

Guerin v Smith
2012 NY Slip Op 33082(U)
December 14, 2012
Sup Ct, Suffolk County
Docket Number: 16643/2012
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 16643/2012

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 MICHAEL GUERIN,

Plaintiff,

-against-

DUBOIS T. SMITH, Individually and DUBOIS
 T. SMITH and DOROTHY BORDEN, as Co-
 Trustees of the Trust under the Last Will and
 Testament of FRANCES NOBLE SMITH,

Defendants.

ORIG. RETURN DATE: AUGUST 30, 2012
 FINAL SUBMISSION DATE: SEPTEMBER 6, 2012
 MTN. SEQ. #: 001
 MOTION: MG CASEDISP

PLTF'S/PET'S ATTORNEY:

PINKS, ARBEIT & NEMETH
 140 FELL COURT - SUITE 303
 HAUPPAUGE, NEW YORK 11788
 631-234-4400

DEFT'S/RESP ATTORNEY:

CERTILMAN BALIN ADLER & HYMAN, LLP
 100 MOTOR PARKWAY - SUITE 156
 HAUPPAUGE, NEW YORK 11788
 631-979-3000

Upon the following papers numbered 1 to 7 read on this motion _____
TO DISMISS

Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affirmation in
 Opposition and supporting papers 5, 6; Reply Affirmation 7; it is,

ORDERED that this motion by defendant, DOROTHY BORDEN ("defendant"), for an Order: (1) pursuant to CPLR 3211 (a) (1) and (5), dismissing the summons and complaint; and (2) pursuant to CPLR 6514, canceling the Notice of Pendency filed by plaintiff, is hereby **GRANTED** in its entirety for the reasons set forth hereinafter. The Court has received opposition hereto from plaintiff. The Court has also received an unauthorized and untimely sur-reply by plaintiff that has not been considered in rendering the within decision and Order (see CPLR 2214).

Plaintiff commenced this action on May 30, 2012, by summons and verified complaint, asserting a single cause of action for specific performance of a purported contract for the sale of the real property commonly known as 8 Northfield Lane, St. James, New York ("Property"). Also on or about May 30, 2012, plaintiff filed a Notice of Pendency against the Property.

KAT

Defendant alleges that the Property is owned by defendant DUBOIS T. SMITH, individually, as well as by defendant and co-defendant DUBOIS T. SMITH, as co-trustees of the Trust under the Last Will and Testament of FRANCES NOBLE SMITH ("Trust"). Defendant DUBOIS T. SMITH is the father of defendant, is 81 years old, and is currently residing in a nursing home in North Dakota. Defendant informs the Court that "[d]ue to advanced dementia and the onset of Alzheimer's disease, at times [defendant SMITH] is not lucid." Defendant further informs the Court that the Property was their family home, but is now rented to a third party.

Plaintiff is the owner of the real property commonly known as 12 Northfield Lane, which is adjacent to defendants' Property. Beginning in or about March of 2012, plaintiff and defendants began negotiating for the sale of the Property to plaintiff. On or about March 30, 2012, plaintiff and defendant signed a one-page document entitled "Proposed Transaction" ("Proposal"). The Proposal recites the seller as "DuBois T. Smith Trust u/w/o Frances Noble Smith," and the purchaser as plaintiff MICHAEL GUERIN. A footnote to the seller's name on the Proposal indicates, "Co-Trustees – DuBois T. Smith [and] Dorothy M. Borden (maiden name – Dorothy M. Smith – this is the name on the Trust)." The Proposal further provides the address of the Property, a purchase price of \$640,000, a "contract payment" of \$25,000, and a deposit in the amount of \$1,000. The Proposal is signed by defendant as the only seller, and plaintiff, as purchaser. Plaintiff claims that he tendered the deposit of \$1,000 as consideration for the Proposal, which was retained by defendants. Although this Proposal is in the nature of a binder for the sale of real property, defendant alleges that no contract of sale was executed, and no closing was ever scheduled.

Plaintiff thereafter commenced this action for specific performance of the Proposal. Plaintiff argues that the Proposal was a binding agreement for the sale of the Property, containing all the requirements of a contract for the sale of real property, and seeks to have defendants perform thereunder. In response to the complaint, defendant has filed this pre-answer motion to dismiss, pursuant to CPLR 3211 (a) (1) and (5), arguing that the Proposal is unenforceable as it does not satisfy the Statute of Frauds.

Pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual

issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

Here, the Court finds that the documentary evidence submitted, to wit: the Proposal, resolves all factual issues as a matter of law and conclusively disposes of plaintiff's claim for specific performance. In particular, the Proposal does not satisfy the requirements of the Statute of Frauds codified in New York's General Obligations Law, as it is not signed by the parties to be charged, to wit: defendant DUBOIS T. SMITH, in his individual capacity, or defendant DUBOIS T. SMITH, as co-trustee of the Trust.

General Obligations Law § 5-703, entitled, "Conveyances and contracts concerning real property required to be in writing," provides in pertinent part:

2. A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, *subscribed by the party to be charged*, or by his lawful agent thereunto authorized by writing

(General Obligations Law § 5-703 [2] [emphasis supplied]).

It has been held that a binder agreement for the sale of real property satisfies the Statute of Frauds and is subject to specific performance where the agreement identifies the parties and the subject property, recites all essential terms of a complete agreement, and is signed by the party to be charged. In addition, the binder agreement must include those essential terms customarily encountered in a real estate transaction (see *Omar v. Rozen*, 55 AD3d 705 [2008]; *Rahimzadeh v M.A.C. Assocs.*, 304 AD2d 636 [2003]; *O'Brien v West*, 199 AD2d 369 [1993]).

While the Proposal identifies, among other things, the street address of the Property, the purchaser, and the purchase price, it neither identifies nor is executed by all of the sellers of the Property. As discussed hereinabove,

defendant indicates that the Property is owned by defendant DUBOIS T. SMITH, individually, as well as by the Trust. It is undisputed that defendant DUBOIS T. SMITH did not sign the Proposal in his individual capacity, or in his capacity as co-trustee. Indeed, plaintiff acknowledged the state of title of the Property by naming as defendants in this matter DUBOIS T. SMITH, individually, as well as DUBOIS T. SMITH and defendant as the two co-trustees of the Trust.

With respect to the Trust's ownership interest in the Property, the general rule in New York is that when there is more than one trustee, they must exercise their powers collectively (see EPTL 10-10.7; *In re Luckenbach's Will*, 303 NY 491 [1952]; *In re Estate of Burke*, 129 Misc 2d 145 [Surr Ct, Cattaraugus County 1985]; 3-46 Warren's Heaton on Surrogate's Court Practice § 46.05 [7] [a]). Defendant alone signed the Proposal on behalf of the Trust, notwithstanding the fact that defendant DUBOIS T. SMITH is the co-trustee thereof. Although defendant indicates that defendant DUBOIS T. SMITH suffers from dementia and the onset of Alzheimer's disease, there has been no representation that he resigned as trustee or that he has ceased to act, or that a conservator or other fiduciary has been appointed to manage his estate. Notwithstanding the foregoing, the Court need not reach the issue of defendant DUBOIS T. SMITH's capacity, as he is not even listed on the Proposal as an owner or seller of the Property.

Further, the Court finds without merit plaintiff's argument that defendant held herself out and acted with the apparent authority to sell the Property "on behalf of herself, individually, and as Trustee of the Trust." Defendant has no individual ownership interest in the Property, and as discussed hereinabove, the Proposal expressly states that the sole seller was the Trust with two trustees appointed to administer the Trust.

Finally, the Court notes that the Proposal indicates there was to be a "contract payment" of \$25,000, which gives rise to the reasonable inference that a more formal and complete contract of sale was to be forthcoming, whereupon plaintiff would tender a deposit of \$25,000 (see *Frankel v. Ford Leasing Dev. Co.*, 7 AD3d 757 [2004]; *Behar v Mawardi*, 268 AD2d 400 [2000]; *La Barca v Altenkirch*, 193 AD2d 586 [1993]).

Based upon the foregoing, the Court finds that the Proposal is unenforceable under the Statute of Frauds. Accordingly, this motion by defendant is **GRANTED**, and plaintiff's complaint is hereby dismissed.

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FARNETI, J.
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Additionally, the Notice of Pendency filed by plaintiff against the Property on or about May 30, 2012, is hereby cancelled, and the Clerk is directed to do so.

The foregoing constitutes the decision and Order of the Court.

Dated: December 14, 2012



HON. JOSEPH FARNETI
Acting Justice Supreme Court

 X FINAL DISPOSITION

 NON-FINAL DISPOSITION