

Merims v 294 W. 10 Realty, LLC

2011 NY Slip Op 31658(U)

June 15, 2011

Supreme Court, New York County

Docket Number: 111868/09

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

ROBERT MERIMS and BELDEN R. MERIMS as
TRUSTEES OF THE ROBERT MERIMS LIVING TRUST
DTD 5-27-94 and ROBERT MERIMS and BELDEN R.
MERIMS as TRUSTEES OF THE BELDEN R. MERIMS
LIVING TRUST DTD 5-27-94,

Index No.: 111868/09

Motion Date: 07/06/10

Motion Seq. No.: 01

Plaintiffs,

- v -

294 WEST 10 REALTY, LLC,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____	No (s) .	1, 2
Answering Affidavits - Exhibits _____	No (s) .	3, 4
Replying Affidavits - Exhibits _____	No (s) .	5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

In this action for breach of a contract to sell real property the plaintiff sellers move for summary judgment seeking a declaration that they are entitled to retain the defendant buyer's deposit as liquidated damages under the contract. For the following reasons the court grants plaintiffs' motion.

As set forth in the answer and in defendant's opposition to the motion, defendant argues that the plaintiffs were in breach of the contract because the subject premises were encumbered by a

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: .. MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

conservation deed that restricted the title owner's ability to improve the property. The seller claims that the conservation deed violated Paragraph 45 (vi) of the contract which states that "Seller has not sold, or contracted to sell, transferred or encumbered, leased or assigned any air rights or developmental rights relating to the premises."

Plaintiffs argue that the complained of easement is "permitted exception" under Sections 9 and 30 of the Contract. Section 30 (b) of the Contract provides in pertinent part that "the Premises are sold subject also to the following: . . . Any covenants, restrictions, easements, reservations, agreements and other matters of record; specifically a certain Open Space and Architectural Facade Easement dated 7/8/2002 recorded in the Office of the City Register." As stated by the Court

"Permitted exceptions" are generally understood as encumbrances listed in a real property contract that need not be removed by the seller. When a real estate contract identifies an encumbrance on title as a permitted exception, it is expected by the parties that the transaction can and will proceed despite that encumbrance.

The permitted exceptions listed in the contract at issue here are typical; they include zoning restrictions, easements, encroachments, adverse possession claims, existing mortgages, leases, and existing code violations. The hallmark of such typical permitted exceptions is that they affect good title, but do not preclude the buyer from taking title. Basically, the use of permitted exceptions arranges for the buyer to step into the shoes of the seller and take exactly that form of encumbered title that the seller currently possesses.

CPS Operating Co. LLC v Pathmark Stores, Inc., 76 AD3d 1, 13 (1st Dept 2010) (citations omitted, emphasis added).

Contrary to defendants argument, there is no ambiguity in the parties' contract with respect to the easement. The easement's inclusion as a permitted exception to title establishes the intent of the parties to proceed to closing with knowledge of and in spite of the encumbrance. Paragraph 45 (vi) of the Contract is not to the contrary. That clause merely sets forth the seller's representation that the rights being conveyed, in this case the premises and the title exceptions thereto including the subject easement, have not been otherwise impaired.

Therefore, the court finds that the plain words of the contract set forth the parties' mutual understanding that the premises would be conveyed subject to the aforementioned easement and that the existence of the easement was not a bar to the parties' obligations under the contract.

In order to establish a prima facie entitlement to judgment as a matter of law, plaintiff-sellers must establish that they were ready, willing, and able to perform on the law day and that the purchaser unjustifiably failed to proceed with the closing. Pinhas v Comperchio, 50 AD3d 1117 (2d Dept 2008). It is uncontested here that after two consent adjournments that final closing date, time of the essence, was August 5, 2009. By letter dated August 4, 2009, defendant asserted its belief that

plaintiff would not be able to convey marketable title and would not appear at the closing. Based upon this set of facts the plaintiffs have established their prima facie entitlement to retain the deposit.

Defendant's argument that plaintiffs' motion must be denied because plaintiffs have failed to establish that they were ready, willing and able to close on the law day is incorrect because "defendant's statements to the plaintiffs that [it] did not intend to attend the closing amounted to an anticipatory breach of the contract, and the plaintiffs were not required to demonstrate that they were ready, willing, and able to close because the necessity for such a tender was obviated by the defendant's anticipatory breach." Somma v Richardt, 52 AD3d 813, 814 (2d Dept 2008); Zeitoune v Cohen, 66 AD3d 889, 891-892 (2d Dept 2009) ("a party seeking damages for breach of a contract for the sale of real property need not establish that he or she was ready, willing, and able to perform on the closing date when there has been an anticipatory breach by the other party").

In opposition to plaintiffs' showing defendant-purchaser argues that in addition to the issue of the conservation easement plaintiffs frustrated its performance under the contract by refusing to provide documents that would allow it to evaluate the tax consequences of the property acquisition. As there was no provision in the contract requiring the plaintiffs to provide

such information, there is no basis for holding the plaintiffs liable for breach of contract.

Based upon the foregoing it is

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

ORDERED, ADJUDGED and DECLARED that defendant 294 WEST 10 REALTY, LLC, is in breach of the parties' contract dated May 20, 2008, and pursuant to the terms of the contract plaintiffs may retain the downpayment in the amount of \$225,000.00, along with any accrued interest, as liquidated damages pursuant to Paragraph 23 (a) of the contract and all other contractual obligations are hereby discharged; and it is further

ADJUDGED that plaintiffs do recover from the defendant, costs and disbursements in the sum of \$_____ as taxed by the Clerk, and plaintiffs have execution therefor.

This is the decision and order of the court.

Dated: JUN 15 2011

ENTER:

~~_____~~
DEBRA A. JAMES J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).