

18 Fern Ave., Inc. v Kreth
2011 NY Slip Op 31500(U)
June 2, 2011
Sup Ct, Suffolk County
Docket Number: 08-8012
Judge: Arthur G. Pitts
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ORDERED that motion (006) by the defendant, Ernest Ranalli, Esq. pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint has been rendered academic by service of the amended notice of motion (007) and is denied as moot; and it is further

ORDERED that motion (007) by the defendant, Ernest Ranalli, Esq., by amended notice of motion for an order pursuant to CPLR 3212 and 3211 (a) (3), (5) and (7) granting summary judgment dismissing plaintiff's complaint is denied.

This action for breach of contract, as set forth in the amended complaint, arises out of a contract for the sale of a parcel of real property known as 18 Fern Avenue, East Islip, New York. It is claimed that on or before January 24, 2002, the defendant owners of the property, Ronald Kreth and Kathleen Kreth, entered into a written agreement with the plaintiff, 18 Fern Avenue, Inc., wherein the plaintiff agreed to purchase the property for the sum of \$280,000.00, by depositing \$50,000.00 with the seller's attorney and paying the remaining \$230,000.00 at the closing. It is asserted that the \$50,000.00 deposit paid on contract was held in escrow by the attorney for the Kreth defendants, and thereafter was to be released to the defendants pursuant to the contract of sale, which provided for the closing to be held on or about January 1, 2004.

It is claimed that on or about January 1, 2004, the closing date was adjourned on consent by the parties' attorneys. On February 24, 2004, counsel for the defendants, allegedly unilaterally, set a "time is of the essence" closing date of March 12, 2004 by letter to plaintiff's attorney. That date was adjourned on consent on March 11, 2004, without a new closing date being set. After that adjournment, it is claimed that the defendants refused and failed to set a new closing date. It is further asserted that on or about September 20, 2004, Ronald Kreth advised the plaintiff that Kathleen A. Kreth refused to close at the price set forth in the contract of sale. By letter dated November 15, 2004, the plaintiff served counsel for the defendants, by certified and regular mail, "time is of the essence" letter setting the closing for December 1, 2004 at 2:00 p.m. at the office of Siben & Siben, Bay Shore. The plaintiff further advised it was ready, willing and able to close the transaction. The time is of the essence closing was adjourned on consent to December 15, 2004. By letter dated December 13, 2004, the attorney for the defendants rejected the time of the essence letter and refused to close on the subject premises.

On January 4, 2005, the plaintiff filed a notice of pendency on the subject property. Despite the same, the Kreth defendants sold the property to the defendants Island Properties & Associates, LLC (Island Properties) and LJK, LLC (LJK) on March 13, 2007, subject to three mortgages, in the order of priority, Citibank, N.A., Robert Margolin and Long Island Savings Bank. It is asserted that at the time the property was transferred to Island Properties and LJK, Citibank, N.A. had obtained a judgment of foreclosure and the sale was scheduled.

Thereafter, Ernest Ranalli, Esq. filed a bankruptcy petition in the Eastern District of New York on April 26, 2007 on behalf of Ronald Kreth, who was allegedly not a resident of the State of New York. That action was dismissed. It is claimed that Ranalli then filed an Order to Show Cause in Supreme Court, County of Suffolk, seeking to stay the foreclosure proceeding and demanding reinstatement numbers. The Kreth defendants were represented to be the owners of the property at the time, and the plaintiff alleges that this claim was not true because the property had been conveyed to Island Properties and LJK on March 13, 2007. It is claimed that Ernest Ranalli represented the sellers and the purchasers in that transaction. Thereafter, Island Properties and LJK settled the foreclosure action by paying the mortgage in full to Citimortgage, and then purchasing an assignment of the judgment obtained against the property by Long Island Savings Bank, which judgment had been assigned to Astoria Federal Savings and Loan Association.

The plaintiff commenced a prior action under Index No. 29511/2004, on or about December 23, 2004, against Ronald and Kathleen Kreth, wherein it sought, inter alia, specific performance of the contract of sale, and money damages for said breach. It is noted that by order dated December 22, 2008 (Molia, J.), the within action has been scheduled for a joint trial with the prior action pending under Index No. 29511/2004. It is further noted that defendant Gary J. Dolce has settled with the plaintiff and is no longer in this action.

In the instant action, the first cause of action alleges a tortious interference with the sale of the property to the plaintiff because the defendants unlawfully interfered with the contract of sale for the subject premises and wrongfully induced the breach of contract. In the second cause of action, the plaintiff seeks a permanent injunction prohibiting Island Properties and LJK from transferring the subject property to Gary J. Dolce, or any other third-party, pending resolution of the plaintiff's outstanding action against Ronald and Kathleen Kreth for specific performance.

In motion (005) the defendants, Island Properties & Associates, LLC, LJK, LLC, David D. DeRosa and Leo Pessa, seek summary judgment dismissing the complaint on the bases that the Kreths sold the property to Island Properties and LJK, LLC, by deed dated March 13, 2007, as a result of the plaintiff breaching the contract with the Kreths; that Island Properties' owner, David DeRosa, and LJK's owner, Leo Pessa, did not learn of the property prior to 2006; that Island Properties and LJK sold the property, by deed dated February 4, 2008, to Gary J. Dolce after the plaintiff's notice of pendency lapsed; and that on October 28, 2009, the plaintiff's corporation was dissolved by Proclamation of the State Department of the State of New York, and, thus, it has no standing.

In motions (006) and (007), the defendant, Ernest Ranalli, Esq., seeks dismissal of the complaint as asserted against him on the bases that there are no factual issues to be determined; that the plaintiff lacks capacity to sue in that his corporation is now defunct; the plaintiff defaulted on the "time is of the essence closing" and thus breached the contract for sale of the subject property; the pleading fails to state a cause of action; that the plaintiff is estopped by collateral estoppel and res judicata from relitigating the order to show cause of *Citimortgage Inc. v Kreth* and the bankruptcy; the plaintiff did not pay any monies as required under the use and occupancy agreement and was evicted from the property in September 2005; that Ranalli was unaware of the transfer of the subject property by the Kreths to Island Properties and LJK; that Ranalli did not represent Island Properties and LJK when the subject property was then transferred by deed to Gary J. Dolce on or about February 4, 2008; that Ranalli did not make any false statements or misrepresentations to the court; there was no contractual privity between the plaintiffs and Ranalli; and that Ranalli did not intentionally, wrongfully, or tortiously interfere with the plaintiff's contract with the Kreths.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept

1979)), and must assemble, lay bare and reveal the proof in order to establish that the matters set forth in the pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]).

In support of motion (005), Island Properties & Associates, LJK, DeRosa and Pesso have submitted, inter alia, an attorney's affirmation; the affidavit of David DeRosa dated January 31, 2011; a copy of the summons and complaint (Index No.04-29511); Notice of Pendency dated December 24, 2004, indenture dated March 13, 2007 between Ronald Kreth and Kathleen Walz and Island Properties and LJK; indenture dated February 4, 2008 between Island Properties and LJK and Gary J. Dolce; the amended complaint (Index No. 08-8012); the signed transcripts of the examinations before trial of Charles Luccetti dated February 2, 2010, and Leo Pesso dated July 23, 2010; the unsigned transcript of the examination before trial of David DeRosa dated July 23, 2010; a copy of a signed lease agreement dated January 18, 2002 effective until January 1, 2004; a copy of a contract of sale between 18 Fern Avenue, Inc. and Ronald and Kathleen Kreth; letters dated February 24, 2004, November 15, 2004, and December 13, 2004; a copy of the NYS Department of State Division of Corporations current through December 20, 2010; and a partial, undated copy of an order concerning motions (002), (003), and (004).

In support of motions (006) and (007), the defendant Ranalli has submitted, inter alia, an attorney's affirmation; the affidavit of Earnest E. Ranalli dated March 7, 2001; a signed copy of the transcript of the examination before trial of Charles Lucchetti dated February 2, 2010; a copy of a lease agreement dated January 18, 2002 between Ronald Kreth and Charles Luccetti running until January 1, 2004; copy of the contract of sale between the Kreth defendants and the plaintiff; a copy of a mortgage commitment dated November 30, 2004; copies of judgments filed with the Suffolk County Clerk's office; letters dated February 24, 2004, November 15, 2004, and December 13, 2004; a copy of the summons and complaint (Index No. 04-29511); notice of pendency dated December 24, 2004; a copy of an order dated November 29, 2005 (Pitts, J.) (Index No. 04-29511); copy of an order to show cause and stipulation dated December 11, 2007 (Index No. 05-5097); indenture dated March 13, 2007 from Kreth and Walz to Island Properties and Associates and LJK; indenture dated February 4, 2008 from Island Properties and Associates and LJK to Gary J. Dolce; an unsigned copy of the transcript of the examination before trial of Ernest Ranalli, Esq. dated April 20, 2010; a copy of the summons and complaint for the instant action, and an amended summons and complaint; a printout concerning 28 USC 1408, Sec. 1408 Venue of Cases; and a copy of an order dated December 22, 2008 (Molia, J.).

The unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), and are not accompanied by an affidavit pursuant to CPLR 3116.


CPLR 3212 requires that a motion for summary judgment be supported with a copy of the pleadings. Here, motions (005), (006), and (007) are not supported with copies of the defendants' respective answers, thus, the motions fail to comport with CPLR 3212. This court is left to speculate as to whether or not there are cross claims or counter claims asserted by the defendants, and is further precluded from seeing what affirmative defenses, if any, were raised by the answering defendants.

As a matter of law, however, it is determined that although the moving defendants did not submit copies of their respective answers with the moving papers (*see, Lefkowitz v Kaye, Scjholer, Fierman, Hays & Handler*, 271 AD2d 576, 706 NYS2d 176 [2nd Dept 2000]), Island Properties and LJK did previously raise the issue of standing

and whether the plaintiff had the capacity to sue in their prior motion made pursuant to CPLR 3:211, which was denied with leave to renew. It is therefore determined as a matter of law, that although dissolved by proclamation of the State Department Division of Corporations of the State of New York on October 28, 2009, the plaintiff, 18 Fern Avenue, Inc., has standing to continue this action. Charles Lucchetti, the owner of 18 Fern Avenue, Inc., testified that he formed the corporation for the purpose of purchasing the subject premises. As a dissolved corporation, 18 Fern Avenue, Inc. does not lack the legal capacity to maintain the instant action since it arises out of the underlying claim, and it is made in the course of winding up the affairs of 18 Fern Avenue, Inc. (*see, Sackaris & Sons, Inc. v Onekey, LLC*, 60 AD3d 733, 873 NYS2d 919 [2nd Dept 2009]; Business Corporation Law §1006 [b]). Accordingly, 18 Fern Avenue, Inc. is deemed to have capacity to maintain the instant action.

Accordingly, motion (005) by Island Properties & Associates, LJK, David DeRosa, and Leo Pessa for summary judgment in their favor and both motions (006) and (007) by the Ernest Ranalli, Esq. for summary judgment in his favor are all denied.

Dated: June 2, 2011



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION