit of Melinda A. Rubin, Esq., the attorney who represented defendant in the landlord/tenant proceeding and negotiated the Stipulation of the parties; the Contract; and the Stipulation.

In opposition, plaintiff argues that the documentary evidence demonstrates that defendant was in breach of the Contract and Stipulation and failed to tender the deed at the purported time of the essence closing date pursuant to the Stipulation; that defendant's failure and refusal to add plaintiff's wife as a purchaser was intended to frustrate plaintiff's rights under the Contract and to cause a forfeiture of the sum of \$112,500 paid by plaintiff to defendant and constituted a breach of defendant's duty of fair dealing and good faith implied in every contract; that questions of fact and issues as to defendant's lack of good faith preclude dismissal of the action; and that plaintiff is entitled to discovery of information that is principally within the purview of defendant.

Regarding that branch of defendant's motion to dismiss pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). Moreover, CPLR 3211 (a) (5) provides for dismissal of an action if it may not be maintained because of, among other things, the existence of a release (see CPLR 3211 [a] [5]; *Luxury Travel Coach v 4020 Assocs.*, 241 AD2d 443 [1997]). Further, on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

In the instant motion, the Court finds that the documentary evidence submitted by defendant, to wit: the Contract and Stipulation, conclusively establish that this action may not be maintained by plaintiff. Plaintiff does not dispute the existence of the parties' Contract or Stipulation, or the release contained in the Stipulation, or the terms of the Contract which provided that if title did not pass by September 15, 2009 plaintiff would vacate the Premises with no further obligations by either plaintiff or defendant. Furthermore, it is undisputed that paragraph 3 of the Rider to the Contract prohibited any lien or *lis pendens* being placed on the Premises.

With respect to plaintiff's arguments regarding certain defects in the Premises, the Court notes that paragraph 8 of the Rider to the Contract expressly states that the Premises would be sold in "as is" condition. With respect to plaintiff's arguments that defendant negotiated in bad faith, the Court notes that the implied covenant of good faith and fair dealing inherent in every contract cannot be used to create terms that do not exist in the writing or to create independent contractual rights (see *Vanlex Stores, Inc. v BFP 300 Madison II LLC*, 66 AD3d 580 [2009]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309 [2006]). The "bad faith" alleged herein was after the Contract was executed and was alleged in connection with defendant's refusal to amend the Contract to change the purchaser thereunder. However, paragraph 26 of the Contract prevented any assignment of the Contract by plaintiff without prior written consent of defendant.

Based upon the foregoing, this motion by defendant to dismiss plaintiff's complaint in its entirety is **GRANTED**. The notice of pendency filed on or about April 7, 2010 with respect to Premises commonly known as 4 Powers Drive, Southampton, New York is hereby vacated, and the Clerk of the County of Suffolk is directed to mark upon the margin of her records the notation "vacated and cancelled" with a reference to this Order.

Finally, that branch of defendant's motion for the imposition of sanctions is **DENIED**, as it cannot be said that this action was commenced by plaintiff against defendant solely in bad faith, is completely without merit in law, or was done purely to harass or maliciously injure defendant (see 22 NYCRR § 130-1.1 [c]). Moreover, defendant failed to seek such relief in its notice of motion (see CPLR 2214).

The foregoing constitutes the decision and Order of the Court.

Dated: January 5, 2011

  
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HON. JOSEPH FARNETI  
Acting Justice Supreme Court

  X   FINAL DISPOSITION

\_\_\_\_\_ NON-FINAL DISPOSITION