

**Del Pozo v Impressive Homes, Inc.**

2011 NY Slip Op 30502(U)

March 1, 2011

Sup Ct, Queens County

Docket Number: 5342/2004

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IA Part 14

\_\_\_\_\_  
PATRICIA DEL POZO

x

Index  
Number 5342 2004

- against -

Motion  
Date October 5, 2010

IMPRESSIVE HOMES, INC., et al.  
\_\_\_\_\_

x

Motion  
Cal. Numbers 6, 7

Motion Seq. Nos. 13, 14

The following papers numbered 1 to 38 read on this motion by defendant Citibank, N.A. (Citibank) pursuant to CPLR 3211(a)(7) for summary judgment dismissing the second amended complaint asserted against it for failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (5) to dismiss the second amended complaint asserted against it, and pursuant to CPLR 3212 for summary judgment dismissing the second amended complaint asserted against it; and this motion by defendant HSBC Mortgage Corporation (USA) (HSBC) pursuant to CPLR 3212 for summary judgment dismissing the second amended complaint asserted against it; and this cross motion by defendants Merci Astudillo and Bolivar Astudillo (defendants Astudillo) pursuant to CPLR 3212 for summary judgment dismissing the second amended complaint asserted against them.

	<u>Papers Numbered</u>
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Upon the foregoing papers it is ordered that the motion numbered 6 and motion and the cross motion numbered 7 on the motion calendar for October 5, 2010 are determined together as follows:

Plaintiff, as the prospective purchaser, entered into a contract dated June 7, 2002, with defendant Impressive Homes, Inc. (Impressive), as the seller, for the purchase of a three-family house to be built upon a vacant lot. When defendant Impressive subsequently cancelled the contract due to plaintiff's failure to satisfy a mortgage contingency clause, plaintiff commenced this action naming Impressive as the sole defendant, and seeking specific performance, or alternatively, to recover damages for breach of contract, including attorneys' fees. On March 5, 2004, plaintiff filed a notice of pendency regarding the property identified in the notice of pendency as "Block 1742, Lot 49 (part of old lot 49) on the Tax Map of Queens County and is also known as 35-13 101<sup>st</sup> Street, Corona, New York."

Defendant Impressive moved to dismiss the complaint against it pursuant to CPLR 3211(a)(1). By order dated July 13, 2005, the Supreme Court decided that "the terms of the [contract's] mortgage contingency clause were unambiguous, they were for the benefit of both the seller and the purchaser, and defendant properly executed [sic] its right to cancel the contract." That order was reversed by order of the Appellate Division, Second Department (*Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]). The Appellate Division determined that factual issues remained and thus dismissal pursuant to CPLR 3211(a)(1) was unwarranted.

By order dated April 23, 2007, plaintiff was granted leave to amend to serve and file a supplemental summons and amended complaint naming Corona Gardens, Inc., Kfir Group LLC, Cambridge Funding Group, LLC and Remark Development Corp., as additional parties-defendant. Plaintiff obtained a separate order extending the notice of pendency filed on March 5, 2004 for an additional three years (*see* order dated May 21, 2007). Plaintiff's amended complaint was ultimately dismissed in favor of defendants Cambridge and Remark by order dated June 8, 2010.

By order dated March 26, 2008, the motion by defendant Impressive for, among other things, summary judgment dismissing the complaint and consolidation or joint trial of this action with another action entitled *German Del Pozo v Impressive Homes, Inc.* (Supreme Court, Queens County, Index No. 5345/2004), was denied, and plaintiff was granted leave to supplement the amended complaint to add Citibank, HSBC and the Astudillos as additional parties-defendant in this action, and additional allegations regarding such additional defendants. Although plaintiff was directed to serve and file a supplemental summons, apparently no supplemental summons was filed.

In the second amended complaint, plaintiff reasserted her claims for specific performance and monetary damages for breach of the contract of sale, and, in addition, asserted a cause of action to vacate and set aside the deed dated December 12, 2006, and recorded on January 29, 2007, into the Astudillo defendants, as well as the mortgages given

by the Astudillo defendants to defendants HSBC and Citibank with respect to the purported subject real property. Plaintiff alleges that despite the existence of the notice of pendency originally filed on March 5, 2004, defendants Astudillo took title and encumbered the property. She also claims that defendants Citibank and HSBC were aware of such notice of pendency against the disputed property at the time of the making of their respective mortgage loans, and had notice of her claims relative to the property.

Issue has been joined with respect to defendants Citibank, HSBC and Astudillo. The note of issue was filed on May 30, 2007. By so-ordered stipulation dated March 23, 2010, the court directed that summary judgment motions be made returnable no later than August 3, 2010.

The motions by defendants Citibank and HSBC are timely made. The cross motion by defendants Astudillo is untimely, having been made returnable on September 14, 2010. Nevertheless, the cross motion by defendants Astudillo is nearly identical to the motions of codefendants Citibank and HSBC for summary judgment, and consequently may be considered (*see Whitehead v City of New York*, 79 AD3d 858 [2010]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]).

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendants Citibank, HSBC and Astudillo assert that plaintiff has failed to state a cause of action against them insofar as she claims to have rights to real property identified in her complaint and in the contract of sale as 35-13 101<sup>st</sup> Street, Corona, New York. Defendants Astudillo also assert they have an ownership interest in the real property known as 35-15 101<sup>st</sup> Street, Corona, New York, and defendants Citibank and HSBC each assert they have a mortgage interest in the real property known as 35-15 101<sup>st</sup> Street, Corona, New York. Defendants Citibank, HSBC and Astudillo argue that plaintiff cannot demonstrate that their respective interests in the property now known as 35-15 101<sup>st</sup> Street are subject to her claimed contract rights, and therefore, she is not entitled to vacate or void their interests.

Plaintiff acknowledges that at the time of the making of the contract, no property was known by the street address “35-13 101<sup>st</sup> Street, Corona, New York.” She asserts, however, that she and her brother-in-law, German Del Pozo, responded to an advertisement by defendant Impressive to build and sell two proposed three-family houses on the vacant lot then designated on the Tax Map as Block 1742, Lot 49. According to plaintiff, defendant

Impressive intended to subdivide Lot 49, but had not yet completed the subdivision.<sup>1</sup> She asserts that as a consequence, she and German each entered into separate contracts of sale with defendant Impressive with the intention of becoming adjoining lot owners of the subdivision.<sup>2</sup> She asserts that because the subdivision was incomplete, the street numbers used in her contract of sale, and in Germain's contract of sale, were tentative, proposed street numbers, and the tax map designation and lot size description used in both contracts was "Block: 1742; Lot 49- PART OF OLD LOT 49- Lot Size: 25 x 100." Plaintiff therefore asserts because the contract of sale references "Lot 49," as it then existed, the interests of defendants Citibank, HSBC and Astudillo, which were acquired by them after the filing of the notice of pendency as against the entire Lot 49, are subject to her claimed rights under the contract of sale. Plaintiff argues that defendants Citibank, HSBC and Astudillo have no standing to challenge the adequacy of the description of the real property in her contract.

A contract of the sale of real property must describe the realty to be sold with such definiteness and exactness as will permit it to be identified with reasonable certainty (*see* General Obligations Law § 5-703[2]; *Maccioni v Guzman*, 145 AD2d 415 [1988]). Contrary to the argument of plaintiff, a successor-in-interest to a contracting party may assert the statute of frauds as a defense to the contract's enforcement by specific performance (*see Raoul v Olde Village Hall, Inc.*, 76 AD2d 319 [1980]). In this instance, the interests of defendants Citibank, HSBC and Astudillo appear in the chain of title proceeding from defendant Impressive, and therefore, defendants Citibank, HSBC and Astudillo may raise the issue of whether the property which is the subject of the contract of sale coincides in any way with their respective property interests.

Defendants Citibank, HSBC and Astudillo have demonstrated the version of the contract of sale relied upon by plaintiff, does not identify the subject real property with sufficient particularity to discern the property to be sold (*see Sieger v Prehay*, 16 AD3d 575 [2005]; *Cohen v Swenson*, 140 AD2d 407 [1988]; *cf. Hackal v Adler*, 234 AD2d 341 [1996]). The first page of the contract of sale, in describing the property to be sold, makes reference

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Plaintiff admits that the subdivision and apportionment of Lot 49 did not occur until 2007. She also admits the subdivision and apportionment resulted in two lots, i.e. one comprised of a portion of former Lot 49, with dimensions of approximately 29 feet by 100 feet, and designated new Lot 50, with a street address of 35-11 101<sup>st</sup> Street, Corona, New York, and another lot comprised of the remainder of former Lot 49, combined with a portion of former Lot 46, and designated new Lot 48, with a street address of 35-15 101<sup>st</sup> Street, Corona, New York.

2

Plaintiff admittedly filed a notice of pendency against the entire Lot 49 (as the lot was then designated on the Tax Map), notwithstanding the fact that she never intended to purchase the entire lot.

to “35-13 101<sup>st</sup> Street, Corona, New York,” and “Block: 1742; Lot 49- PART OF OLD LOT 49- Lot Size: 25 x 100” and a “separate page marked ‘Schedule A’, annexed hereto and made a part hereof.” The copies of the version of the contract provided to the court, however, do not include any “Schedule A,” and plaintiff has failed to demonstrate such a “Schedule A” ever existed, and if so, the nature of its terms. The main body of the version of the contract provided to the court does not otherwise include a metes and bounds description of the property to be sold, and the rider thereto simply refers to the premises as “35-13 101<sup>st</sup> Street, Corona, New York,” and states that the closing deed “shall contain such a description of the premises as shall be accepted and/or approved by the title company insuring “PURCHASERS’ lender and PURCHASERS.” Moreover, the fact that plaintiff herself has no way of identifying which portion of the property she intended to purchase lends credence to the defendants’ argument regarding the statute of frauds.<sup>3</sup>

To the extent plaintiff asserts that the contract of sale with German Del Pozo may be used as a frame of reference to identify the property intended to be sold to her, the copy of the version of the German Del Pozo contract submitted to the court, also does not include boundaries or an annexed “Schedule A,” and merely indicates the property is known as “35-15 101<sup>st</sup> Street, Corona, New York,” and “Block: 1742; Lot 49- (PART OF OLD LOT 49) - Lot Size: 25 x 100.”

Plaintiff, furthermore, has failed to demonstrate the original Lot 49 was 50 feet by 100 feet in size and hence capable of being equally divided into two lots with the dimensions 25 feet by 100 feet. Nor has plaintiff offered any evidence as to which new lot was to be numbered “35-13 101<sup>st</sup> Street” and which new lot was to be numbered “35-15 101<sup>st</sup> Street.” Although the riders to the respective contracts indicate that building plans had been filed as of the time of the making of the contracts, plaintiff has failed to present such plans to demonstrate the planned boundaries and addresses of the subdivided lots.

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The court takes note that its holding with respect to the statute of frauds is in no way inconsistent with its prior ruling on July 13, 2005, and the subsequent Appellate Division decision and order dated May 9, 2006 reversing same. In this court’s July 13, 2005 order (at this point, plaintiff’s action was asserted against Impressive only), it was determined that Impressive, “fail[ed] to address how the residential contract of sale . . . fails to comply with the Statute of Frauds.” The Appellate Division’s May 9, 2006 decision and order did not address this branch of Impressive’s motion. On the instant motions and cross motion the court finds that the respective movants have adequately addressed: (1) how the contract of sale fails to comply with the statute of frauds; and (2) how defendants’ interest is distinct from that of plaintiff’s.

Under these circumstances, plaintiff has failed to state a cause of action against defendants Citibank, HSBC and Astudillo based upon her claim that their respective property interests are subject to her alleged contract rights. The motions by defendants HSBC and Citibank for summary judgment dismissing the second amended complaint against them are granted. The cross motion by defendants Astudillo for summary judgment dismissing the second amended complaint against them is granted. In view of the foregoing, the failure by plaintiff to file a supplemental summons pursuant to the March 26, 2008 order is moot.

Dated: March 1, 2011

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J.S.C.