

Pfeifer v Groisman

2013 NY Slip Op 33344(U)

April 16, 2013

Sup Ct, Queens County

Docket Number: 703322/2012

Judge: Sidney F. Strauss

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

ORIGINAL

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

-----X

SHABSI PFEIFER,

Index No.: 703322/2012

Plaintiff,

Motion Date: March 1, 2013

-against-

Seq. No.: 2

ELIAS A. GROISMAN and
MAYA DEVELOPMENT LLC,

Defendants.

-----X

2013 APR 19 PM 12:50
NYSCEF 04/19/2013

The following papers numbered 1 to 6 were read on the motion by the defendants, seeking an order pursuant to CPLR 3211, dismissing plaintiff's complaint with prejudice; pursuant to CPLR 6514(b), cancelling the notices of pendency, directing plaintiff to pay defendants' legal costs incurred; and enjoining plaintiff from filing any new notices of pendency against properties owned by the defendants.

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affirmation - Exhibits.....	1 - 3
Opposition Affirmation - Exhibit.....	4 - 5
Reply Affirmation.....	6

Defendant Elias A. Groisman ("Groisman") offered to sell to plaintiff the deeds to three properties provided plaintiff negotiate the removal of two liens against Groisman's name, and upon the payment of \$55,000.00. The offer, made via e-mail transmission dated April 7, 2011, did not contain an end date by which plaintiff had to complete performance. Defendant Groisman argues that, although plaintiff made a \$7,000.00 deposit, he never completed performance pursuant to the terms of their agreement, and therefore, Groisman cancelled the contract, offered to return the deposit, and then entered into a contract of sale for the respective premises to the co-defendant Maya Development LLC ("Maya"). Defendant Groisman claims, that plaintiff's failure to perform within six months of the date of the agreement, permitted him to consider the agreement terminated. Groisman further argues that at no time since the offer was initially made has the plaintiff tendered payment in full or satisfied the liens in question.

At the outset, defendants submit a copy of the stipulation signed by the parties wherein

the plaintiff agreed to discontinue their action with prejudice, as against the defendant Maya Development LLC, and further, to cancel the notice of pendency as to 32-34 106th Street, Corona, New York, Block 1700, Lot 22, in Queens County, New York. Further, the plaintiff also agreed that no further notices of pendency or UCC liens would be filed with respect to said premises.

Plaintiff opposes this motion contending that the defendants' moving papers incorrectly rely upon CPLR 3211(a)(1), and further, that the failure to come to agreement as to the terms of the closing date did not prevent a meeting of the minds, and therefore, the agreement was in full force and effect. At the outset, the court notes that defendants' notice of motion cites CPLR 3211, without specifying which subsection they are relying upon.

The defendants' moving papers state that although they are moving, as a whole, pursuant to CPLR 3211, it is subsection (a) (1), that is the guiding provision for dismissal. CPLR 3211 (a) (1) provides that "(a) . . . A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . ." In order to prevail on a CPLR 3211(a) (1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . ." (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003], quoting *Trade Source v Westchester Wood Works*, 290 AD2d 437 [2d Dept 2002].) Here, defendants argue in reply, that the motion is based on "plaintiff's failure to perform and failure to act. It is somewhat difficult to produce evidence of inertia. Nonetheless, Defendant did annex documents that provide that the sale offer was made in April 2011, and [defendant] produce[d] documents showing that the last action Plaintiff took to further this sale was in July 2011 - seventeen months before moving to compel specific performance." To the extent that defendants agree that there is insufficient documentary evidence to support dismissal, the court denies defendant's motion pursuant to CPLR 3211(a)(1).

However, the defendants rely upon the whole of CPLR 3211 in the instant motion. The court finds that CPLR 3211(a)(7) is the subsection within which defendants, inartfully, seek relief. "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" (See, *Parekh v Cain*, --- N.Y.S.2d ----, 2012 WL 2125829 [2d Dept.2012]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept. 2008]; see *Moore v Liberty Power Corp., LLC*, 72 A.D.3d 660[2d Dept. 2010], lv. denied 14 N.Y.3d 713, 2010 N.Y. Slip Op. 73808, 2010 WL 2301693 [2010]). "However, bare legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such consideration." (*Garner v China Natural Gas, Inc.*, 71 AD3d 825 [2d Dept. 2010]; *Riback v Margulis*, 43 AD3d 1023 [2d Dept. 2007].)

The court need not determine whether or not there is evidentiary support for the complaint, merely but rather, to determine if the plaintiff has alleged a cause of action. It is not the function of the court to evaluate the merits of the case on a motion to dismiss for legal insufficiency (See, *Parekh v Cain*, supra; *Leon v Martinez*, 84 NY2d 83 [1994]; *219 Broadway Corp. v Alexander's Inc.*, 46 NY2d 506 [1979]; *Carbillano v Ross*, 108 AD2d 776 [2d Dept.

1985].)

Groisman argues that the plaintiff's complaint should be dismissed because, as the evidence proves, there was merely an offer, not a contract, wherein the plaintiff was to satisfy certain conditions, namely the clearing of the liens, before the offer would be considered a contract for the purchase of certain real property. Additionally, Groisman states that the fact there was no closing date set forth with any specificity should be interpreted as that the plaintiff had a reasonable time within which to comply with the conditions precedent, and plaintiff failed to perform within such time.

The court finds that the by failing to agree to when the closing was to take place, the parties never reached a meeting of the minds as to the terms customarily contained in an agreement for the sale of real property. (See, *Hausman v Klaver*, 262 AD2d 613 {2d Dept. 1999}.) Contrary to plaintiff's affidavit, it is not the defendant's obligation, prior to treating the offer as cancelled, to send a cancellation notice, or further, to send a letter that the defendant was ready, willing and able to close along with a set closing date. The court finds that when an agreement is missing an express term fixing the duration of a contract, it is within the discretion of the court to examine the intent of the parties, and determine that duration may be determined as what would be fair and reasonable according to the circumstances. (See, *Gelman v Buehler*, 91 AD3d 425 [1st Dept. 2012]; *Meccariello v Di Pasquale*, 35 AD3d 678 [2d Dept. 2006]; *Parker v Booker*, 33 AD3d 602 [2d Dept. 2006].)

Accordingly, there was no enforceable agreement since there was no showing that there was a meeting of the minds between the parties as well as a clear intent to be bound. It is undisputed that the plaintiff was required to satisfy the two liens as against the defendant as well as provide payment of the balance in order to close. Defendant submits proof that the plaintiff's last attempt to satisfy the removal of the liens was in June, 2011. Despite plaintiff's argument to the contrary, it is irrelevant whether the defendant had filed for bankruptcy protection inasmuch as the copy of the bankruptcy discharge specifically delineates that the liens in question were not discharged by said filing. As to the lien of Nadia Gonzalez, defendant submits the affidavit of the non-party's attorney, wherein he states that the lien incurred as the result of defendant's default in an unrelated personal injury action remains outstanding, as well as the fact that the bankruptcy discharge merely lists those debts noticed by Groisman but does not state whether they are to be considered discharged. Defendant also submits that plaintiff failed to provide proof of any attempt to tender performance and demand title beyond his own conclusory affidavit. (See, *Cohen v Securan Realty Corp.* 151 AD2d 634 (2d Dept 1989).)


Consequently, there is no basis for an action for a breach of a contract that does not exist, and moreover, there can be no specific performance for an agreement wherein the plaintiff himself did not comply with the pre-requisites of such an alleged agreement. (See, *Ramos v Lido Home Sales Corp.* 148 AD2d 598 [2d Dept. 1989].) Therefore, it is

ORDERED, defendant's motion is granted and plaintiff's complaint is dismissed. CPLR 3211(a)(7); *Id.* In light of this, plaintiff's notices of pendency are vacated, and it is

ORDERED, that the County Clerk of Queens County is directed, upon payment of proper fees, if any, to cancel and discharge the notices of pendency filed in this action on December 24, 2012, against the following properties respectively located: at 32-34 106th Street, East Elmhurst, New York, designated at Block 1700, Lot 22, Queens County; at 108-21 46th Avenue, Corona, New York, designated at Block 2001, Lot 77, Queens County; and at 103-59 52nd Avenue, Corona, New York, designated at Block 1942, Lot 71, Queens County. The Clerk shall enter upon the margin of the record for each property 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.

Dated: April 16, 2013



SIDNEY F. STRAUSS, J.S.C.