

1526 Central Ave. Assoc. v New York Mtge. Co., LLC
2011 NY Slip Op 31033(U)
April 18, 2011
Sup Ct, NY County
Docket Number: 600975/04
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

1526 CENTRAL AVENUE ASSOCIATES,
Plaintiff,

Index No.: 600975/04

Motion Date: 06/28/10

- v -

Motion Seq. No.: 02

THE NEW YORK MORTGAGE COMPANY, LLC,
Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhiblts _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

3

4, 5

FILED

Cross-Motion: Yes No

APR 21 2011

Upon the foregoing papers,

NEW YORK
COUNTY CLERK'S OFFICE

Defendant moves for summary judgment dismissing the complaint.

This is a breach of contract action. On October 22, 2002, Darryl Green (Green), plaintiff's principal, contracted with Sh'ar Yoshuv to purchase real property located at 1526 Central Avenue, Far Rockaway, New York, for the amount of \$700,000, which plaintiff intended to rent to an educational institution. The Purchase Agreement had a deadline for closing of the later of December 18, 2002, or ten days after court approval authorizing the sale of the property. On October 22, 2002, Green assigned

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

* 2]
his interest under the Purchase Agreement to plaintiff.

The closing date was extended several times, with time of the essence. On May 5, 2003, plaintiff submitted a loan application to defendant. On June 12, 2003, defendant issued a loan commitment letter (the Letter). The Letter provided a conditional approval of a loan for \$525,000, to be secured by a first mortgage on the property. The Letter indicated that it was subject to certain conditions, including but not limited to:

1. The title examination and survey show the premises are unencumbered, or that you will remove any encumbrances before closing. And that the proof be shown [sic] the property is free of municipal or other violations.
2. The approval of all legal and title details by the Bank or its Counsel.

On June 16, 2003, defendant's closing attorneys wrote to plaintiff's attorney, advising that, among other things, numerous items were needed in order to satisfy the conditions set forth in the Letter, including a survey inspection, and that there were various violations that needed to be corrected prior to closing. A copy of the survey for the property was thereafter provided to defendant's attorney and, upon review, defendant's attorney found that the survey and the certificate of occupancy were inconsistent, as the survey indicated an extra extension on the property appearing as a garage, which might be seen as an encumbrance to the property. The parties' attorneys discussed

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these matters but there was no resolution. Defendant did not fund the loan and this action was commenced.

Defendant moves for summary judgment, claiming that no issues of fact exist. Defendant denies breaching the Letter, contending that it was not required to carry out the terms of the Letter as the condition precedent was not fulfilled. It argues that there was an issue as to the certificate of occupancy and therefore the condition was not satisfied.

Plaintiff opposes the motion, claiming that defendant has yet to establish that actual violations existed as of the date of the closing. Alternatively, plaintiff argues that defendant has displayed a practice of closing transactions with violations or certificates of occupancy problems subject to post closing conditions. Plaintiff relies on the deposition testimony of defendant's closing attorney, Christopher Kulakis, to indicate that defendant has often exercised its discretion in closing mortgages where violations or certificates of occupancy problems occurred. Plaintiff also claims that defendant has closed on nine separate property transactions where there were violations or certificate of occupancy problems.

Plaintiff contends that defendant never advised its closing attorney of any determination of whether the violations or the encumbrance was a factor preventing the closing. Plaintiff states that defendant never properly processed plaintiff's file

* 4]

or closed the transaction in good faith. Plaintiff further argues that the Letter is not the final expression of the parties' agreement and that an inquiry pursuant to the parol evidence rule would be dispositive.

In reply, defendant argues that the deposition testimony was taken out of context and that transactions are "closeable" as long as issues are resolved. In this case, the issues were not resolved because the condition precedent allegedly had not been satisfied. Defendant argues that plaintiff's evidence concerning other transactions is not admissible nor relevant. Defendant disputes plaintiff's reliance on the parol evidence rule, claiming no ambiguity or incompleteness with respect to the Letter.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007) citing Winegrad v New York University Medical Center, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing the motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" People v Grasso, 50 AD3d 535, 545 (1st Dept 2008), quoting Zuckerman v City of New York, 49 NY2d 557, 562

(1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. Rotuba Extruders v Ceppos, 46 NY2d 223 (1978); Gross v Amalgamated Housing Corporation, 298 AD2d 224 (1st Dept 2002).

In support of its motion defendant has produced a copy of the Letter, evidence indicating an issue with respect to the certificate of occupancy and deposition testimony from Kulakis. Plaintiff has responded with deposition testimony from Kulakis and evidence indicating that defendant had closed loans with other borrowers with similar certificate of occupancy problems. Plaintiff contends that defendant is acting in bad faith in attempting to offer a strict interpretation of the Letter which is contradicted by the general practice of defendant in dealing with other transactions.

A condition precedent is "an act or event, other than a lapse of time which, unless the condition is excused must occur before a duty to perform a promise in the agreement arises [internal quotations marks and citations omitted]." MHR Capital v Presstek, Inc., 12 NY3d 640, 645 (2007). The court does not find any evidence that defendant was obligated to comply with the terms of the Letter as the conditions precedent was apparently not satisfied. Plaintiff does not deny that there was an encumbrance on the property or a violation. The deposition

testimony provided herein does not indicate that defendant led plaintiff to assume that their transaction would be closed.

"When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms; evidence outside the four corners of the document as to what is really intended . . . is generally inadmissible to add or vary the writing." Vision Development Group of Broward County, LLC v Chelsey Funding, LLC, 43 AD3d 373, 374 (1st Dept 2007) (internal quotation marks and citations omitted). The parol evidence rule is not applicable because there is no indication that the Letter is ambiguous or incomplete.

As for evidence of other transactions with defendant, the court finds said evidence irrelevant. There is no proof that the agreements in those transactions were similar to the Letter in this transaction. Moreover, the borrowers in the other transactions are not parties in this action. The issue here is whether or not the parties in this action properly performed the terms of this specific agreement.

The court finds that the conditions precedent in the Letter were not met and that defendant was not obligated to provide the loan to plaintiff. See Tichenor v Peoples Savings Bank of Yonkers, 282 AD2d 1053 (2d Dept 1953).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is GRANTED; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: April 18, 2011

ENTER:


DEBRA A. JAMES J.S.C.

FILED

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COUNTY CLERK'S OFFICE