

Bokhour v Kong

2011 NY Slip Op 30946(U)

April 11, 2011

Supreme Court, Queens County

Docket Number: 24565/2009

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

AL BOKHOUR, x

Plaintiff,

- against -

YUCHAN KONG and TEASUN
CHIN RI HO, INC.,

Defendants.
_____ x

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Number 24565 2009

Motion
Date February 1, 2011

Motion
Cal. Number 9

Motion Seq. No. 2

The following papers numbered 1 to 16 read on this motion by Yuchan Kong for summary judgment in his favor and cross motion by plaintiff for summary judgment in his favor pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-5
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Upon the foregoing papers it is ordered that the motion and cross motion are denied.

Plaintiff in this breach of contract action seeks, inter alia, specific performance of a contract of sale entered into on or about December 6, 2007 (“original contract and rider”), for premises known as 74-01 34th Avenue, a/k/a 33-55 74th Street, Jackson Heights, New York. The sales price was \$1,800,000.00. Pursuant to the terms of the original contract and

rider, plaintiff, as purchaser, paid \$160,000.00 as down-payment for the transaction. Pursuant to the terms of the original contract and rider, plaintiff was obligated to, among other things, pay the mortgage and carrying costs of the property, maintain the property, remove pending violations and expend reasonable costs associated with such removal efforts up to \$10,000.00.

Pursuant to the terms of the original contract and rider, the parties agreed that “if the closing does not occur through no fault of the [plaintiff -purchaser], [defendant-seller] shall reimburse [plaintiff-purchaser] for such costs.” After the parties executed the original contract and rider, the New York City School Construction Authority (SCA) commenced condemnation proceedings against the property.

Thereafter, on or about January 30, 2009, the parties executed the Revised and Restated Rider to the Original Contract of Sale. Pursuant to the terms of the Revised Rider, plaintiff-purchaser was refunded \$150,000.00 of his initial down payment. Pursuant to the terms of the Revised Rider, “any violation due either under this Revised and Restated Rider to the Contract . . . shall constitute a default. In the event of a default, under this agreement or the Contract of Sale and whether the default is monetary or non-monetary, the Seller reserves the right to rescind this agreement in its entirety.”

Pursuant to the terms of the Revised Rider, plaintiff-purchaser was obligated to remove an unsafe building violation filed under Index No.: 14702/08 in Queens County affecting the subject property; and to remove “any violations” affecting the subject property.

On or about August 25, 2009, defendant-seller notified plaintiff-purchaser about his continued default and breach of contract and failure to remove such violations, and formally requested that the plaintiff remove the recorded contract of sale from the County record. Plaintiff failed to remove the lis pendens filed under Index No.: 14702/08 for the unsafe building in accordance with the parties’ agreement(s). Defendant submits that plaintiff’s conduct is a breach of the covenant of good-faith implied in every contract of sale.

Plaintiff submits various written statements, in which he claims that he has expended approximately \$207,158.59 in costs associated with the property. Plaintiff contends that he is entitled to be reimbursed for these costs according to the terms of the January 2009 Revised Rider to the Contract. In general, the January 2009 Revised Rider entered into between the parties directed that plaintiff remove an unsafe building violation that had been issued against the premises. GMAC, the Seller’s mortgagee, had instituted a foreclosure proceeding against the Sellers because of the unsafe building violation and would not agree to resume accepting further mortgage payments until the unsafe building violation had been cured. Under the terms of the January 2009 Revised Rider, plaintiff also agreed to make

mortgage payments, property tax payments and assumed the responsibility for the maintenance of the premises and correction of building violations, as well as agreed to represent the Seller's interest in the condemnation proceedings. In exchange, the Sellers agreed to release \$150,000.00 of the buyer's previously-tendered down-payment and to reduce the purchase price of the premises to \$1,700,000.00. The January 2009 Revised Rider also directed that in the event of the condemnation of the premises, plaintiff would be entitled to any award payment by the SCA in excess of \$1,700,000.00, as well as be reimbursed for the various expenditures on behalf of the Sellers pursuant to the Contract - such as payments related to the premises, including but not limited to the mortgage, real estate taxes, repairs, renovations, correction of violations, etc. Defendant argues that any amount which plaintiff claims to have expended which is over and beyond the agreed \$10,000, is the sole responsibility of plaintiff as agreed upon in writing by the parties in the Original Contract.

Subsequent to the start of the instant lawsuit, in or about August 2010, the subject premises were officially condemned by the SCA and the SCA took title on August 6, 2010.

Defendant-seller avers that the condemnation has rendered specific performance and plaintiff's complaint moot. The Appellate Division, Second Department dismissed plaintiff's appeal of the condemnation proceeding on the ground that plaintiff did not comply with the personal service requirements of CPLR 311; and that plaintiff did not include with the papers he attempted to serve by mail a "statement of service by mail and acknowledgment of receipt" (CPLR 312-a [a]; *see Horseman Antiques, Inc. v Huch*, 50 AD3d 963 [2008]). Therefore, the proceedings were dismissed for lack of personal jurisdiction over the SCA. Defendant contends that plaintiff was unsuccessful in contesting the condemnation of the property and thus defendant cannot transfer the property to plaintiff or anyone else, for that matter, since plaintiff failed to properly and successfully contest the condemnation.

Preliminarily, it should be pointed out that the rights and remedies of a buyer and seller of real property with regard to risk of loss between the time of contract and conveyance are governed by General Obligations Law § 5-1311, entitled the Uniform Vendor and Purchaser Risk Act. This section is made part of every contract of sale unless specifically excluded. Prior to the enactment of this section, the vendee bore the risk of loss in the event of a substantial damage or a taking by condemnation subsequent to entering into a contract of sale and prior to closing (*see Relfe v Osmer*, 252 NY 320 [1906]; *Clarke v Long Island Realty Co.*, 26 AD 222 [1908]). The contract of sale was deemed to effect an equitable conversion, making the seller the holder of legal title to the property as security for the purchase price and making the buyer in equity the owner of the property (*see Samuelson Williston*, "Williston On Contract," § 933A (3rd Ed.1966) Friedman, *Contracts and Conveyances of Real Property*, § 4.31, p. 227 (2d Ed.1963)). The buyer took title subject to the risk of damage or condemnation occurring after the contract (*Id.*). The buyer could not

rescind the contract of sale by reason of substantial damage or condemnation of the premises and remained liable for the purchase price (*Id.*).

The Uniform Vendor and Purchaser Risk Act changed the principle of equitable conversion. Specifically, General Obligations Law § 5-1311 incorporates New York's version of the Uniform Vendor and Purchaser Risk Act which eliminated a purchaser's risk of loss if the property were destroyed or subject to condemnation before a closing through no fault of the purchaser (*see generally Lucenti v Cayuga Apts.*, 48 NY2d 530, 534-542 (1979)). Such Act provides that unless there is an express agreement in the contract to provide otherwise, the risk of loss will remain on the seller until the time that legal title or possession has been transferred to the purchaser (*see* General Obligations Law § 5-1311(1)(a); *Lucenti v Cayuga Apts.*, *supra*; *see also Citibank v Liebeskind*, 237 AD2d 478 [1997]). Based thereon, the branch of the motion which seeks to dismiss plaintiff's first cause of action for specific performance is granted. Relatedly, the branch of the cross motion which seeks specific performance of the contract is denied.

Under New York law, condemnation of all or a material part of property that is the subject of a contract to convey relieves the vendor of the obligation to deliver title to the property if neither legal title, nor possession has been transferred to the vendee (New York Gen.Oblig. Law § 5-1311; *see U.S. v 21.5 Acres*, 584 F. Supp. 1093 [1984]). The contract vendee is entitled to recover the money it paid on the contract, but is not entitled to specific performance, the value of the contract or consequential damages under such circumstances (*Town of Wellsville v Shutt*, 60 Misc.2d 386 (Allegheny Cty.Ct. 1969), *aff'd*, 40 AD2d 953 [1972]; *County of Westchester v P. & M. Materials Corporation*, 20 AD2d 431 [1964]).

The branch of the cross motion which seeks an equitable lien in the condemnation award based on plaintiff's claim that he expended approximately \$207,158.59 in costs associated with the property, is denied. As the Court of Appeals has long recognized, an equitable lien "is dependent upon some agreement express or implied that there shall be a lien on specific property." *Teichman*, at 520. However, the provision must deal with "some particular property either by identifying it or by so describing it that it can be identified and must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given or transferred as security for the obligation." *Id.*, quoting *James*, 256 NY2d at 303. Here, it is not clear that the contract states the parties' intention that the property be "held, given or transferred as security for [an] obligation." (*James v Alderton Dock Yards*, *supra*; *see also Datlof v Turetsky*, 111 AD2d 364, 365 [1985]). Thus, the effect of the agreement may not have been to grant plaintiff an equitable lien or assignment of any part of the condemnation award. As was said in *Williams v Ingersoll*, 89 NY 508 [1882]: 'Whatever the law may be elsewhere, it must be regarded as the settled law of this State that an agreement, either by parol or in writing, to pay

a debt out of a designated fund does not give an equitable lien upon the fund, or operate as an equitable assignment thereof.’

Similarly, it was decided in *McAvoy v Schramme*, 219 AD 604 [1927], affd., 245 NY 575 [1927], that an agreement does not constitute an equitable assignment when it does not contain a direction to pay and contains no application of funds pro tanto. This does not mean, however, the plaintiff here is without protection. A clause in the Revised and Restated Rider to the Contract of Sale dated 1/26/09 states that “as a result of the condemnation or acquisition by the SCA, the contract of sale between the parties shall remain in effect. The obligations of both parties exclusive of the purchase and sale of the property shall be performed.” This clause may be construed to mean that the award made by the City of New York in the condemnation proceeding shall not belong to the seller until the buyer has been reimbursed in the manner provided for in the contract. It might be construed to mean that the fund be held as security for the payment of the buyer’s share. The plaintiff is entitled in this proceeding to an order staying the Comptroller from paying any of the award here to the defendants, until plaintiff’s claim for reimbursement has been satisfied. If the plaintiff finds it necessary to bring an action to enforce the claim for reimbursement under the contract, such action should be brought within ninety days of service of this decision with Notice of Entry.

While plaintiff asserts that he is entitled to reimbursement according to the terms of the January 2009 Revised Rider to the Contract, defendant contends that the original contract limited recovery to \$10,000.00. A proponent of a motion for summary judgment 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 (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Romano v St. Vincent’s Medical Center of Richmond*, 178 AD2d 170 [1991]; see also, *Bensonhurst Real Estate v Ltd v Helsam Realty Co.*, 1 AD3d 302 [2003]).

Defendants’ contention that they are only liable to plaintiff for \$10,000.00 spent pursuant to the contractual terms is based upon paragraph 3 of the Original Contract and Rider. This paragraph only provides that plaintiff is entitled to expenses for the curing of non-monetary violations on the premises up to \$10,000.00. It makes no mention of other amounts advanced by plaintiff including mortgage payments, property taxes and general repairs and maintenance of the premises. This clause also does not prevail as it was revised and replaced by paragraph 6 of the 2008 Revised Rider that maintained no cap on the expenses for the removal of violations that defendants were obliged to pay. In any event, the contract is ambiguous. It is not clear whether the \$10,000.00 limit pertained solely to

“reasonable costs associated with [violations] removal efforts up to \$10,000.00”. Thus, the terms of the contract are ambiguous and raise an issue of fact (*see generally Mawardi v New York Prop. Ins. Underwriting Assn.*, 183 AD2d 756 [1992]; *Leon v Lukash*, 121 AD2d 693 [1986]). Therefore, defendant is not entitled to summary judgment dismissing the second cause of action and plaintiff is not entitled to summary judgment on his claim for damages because neither party established entitlement to judgment as a matter of law based upon the mere submission of copies of the contract and the various amendments.

Conclusion

The branch of the motion which seeks to dismiss plaintiff’s first cause of action for specific performance is granted. The branch of the motion which seeks to dismiss plaintiff’s second cause of action, to wit, his claim for damages, is denied.

The branch of the cross motion which seeks specific performance of the contract is denied. The branch of the cross motion which seeks summary judgment on the claim for contractual damages is denied.

Dated: April 11, 2011

J.S.C.