

Jannetti v Whelan

2014 NY Slip Op 30392(U)

February 5, 2014

Sup Ct, Suffolk County

Docket Number: 44564/2010

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ: 010 MD; 011 Mot. D
012 Mot. D.

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

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David Jannetti,	:	Mike G. Walsh, Esq.
	:	860 Montauk Hwy., Unit 4
Plaintiff(s),	:	Watermill, N.Y. 11976
- against -	:	
	:	Patricia Weiss, Esq.
Mary M. Whelan and David J. Whelan,	:	P.O. Box 751
	:	78 Main Street, Suite 14
Defendant(s),	:	Sag Harbor, N.Y. 11963
-----X		

Upon the following papers numbered 1- 17 , Notice of Cross Motion and supporting papers numbered 1- 11; Affirmation in Opposition and supporting papers numbered 12-17; it is

ORDERED that the defendants' cross-motion¹ for summary judgment is granted as set forth herein and the complaint is dismissed; it is further

ORDERED that the defendants' motion (mot.seq.10) is denied as moot; and it is further

ORDERED that counsel for plaintiff 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.

¹By Notice of Motion, the plaintiff has made a motion requesting certain relief *vis a vis* discovery issues (mot seq 11). That application is decided by separate decision.

Pursuant to verified complaint², 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 an alleged 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 then-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 Dollars (\$6,050,000.00) and the contract required a non-refundable down-payment of One Hundred Thousand Dollars (\$100,000.00) upon execution. The contract also provided that the defendants would hold a purchase money mortgage in the sum of Four Million Five Hundred Thousand Dollars (\$4,500,000.00). The balance—One Million Four-Hundred Fifty Thousand Dollars (\$1,450,000.00)—was to be paid by plaintiff 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, however, include “time is of the essence” language. Additionally, and very germane to this decision, the contract was to terminate by its own terms on December 24, 2010 (“Rider”, paragraph 39).

Thereafter, the history of the transaction after the contract's execution and its termination date 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.³, 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 required by the miscellaneous provision in the contract which 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.” [Contract, paragraph 28(g).])

²The 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 but reinstated by Order of the Appellate Division dated July 25, 2012 (*Jannetti v. Whelan*, 97 AD3d 797) (holding that summary judgment was premature in that it was not sought by plaintiff and the Court had not converted the motion to a summary judgment motion). Accordingly, the cause of action for specific performance remained intact.

³ Mr. Heller was retained by the defendants after the execution of the contract.

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, weeks before the contract's "on or before" closing date and termination date of December 24, 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, as indicated above, the Appellate Division restored the plaintiff's claim for specific performance on July 25, 2012 and hence the original *lis pendens* as well⁴.

While the appeal was *sub judice*, plaintiff attempted a second closing by sending a "law day" letter on May 3, 2011 to defendants' counsel requesting that plaintiff's provide certain information for the "law day" closing including but not limited to: payoff information on existing mortgages, the manner in which defendants wished checks to be payable, and insurance information (presumably for title insurance for the purchase money mortgage). That same day, defendants' counsel responded with a letter to plaintiff's counsel which indicated (among other things) that the plaintiff was no longer entitled to establish a "law day" as the contract had terminated by its own terms on December 24, 2010. On April 8, 2011, plaintiff's counsel wrote to defendants' counsel indicating that he was designating May 13, 2011 as the "law date to close title". That letter further stated that failure to close on that date would be considered a default under the contract and that "time is of the essence". On May 5, 2011, plaintiff's counsel again wrote to defendants' counsel advising that notwithstanding defendants' May 3, 2011 letter, plaintiff intended on closing as stated in his April 8, 2011 letter. Thereafter, on May 13, 2011, plaintiff arrived at defendants' counsel's office and tendered performance of his obligations ostensibly as set forth in the contract of sale. Plaintiff's purported

⁴In the interval, plaintiff amended its complaint, filed a second *lis pendens* and attempted a "law day" closing in May of 2011. This Court, on defendants' motion, however, vacated the second *lis pendens* by Short Form Order dated May 28, 2012 on the ground that the contract had expired by its own terms on December 24, 2010.

performance of his contractual obligations was memorialized in a transcript prepared by a court reporter/notary public.

Thereafter, upon the restoration of plaintiff's cause of action for specific performance by the Appellate Division in its July 25, 2012 opinion *supra*, plaintiff, in an apparent effort resurrect his position, re-filed and re-served the original summons and complaint

The defendants now cross-move for summary judgment dismissing the complaint asserting that, because the contract allegedly required the plaintiff to establish creditworthiness, his failure to do so entitles them to have the action against them dismissed.

The Court's analysis begins by discarding as unnecessary any critique of the latter contention and, as noted below, it need not be resolved. Instead, the focus of the inquiry should be the omissions by the plaintiff, both in his moving papers wherein he attempted to defeat the defendants' contentions, as well as his apparent failure to appropriately establish a binding closing date and demonstrate his ability to tender his contractually required performance.

Preliminarily, the analysis begins by noting that the Court is disinclined at this juncture to concede that the contract of sale required the plaintiff to establish his financial ability. Secondly, and what does merit review and underscoring is that, as a matter of law, "[a] party seeking specific performance of a real estate contract must establish that it was ready, willing, and able to perform its obligations under the contract on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter" *Ferrone v. Tupper*, 304 A.D.2d 524, 525; *citing Huntington Min. Holdings v. Cottontail Plaza*, 60 N.Y.2d 997, 998; *Kabro PM, LLC v. WGB Main St., LLC*, 52 A.D.3d 659, *Internet Homes, Inc. v. Vitulli*, 8 A.D.3d 438, 439). Pursuant to a somewhat recent Court of Appeals case, *Pesa v. Yoma Development Group, Inc.*, 18 NY3d 527 (2012), the law amongst the various judicial departments has been unified so as to provide that it is *also* incumbent upon the party seeking damages for a "seller's anticipatory breach of contract for the sale of real property" to establish that it was "ready, willing and able" to perform its obligations under the contract. (Prior to *Pesa*, when seeking damages only, a purchaser in the Second Department was not required to show that he was "ready, willing and able" to close, only that he or she had the "ability" to close [*see, e.g., Zeitoune v. Cohen*, 66 A.D.3d 889; *Pesa v. Yoma Development Group, Inc.* 74 AD3d 769].)

Accordingly, when a party seeks either specific performance or damages, an anticipatory breach by a seller does not excuse the purchaser from establishing that he or she "was ready, willing, and able to perform" (see, *Zev v Merman*, 134 AD2d 555, 557, *affd* 73 NY2d 781; *cf. Eivers v. Dreamworsk Constr., Inc.*; 48 AD3d 625; (See also; *Fridman v. Kucher*; 34 AD3d 726; *McCabe v Witteveen*, 34 AD3d 652, 653- 654; *Johnson v. Phelan*; 281 AD2d 394, 395). Said otherwise, one party's improper cancellation of the contract does not excuse the other party from demonstrating its ability to tender its own performance (*see, Zev v. Merman, Supra.; Huntington Min. Holdings v. Cottontail Plaza*, 96 A.D.2d 526, *affd.* 60 N.Y.2d 997; *Stawski v. Epstein*, 67 A.D.2d 681).

Also worth noting is the general rule:

“time is not of the essence in a contract for the sale of real estate unless the parties agree to do so. Unless specifically established in the contract, time is not of the essence and the closing date is only an ‘on or about’ date subject to reasonable adjournments. It is possible for a party to unilaterally convert a non-time-of-the-essence contract into one making time of the essence. This is done by giving the other party reasonable and sufficient notice which (1) must be clear, distinct and unequivocal; (2) must fix a reasonable time within which to perform; and (3) must inform the other party that failure to perform by the designated date will constitute a default.”

Arzumanyants v. Fragetti, 19 Misc.3d 1134(A), 10. (see also, *Zev v. Merman*, supra.).

In the matter at bar, such proof is absent. For instance, the subject contract does not specify that “time is of the essence” with respect to the closing date. As such, in order to unilaterally establish a “law day”, plaintiff herein would have been required to give sufficient and reasonable notice declaring that time is of the essence, informing the defendant that failure to perform would be considered a default, fixing the closing date, and establishing its ability to perform its obligations under the contract. Although plaintiff’s counsel’s November 30, 2010 letter states that plaintiff “fully expects to close on the transaction in accordance with the terms of the contract”, this language neither fixed a reasonable time to perform nor informed the defendants that failure to perform would be considered a default. Even if it was clear based upon the correspondence between the parties that defendants would not proceed to closing, the lack of directness and specificity in plaintiff’s communications to establish a “law day” precludes plaintiff from as yet obtaining specific performance and or damages on the contract.

It also bears noting that the premise of defendants’ application herein is not the key to the litigation and their emphasis misplaced and misguided. Contrary to defendants’ assertions, the central issue to be resolved in this case is not whether Mr. Jannetti had to show his financial wherewithal to close on the contract which included (in defendants’ opinion) his ability to pay the private purchase money mortgage that defendants agreed to give to plaintiff, but rather, whether Mr. Jannetti was ready willing and able to close the transaction at the time specified in the contract of sale, which in essence apparently involved only supplying the money he was required to pay on the closing of title had the closing taken place.

Against that requirement, the plaintiff’s demonstration is lacking; conversely, defendants’ submissions are sufficient to demonstrate its prima facie entitlement to judgment dismissing the complaint (see, *Citibank v. Jones*, 272 AD2d 815). Indeed, once such proof had been offered, the burden then shifted to the plaintiff, who, in order to defeat the motion for summary judgment, was required to proffer evidence in *admissible* form to “show facts sufficient to require a trial of any issue of fact” (CPLR §3212[b]; *Zuckerman v City of New York*, 49 NY2d 557; *Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499) and must simultaneously assemble, lay bare and reveal his proof in order to establish that the matters set

forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014).

In response to the defendant's motion however, plaintiff merely provided a single page each from two separate bank statements which purportedly show that between December 10, 2010 and January 11, 2011, plaintiff had a bank balance of 1) between \$339,317.05 and \$333,021.28 in the joint checking account he shared with his estranged wife, and 2) between \$1,763,297.04 and \$614,211.12 in a commercial account that he asserts was under his full control. There is, however, an absence of acceptable proof (*viz*, an affirmation from an accounting professional or any other persuasive and acceptable authority) to demonstrate that the plaintiff had full control of these accounts. Also, plaintiff did not offer to provide the required proof by additional documentation for *in camera* inspection as it is purportedly private, and in his view, not subject to exploitation by the defendants. That contest notwithstanding, it would appear, however, at least a futile and meaningless exercise for the Court to review any such documents since a demonstration of his mere recent financial resources does not necessarily and persuasively portray such resources and funds in or around the time the parties were attempting to set a closing date in late 2010. Albeit repetitious, the question which at first blush deceptively appeared to need resolution was whether the plaintiff established that he was "ready, willing and able" to close on the "law date" set forth in the contract. However, upon closer analysis and given the fact that no such law date was ever set prior to the termination of the contract (by its own terms on December 24, 2010), the Court need not pursue that issue.

Unfortunately, even though it might be argued that defendants were perhaps the first to undermine the contract by demanding "proof of creditworthiness" as a pre-condition to setting the closing⁵, that is now also a moot and at best academic exercise. Indeed, plaintiff's submissions do not overcome the fact that he did not, as a matter of law, appropriately and reasonably set a "law day" for the closing and sufficiently establish that he was ready, willing and able to close prior to December 24, 2010, the date the contract expired. Indeed, the November 30, 2010 letter never set a closing date, never gave the defendant reasonable and sufficient notice of the date on which he expected their performance, never fixed a reasonable time within which to perform, nor did he simultaneously advise defendants that failure to perform by the designated date would constitute a default. In light of the case law which requires such a showing, the Court awards summary judgment to the defendants.

The foregoing constitutes the decision and order of the Court.

Dated: 2/5/14
 Riverhead, NY



 Ralph T. Gazzillo
 A.J.S.C.

NON-FINAL DISPOSITION

Purely parenthetically, it would appear that among the defendants' options and/or remedies for the plaintiff's failure to perform its financial obligations under the mortgage would have been to begin foreclosure proceedings.