

Phills v First Roosevelt LLC

2011 NY Slip Op 30639(U)

March 9, 2011

Sup Ct, Queens County

Docket Number: 1811/2010

Judge: James J. Golia

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

REGINALD PHILLS,	x	Index
		Number <u>1811</u> 2010
Plaintiff (s),		Motion
-against-		Date <u>October 14,</u> 2010
FIRST ROOSEVELT LLC,		Motion
		Cal. Number <u>21</u>
Defendant(s).		Motion Seq. No. <u>2</u>
	x	

The following papers numbered 1 to 17 read on this motion by defendant pursuant to CPLR 3211(a)(1), CPLR 3211 (a)(7), CPLR 3211(a)(8) and CPLR 6514 for an order dismissing the verified complaint and cancelling the notice of pendency filed against 130-30 146th Street, Jamaica, New York; and on the cross motion by the plaintiff pursuant to CPLR 3215(a) for a default judgment and pursuant to CPLR 3212 for summary judgment on its breach of contract cause of action.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits.....	5-8
Answering Affidavits - Exhibits.....	9-11
Reply Affidavits.....	12-17

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action by a purchaser for specific performance or in the alternative for money damages for breach of a contract of sale for property known as 130-30 146th Street,

Jamaica, New York 11436 (the Property). The parties entered into a contract of sale for the Property on or about November 12, 2009, and no closing has occurred. In accordance with the agreement, the plaintiff tendered to defendant a down payment check in the amount of \$27,000. Under the terms of the contract, the commitment date was established as 60 days after the date 5 days following the receipt by the plaintiff's counsel of the fully executed contract of sale.

The contract was never closed. The plaintiff claims that the defendant informed the plaintiff's counsel on January 14, 2010, through a representative, that the contract was invalid as it did not close as scheduled. The plaintiff contends that the defendant breached the contract by failing to convey the subject premises when it repudiated the contract on January 14, 2010 and the defendant made false representations including that it was the sole owner of the premises, that the premises would be sold subject to the tenancies of the current tenants, and that the plaintiff would not be obligated to complete the purchase of the property unless the defendant delivered to the plaintiff a written statement issued by the Federal Housing Commission that sets forth that the appraised value of the property is not less than \$275,000.

The plaintiff commenced this action on January 22, 2010. Further, by order to show cause returnable on February 4, 2010, the plaintiff moved for injunctive relief. In an order dated June 29, 2010, this court denied the order to show cause. The defendant served an answer on August 23, 2010. The answer was rejected by the plaintiff claiming it was served too late.

The defendant moves to dismiss the complaint on the ground that the plaintiff failed to serve the summons and complaint and did not file an affidavit of service. This argument is without merit. The defendant was served pursuant to CPLR 311-a. The plaintiff has submitted affidavit of service that establish that a manager of the defendant, who was authorized to accept service, was personally served. This affidavit is prima facie evidence of due and proper service. The defendant argues that the service is invalid as the plaintiff served Shelving Rock LLC which has no affiliation with the defendant. However, the affidavit of service states that the defendant First Roosevelt, LLC was served not Shelving Rock LLC. The affidavit only lists Shelving Rock LLC as part of the address of service and then goes on to give a name and description of a person affiliated with the defendant who was authorized to accept service. The defendant has not submitted any affidavit of a person having knowledge of the facts to refute the claim that the manager named and described in the affidavit of service was not authorized to accept service on the defendant's behalf. Furthermore, the defendant's counsel's denial of service also does not warrant dismissal. This bare and unsubstantiated denial of receipt is insufficient to dispute the veracity and content of the affidavit, and, therefore, does not rebut the presumption of

proper service created by the affidavit of service (*see Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984 [2009]; *Simmons First Natl. Bank v Mandracchia*, 248 AD2d 375 [1998]; *Remington Investments, Inc. v Seiden*, 240 AD2d 647 [1997]). “A court need not conduct a hearing to determine the validity of the service of process where the defendant fails to raise an issue of fact regarding service” (*Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner*, 57 AD3d 732, 733 [2008]); *see Simmons First Natl. Bank*, 248 AD2d at 376; *Sando Realty Corp. v Aris*, 209 AD2d 682 [1994]). Therefore, service on the defendant is valid.

On or about August 11, 2010, the defendant alleges that it sent a letter to the plaintiff cancelling the contract if it would not waive title defects. The defendant alleges that the contract was terminated when the plaintiff did not respond by August 27, 2010. The defendant argues that once it cancelled the contract it has a complete defense to this action. This argument is without merit. The defendant’s attempted cancellation of the contract after the commencement of the action is not, as argued, a complete defense to the action. This purported cancellation does not resolve whether there were any prior breaches of the contract by the defendant which would entitle the plaintiff to damages if successful on his cause of action for breach of contract. Furthermore, the defendant did not establish that this cancellation was valid and that it was unable to cure the alleged defects. Therefore, the defendant is not entitled to dismissal of the complaint.

The defendant also moves to dismiss the cause of action for specific performance and cancel the notice of pendency. The defendant did not establish that the plaintiff did not adequately plead a cause of action for specific performance. On a motion to dismiss pursuant to CPLR 3211(a)(7), a court must accept as true all the allegations in the complaint, accord the plaintiff the benefit of every favorable possible inference, and determine only whether the facts as alleged fit into any cognizable legal theory (*see Goldman v Metro. Life Ins. Co.*, 5 NY3d 561 [2005]; *Natural Organics, Inc. v Smith*, 38 AD3d 628 [2007]). Here, the allegations in the complaint that the plaintiff entered into a contract for sale of the premises, that the defendant repudiated the contract for sale in a manner constituting an anticipatory breach, was sufficient to state a cause of action for specific performance (*see Melnicke v Brecher*, 65 AD3d 1020 [2009]; *R.I. Is. House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890 [2008]; *Kypreos v Spiridellis*, 124 AD2d 786 [1986]). The fact that the plaintiff did not plead that he was ready, willing and able to perform is not fatal to his cause of action as such a requirement was obviated by the alleged acts of the defendant which would amount to an anticipatory breach of the contract (*see Moray v DBAG, Inc.*, 305 AD2d 472 [2003]; *Ehrenpreis v Klein*, 260 AD2d 532 [1999]). In light of the determination to deny the motion to dismiss the cause of action for specific performance, the notice of pendency, which may be filed “in any action...in which the judgment demanded

would affect the title to, or the possession of, real property” is proper and should not be cancelled (CPLR 6501).

Turning next to the cross motion, the defendant argues that the plaintiff’s cross motion is untimely since its original motion was noticed to be heard on September 20, 2010 and contained a demand pursuant to CPLR 2214(b) that all answering papers and cross motions be served no later than seven days prior to the return date. The plaintiff served the cross motion on September 13, 2010 by overnight mail. While the plaintiff served his cross motion within seven days, an additional day needed to be added as the cross motion was served by overnight mail. Therefore, the cross motion is untimely. However, the plaintiff was not prejudiced by this delay of one day and not only submitted opposition papers but also a reply to plaintiff’s reply (*see Guzzetti v City of New York*, 32 AD3d 234 [2006]). In addition, the court’s motion support office sua sponte adjourned the matter rendering any untimely submission of motion papers moot. Therefore, the court will hear the cross motion.

The plaintiff has cross-moved for a default judgment. As discussed above, the plaintiff properly served the defendant. The fact that the affidavit of service was not filed is not grounds to deny a default judgment. However, due to the strong public policy favoring litigating actions on the merits, the lack of prejudice to the plaintiff, the fact that the defendant’s delay was not willful or lengthy, defendant proffered a reasonable excuse for the delay and the record indicates a meritorious defense, the plaintiff’s cross motion for a default judgment is denied (*see Feder v Eline Capital Corp.*, 80 AD3d 554 [2011]; *Kaiser v Delaney*, 255 AD2d 362 [1998]). Here, there were ongoing settlement negotiations, the parties were awaiting resolution of the order to show cause brought by the plaintiff and the plaintiff’s attorney never mentioned that he would enter a default judgment (*see Scarlett v McCarthy*, 2 AD3d 623 [2003]; *Lehrman v Lake Katonah Club*, 295 AD2d 322 [2002]). Furthermore, the defendant filed an answer prior to the plaintiff’s commencement of the cross motion for default. Additionally, there is confusion over when the answer was due, as even the plaintiff is unable to state when the defendant’s time began from and despite repeated requests, the plaintiff never provided the defendant with any affidavit of service. Therefore, a default judgment is not warranted and the plaintiff is ordered to accept the defendant’s late answer.

Finally, the plaintiff also moves for summary judgment. On a motion for summary judgment, the party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The plaintiff alleges that the defendant breached the contract. However there has been no discovery and there are multiple issues

of fact outstanding including as to whether the plaintiff suffered any damages, whether there were any breaches of the contract and, if so, which part breached the contract. Therefore, the plaintiff failed to make a prima facie showing of entitlement to summary judgment on the breach of contract cause of action.

Accordingly, the branch of the defendant's motion to dismiss the cause of action for specific performance is denied. The branch of the motion cancelling the notice of pendency is denied. The branch of the motion to dismiss the complaint in the entirety is denied.

The branch of the cross motion by the plaintiff for a default judgment is denied and the plaintiff is ordered to accept the answer served by the defendant. The branch of the cross motion by the plaintiff for summary judgment is denied.

Dated: March 9, 2011

J.S.C.