

Cosby v DeCicco

2011 NY Slip Op 34345(U)

December 27, 2011

Supreme Court, Bronx County

Docket Number: Index No. 21305/11E

Judge: Alexander W. Hunter, Jr.

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA23A**

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John Cosby and Desiree Cosby,

Index No.: 21305/11 *E*

Plaintiffs,

Decision/Order

-against-

Thomas DeCicco and Kathryn DeCicco,

Defendants.

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HON. ALEXANDER W. HUNTER, JR.

The motion by defendants for an summary judgment dismissing plaintiffs' complaint with a direction to the non-party escrow agent to release the down payment to them as contractual liquidated damages, is denied. Plaintiffs cross-motion for an order directing the non-party escrow agent to release to plaintiffs or their counsel their down payment, is also denied.

In this cause of action, plaintiffs seek to obtain a refund of their down payment in the amount of \$45,000.00 which was made in connection with a written contract of sale dated September 7, 2010 whereby defendants/sellers agreed to sell and purchasers/plaintiffs agreed to buy a single family home located at 1235 Mayflower Avenue, Bronx, New York.

Defendants move for summary judgment dismissing plaintiffs complaint. In support of their motion, they submit a copy of the contract of sale as well as various letters and facsimiles exchanged between plaintiffs' counsel and defendants' counsel and the affidavit of defendant Thomas DeCicco. Defendants assert that plaintiff John Cosby entered into a contract for the purchase of the subject property on September 7, 2010 for an agreed upon price of \$445,000.00. A down payment in the amount of \$45,000.00 was delivered to the escrow agent, Cavallo & Cavallo with the balance of \$400,000.00 being due on the contract law date of October 29, 2010. Defendants further assert that the contract provided plaintiff John Cosby forty-five (45) days from the date of the contract to obtain a mortgage commitment in the sum of \$400,000.00. The contract also provided the right to cancel the contract if said commitment was not timely obtained. Moreover, paragraph 9 of said contract stated that if a commitment was obtained and the buyer thereafter failed to close, the down payment would be deemed forfeited as and for liquidated damages.

Defendants assert that on November 22, 2010, plaintiff John Cosby was issued a mortgage commitment for a loan of \$403,987.00. On or about March 31, 2011, the parties amended the contract to add plaintiff Desiree Cosby as a purchaser and otherwise reaffirmed the provisions of the contract. On April 20, 2011, defendants counsel sent a letter to plaintiffs' counsel establishing a "time of the essence" closing date of May 19, 2011. Additionally, defendants advised plaintiffs that failure to close on that date would result in a breach of contract including, but not limited to, the retention of the down payment pursuant to the terms of the contract of sale. Neither plaintiffs nor their attorney appeared for the closing date on May 19, 2011 and defendants contend that they defaulted under the contract and defendants became contractually entitled to retain the down payment as liquidated damages.

Defendants cite to case law and argue that State law provides that a contract vendor may retain the down payment where the vendee defaults on a real estate contract without a lawful

excuse. Moreover, in the case at bar, defendants, through their counsel, clearly and unequivocally elected to set a time of the essence closing date. The notice fixed a reasonable time to perform and clearly specified that if there was non-performance on the part of the plaintiffs, there would be a default. Defendants argue that plaintiffs make no claim for specific performance and fail to assert any claim that they were ready, willing and able to close on the date set or at any other time. Defendants argue that they have demonstrated that they are *prima facie* entitled to judgment as a matter of law by showing that plaintiffs were unable or unwilling to close on the law day in accordance with the terms of the contract and have defaulted on the contract. Therefore, summary judgment should be granted in their favor.

Plaintiffs oppose the motion and cross-move for summary judgment in their favor. Plaintiffs argue that the written contract of sale for the subject property entered into between the parties on September 7, 2010, does not specify that time is of the essence and, contrary to the assertion of defendants' counsel, it does not specify a "law date." (Fazio Aff., para. 4). Plaintiffs argue that defendants have refused to direct the escrow agent, Cavallo & Cavallo, who represented defendants with respect to the contract, to refund the down payment and seek to retain same as liquidated damages for an alleged default by plaintiffs under the terms of the contract.

Plaintiffs' counsel contends that the "time of the essence" letter sent to him by defendants' counsel on April 26, 2011, was rejected by him via a letter dated April 29, 2011 because it did not allow the plaintiffs a reasonable amount of time to perform their obligations under the contract. Plaintiffs argue that when a contract for the sale of real property does not specify that time is of the essence, either party is entitled to a reasonable adjournment of the closing date. If one party unilaterally imposes a condition that time be of the essence as to a particular date, the effectiveness of this condition is contingent upon the reasonableness of the time period. What constitutes a reasonable time to close depends on the facts and circumstances of the particular case. Plaintiffs cite to case law which holds that among the factors to be considered are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance.

Plaintiffs argue that when the aforesaid considerations are applied to the facts and circumstances in the case at bar, it is clear that the time of the essence closing date that defendants attempted to assert in their "time of the essence" letter was not reasonable and, thus, plaintiffs cannot be held in default. Plaintiffs assert that at the time the contract was entered into, plaintiff John Cosby, was on active duty in the U.S. military and was stationed in Iraq. The contract provided a standard mortgage contingency clause whereby the obligations of the parties were contingent upon plaintiff obtaining a commitment for a mortgage within 45 days of the date of the contract. Immediately upon entering into the contract, plaintiff John Cosby, applied for a Veterans Administration sponsored loan through Bank of America to obtain financing for the purchase of the home. Despite diligently pursuing the mortgage commitment, plaintiff John Cosby had not succeeded in obtaining a commitment by the expiration date of the mortgage contingency period. At that point, either party had the option of canceling the contract but instead, they agreed to extend the mortgage contingency period through November 15, 2011.

Plaintiffs further assert that the mortgage commitment contained extensive conditions and documentation requirements to be processed by the lender prior to the loan being cleared to close. Said clearance was also complicated by the fact that plaintiff John Cosby was stationed in Iraq. Therefore, Bank of America suggested that John Cosby's daughter, Desiree Cosby, a resident of

Bronx County, be added to the contract as an additional buyer. This suggestion was communicated to defendants' attorney on March 29, 2011 and on or about March 31, 2011, the parties executed a written amendment to the contract adding plaintiff Desiree Cosby as an additional buyer. Plaintiffs argue that defendants agreed to the amendment to the contract with the understanding that the purpose of the amendment was to facilitate plaintiff's submission of a joint application for financing pursuant to obtaining a revised commitment letter. Therefore, defendants "implicitly agreed to allow a reasonable time for the lender to process the amendment and change of circumstances and issue a revised commitment letter." (Fazio Aff., para. 17).

Plaintiffs argue that the "time of the essence" letter did not allow plaintiffs ample time to perform as it was sent to plaintiffs' attorney on April 26, 2011, only eighteen (18) days after the amendment of the contract. Moreover, the "time of the essence" letter allowed plaintiffs only seventeen (17) business days from the date of the letter to close title. Plaintiff contends that said time periods are particularly unreasonable, "considering the current state of affairs in the banking industry whereby long delays in the processing and approval of mortgage loans have become typical, particularly with respect to VA and other government sponsored loans. (Fazio Aff., para. 19).

Plaintiffs also argue that the pattern of conduct between the parties was such that they were cooperating towards the common goal of bringing about a closing, up until the "time of the essence" letter was sent. Prior to sending that letter, defendants never gave any indication that they were disconcerted by the amount of time that had passed or that they were suffering any inconvenience or hardship as a result of same. Moreover, the affidavit of defendant Thomas DeCicco submitted in support of defendants' motion for summary judgment does not allege any hardship on defendants' part. Plaintiffs argue that they have acted in good faith in all respects in attempting to fulfill their obligations under the contract and there has been no allegation to the contrary. Thus, summary judgment should be granted in plaintiffs favor, or at the very least, summary judgment in favor of defendants should be denied as there exists an issue of fact with respect to whether plaintiffs were afforded a reasonable time to close.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. **Rotuba Extruders v. Ceppos**, 46 N.Y.2d 223 (1978). "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor...and he must do so by tender of evidentiary proof in admissible form." **Friends of Animals, Inc. v. Associated Fur Manuf., Inc.**, 46 N.Y.2d 1065 (1979). The court's function on a motion for summary judgment is issue-finding rather than issue-determination. **Sillman v. Twentieth Century Fox Film Corp.**, 3 N.Y.2d 395 (1957). Once the movant has made this showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." **Alvarez v. Prospect Hospital**, 68 N.Y.2d 320 (1986).

In, **Miller v. Almquist**, 241 A.D.2d 181 (1st Dept. 1998), the court stated, "We have long been guided by the rule that 'every contract contains an implied obligation by each party to deal fairly with the other and to eschew actions which would deprive the other party of the fruits of the agreement...in furtherance of the covenant of good faith implied in every contract..." (citations omitted). **Id.** at 184-185. The court further went on to state that, "When a contract for sale of real property does not specify that time is of the essence, either party is entitled to a reasonable adjournment of the closing date...In granting the adjournment, the other party may unilaterally impose a condition that time be of the essence as to the rescheduled date...The


effectiveness of this condition, though, is contingent on the specificity of the notice and on the reasonableness of the time period...What constitutes a reasonable time to close depends on the facts and circumstances of the particular case..." (citations omitted). **Id. at 185.**

In the case at bar, this court finds that neither defendants nor plaintiffs have demonstrated their entitlement to judgment as a matter of law. The contract of sale did not specify that time was of the essence. The parties appeared to have been working amicably toward a firm closing date prior to defendants' counsel sending out the "time is of the essence" letter. Given the particular facts and circumstances of this case, where an additional buyer was added, the contract was amended at the end of March 2011 and defendants declared that time was of the essence in a letter dated one month later, with a closing date approximately seventeen (17) business days after said letter, this court finds that there remains an issue of fact as to whether plaintiffs were afforded a reasonable time to close.

Accordingly, defendants' motion for summary judgment and plaintiffs' cross-motion for summary judgment are denied.

This constitutes the decision and order of this court.

Dated: December 27, 2011



J.S.C.

ALEXANDER W. HUNTER, JR.
J.S.C.