26 Regal LLC v Longfellow Ventures LLC
2014 NY Slip Op 33402(U)
December 1, 2014
Supreme Court, Bronx County
Docket Number: 21321/2014
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

26 REGAL LLC,

Plaintiff,

-against-

LONGFELLOW VENTURES LLC,

Defendant.

Index No. 21321/2014E
Present: Hon. Sharon A. M. Aarons

DECISION and ORDER

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Others:	

Upon the foregoing papers, the foregoing motion is decided as follows:

Defendant LONGFELLOW VENTURES LLC moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint and vacating the notice of pendency. Plaintiff 26 REGAL LLC (26 REGAL) submits written opposition. The motion is decided as follows.

This breach of contract action arises out of an agreement for the proposed sale of real property located at 833 Longfellow Avenue in Bronx County by defendant Longfellow as seller and plaintiff 26 Regal as buyer. The contract, dated December 18, 2013, provided that the premises were sold for $2,023,500, with a down payment of $106,500. Closing of title was to take place 60 days after the date of the contract, with time being of the essence. Defendants state that they were ready to close on February 18, but that plaintiff's refused to close title. The plaintiffs, who bring this action for specific performance and breach of contract, assert that the defendants failed to cure the requisite violations.

In support of the motion, defendants submit the affidavit of Errol McIntosh, and architect, reciting that 150 open violations relating to 12 apartments had been corrected; the affidavit of Vincent Romano, defendant's property manager and member of the defendant limited liability corporation; the contract of sale; the title policy commitment issued by Old Republic Title Insurance Company; a letter from defendant Longfellow's counsel to plaintiff's counsel dated February 18, 2014, making time of the essence and setting a closing date of March 24, 2014; a letter dated February 19, 2014, from plaintiff's rejecting defendant's demand to close on the ground that the building "is currently in the NYC AEP Program[1];" and work orders relating to various apartment repairs. Although the contract provided that the premises were sold "as is," the rider to the contract contained the following provision: "66. Prior to closing Seller shall physically repair violations at the Premises with 90 violations to remain uncured." Defendants assert that there existed 235 violations at the time the contract was entered into, but that they corrected 150 violations, as attested to by defendant's architect. Defendants assert that were accordingly ready, willing and able to close on the law day (February 18), and on the subsequent adjourned date (March 24), and that the plaintiff's refusal to close was an unexcused breach of contract.

Plaintiff, in opposition, submits the affidavits of Yaakov Gross and Moshe Brown, members of the plaintiff, who assert that the violations were not corrected; the contract of sale; and "print outs" from the website of the New York City Department of Housing Preservation & Development (DHPD) setting forth general explanatory information concerning the NYC AEP Program, as well as a listing of violations specific relating to the premises at 833 Longfellow Avenue. Plaintiff asserts that 235

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[1]The NYC AEP Program is an initiative whereby the "worst" properties with the most housing violations in New York City are identified and monitored. In order to be removed from the program, 80% of hazardous violations must be removed,

violations existed at the time of the contract, and that 236 violations exist as of record now. They maintain that their refusal to close was not based on the fact that the property was incorporated into the NYC AEP Program, but rather, because the requisite violations were not cured.

Defendant seeks dismissal based on documentary evidence. "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994], citing *Heaney v Purdy*, 29 NY2d 157, 272 N.E.2d 550, 324 N.Y.S.2d 47 [1971]). Unlike on a motion for summary judgment where the court "searches the record and assesses the sufficiency of the parties' evidence," on a motion to dismiss the court "merely examines the adequacy of the pleadings" (*State v Barclays Bank of New York, N.A.*, 151 AD2d 19, 21, 546 N.Y.S.2d 479 [3d Dept 1989], *affd* 76 NY2d 533, 563 N.E.2d 11, 561 N.Y.S.2d 697 [1990]). Here, the relevant portion of the contract provided that "Seller shall physically repair violations at the Premises with 90 violations to remain uncured." The contract does not by its terms require that the violations be removed as of record. Nevertheless, the statement by defendant's architect that the requisite number of violations were cured, combined with copies of work orders, does not constitute conclusive documentary evidence sufficient to warrant dismissal. To warrant the relief sought, however, the affidavits must "establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636, 357 N.E.2d 970, 389 N.Y.S.2d 314 [1976]). A motion to dismiss pursuant to CPLR 3211(a)(7) in which the movant relies upon evidence beyond the four corners of the complaint must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d at 275). Here, to the contrary, the evidence demonstrates the existence of a significant dispute as to whether the violations were physically repaired, as required by

the contract. The foregoing is true irrespective of the existence of violations as of record, or the inclusion of the building in the NYC AEP Program. (*Attias v. Costiera*, 120 A.D.3d 1281, 993 N.Y.S.2d 59 [2d Dept. 2014] [In action for breach of real estate contract, "affidavits submitted by the defendants, their attorney's affirmation, and the correspondence that was submitted in support of the defendants' motion did not constitute documentary evidence within the meaning of CPLR 3211(a)(1)"].)

Alternatively, defendant seeks dismissal of the complaint for failure to state a cause of action. "On a motion to dismiss pursuant to CPLR 3211 (a) (7), we are to afford the pleading a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sand v Chapin*, 238 AD2d 862, 863, 656 N.Y.S.2d 700 [1997]; *see Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]). Whether a plaintiff can "ultimately establish its allegations is not part of the calculus in determining [such] motion" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]; *see Lewis v DiMaggio*, 115 AD3d 1042, 1044, 981 N.Y.S.2d 844 [2014]). Here, the compliant clearly states valid causes of action.

The motion is denied.

Accordingly, defendants' motion is denied.

Dated: December 1, 2014

SHARON A. M. AARONS, J.S.C.