20 Schuyler Lane Trust v de Silva
2014 NY Slip Op 33081(U)
July 25, 2014
Supreme Court, Putnam County
Docket Number: 2675/13
Judge: Lewis J. Lubell

SC 9/2/14 @ 9:30 am

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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20 SCHUYLER LANE TRUST, by ROHINI P. de SILVA, as Trustee, and MARK ALAN CONLEY, as Trustee,

Plaintiff,

-against -

JOSEPH de SILVA, a/k/a ASOKA JOSEPH deSILVA, and CHANDRIKA de SILVA, a/k/a CHANRIKA LAKSHMI, PATTIARATCHI de SILVA,

Defendants.

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DECISION & ORDER

Index No. 2675/13

Sequence No. 1 & 2
Motion Date 5/5/14

LUBELL, J.

The following papers were considered in connection with **Motion Sequence #1** by Plaintiffs for an Order pursuant to Real Property Actions and Proceedings Law Section 211, restraining the Defendants from committing any further waste upon or damage to the subject property located at and known as 20 Schuyler Lane, Garrison, New York, and why an Order should not be made and entered herein granting the Plaintiffs, or their designated representative, immediate access to enter upon the subject property to inspect, assess and repair the aforesaid damage and waste to the property; and **Motion Sequence #2** by Plaintiffs for an Order pursuant to CPLR 3212 granting the Plaintiffs summary judgment and declaring and directing that (i) Plaintiffs are entitled to sell the property and Defendants shall cooperate in all respects with the Plaintiffs to effectuate the sale of the property; (ii) that the Plaintiffs is entitled to judgment against the Defendants, upon inquest, for the amount of arrears owed by Defendants for the cost of home ownership, attorney's fees and interest under the underlying agreement, and why such other and further relief should not be granted to the Plaintiffs as to this Court may seem just and proper:

PAPERS	**NUMBERED**
ORDER TO SHOW CAUSE/AFFIDAVITS/EXHIBITS A-C	1
MEMORANDUM OF LAW IN SUPPORT	2

AFFIDAVIT IN OPPOSITION/EXHIBITS	3
AFFIDAVIT IN OPPOSITION/EXHIBITS	4
AFFIDAVIT/AFFIRMATION IN OPPOSITION/EXHIBITS	5
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/EXHIBITS A-H	6
MEMORANDUM OF LAW IN SUPPORT	7
REPLY AFFIRMATION IN SUPPORT OF SUMMARY JUDGMENT	8
REPLY AFFIDAVIT IN SUPPORT/EXHIBITS I-L	9

Plaintiffs, 20 Schuyler Lane Trust (the "Trust") and its two trustees, Rohini P. de Silva and Mark Alan Conley (the "Trustees"), bring this action against Defendants, Joseph de Silva and Chanrika deSilva, husband and wife, to enforce the terms of a written "Limited Co-Ownership Agreement" (the "Agreement") dated April 7, 2008 relating to the ownership, occupancy and maintenance of a single-family home located at 20 Schuyler Lane, Garrison, New York (the "Property").

The Property was once owned by the Defendants alone. Thereafter and as the result of their financial difficulties and the Trustees desire to assist Trustee De Silva's son, Defendant Joseph de Silva, and his wife, Defendant Chandrika de Silva, and their two school-aged children in remaining at the Property, the Trust acquired from Defendants a 71.04% interest in the Property in exchange for, among other things, the payoff of certain of defendants' debt, including a variable rate mortgage on the Property. Among yet other terms, the Agreement provides that the Trust shall pay one-half and the Defendants shall pay the other half of the monthly costs of the newly acquired mortgage, real estate taxes, and insurance and Defendants "shall be responsible for all repairs and maintenance and the day-to-day operation of the Property and shall use their best efforts to maintain the Property in good condition."

By way of their first cause of action, Plaintiffs allege that "Defendants have failed and neglected to maintain and repair the Property, in that they have permitted and allowed roof and interior leaks to cause waste and damage to the Property, including but not limited to damaged and water stained ceiling and wall sheet rock and floors." As such, Plaintiffs contend that Defendants are in breach of the Agreement and that Plaintiffs will suffer irreparable harm if said waste and damage is permitted to continue. Correspondingly, Plaintiffs seek "immediate access to the Property to perform the necessary repairs."

As and for their second cause of action, Plaintiffs claim that Defendants have failed in connection with their obligation to pay half of the cost of home ownership as set forth in the Agreement, including payment of one-half of the monthly mortgage principal and interest, homeowner's insurance and real property taxes.

In the end, Plaintiffs seek judgment (I) granting immediate

access to the Property to perform necessary repairs . . . (II) directing that [Plaintiffs are] entitled to judgment for the amount of arrears owned by Defendants . . . and (III) that [Plaintiffs are] entitled to sell the Property and that Defendants shall cooperate [to effectuate same] . . .

Motion Sequence "1"

Section 211 of the Real Property Actions and Proceedings Law provides:

> If, during the pendency of an action to recover a judgment affecting the title to, or the possession, use or enjoyment of, real property, a party commits waste upon, or does any other damage to, the property in controversy, the court may grant, without notice or security, an order restraining him from the commission of any further waste upon or damage to the property. Disobedience to such an order may be punished as a contempt of the court. This section does not affect the right to a permanent or temporary injunction in such an action.

Without ruling on the materiality of any waste herein alleged, the Court hereby grants Plaintiffs' motion for an Order pursuant to section 211 of the Real Property Actions and Proceedings Law restraining Defendants from committing any further waste upon or damage to the Property.

In addition, even if access has already been granted to Plaintiffs in the past, Defendants are directed to allow Plaintiffs and/or their designated representative or representatives access to the Property to inspect, assess and repair the damage and/or waste alleged in this action and/or otherwise found upon said further inspection and assessment. If the parties cannot come to terms on the dates and times for said access, then they are directed to appear before the Court and the Court will set the dates and times for access as it sees fit with or without regard to the parties' personal and/or business appointments, as the circumstances may dictate.

Motion Sequence "2"

The Court denies Plaintiffs' motion for summary judgment in their favor and against Defendants for a judgment declaring and directing that Plaintiffs are entitled to sell the property.

Plaintiffs have come forward in the first instance with a sufficient showing of entitlement to judgment in their favor as a

matter of law on their assertion that Defendants have breached their monthly financial and upkeep and maintenance obligations under the Agreement. In response, however, and notwithstanding the terms of the Agreement and its "no oral modifications" clause, the Court finds that Defendants have raised material questions of fact regarding same including, but not limited to, whether and, if so, to what extent, Plaintiffs suspended, extended or otherwise excused defendants' obligation to fully and/or timely fund their monthly financial obligations.

A "no oral modifications" clause is not determinative of the issue. "[A] contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement" (Schapfel v. Taylor, 65 AD3d 620 [2d Dept 2009] citing Bank Leumi Trust Co. of N.Y. v. Block 3102 Corp., 180 AD2d 588, 590 [1992], citing Alside Aluminum Supply Co. v. Berliner, 32 AD2d 731 [1969]; see Baker v. Norman, 226 AD2d 301, 303 [1996]; Dellicarri v. Hirschfeld, 210 AD2d 584 [1994]). (See also Chadirjian v. Kanian, 123 AD2d 596, 597 [2d Dept 1986][equitable estoppel entails proof of justifiable reliance upon the words or actions and that, in consequence of such reliance, there has been a prejudicial change in position] citing Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175, 184]).

Although Plaintiffs have also met their initial burden with respect to their claims of waste and damage, Defendants have raised material questions of fact in response as to the materiality of same.

> Under New York law, a material breach is a breach that "go[es] to the root of the agreement between the parties," and "is so substantial that it defeats the object of the parties in making the contract." Felix Frank Assocs., Ltd. v. Austin Drugs, Inc., 111 F.3d 284, 289 (2d Cir.1997). In determining whether a breach is material, the Court remains mindful of the special purpose of the contract, id., and considers the following circumstances: "the extent to which the injured party will be deprived of the benefit which [it] reasonably expected"; "the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived"; "the extent to which the party failing to perform or offer to perform will suffer forfeiture"; "the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances"; and "the

> extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." Rest. (Second) of Contracts, §241(a). When one party commits a material breach, the other party is relieved, or excused, from its further performance obligations. Felix Frank, 111 F.3d at 289.

(Wechsler v. Hunt Health Sys., Ltd., 330 F Supp 2d 383, 414 [SDNY 2004]). Thus, summary judgment would be inappropriate.

Although not contained in the complaint, Plaintiffs move for summary judgment upon their assertion that there has been "a material change in the health of either of the [Trustees] . . . " (Agreement ¶2[c][ii]), and Defendants have responded to same.

> While the general rule is that a party may not obtain summary judgment on an unpleaded cause of action (Cohen v. City Co. of New York, 283 N.Y. 112, 27 N.E.2d 803), it is also true that summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice (Torrioni v. Unisul, Inc., 214 A.D.2d 314, 315, 624 N.Y.S.2d 433). As with a trial, the court may deem the pleadings amended to conform to the proof (Deborah International Beauty, Ltd. v. Quality King Distributors, Inc., 175 A.D.2d 791, 793, 573 N.Y.S.2d 189).

In contrast to Plaintiffs' adequate initial showing with respect to Defendants' breach of monthly financial and upkeep and maintenance obligations, the Court is not satisfied from the scant medical proof and the manner and form in which it is submitted, that Plaintiffs have met their initial burden of establishing that "a material change in the health of [Plaintiff Trustee Conley] . . . ", such as would entitle Plaintiffs to compel the sale of the Property. As such, summary judgment is denied and the Court will not, sua sponte, deem the pleadings amended to conform to such (inadequate) proof.

Admittedly arrears are due to Plaintiffs from Defendants. Although arrears are due and, accordingly, judgment as to liability for same is hereby granted, the Court will stay the entry of judgment pending trial on all extant issues, including the amount of arrears. Plaintiffs' entitlement to a counsel fee award pursuant to paragraph "16" of the Agreement is denied as premature.

Based upon the foregoing, it is hereby

ORDERED, that, Plaintiffs' motion for summary judgment be and is hereby denied, except as to the issue of liability as to arrears and, as to that, the entry of judgment is stayed; and, it is further

ORDERED, that, Defendants be and are hereby restrained from committing any waste upon or damage to the Property; and, it is further

ORDERED, that, Defendants are directed to allow Plaintiffs and/or their designated representative or representatives access to the Property to inspect, assess and repair the damage and/or waste alleged in this action and/or otherwise found upon said further inspection and assessment; and, it is further

ORDERED, that, the access herein directed shall take place no later than fourteen days after the date hereof, unless otherwise agreed by the parties in writing, be it e-mail correspondence or otherwise; and, it is further

ORDERED, that, if the parties cannot come to terms on the dates and times for said access or any further access as may be warranted, then either party may contact Chambers (845-208-7828) to request a Conference Date for the Court to set the access date(s) and time(s), as it may see fit; and, it is further

ORDERED, that, in any event, the parties are directed to appear before the Court for a Status Conference at 9:30 A.M. on September 2, 2014.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
July 25, 2014

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

The McCarthy Law Firm, PC
By: Daniel F. McCarthy, Esq.
Attorney for Plaintiff
1 Croton Point Avenue
Croton-on-Hudson, NY 10520

Joseph deSilva, a/k/a Asoka Joseph deSilva
Chandrika de Silva, a/k/a Chandrika Lakshmi
Chandrika Lakshmi and Pattiaratchi de Silva
20 Schuyler Lane
Garrison, New York 10524