

Jannetti v Whelan

2013 NY Slip Op 30862(U)

April 17, 2013

Supreme Court, Suffolk County

Docket Number: 44564/2010

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Index No: 44564/2010

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTYMOT. SEQ: 007 MD; 008 MD
009 MG**PRESENT:**Hon. RALPH T. GAZZILLO
A.J.S.C.

-----X		
DAVID JANNETTI,	:	MELTZER, LIPPE, GOLDSTEIN
	:	& BREITSTONE, LLP
Plaintiff(s),	:	Attorneys for Plaintiff
- against -	:	190 Willis Avenue
	:	Mineola, N.Y. 11501
MARY M. WHELAN and	:	
DAVID J. WHELAN,	:	DAVID LEE HELLER
	:	Attorney for Defendants
Defendant(s).	:	3334 Noyac Road, Suite 1
-----X		Sag Harbor, N.Y. 11963

Upon the following papers numbered 1- 71, Notice of Motion and supporting papers numbered 1-28, Notice of Cross-Motion and supporting papers numbered, 29-44, Reply Affirmation and supporting papers numbered 45-50; Notice of Motion for Sanctions and supporting papers numbered 51-56; Affirmation in Opposition and supporting papers numbered 57-67; Affirmation in further support of Plaintiff's Cross-Motion and supporting papers numbered 68-71; it is

ORDERED that the defendants' motions (motion sequences #007 and #008) and the plaintiff's motion (motion sequence #009) are consolidated for the purposes of this Short Form Order; and it is further

ORDERED that the defendants' motion (mot seq 007) seeking to vacate and cancel the *lis pendens* on the premises is denied in its entirety, and it is further

ORDERED that defendant's motion (mot seq 007) seeking to disqualify the firm Meltzer, Lippe, Goldstein & Breitstone, LLP, is denied as moot, and it is further

ORDERED that the defendant's motion (mot seq 007) seeking to dismiss plaintiff's affirmative defenses is denied in its entirety, and it is further

ORDERED, that the defendant's motion (mot seq 008) seeking to impose sanctions upon plaintiff's counsel is denied, and it is further

ORDERED that the plaintiff's cross-motion (mot seq 009) seeking an order deeming the *lis pendens* filed *nunc pro tunc* is granted, and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court

Pursuant to verified complaint¹, the plaintiff in this action seeks specific performance on a contract of sale for waterfront residential property located in North Haven and owned by the defendants. Alternatively, he seeks money damages based upon the breach of the subject contract of sale. The salient facts are not in dispute.

The subject contract of sale was dated September 9, 2010 and was negotiated between defendant/property owner Mary M. Whelan (who is an attorney) and plaintiff's attorneys Sigmund S. Semon, Esq., and Ira Halperin, Esq., both of Meltzer, Lippe, Goldstein and Breitstone, LLP. The purchase price for the property was Six Million Fifty Thousand (\$6,050,000.00) dollars and the contract required a down payment of One Hundred Thousand (\$100,000.00) Dollars upon execution. The contract also provided that the defendants would hold a purchase money mortgage in the sum of Four Million Five Hundred Thousand (\$4,500,000.00) dollars. Plaintiff was to pay One Million Four-Hundred Fifty Thousand (\$1,450,000.00) dollars at the time of closing. The contract contained an "on or before" closing date of December 24, 2010. The "Time of Closing" provision in the contract of sale (paragraph 39 of the rider) did not include "time is of the essence" language. The contract terminated by its own terms on December 24, 2010.

The transaction's history between the time of the contract's execution and its termination is as follows:

In or around late November of 2010 and following the contract's execution, the defendants began verbally requesting financial documentation from the plaintiff ostensibly in order to establish his ability to repay the purchase money mortgage. In correspondence between the plaintiff's counsel and David Heller, Esq.², the parties debated whether the contract required the plaintiff to provide the defendants with personal and financial information. (Although the contract does not contain any specific requirement that plaintiff provide financial documentation to the defendant as a condition of the closing/financing, defendant argued that the obligation is

¹The sole cause of action set forth in the complaint which sought specific performance (and alternatively contract damages) was dismissed by this Court by Order dated May 13, 2011 and reinstated by Order of the Appellate Division dated July 25, 2012. Accordingly, the cause of action for specific performance remains intact.

² Mr. Heller was retained by the defendants after the execution of the contract.

required by the miscellaneous provision in the contract which generally states that the parties will provide documents to one another “as may reasonably requested by the other in order to carry out the intent and purpose of this contract.” [Paragraph 28(g).]

In a November 29, 2010, letter to the plaintiff’s counsel, Mr. Heller apparently requested that the plaintiff provide specific financial documents to establish his creditworthiness. Plaintiff’s attorney responded by letter dated November 30, 2010, and advised that “...there is no requirement for our client to provide federal income tax returns (or to provide copies of same), authorization to obtain credit information, or a written financial statement.” That letter further states, “[p]lease be further advised that our client fully expects to close on the transaction in accordance with the terms and conditions contained in the contract. Please confirm by return mail that your client is prepared to close on the date specified in the contract and in accordance with the terms contained therein.” Pursuant to a letter dated December 3, 2010, defendants, through their attorney, responded, in pertinent part, as follows: “Please be advised, sellers are prepared to close on the date specified in the contract, subject to timely submission of financial and personal information, sufficient and necessary to warrant a \$4,500,000.00 purchase money mortgage, subject to subordination.” No further correspondence was exchanged between the parties. Instead, plaintiff commenced this action and filed a *Lis Pendens* on the subject property on December 8, 2010.

Thereafter, defendant moved to dismiss the action. By Short Form Order dated April 7, 2011, the undersigned granted the motion in so far as it sought specific performance on the contract since the plaintiff failed to establish a specific “law day” for the closing of sale prior to initiating the action for anticipatory breach of the agreement. However, the Appellate Division restored the plaintiff’s claim for specific performance on July 25, 2012³.

Lis Pendens

Upon the restoration of plaintiff’s cause of action for specific performance, plaintiff, in an effort to bring the case back to the proverbial “square one”, re-filed and reserved the original summons and complaint. In addition, plaintiff also filed another *lis pendens*. Defendants move to vacate the *lis pendens* arguing, on various grounds, that it fails to comply the requirements of CPLR §6501 and that its filing violates the law which precludes the filing of multiple *lis pendens*. This Court disagrees.

“It is a well-established in New York law that “the filing of the *lis pendens* is a proper use of a provisional remedy when filed in conjunction with an action for specific performance.” However, if a *lis pendens* is filed to maliciously interfere with one’s power to sell property, it is actionable.” (See, *North Trihammer Development Corp. v. Ithaca Associates* 704 F.Supp. 422, 428 S.D.N.Y., 1989 citing *Metromedia, Inc. v. Mandel*, 21 A.D.2d 219 (1st

³In the interval, plaintiff amended its complaint, filed a *lis pendens* and attempted a “law daw” closing. This Court, on defendants’ motion, however, vacated the second *lis pendens* by Short Form Order dated on the ground that the contract had expired by its own terms on December 24, 2012.

Dep't 1964); *Ellman v. McCarty*, 70 A.D.2d 150 (2d Dep't 1979).

CPLR § 6501, in pertinent part, states:

“A notice of pendency may be filed in any action in a court of the state * * * in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.”

Since the Appellate Division restored plaintiff's cause of action for specific performance, plaintiffs' use of the *lis pendens* for its statutory purpose in conjunction with this action for specific performance was the appropriate remedy. (See, *Piep v. Baron*, 133 Misc. 2d 248).

Defendants' other arguments, i.e. that plaintiff's matrimonial action prevented him from entering into the contract of sale and that the defendant has filed successive *lis pendens* in violation of statute appear to be without merit and are, at best, premature.

Accordingly, the portion of defendants' motion which seeks to vacate the *lis pendens* is denied and plaintiff's cross-motion, which seeks to deem the *lis pendens* to be filed *nunc pro tunc* is granted.

Disqualification of Counsel

Defendants' motion to disqualify plaintiff's counsel pursuant to 22 NYCRR 1200.29 (Rule 3.7) under the “advocate/witness rule” is denied as moot since it is undisputed that plaintiff has retained new counsel.

Dismissal of Affirmative Defenses

Defendants also seek dismissal of the plaintiff's affirmative defenses raised in defendants' counter-claims. Plaintiff, in summary, alleges that defendants have not properly answered plaintiff's reinstated complaint, have not properly appeared by counsel and have not timely interposed an answer to plaintiff's reinstated complaint. In support of their application, defendants argue that their Patricia Weiss, Esq., who is assisting Mr. Heller, is simply providing assistance to Mr. Heller who now travels out of state frequently to visit his teenage son at college.

Defendants bear the burden of establishing that plaintiff's affirmative defenses are “without merit as a matter of law” (see, *Greco v. Christoffersen*, 70 AD3d 769, *Mazzei v. Kyriacou*, 98 A.D.3d 1088). Furthermore, “In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference” (*Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721).

Here, with regard to the Second Affirmative Defense, defendants argue that they are entitled to have Ms. Weiss represent them as co-counsel to Mr. Heller. Defendants, however, do not address their argument to the First and/or Third affirmative defenses. It appears that the

defendants do not understand the nature of the plaintiff's affirmative defenses in that they appear to be directed at their failure to respond to the reinstated, reserved complaint rather than to defendants' choice of counsel. Defendants have not denied that they have not filed a response to the re-filed and re-served reinstated summons and complaint.

Accordingly, at this juncture, they have failed to establish that the plaintiff's affirmative defenses are entirely without merit and, as such, their motion in that regard must be denied.

Sanctions

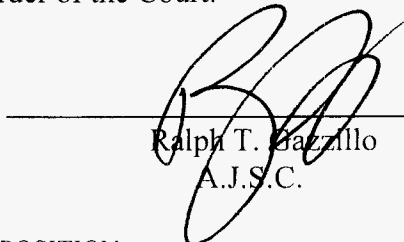
Defendants also seek sanctions pursuant to Rule 130-1.1(mot seq 008) against the plaintiffs on the ground that the plaintiffs acted frivolously in filing successive notices of pendency. In opposition to the motion, plaintiff asserts that, since the Appellate Division reinstated the original complaint, that it was appropriate to re-file the *lis pendens*.

The Court agrees. As set forth herein, the *lis pendens* is the appropriate provisional remedy in an action for specific performance on a real estate contract (see, ***North Trihammer Development Corp. v. Ithaca Associates***, 704 F.Supp. 422). The reinstatement of the plaintiff's complaint simply put the parties back in the position they were in when the action was commenced in 2010. To disallow the use of *lis pendens* as a provisional remedy would be to penalize the plaintiff when no such penalty is warranted. Moreover, plaintiff has established a rational explanation for re-filing the *lis pendens* and that it did not file same to harass or maliciously injure the defendants.

Accordingly, defendants' motion for sanctions is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 4/17/13
RIVERHEAD, NY



Ralph T. Bazzillo
A.J.S.C.

NON-FINAL DISPOSITION