

Tirado v Courterport Corp.

2013 NY Slip Op 33146(U)

December 10, 2013

Sup Ct, Queens County

Docket Number: 14001/13

Judge: Bernice D. Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
Joy L. Tirado,
Plaintiff,

Index No.: 14001/13
Motion Date: 9/23/13
Motion Cal. No.: 107
Motion Seq. No.: 1

-against-

Courterport Corp and John B. Lightstone,
Defendants.

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The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §3211(a)(1) & (7) and CPLR 6514(b) to dismiss plaintiff’s complaint in its entirety for failure to state a cause of action upon which relief can be granted and for an order directing the County Clerk to cancel the lis pendens filed in this action by plaintiff pursuant to CPLR 6514(b) and awarding costs, expenses and counsel fees to defendants for the bad faith filing of the lis pendens pursuant to CPLR 6514(c).

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants move for an order pursuant to CPLR §3211(a)(1) & (7) and CPLR 6514(b) to dismiss Plaintiff’s complaint for failure to state a cause of action and for an order directing the County Clerk to cancel the lis pendens filed in this action by plaintiff pursuant to CPLR 6514(b) and awarding costs, expenses and counsel fees to defendants for the bad faith filing of the lis pendens

pursuant to CPLR 6514(c).

Facts

Plaintiff, Joy L. Tirado (“Plaintiff” or “Tirado”) is a tenant pursuant to a lease with Courterport Corp. As Lessor, for the premises known as 169-38 Pigeon Meadow Road, Flushing, NY 11358 (the “Premises”). The lease contains a right of first refusal whereby the landlord must notify the tenant of any offer to purchase the Premises. Defendant John B. Lightstone, President of Courterport, contends that he received an offer to buy the Premises subject to the Plaintiff’s right of first refusal and that Plaintiff was given proper opportunity to exercise her right of first refusal by matching the offer. The offer was to purchase Premises for the sum of \$800,000 with no financing, including a \$60,000 down payment.

Lightstone contends that Plaintiff failed to exercise her rights under the lease to match the offer and failed to tender the down payment.

Pursuant to the Lease, “[I]n the event that the landlord receives an offer to purchase the property prior to the termination of this agreement, the landlord shall promptly notify the tenant. The tenant shall have a “Right of First Refusal”, to be exercised seven days prior to offer expiration date. Tenant shall receive 60 days notice of final termination, for removal of all property and departure.”

Plaintiff’s complaint states that she was not provided with an accurate Notice of Right to First Refusal and she was not afforded the time to obtain financing to attempt to purchase the premises.

Lightstone contends that the attempt to “obtain financing” would not match the Offer which was an all cash deal.

Discussion

“On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a

cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Rabos v. R & R Bagels & Bakery, Inc.*, 100 A.D.3d 849, 851 [2nd Dept 2013]; *Leon v. Martinez*, 84 N.Y.2d 83 [1994].) The question before this court is “whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate.” (*Rabos v. R & R Bagels & Bakery, Inc.*, at 852.)

Plaintiff’s complaint states that she was not provided with an accurate Notice of Right to First Refusal and she was not afforded the time to obtain financing to attempt to purchase the premises.

It is undisputed that the right of first refusal may be extinguished where the offer is not matched by the holder. (Cf. *Yudell Trust I v. API Westchester Associates*, 227 A.D.2d 471 [2nd Dept 1996]; *Story v. Wood*, 166 A.D.2d 124 [3rd Dept 1991].) Herein, the Defendants have rebutted Plaintiff’s contention that she was not provided with a Notice of Right of Right of First Refusal by attaching the Notice of Right of First Refusal along with an affidavit of service. Furthermore, Plaintiff, in her complaint, admits that she was attempting to get financing, which contradicts the terms of the offer which required the deal be in cash. Moreover, Plaintiff’s contention that the requirement that a purchase be in cash is not material is without basis. There are various factors which would lead an owner to prefer a deal done in cash as opposed to a deal done through financing.

In addition, the Notice of Right of First Refusal provided that the Plaintiff was to issue, in writing, an “irrevocable offer” to purchase the property for \$800,000 on or before May 19, 2013 and

deliver to the Owner a purchase deposit in an amount no less than \$60,000 by May 31, 2013. Plaintiff does not contend that she complied with either provision of the Notice of Right of First Refusal. Instead, Plaintiff argues that “it is impossible to determine if the Plaintiff’s time has expired.” However, by the terms of the Lease, Plaintiff had to match the offer no later than seven days prior to the offer’s expiration. The “offer” required that the Defendant accept the offer by May 20, 2013. Defendants allowed the Plaintiff to match the offer up until May 19, 2013.¹

Accordingly, as Notice of Right of First Refusal was properly delivered and Plaintiff failed to notify, in writing, her irrevocable offer to purchase the property for \$800,000 and deliver the \$60,000 deposit, Plaintiff has failed to state a cause of action.

Conclusion

For the reasons set forth above, it is hereby

ORDERED, Defendants’ motion to dismiss and cancel the lis pendens is granted; and it is further

ORDERED, that the Clerk of Queens County is directed, upon payment of the proper fees, if any, to cancel and discharge a certain notice of pendency filed in this action on July 23, 2013 for the premises located at 169-38 Pigeon Meadow Road, Flushing, NY 11358 , Block 5567, Lot 26, and said Clerk is hereby directed to enter upon the margin of the record of same a notice of cancellation referring to this order; and it is further

ORDERED, that the Clerk of the County of Queens be served with a copy of this Order with notice of entry; and it is further

ORDERED that the portion of the motion for costs, expenses and counsel fees for the bad

¹Defendants could have set an earlier date of May 13, 2013 as the deadline to match.

faith filing of the lis pendens is denied as there was no showing of bad faith on behalf of the Plaintiff.

Dated: December 10 , 2013

Bernice D. Siegal, J. S. C.