Colalillo v Evans
2011 NY Slip Op 30908(U)
March 16, 2011
Supreme Court, Nassau County
Docket Number: 24355/09
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

LOUIS COLALILLO and EILEEN COLALILO

Plaintiffs,

-against-

MOTION SEQ. NO.: 001, 002
MOTION DATE: 12/15/10

RAYMOND S. EVANS and CONSTANCE EVANS

INDEX NO.: 24355/09

Defendants.

The following papers having been read on the motion (numbered 1-6):

Notice of Motion.....1
Notice of Cross Motion.....2
Reply Affirmation.....3
Reply Affidavit.....4
Plaintiffs Memorandum of Law.....5
Reply Memorandum of Law.....6

Motion (seq. no. 1) by the attorneys for the defendants-sellers for an order pursuant to **CPLR 3212** granting summary judgment in favor of the defendants dismissing the complaint with prejudice and awarding defendants a judgment on their counterclaim declaring that plaintiffs are in default and in breach of the contract; the contract is terminated, null and void; the down payment is the exclusive property of defendants; and directing Jaspan Schlesinger LLP to release the down payment to defendants free and clear of any claims by the plaintiffs; and the cross-motion (seq. no. 2) by the attorneys for the plaintiffs-buyers for an order pursuant to **CPLR 3212** granting summary judgment on the first cause of action in plaintiffs' complaint directing the return of plaintiffs' down payment in the amount of $90,000, forthwith, and denying defendants' motion for summary judgment are hereby determined as follows.

Plaintiffs and defendants entered into a contract of sale dated March 19, 2009, wherein the defendants agreed to sell and the plaintiffs agreed to purchase condominium Unit No. 439 (the Unit) at Mill Pond Acres Condominium in the Village of Port Washington North known as 246 Pond View Drive, Port Washington, New York,

designated on the Nassau County land and tax map as Section 4, Block J, Lot 0753-U, Bldg. CA0208; Unit 00439. The contract price was $900,000. On signing the contract, plaintiffs gave a down payment of $90,000.

Following the signing of the contract and prior to the closing, the plaintiffs became aware of a number of outstanding violations issued by the Village of Port Washington North. The Order To Remedy Violation (dryer exhaust violation) dated December 26, 2008, concerned the installation of dryer exhaust ducts and is the subject of the within action. The violation stated as follows:

> Please take notice there exists a violation at the project known as Mill Pond Acres, located at One Liberty Lane in the Village of Port Washington North, Tax Map No: Section 4, Block J, Lot 753 in the County of Nassau, in that the dryer exhaust ducts have not been installed as per the approved drawings, nor in accordance with the manufacturer's installation instructions. As per Section 68-1 of the Code of the Village of Port Washington North, the existing conditions are deemed to be unsafe and a violation of the code.
>
> You are therefore directed and ordered to comply with the law and to remedy the conditions above, on or before the 29th of January, 2009 to avoid the issuance of a summons.

Plaintiffs-buyers refused to close until the defendants-sellers corrected the problem with the dryer exhaust violation. Defendants-sellers offered to give the buyers a $5,000 credit.

Plaintiffs commenced the within action to procure the return of the $90,000 down payment alleging causes of action for breach of contract; fraudulent inducement; fraud; restitution; and unjust enrichment. Defendants interposed an answer with counterclaims alleging breach of contract and a declaratory judgment that they are entitled to retain the $90,000 down payment.

Paragraph 6(c) of the contract states:

> (c) It is a condition of Purchaser's obligations to close title

hereunder that:

(i) All notes or notices of violations of law or governmental orders, ordinances or requirements affecting the Unit and noted or issued by any governmental department, agency or bureau having jurisdiction which were noted or issued on or prior to the date hereof shall have been cured by Seller.

Section 6(a)(i) of the contract provides that the seller shall deliver to the buyer at the closing the following:

> Bargain and sale deed with covenant against grantor's acts ("Deed"), complying with RPL § 339-o and containing the covenant required by LL § 13(5) conveying to Purchaser title to the Unit, together with its undivided interest in the Common Elements (as such term is defined in the Declaration and which term shall be deemed to include Seller's rights, title and interest in any limited common elements attributable to or used in connection with the Unit) appurtenant thereto, free and clear of all liens and encumbrances other than Permitted Exceptions.

SCHEDULE A Permitted Exceptions paragraph 10. [last two pages of the contract] sets forth the following exception of violations affecting only the Common Elements:

> Notes or notices of violations of law or governmental orders, ordinances or requirements (a) affecting the Unit and noted or issued subsequent to the date of this Contract by any governmental department, agency or business having jurisdiction and (b) any such notes or notices affecting only the Common Elements which were noted or issued prior to or on the date of this Contract or at any time hereafter.

It is not disputed that the dryer exhaust violation was "noted or issued . . . prior to"

the date the contract was signed. Further, there is no clause in the contract that limits the violations to only those "of record."

In support of its motion for summary judgment, the defendants-sellers argue that offering to give the plaintiffs a credit of $5,000 at the closing was sufficient to satisfy the sellers' obligation. This argument is misplaced. The plaintiffs were not under any obligation to agree to the offer of a money reduction in the purchase price, as it did not satisfy the defendants' obligation to cure the violation affecting the unit pursuant to contractual provision 6(c). *See Dub v 47 East 74th Street Corp.*, 204 AD2d 145. Real estate contracts are the best examples of arm's length's transactions. Except in cases where there is a real risk of overreaching, the courts need not relieve the parties of the consequences of their contract. If the parties are dissatisfied with this rule, the time to say so is at the bargaining table. *See Maxton Builders, Inc. v Lo Galbo*, 68 NY2d 373, 382; *Ittleson v Barnett*, 304 AD2d 526. A contract is to be interpreted so as to give effect to the intentions of the parties as expressed in the unequivocal language employed. *Breed v Insurance Co. of North America*, 46 NY2d 351, 355. Had the sellers wished to require the buyers to accept a monetary credit rather than removal of the violation, such language should have been agreed to and included in the contract. See, for example, Friedman, Milton, Contracts and Conveyances of Real Property, Sixth Ed., Vol. 1, Sect 3.6(a).

The sellers' belated assertion for the first time in the papers before this Court that they offered to remedy the violation and that the buyers stated they would not close even if the defendants rectified the condition is consequently unavailing.

In a letter, dated September 25, 2009, the defendants notified the buyers that "time is of the essence" and that the closing would occur as scheduled. Nowhere in that letter do the sellers offer to fix the violation and/or hold money in escrow until the work is completed. In a letter, dated October 9, 2009, the attorneys for the defendants argue that the dryer exhaust duct violation does not affect the Unit and the sellers have no obligation to rectify the condition. There is no mention that the sellers would take the responsibility of curing the violation. In fact, when the offer to accept a credit of $5,000 was rejected, the fallback position taken by the sellers was that fixing the dryer exhaust ducts was not their responsibility, but rather, the condominium's obligation. Unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact. *Billordo v E.P. Realty Associates*, 300 AD2d 523. On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it.

Sillman v Twentieth Century Fox Films Corp., 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. The sellers have not made an adequate *prima facie* show of entitlement to summary judgment.

In support of their cross-motion for summary judgment, the purchasers argue that the violation affected the Unit; and therefore the sellers were obligated to cure pursuant to paragraph 6(c) of the contract. The sellers argue that the violation affected only the Common Elements; and therefore they had no obligation to cure pursuant to Schedule A, paragraph 10.

Ten days before the March 19, 2009 execution of the contract, based on the bylaws (Article 3, Sect. 6), the Board of Managers issued a notice to all Mill Pond residents which at the time included defendants, (Ex. A to the Reply Affidavit of Louis Colalillo). The notice stated the following:

> IMPORTANT NOTICE TO ALL HOMEOWNERS &
> RESIDENTS OF MILL POND ACRES CONDOMINIUM
> ABOUT YOUR CLOTHES DRYERS
>
> We believe that the venting for some/all clothes dryers installed by the builder in MPA was not done properly and your dryer could be one of them.
>
> The Board of managers strongly urges residents to use their clothes dryers ONLY when they are AT HOME and FULLY AWAKE to to minimize the risks of damage to their dryers and their homes. Although we do not think it is imminent, the risk of fire is our greatest concern.
>
> The Board, in consultation with our attorney, has determined that the maintenance of the dryer vents is the responsibility of each individual owner.
>
> At the time of the signing of the contract, there were multiple violations against

Mill Pond Acres and various units within the development including the subject unit. On November 14, 2008, a violation was issued alleging the storm water management system was not performing as per the approved Erosion and Sediment Control Plan. On December 26, 2008, the violation was issued which is the subject of this litigation alleging the dryer exhaust ducts were not installed per the approved drawings, or in accordance with the manufacturer's installation instructions, deeming the existing conditions unsafe. On December 26, 2008, a violation was issued alleging that the outdoor compressors for air condition equipment were not buffered with evergreen landscaping. On December 29, 2008, a violation was issued alleging that trash storage areas at the courtyards were not constructed as per the approved drawings. On March 9, 2009, a violation was issued alleging that the roadway curbing was not constructed as per the approved drawings; and on August 3, 2009, a violation was issued alleging that multiple units were constructed without termite shields as required by approved drawings.

In further support of the cross-motion, purchasers assert that a performance based litigation was instituted by the Village against the builder that pertains only to the Common Elements violations. The Village in its enforcement action on the cited violations only sued the developer and builder based on the common area violations, and excluded the interior violations such as the violation involving the dryer exhaust ducts. The purchasers have made an adequate *prima facie* showing of entitlement to summary judgment on the cross-motion. *See Sillman v Twentieth Century-Fox Film Corp.* 3 NY2d 395, 404. The sellers have offered no documentary evidence to rebut the purchasers' showing that the dryer exhaust violation affected the subject unit, rather than "affecting only the Common Elements." *Alvarez v Prospect Hospital, supra.*

Based on the foregoing, it is

ORDERED, that defendants motion for summary judgment pursuant to **CPLR 3212** is **denied**; and it is further

ORDERED, that plaintiffs cross motion for summary judgment pursuant to **CPLR 3212** is **granted**.

Jaspan Schlesinger LLP is directed to release, forthwith, the down payment in the sum of $90,000 to plaintiffs Louis Colalillo and Eileen Colalillo, free and clear of any claims of the defendants.

This constitutes the Order of the Court.

Dated: March 16, 2011

ENTERED
APR 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

J.S.C.