

Kwiatkowski v 322 W. 57th Owner LLC
2011 NY Slip Op 33803(U)
March 8, 2011
Supreme Court, New York County
Docket Number: 651326/10
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Justice

PART 45

Index Number : 651326/2010
KWIATKOWSKI, JERZY
vs.
322 WEST 57TH OWNER LLC,
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*by defendants to
Dismiss is DENIED;
Motion by plaintiff for
summary judgment is
GRANTED*

*Defendants are to pay plaintiff
Damages in the amount of
\$259,500 plus interest since
April 4, 2009, all per the
attached Decision and Order.*

Dated: March 8, 2011

M. J. ...

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

On June 9, 2008, the Sponsor sent a letter to the plaintiff indicating that the Condominium was near completion and setting a closing for unit 34P1 on July 14, 2008. Subsequently, plaintiff inspected unit 34P1 on July 8, 2008 and discovered significant problems related to the Certificate of Occupancy, floors, windows, driveway, and air conditioning. Plaintiff demanded that Sponsor remedy these problems prior to closing, but since Sponsor was unable to fix all the problems prior to July 14, 2008 it chose to postpone the closing. On July 20, 2008 Sponsor sent a notice of closing scheduled for July 26, 2008. However, plaintiff objected in a letter sent July 25, 2008, because he lived in Poland and the unilaterally scheduled closing date was not mutually agreeable. On August 1, 2008, without scheduling a mutually agreeable date, Sponsor sent a notice scheduling a closing for August 7, 2008. Again, plaintiff objected, in a letter dated August 6, 2008, due to the fact that he could not make travel and financial arrangements from Poland to the United States on six (6) days notice. Sponsor responded with a letter dated August 8, 2008, claiming that plaintiff was in default and would have to close by September 12, 2008, otherwise the Sponsor would terminate the contract and retain the down payment.

On August 22, 2008, Sponsor and plaintiff scheduled a mutually agreeable closing date for September 11, 2008. However, plaintiff then suffered a heart attack in Poland on September 10, 2008, and was unable to travel and had to cancel the September 11, 2008 closing. Subsequently, Sponsor sent a letter to plaintiff on October 28, 2008 terminating the purchase agreement as of November 10, 2008 and informing plaintiff that it would retain plaintiff's \$259,000 down payment plus interest accrued thereon as of that date. On November 14, 2008, Sponsor sent plaintiff a letter setting another closing date for November 20, 2008. Plaintiff was

uncertain of the nature of this letter due to the purported termination of the contract in the October 28, 2008 letter and did not attend the November 20, 2008 closing.

On April 4, 2009 the Escrow Agent disbursed the down payment to the Sponsor. Following disbursement, plaintiff and Sponsor amended the original purchase agreement to close on a different unit, unit 37A, in an all cash transaction for \$693,750 contingent on there not being any problems with the title insurance. The down payment of \$259,000 and other charges already paid by plaintiff were to be applied to the purchase price at closing. Due to a title report dated April 7, 2009 indicating there were outstanding mechanics' liens in excess of four million dollars (\$4,000,000), on the Condominium, plaintiff notified Sponsor on April 22, 2008 that he was not able to obtain title insurance and close on unit 37A.

During November 2009, plaintiff learned that the down payment had been disbursed to the Sponsor by the Escrow Agent. As a result, plaintiff filed this action against Sponsor and Operator for breach of contract, claiming they were not able to present good and marketable title at the time of closing. Plaintiff also made claims against Escrow Agent for breach of contract and fiduciary duty, alleging that Escrow Agent breached the Escrow Agreement by disbursing the down payment without proper notice to the plaintiff, who stood as a third party beneficiary of the Escrow Agreement through the purchase agreement with the Sponsor.

Sponsor and Escrow Agent (Moving Defendants) now move to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) and/or (7), claiming that the documentary evidence conclusively supports the Moving Defendants' defenses and that plaintiff failed to state a cause of action in his complaint. Plaintiff cross moves for (i) summary judgment pursuant to CPLR 3212(b), and (ii) leave to amend the complaint pursuant to CPLR 3025(b).

Discussion

A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) should be granted “[w]here documentary evidence definitively contradicts the plaintiff’s factual allegations and conclusively disposes of the plaintiff’s claim.” *Berardino v Ochlan*, 2 AD3d 556, 557 (2d Dept 2003). “While pleadings should be liberally construed on a motion to dismiss, claims ‘flatly contradicted by documentary evidence’ must be rejected.” *Iragashi v Higashi*, 289 AD2d 128 (1st Dept 2001) (citing *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996]). This means that in order to be successful on a CPLR 3211(a)(1) motion to dismiss defendants must introduce documentary evidence in their motion that shows that none of the plaintiff’s allegations are supported by the facts.

In order for a motion for summary judgment pursuant to CPLR 3212(b) to be granted, the movant must make a prima facie showing that he is entitled to judgment as a matter of law, based on acceptable evidence. *Winegrad v New York University Med Ctr*, 64 NY2d 851 (1985); *Zuckerman v City of New York*, 49 NY2d 557 (1980). Acceptable evidence is an “affidavit, [...] a copy of the pleadings and [...] other available proof, such as depositions and written admissions.” CPLR 3212(b). If the movant is able to satisfy his burden of proof then the burden shifts to the opponent to demonstrate that significant issues of material fact exist. *Zuckerman*, 49 NY2d at 562.

Defendants present the Contract, amendments thereto, and several letters to establish that the mechanics’ liens against the Condominium would not have prevented the plaintiff from obtaining title insurance prior to the October 28 letter. Similarly the Escrow Agent points to the Escrow Agreement and the October 28 letter to support its arguments that the October 28 letter

itself was sufficient notice of the fact that the down payment would be distributed to the Sponsor November 10, 2008.

However, both arguments fail to consider the chronology of events past November 10, 2008. Plaintiff's cross-motion for summary judgment focuses on these events to argue that the Sponsor waived its right to terminate the contract due to the continued expression of an intent to perform under the Contract.

It has long been held that "[a] valid waiver 'requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable.'" *Gresser v Princi*, 128 AD2d 752 (2d Dept 1987) (citing *Nassau Trust Co v Montrose Concrete Prods Corp*, 56 NY2d 175, 184 [1982]). A waiver does not necessarily have to be made in writing to be enforceable. *Gresser*, 128 AD2d at 753. Instead, it can be made either "by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage." *Hadden v Consolidated Edison Co*, 45 NY2d 466, 469 (1978).

In *Gresser* the court held that the defendant real property sellers had "waived their contractual right to cancel the agreement in the event that a rezoning of the property was not obtained by September 1, 1985 [when they] continued to perform under the contract and to request performance by the plaintiffs, and they did not attempt to cancel the agreement until January 21, 1986." *Gresser*, 128 AD2d at 752. In the case here, the Sponsor's actions indicate even more clearly an intention to waive its right to terminate the contract and retain the down payment.

After purportedly terminating the purchase agreement on November 10, 2008, Sponsor sent plaintiff a letter dated November 14, 2008, scheduling a closing for November 20, 2008. Even after the closing had not occurred on that date, and after the down payment had been disbursed to the Sponsor on April 4, 2008, the Sponsor and plaintiff engaged in negotiations to amend the Contract as shown by correspondence, attached to plaintiff's cross-motion for summary judgment, dated April 7, 2008 and April 20, 2008. In this correspondence the defendants offer to amend the purchase agreement, substituting Unit 34P1 for 37A, lowering the purchase price to \$693,750, and crediting the down payment to the purchase price at closing.

This documentary evidence shows a clear intent on the part of the defendants to perform under the Contract and to have plaintiff perform as well. Furthermore, Sponsor never terminated the Contract after scheduling the November 20, 2008 closing and the attempted April 2009 closing. In fact the documentary evidence indicates that the defendants simply did not respond to plaintiff after he informed them of his inability to obtain title insurance.

For the foregoing reasons, defendants' actions are evidence of their intent not to claim their right to terminate the purchase agreement and to retain the down payment. Therefore, Sponsor was not entitled to disbursement of the down payment and Escrow Agent was not entitled to disburse the down payment under the Escrow Agreement without further notice. Accordingly, the court need not address plaintiff's motion to amend the complaint, because the motion document and affidavits allow the court to conclude that there are no material issues of fact and that summary judgment can be rendered as a matter of law.

Conclusion

Accordingly, it is

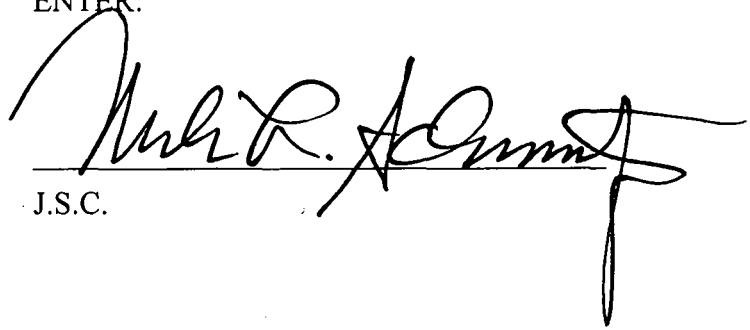
ORDERED that the defendants' motion to dismiss is denied; and it is further

ORDERED that the plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the plaintiff be paid damages by the defendants in the amount of \$259,500 plus interest since April 4, 2009.

Dated: March 8, 2011

ENTER:

A handwritten signature in black ink, appearing to read "Mark R. Acquisti", written over a horizontal line. The signature is highly stylized and cursive.

J.S.C.