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SHORT FORM ORDER

INDEX NUMBER: 34136-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 02-22-2011
Motion Submit Date: 05-24-2011
Motion Sequence No.: 001 MOTD
002 MOTD

[ ] FINAL
[x] NON FINAL

X

NEW HIGH LLC.,

Plaintiff,

-against-

HAMLET HOLDING LLC., AND DONOHUE, KRETZ & GARABRANT, as escrow agent,

Defendants.

X

Attorney for Plaintiff
Lawrence A. Kushnick, Esq.
Kushnick & Associates, PC
445 Broadhollow Road, Suite 124
Melville, New York 11747

Attorney for Defendants
William T. LaVelle, PC
By: Alicia M. Menechino, Esq.
57 East Main Street
Patchogue, New York 11772

FACTUAL AND PROCEDURAL BACKGROUND

On May 20, 2008, the plaintiff, New High, LLC ("New High" or Plaintiff"), as purchaser, and the defendant, Hamlet Holding LLC ("Hamlet" or "Defendant"), as seller, entered into an agreement ("Contract") for the purchase of a certain parcel of real property ("Premises") for a purchase price of $3,496,000. New High paid the sum of $175,000, as a down payment, to be held in escrow by defendant Donohue, Kretz & Garabrant. The Contract scheduled the closing for on or about July 20, 2008. The Contract provided, in relevant part:

> **SECTION 12. State of Title.**
>
> Seller shall give and Purchaser shall accept marketable fee title to the Premises subject to (a) the Permitted Encumbrances and (b) such other matters as any reputable title insurance company doing business in the New York City Metropolitan Area . . .

> would be willing, without special premium or charge, to omit as exceptions to coverage . . . If there are any objections to title which Seller shall have been unable to remove at or prior to the scheduled or any adjourned date of Closing, and which objections may, according to reasonable expectations, be removed within sixty (60) days after such date, the Seller shall be entitled to one or more adjournments of the Closing for the purpose of such removal for a period not exceeding the aggregate of sixty (60) days . . .
>
> **SECTION 15. Limitation on Seller's Liability**
>
> A. In the event that the Seller is unable to convey title to the Premises in accordance with the provisions of this Agreement for any reason other than Seller's willful default, then, and in such event, the Seller's sole obligation and liability hereunder shall be to cause the Down Payment to be refunded to Purchaser and to reimburse the Purchaser for the actual cost of title examination incurred . . . and thereupon all rights and obligations hereunder, by either party against the other shall cease and terminate, and this Agreement shall be null and void . . .

Paragraph R-2 to the Rider to Contract of Sale provided, in relevant part:

> Notwithstanding Seller's disclaimer in Section 16 of the Contract, Seller represents, warrants and covenants as follows that the following are true as of the date hereof, and shall be true as of the Closing Date (and such representations and warranties shall survive Closing for 60 days):
>
> * * *
>
> (e) To the best of Seller's knowledge, there exists no litigation, proceeding, action, claim, or investigation pending, threatened against or affecting Seller of the Premises.

After conducting a title examination, Chicago Title Insurance Company issued a Certificate for Title Insurance on June 2, 2008, that listed numerous exceptions. Additional exceptions were added by Chicago Title on June 30, 2008. The closing did not go forward on July 20, 2008.

On or about August 21, 2008, the Plaintiff's attorney provided the Defendant's attorney with a copy of a Stipulation of Settlement Agreement dated May 1, 2008 ("Stipulation of Settlement"), in **Hick v. Spur Construction Co., Inc.,** Supreme Court, Suffolk County, Index No. 04-00237. The plaintiff in that action, Simon Hick, an adjoining owner, had asserted an adverse possession claim in 2004 with regard to a portion of the Premises against Spur Construction, Hamlet's predecessor in title. It is undisputed that Hamlet was aware of but did not disclose the existence of the **Hick** action or settlement to New High before the Contract of Sale was entered into on May 20, 2008. Pursuant to the Stipulation of Settlement, Spur Construction agreed to pay Mr. Hick $25,000, and Mr. Hick agreed to execute a quit claim deed conveying all of his right, title and interest in the Premises to Hamlet. The Stipulation also

provided, in relevant part:

> 4) Defendant represents that it has obtained the tentative approval from the Town of Babylon, for the erection of, and Defendant agrees that upon issuance from the Town of Babylon of final approval for same, to install along the 191 foot common boundary line between Plaintiff's property and Defendant's property . . . a sic (6) foot high chain link fence with brown vinyl slats with a five (5) foot high berm with four (4) inch minimum diameter white pine spaced at six (6) feet on center along said common boundary line all as illustrated on the modified site plan dated April 10, 2008 prepared by Brian A. Fisher, Architect, P.C.
>
> 5) Defendant represents that it has obtained the approval from the Town of Babylon, for the erection of, and Defendant agrees to install a curb set back (10') feet from the 191 foot common boundary line . . .
>
> 6) The Plaintiff acknowledges and agrees that the Plaintiff waives any and all claims of adverse possession and/or prescriptive easement of the "claimed premises", that Plaintiff has vacated the "claimed premises" has surrendered all rights, if any to the "claimed premises" and shall have no further right, if any to re-enter the "claimed premises".
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> * * *
>
> 13) This Agreement shall inure to the benefit of, and shall be binding upon, the heirs, successors and assigns of the parties.

On September 23, 2008, Chicago Title issued an endorsement adding an exception to the title policy for "the terms and conditions of a stipulation agreement between Simon Hick, Spur Construction Co., Inc. and Hamlet Holding, LLC, dated May 1, 2008 entered in action number 04-00237, Supreme Court Suffolk County on May 23, 2008." Chicago Title agreed to omit this exception "upon receipt by [it] of a deed from Simon Hick for the premises to be insured. Said deed must include a recital that all the terms and conditions of the stipulation agreement have been satisfied."

By letter dated September 25, 2008, New High advised Hamlet "that, pursuant to Sections 12 of the above-referenced Contract and Section R-2 of the Rider to Contract of Sale, my client New High LLC hereby cancels said contract and demands return of its down payment in the amount of $175,000 forthwith."

By letter dated October 3, 2008, Hamlet rejected New High's purported cancellation of the transaction, claimed that the issues raised by Chicago Title were curable, that it was in the process of clearing the exceptions, and that it expected to have the exceptions cleared in accordance with Section

12 of the Contract.

By letter dated October 9, 2008, New High advised Hamlet that its time to cure title defects had expired pursuant to the terms of Section 12 of the Contract, which entitled Hamlet to adjourn the closing for not more than 60 days to cure any defects. The letter also states:

> Furthermore, as we discussed, your client falsely represented in the Rider to Contract that they knew of no claims with regard to the subject premises. In fact, they were fully aware that a four-year-old Adverse Possession claim was settled only two(2) weeks before making the representation. The Stipulation of Settlement of that claim contains executory terms that have not been satisfied to date.

By letter dated November 18, 2008, Hamlet advised New High that it had:

> resolved the issue regarding the stipulation of Simon Hick and will deliver at closing a deed from him for the subject premises which will include a recital that all the terms and conditions of the stipulation have been satisfied. This is pursuant to the endorsement from Chicago Title dated September 23, 2006, the first time that this title exception was raised and less than sixty (60) days ago.
>
> Our clients maintain that they have complied with all the terms of the contract and are ready, willing and able to satisfy all of their obligations of the contract . . . First American [Title Insurance Company] has reviewed the file and Chicago's title report and is prepared to insure without additional premium or cost to your client.

By letter dated December 9, 2008, Hamlet attempted to set a time of the essence closing date of December 30, 2008.

By letter dated December 19, 2008, New High responded that it had cancelled the contract by its letter dated September 25, 2008, that it did not intend to close title of December 30, 2008, and again demanded the return of its down payment.

By letter dated January 5, 2009, Hamlet advised New High that it appeared ready, willing and able to close title on December 30, 2008, that New High was in default because it failed to appear at the closing, and that Hamlet wanted the down payment released to it from escrow.

In August 2009, New High commenced this action against Hamlet and Donohue, Kretz & Garabrant, as escrow agent. The first cause of action is for fraudulent inducement and seeks damages of $350,000 plus attorneys' fees. Plaintiff claims that at the time that Hamlet signed the Rider to the Contract, it knew that the representations of clear title to the property were false and knew that there was

a pending claim by Mr. Hick against the property. Plaintiff claims that Hamlet intentionally, knowingly, and affirmatively failed to disclose the existence of the adverse possession claim by Hick in order to fraudulently induce Plaintiff to execute the Contract. The second cause of action seeks a judgment declaring that the Contract terminated due to Hamlet's breach thereof and a direction that Donohue, Kretz immediately return the down payment funds to New High. The third cause of action is for breach of contract based upon Hamlet's inability to covey marketable title and false statement and seeks $175,000 in damages. The fourth cause of action is for breach of the implied covenant of good faith and fair dealing. Hamlet served an answer denying the material allegations of the complaint. Hamlet also interposed a counterclaim alleging that New High anticipatorily breached the Contract by attempting to cancel the Contract through its letter dated September 25, 2008, and seeking $344,000, the difference between the Contract price and the price paid to Hamlet by a subsequent purchaser, and other expenses incurred totaling $150,000. New High served a reply denying the material allegations of the counterclaim.

Plaintiff now moves for summary judgment on each of its causes of action and for summary judgment dismissing Defendant's counterclaim. In support of its motion, Plaintiff submits an affidavit from Douglas S. Partrick, a member of New High. Mr. Partrick recounts the facts as set forth above and further states that he executed the Contract and provided the down payment funds in reliance upon Hamlet's statements that it would provide marketable and insurable title and that there was no litigation, proceeding, action, claim, or investigation pending, threatened against or affecting Hamlet or the Premises. Further, Mr. Partrick states that Hamlet failed to disclose the existence of the adverse possession claim asserted by Mr. Hick and the Stipulation of Settlement entered into between Hamlet and Mr. Hick, which, according to Partrick, would have required New High to obtain approval from the Town of Babylon to erect the fence, build the berm, plant the trees, and install the concrete curb as mandated by the Stipulation of Settlement. Partrick did not learn of the Stipulation of Settlement between Hick and Hamlet until August 26, 2008, after his attorney received a copy of it. He contends that Hamlet actively concealed the existence of the Hick action and settlement and fraudulently induced him to execute the Contract to his detriment.

New High also provides an affidavit from Carolyn J. Purcell-Smith, the attorney that represented New High in the transaction. Ms. Purcell-Smith also recounts the factual background of the transaction. She notes that the Stipulation of Settlement in the Hick action contained many executory terms that, if not performed by Hamlet, would become New High's responsibility even though New High had not been made aware of the Stipulation of Settlement prior to executing the Contract. Additionally, Ms. Purcell-Smith avers that as of September 25, 2008, all defects, encumbrances, and impediments to clear title had not been removed by Hamlet. Therefore, she advised Hamlet that New High elected to cancel the Contract pursuant to Section 12 of the Contract and paragraph R2 of the Rider, and she demanded return

of the down payment. She further sates that as of Hamlet's letter dated December 9, 2008, the terms of the Stipulation of Settlement with Hick had not been satisfied. Therefore, a recital from Hick in a deed delivered at closing that all terms and conditions of the Stipulation of Settlement had been satisfied would have been false. Ms. Purcell-Smith notes that Hamlet never performed the construction required by the Stipulation of Settlement with Hick.

New High also relies upon portions of deposition testimony given by John Garcia, a member of Hamlet. Mr. Garcia testified that the existence of the Hick action was not disclosed to New High before the Contract was executed because he believed that the action had been settled prior thereto. Garcia testified further that although the work required to be done pursuant to the settlement with Hick had not been done as of the date the Contract was entered into, it was on the site plan approved by the Town. Garcia admitted that he never mentioned the settlement with Hick to New High "because [he] figured it was all satisfied and taken care of." Nevertheless, Garcia testified that the work required by the settlement with Hick would be done at the purchaser's expense.

Plaintiff argues that its termination of the Contract was proper because Hamlet breached the Contract by falsely representing that there existed no pending litigation, proceeding, action, claim or investigation. Plaintiff also argues that Hamlet was unable to clear objections to title by September 20, 2008, 60 days after the scheduled closing date of July 20, 2008. Specifically, Plaintiff relies on Hamlet's admission that the terms of the Stipulation of Settlement with Hick had not been complied with as of September 20, 2008, and notes that on September 23, 2008, Chicago Title issued an endorsement adding an exception to the title policy for the terms and conditions of the Hick Settlement Stipulation. Because all defects, encumbrances and impediments to clear title had not been removed by Hamlet, Plaintiff cancelled the Contract pursuant to section 12 of the Contract and paragraph R-2 of the Rider.

In opposition to Plaintiff's motion and in support of its cross-motion for summary judgment, Hamlet submits, among other things, an affidavit from Anthony Giovinazzi, a member of Hamlet. In relevant part, Mr. Giovinazzi states that the **Hick v. Spur Construction** action was settled on May 1, 2008, but he admits that Hamlet "did not formally inform New High of the **Hick v. Spur** litigation at that time, we did point out that portion of the Site Plan that involved the neighbor and stressed the importance of the remediation in that area." He further states that Hamlet did not attempt to hide or otherwise make any misrepresentations with respect to the **Hick v. Spur** matter. He states that Hamlet made clear to New High that a dispute with a neighbor would require New High to install a landscape buffer as set forth on the Site Plan and that New High voice no issue at that time. According to Mr. Giovinazzi, Hamlet had fully incorporated all remediation required pursuant to the settlement with Hick in the Site Plan and made New High fully aware of the requirements. He further states that when New High cancelled the contract via letter dated September 25, 2008, Hamlet believed that New High raised

the issue in an effort to cancel the contract with impunity, and that had New High not raised the issue of the Hick settlement with the title company, it would not have prevented a title policy from being issued. Giovinazzi claims that by September 11, 2008, Hamlet had cleared all exceptions raised in the title report dated June 2nd, and that it was not until Hamlet's attorney received a letter from New High's attorney dated September 25, 2008 cancelling the contract that Hamlet learned that the **Hick v. Spur** settlement was being raised as an exception to title. Giovinazzi states that because the title exception for the **Hick v. Spur** was not raised until September 23, 2008, Hamlet did not have an opportunity to clear the alleged title defect before New High cancelled the contract on September 25, 2008. Giovinazzi claims that Hamlet was ready, willing and able to close with clear and marketable title on September 11, 2008, and that a time of the essence closing was thereafter set by Hamlet for December 30, 2008, at which New High failed to appear. Hamlet provides a copy of a title policy issued by First American Title Insurance Company dated December 30, 2008, that does not raise an exception with regard to the Hick Settlement, and argues that this is sufficient to defeat New High's motion for summary judgment as it demonstrates that marketable and insurable title was available and offered. Thus, Hamlet contends that New High defaulted on the Contract and that it is entitled to retained New High's down payment. Additionally, Hamlet contends that it ultimately sold the property to another buyer for $344,000 less than the price New High agreed to pay and that it is entitled to recover this amount due to New High's breach of the Contract. Hamlet also seeks to recover additional expenses of at least $150,000 it incurred as a result of New High's breach.

In reply and in opposition to Hamlet's cross-motion for summary judgment, Plaintiff argues, among other things, that based upon Hamlet's admission that the work required by the Hick Stipulation of Settlement was to be done at the purchaser's expense, it could not have cleared the title exception raised with regard thereto. Additionally, Plaintiff states that Hamlet never provided a quit claim deed from Mr. Hick containing a recital that all of the terms and conditions of the Stipulation of Settlement had been complied with. Further, Plaintiff counters Hamlet's assertion that the Hick action had been settled by the time the Contract was entered into on May 20, 2008, by pointing out that the terms of the Stipulation of Settlement were executory and admittedly had not been performed as of that date. Plaintiff also points out that Hamlet could not and did not present marketable and insurable title before plaintiff cancelled the Contract by letter dated September 25, 2008. Plaintiff argues that the Contract was voidable upon execution because Hamlet made a material misrepresentation essential to the bargain that influenced plaintiff in its decision to agree to purchase the property.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 85 [1985]; ***Zuckerman***

v. City of New York, 49 NY2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue; however, once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial ***(see, Zayas v. Half Hollow Hills Cent. School Dist.***, 226 AD2d 713 [2d Dept 1996]). Speculative and conclusory allegations are insufficient to defeat summary judgment (***see, Boone v. Bender***, 74 AD3d 1111, 1113 [2d Dept 2010]).

"To maintain a cause of action for fraudulent inducement of contract, a plaintiff must show 'a material representation, known to be false, made with intention of inducing reliance, upon which [it] actually relie[d], consequently sustaining a detriment'" (***Frank Crystal & Co., Inc. v. Dillmann***, 84 AD3d 704 [1st Dept 2011] quoting ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC***, 19 AD3d 273, 275 [1st Dept. 2005]).

Here, the Plaintiff has not met its burden of making a prima facie of entitlement to judgment as a matter of law on its cause of action for fraudulent inducement as there is no evidence demonstrating that Hamlet intentionally failed to disclose the existence of the **Hick v. Spur** action and the Settlement Agreement prior to the execution of the Contract with knowledge that its representation in paragraph R-2(e) of the Contract was false and in order to induce Plaintiff to enter into the Contract. The affidavit of Douglas Partrick submitted in support of the Plaintiff's does not address the issues of Hamlet's knowledge and intent. Additionally, the deposition testimony of John Garcia submitted by Plaintiff in support of its motion indicates that Hamlet did not knowingly misrepresent that there was no litigation, proceeding, action or claim pending. Mr. Garcia testified that the existence of the Hick action was not disclosed to New High before the Contract was executed because he believed that the action had been settled prior thereto. Garcia testified further that although the work required to be done pursuant to the settlement with Hick had not been done as of the date the Contract was entered into, it was on the site plan approved by the Town. Garcia admitted that he never mentioned the settlement with Hick to New High "because [he] figured it was all satisfied and taken care of." Thus, that branch of Plaintiff's motion seeking summary judgment on its first cause of action is denied.

That branch of Hamlet's cross-motion seeking summary judgment dismissing the first cause of action is granted. In his affidavit, Mr. Giovinazzi, on behalf of Hamlet, states that Hamlet did not knowingly misrepresent that there existed no litigation, proceeding, action, claim, or investigation pending against or affecting the premises, and that a dispute with a neighbor would require Plaintiff to install a landscape buffer. In opposition, Plaintiff failed to set forth any evidence that Hamlet intentionally misrepresented that fact. Therefore, Hamlet is granted summary judgment dismissing the first cause of action (***see, Frank Crystal & Co., Inc. v. Dillman, supra***).

With regard to the second cause of action seeking a declaratory judgment, Plaintiff's motion for summary judgment is denied and Hamlet's cross-motion for summary judgment dismissing this cause of action is granted. "[I]t is well established that [a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract'" (***Main Evaluations, Inc. v. State***, 296 AD2d 852, 853 [4th Dept 2002] quoting ***Apple Records v. Capitol Records***, 137 AD2d 50, 54 [1st Dept 1988]; *see* ***BGW Dev. Corp. v. Mount Kisco Lodge No. 1552 of the Benevolent and Protective Order of Elks of the United States of America***, 247 AD2d 565, 568 [2d Dept 1998]). Here, as discussed below, Plaintiff has an adequate, alternative remedy in the form of its third cause of action for breach of contract.

With regard to the third cause of action for breach of contract and Hamlet's counterclaim for anticipatory breach of contract, plaintiff's motion for summary judgment is granted and Hamlet's cross-motion for summary judgment is denied. Pursuant to paragraph R-2(e) of the Rider to Contract of sale, Hamlet expressly represented, warranted and covenanted that there existed no litigation, proceeding, action, claim or investigation pending affecting it or the Premises. It has been demonstrated that this representation was false due the executory nature of the Stipulation of Settlement with Hick. The sale of the Premises was not subject to the provisions of the Stipulation of Settlement with Hick. An express warranty is part and parcel of the contract containing it and an action for its breach is grounded in contract (***see CBS, Inc. v. Ziff-Davis Publ. Co.***, 75 NY2d 496, 503 [1990]). Thus, the plaintiff is entitled to judgment as a matter of law on its breach of contract claim based upon Hamlet's breach of the express warranty contained in paragraph R-2(e) of the Contract, and judgment as a matter of law dismissing Hamlet's counterclaim for anticipatory breach.

With regard to damages, pursuant to Section 15 of the Contract Hamlet's liability is limited to causing the down payment of $175,000, plus interest, to be refunded to plaintiff. Additionally, as the prevailing party, Section 29(b) entitles Plaintiff to recovery of reasonable attorneys' fees, court costs and disbursements. However, although in his affidavit in support of the motion Mr. Partrick states that Plaintiff has incurred $18,230.19 in attorneys' fees and $20,000 in expenses, proof of same has not been provided. Thus, a hearing will be held on the issue of attorneys' fees, costs and disbursements, following the resolution of Plaintiff's remaining claim, i.e. the fourth cause of action alleging breach of the covenant of good faith and fair dealing.

"'Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance . . . This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . .'" ***Lonner v. Simon Property Group, Inc.***, 57 AD3d 100, 108 [2d Dept 2008], quoting ***Dalton v. Educational Testing Serv.***, 87 NY2d 384, 389 [1995]). The covenant of good faith and fair dealing is breached when a party

acts in a manner that deprives the other party of the right to receive benefits under their agreement (***511 West 232nd Owners Corp. v. Jennifer Realty Co.***, 98 NY2d 144 [2002]). In order to establish a breach of the covenant, a plaintiff must prove facts that tend to show that the defendant sought to prevent performance of the contract or to withhold its benefit from the plaintiff **(*see, Aventine Inv. Mgt., Inc. v. Canadian Imperial Bank of Commerce***, 265 AD2d 513 [2d Dept 1999]).

Here, neither the Plaintiff nor Hamlet made a prima facie showing of entitlement to summary judgment on the fourth cause of action for breach of the implied covenant of good faith and fair dealing, as neither party addressed the issue of whether Hamlet sought to prevent performance of the contract or to withhold its benefit from Plaintiff. Accordingly, plaintiff's motion and Hamlet's cross-motion for summary judgment on the fourth cause of action are denied.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: August 15, 2011
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

[ ] FINAL
[x] NON FINAL