

18 Fern Ave., Inc v Kreth

2011 NY Slip Op 32950(U)

October 26, 2011

Sup Ct, Suffolk County

Docket Number: 08-8012

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 7-14-11 (#008)
MOTION DATE 8-4-11 (#009)
ADJ. DATE: 8-11-11
Mot. Seq. # 008 - MotD
009 - MotD

-----X

18 FERN AVENUE, INC.,

Plaintiff,

- against -

RONALD KRETH and KATHLEEN A.
KRETH, a/k/a KATHLEEN A. WALZ, ISLAND
PROPERTIES & ASSOCIATES, LLC, LJK,
LLC, ERNEST RANALLI, ESQ., GARY J.
DOLCE, DAVID D. DEROSA, and LEO
PESSO,

Defendants.

-----X

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Upon the following papers numbered 1 to 57 read on this motion and cross motion RRRR and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (008) 1 - 26; Notice of Cross Motion and supporting papers (009) 27-57; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (008) by the defendants, Island Properties & Associates, LLC, LJK, LLC, David D. DeRosa and Leo Pessa for an order granting reargument of motion (005), which motion sought an order granting summary judgment dismissing plaintiff's complaint, and which application was denied, is granted as to reargument, and upon reargument, summary judgment is denied; and it is further

ORDERED that motion (009) by the defendant, Ernest Ranalli, Esq., for an order granting reargument of motion (006), which motion was brought by an amended notice of motion for an order granting summary judgment dismissing plaintiff's complaint, and which application was denied, and for a

further order granting leave to serve another motion for summary judgment as an alternative to reargument, is granted to the extent that reargument only is granted, and upon reargument, summary judgment is denied.

CPLR 2221 (d) (2) provides that a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion (*see Bolos v Staten Island Hosp.*, 217 AD2d 643, 629 NYS2d 809 [2d Dept 1995]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (*Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 588 NYS2d 8 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*Giovanniello v Carolona Wholesale Office Machine Co., Inc.*, 29 AD3d 737, 815 NYS2d 248 [2d Dept 2006]). CPLR 2221 (d) (3) provides that a motion to reargue shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. Here, the moving defendants have not submitted proof of service of a copy of the order with notice of entry to demonstrate that these applications were timely filed.

It was determined in motions (005) and (007) that the moving papers were not supported with copies of the defendants' respective answers, leaving the court to speculate as to whether or not there were cross claims or counter claims asserted by the defendants. The answers having now been submitted in support of the within motions, reargument is granted. In addition, the court will consider the previously submitted unsigned deposition transcripts of David D. DeRosa and Ernest Ranalli, Esq. as having been adopted as accurate by the moving defendants (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

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 [2d Dept 1979]). The opposing party 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 [2d Dept 1981]).

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 defendants, Ronald Kreth and Kathleen Kreth, the owners of the property, 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. \$50,000.00 was deposited with the seller's attorney upon signing. The remaining \$230,000.00 was to be paid 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, a "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 plaintiff alleges that 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. It is further alleged that, 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 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 purchased 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 was joined for 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 a party in this action.

In the instant action, the first cause of action alleges tortious interference with the sale of the property to the plaintiff on the basis 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.

MOTION (008)

In motion (005), the defendants Island Properties & Associates, LLC, LJK, LLC, David D. DeRosa and Leo Pessa, sought 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 Kreth defendants; 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, the plaintiff has no standing. In support of motion (005), the moving defendants previously 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 Pessa 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 KA. Kreth; letters dated February 24, 2004, November 15, 2004, and December 13, 2004; a copy of the NYS Department of State Division of Corporations printout current through December 20, 2010; and a partial, undated copy of an order concerning motions (002), (003), and (004). This court will consider these submissions.

It is noted that counsel for the moving defendants in motion (008) has submitted the affidavits of both David DeRosa dated June 22, 2011, and Leo Pessa dated June 21, 2011, which affidavits were not previously submitted with motion (005), and thus, are not considered on reargument.

MOTION (009)

In motion (007), the defendant, Ernest Ranalli, Esq., sought 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. 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.).

Based upon the adduced testimonies and the evidentiary submission, it is determined that the moving parties have not established prima facie entitlement to summary judgment dismissing the complaint.

No deposition transcripts or affidavits by the Kreth defendants have been submitted with the moving papers. Based upon the parties' submissions, this court determines that there are factual issues concerning whether there was a breach of contract, and if so, whether it was the plaintiff or the Kreth defendants who breached the contract of sale of the subject property. Without a determination relative to the alleged breach of contract, the court is precluded from making a determination with regard to the alleged tortious interference of the plaintiff's contract with the Kreths by the defendants. There are insufficient testimonies and evidentiary submissions for this court to determine whether Ranalli was representing any of the parties during the two closings which transferred the property from the Kreths to Island Properties and LJK, and then to defendant Dolce. No retainer agreements, closing papers, or title reports have been submitted concerning the subject transactions, and the deposition testimony of Ranalli is too vague and contradictory to be of evidentiary value.

There are credibility issues to be determined by the trier of fact as well. Ranalli denied representing the various entities, or that he had an office at 45 Sarah Drive, Farmingdale, or that he had any office staff or employees working for him. This testimony is contradicted by the testimony of David DeRosa who stated that Ranalli maintained an office at the place of business of Island Properties at 45 Sarah Drive, and that Ranalli and he shared the services of a secretary whom they both paid. DeRosa further stated that Ranalli represented Island Properties and LJK at the closing with Dolce and that he represented the Kreths at the closing with Island Properties and LJK, despite the existence of the lis pendens on the property at the time of the first closing, and the pending litigation between the plaintiff and the Kreths.

There are factual issues concerning whether Ranalli, Island Properties and LJK intentionally delayed the foreclosure proceeding in an attempt to have the lis pendens expire so the sale of the property to Dolce could take place. There are further factual issues concerning whether Ranalli was attempting to delay the foreclosure proceeding by filing a Bankruptcy proceeding in the Eastern District of New York on behalf of Ronald Kreth. There are factual issues concerning the residency of Ronald Kreth at the time such

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proceeding was commenced. There are further factual issues concerning whether or not there was an equity agreement entered into between the Kreth defendants and Island Properties and LJK, and a copy of such alleged agreement has not been submitted to this court.

In the prior motion (005), this court previously 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 [2d Dept 2009]; Business Corporation Law §1006 [b]). Accordingly, 18 Fern Avenue, Inc. is deemed to have capacity to maintain the instant action. This court adheres to its prior determination on this issue as a matter of law.

Accordingly, motion (008) by defendants, Island Properties & Associates, LLC, LJK LLC, David DeRosa and Leo Pessa, and motion (009) by the defendant Ernest Ranalli, Esq. for summary judgment dismissing the complaint are denied.

Dated: October 26, 2011



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION