

SDK Property One LLC v QPI-XXXII LLC
2014 NY Slip Op 31969(U)
June 11, 2014
Sup Ct, Queens County
Docket Number: 700732/2012
Judge: Frederick D. R. Sampson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IA Part 31
Justice

_____	x	Index
SDK PROPERTY ONE LLC,		Number <u>700732</u> 2012
Plaintiff &		
Counterclaim Defendant		
-against-		Motion
		Date <u>November 4,</u> 2013
QPI-XXXII LLC,		Motion Seq. No. <u>3</u>
Defendant &		
Counterclaim Plaintiff		
_____	x	

FILED
JUN 18 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 21 read on this County by defendant and counterclaim plaintiff for an award of summary judgment dismissing the complaint against it and awarding it a declaratory judgment that plaintiff has no right, title or interest in a certain property and cross-motion by the plaintiff for an award of summary judgment based on defendant's breach of contract and for an order directing specific performance of the parties' real estate sale agreement.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits.....1-12
Notice of Cross Motion - Affidavits - Exhibits...13-18
Answering Affidavits - Exhibits.....19-21
Reply Affidavits.....

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

The plaintiff commenced this action to asserting three causes of action for breach of contract and specific performance to compel defendant to sell the latter's property, known as 43-35 and 43-39 42nd Street in Sunnyside, Queens, New York, to it pursuant to a Purchase and Sale Agreement (agreement) dated May 4, 2010, and to permit it to recover consequential damages arising from the

defendant seller's failure to sell the property to it based upon the defendant's wrongful termination of the agreement on October 3, 2011.

The defendant contends that it is entitled to summary judgment dismissing the claims against it, inter alia, pursuant to the express terms of the parties' agreement of May 4, 2010, limiting the plaintiff's remedies for defendant's breach of the agreement to terminating the agreement and obtaining a return of its deposit plus accrued interest or moving for specific performance within 120 days of the scheduled closing.

The plaintiff contends, in support of its cross motion for summary judgment and in opposition to the defendant's motion for summary judgment, that it is entitled to specific performance of the parties' agreement because the defendant's letter terminating the agreement was contractually and legally improper in that the contract only permitted termination by plaintiff buyer. The plaintiff asserts that it repeatedly extended the time within which the defendant was required to close based on its assumption that the defendant was being truthful in explaining its inability to close and on defendant's good faith efforts to resolve the issue with its mortgage holder so that, given time, defendant would be able to deliver title as required.

In support of their motion and cross motion for summary judgment the parties submit, inter alia, copies of the documents that underlie their dealings in the subject matter. The parties' agreement of May 4, 2010 sets forth the terms pursuant to which the purchase and sale of the subject property would be made. The agreement was amended four times, on September 1, 2010, October 27, 2010, December 17, 2010 and March 29, 2011, in order to extend the closing date. The last scheduled closing date was set for May 1, 2011. The parties admit that there were no additional written amendments to the agreement to further extend the closing date. Further, pursuant to section 2 of the March 29, 2011 Fourth Amendment To Purchase and Sale Agreement, time was of the essence as to the Seller's obligation to close. Pursuant to section 3 thereof, the subject agreement constitutes the entire agreement of the parties.

Defendant seller's letter to plaintiff, which terminated the agreement on October 3, 2011, states in relevant part as follows: "As you know, the Property is subject to a mortgage and is collateral for a securitized loan. Pursuant to our loan documents, the special servicer's consent is required to sell the Property and to release it from the lien of the mortgage. Please note that despite our commercially reasonable efforts to obtain such required consent, the special servicer will not consent to the release of said lien. Accordingly, Seller will be unable to convey title to

Purchaser in accordance with the Purchase Agreement, and therefore Seller is hereby (x)terminating the Purchase Agreement, and (y) instructing the Escrow Agent to immediately refund the Deposit (together with all interest earned thereon) to Purchaser.

Section 13(a) of the parties' agreement enumerates the plaintiff buyer's remedies in the event of a default by the seller as follows: (a) Default By Seller. Except as set forth below, in the event the Closing and the transactions contemplated hereby do not occur as provided herein by reason of the default of the Seller (provided that Purchaser is ready, willing and able to close, other than the actual delivery of the Purchase Price to Seller), Purchaser may elect, as the sole and exclusive remedy of purchase, to either (i) terminate this Agreement and receive the Deposit, and the interest earned thereon from the Escrow Agent in accordance with the provisions of the Escrow Agreement, and in such event, Seller shall not have any liability whatsoever to Purchaser hereunder other than with respect to those obligations which, pursuant to the provisions of this Agreement, shall survive the termination hereof, or (ii) enforce specific performance of this Agreement (but no other action for damages or otherwise, shall be permitted). Purchaser shall be deemed to have elected to terminate this Agreement as provided in subclause (i) above if the Purchaser fails to commence an action for specific performance within one hundred twenty (120) days after the Scheduled Closing Date."

Section 13 (b) of the Agreement contains the defendant seller's remedies in the event of a default by the buyer and provides: "(b) Default by Purchaser. In the event the Closing and the transactions contemplated hereby do not occur as provided herein by reason of any default of Purchaser (assuming that Seller is ready, willing and able to close in accordance with the provisions of the Agreement), Purchaser and Seller agree it would be impractical and extremely difficult to fix the damages which Seller may suffer. Therefore, Purchaser and Seller hereby agree a reasonable estimate of the total net detriment Seller would suffer in the event Purchaser defaults and fails to complete the purchase of the property is and shall be, as Seller's sole and exclusive right, recourse and remedy (whether at law, in equity or otherwise), and not as a penalty, a sum equal to the Deposit and any interest earned thereon."

Summary judgment will be granted when the submitted papers warrant the court directing judgment in favor of the movant as a matter of law (CPLR § 3212[b]). On a summary judgment motion it is incumbent upon the court to consider "whether the pleadings, affidavits, and exhibits in support of the motion are sufficient to overcome the opposing papers, and to justify finding, as a matter of law, either that there is no defense to the action or that the ... defense is without merit" (*Phillips v. Joseph Kantor & Co.*, 31

NY2d 307 [1972]). If the movant makes a prima facie showing, then "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]). Further, the court must view the evidence in the light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences to be drawn from the evidence (see *Negri v. Stop & Shop*, 65 NY2d 625 [1985]). Of course, summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact.

It is clear from the evidence presented herein that defendant seller has defaulted on its obligations under the parties' agreement. That said, it is also evident that the parties specifically limited the remedies that would be available to each party in the event of a default by the other party to what is enumerated in their agreement. Under the circumstances presented, the only remedy available to the plaintiff herein is the return from the escrow agent of its deposit and accrued interest on the deposit pursuant to section 13 (a)(i) of the parties' agreement. This finding is buttressed by the fact that the plaintiff failed to commence an action for specific performance within 120 days after the last scheduled closing date which, according to last sentence of Section 13 of the agreement, is deemed an election by the plaintiff buyer to terminate the agreement as provided in subclause (i) above and relegates it to obtaining a return of its deposit and accrued interest as its only remedy. No triable issues of fact have been presented (*Alvarez v Prospect Hospital*, 68 NY2d 230 [1986]).

Accordingly, the defendant is granted an award of summary judgment dismissing the complaint against it. The motion is in all other respects denied.

Lastly, the cross-motion is in all respects denied.

Dated: June 11, 2014



J.S.C.