

M & M Enters., LLC v Cella

2014 NY Slip Op 33997(U)

January 23, 2014

Supreme Court, Suffolk County

Docket Number: 10556/2013

Judge: Ralph T. Gazzillo

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER



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

Mot. Seq.: 001 MG

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

		X
M & M Enterprises, LLC,		:
		:
	Plaintiff,	:
		:
	- against -	:
		:
Michael Cella,		:
	Defendant,	:
James E. Clark,		:
	Stakeholder,	:
		:
		X

Upon the following papers numbered 1 to 16 read on this motion; Notice of Motion and supporting papers numbered 1-7; Notice of Cross Motion and supporting papers numbered ; Affirmation in Opposition and supporting papers numbered 8-16; it is,

ORDERED that the motion (seq 001) by defendant, to dismiss the complaint against her pursuant to CPLR §3211(a)(7) is granted, and the complaint is dismissed without costs, and it is further

ORDERED that James E. Clark, Esq. is directed to release the down payment in the sum of \$16,950.00 to the defendant Michael Cella within 20 days of the date that this short form order is served with Notice of Entry, and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this Order with Notice of Entry upon counsel for the named defendants, pursuant to CPLR 2103(b)(1), (2) or (3), within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

Plaintiff commenced this action alleging breach of a real estate contract for property located at 24 Irving Road, Amityville, New York. The parties entered into a contract whereby the plaintiff agreed to sell the defendant a single family residence. The purchase price for the residence was \$344,000.00. Within a week of the contract for sale having been fully executed, the subject property was severely damaged by Hurricane Sandy. According to the plaintiff,

following the storm, the house was flooded with 18 inches of water which necessitated, among other repairs, the replacement of the heating system, appliances, electrical panel, flooring and sheetrock. After the parties could not reach an agreement regarding defendant's request for a reduction in the purchase price, defendant wrote to plaintiff canceling the contract and demanding the return of the down payment. This action ensued.

Defendant now moves to dismiss the action alleging that the plaintiff, a Connecticut Limited Liability Company does not have authority to maintain an action in New York. Defendant also asserts that General Obligations Law §5-1311, also known as the Uniform Vendor and Purchaser Risk Act renders a contract unenforceable (which does not expressly provide otherwise) when "all or a material part of thereof is destroyed without the fault of the purchase or is taken by eminent domain." Accordingly, defendant argues that the contract is unenforceable as a matter of law.

Plaintiff opposes the motion arguing that the damage to the premises totaled only about \$10,000.00 and that all repairs were made bringing the premises back to pre-storm condition and that the work was completed by February, 2013, which was when defendant sought to close the transaction¹. Therefore, plaintiff claims that the defendant is required to close on the transaction in accordance with the contract of sale.

On a motion to dismiss a complaint for failure to state a cause of action, the challenged pleading is to be construed liberally (see CPLR §3026; *Leon v Martinez*, 84 NY2d 83, 87; *Bernberg v Health Mgt. Sys.*, 303 AD2d 348, 349). Accepting the facts alleged as true, and according the plaintiff the benefit of every possible favorable inference, the court must determine only whether the facts alleged fit within any cognizable legal theory (see *Leon v Martinez*, 84 NY2d at 87-88; *Bernberg v Health Mgt. Sys.*, 303 AD2d at 349).

A review of the contract of sale and the applicable law requires that the plaintiff's complaint be dismissed. Specifically, Paragraph 12 of the contract of sale, in pertinent part, reads as follows:

"Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation ... and shall accept sale "as is" *in their present condition and state of repair, subject to reasonable use, wear, tear and natural deterioration between the date hereof and the date of Closing.*"(emphasis added.)

Moreover, General Obligations Law §5-1311 states as follows:

1. Any contract for the purchase and sale or exchange of realty shall be interpreted, unless the contract expressly provides otherwise, as including an agreement that the parties shall have the

¹ The closing date specified in paragraph was "on or about November 1, 2012".

following rights and duties:

- a. When neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser: (1) if all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid; but nothing herein contained shall be deemed to deprive the vendor of any right to recover damages against the purchaser for any breach of contract by the purchaser prior to the destruction or taking; (2) if an immaterial part thereof is destroyed without fault of the purchaser or is taken by eminent domain, neither the vendor nor the purchaser is thereby deprived of the right to enforce the contract; but there shall be, to the extent of the destruction or taking, an abatement of the purchase price.

Clearly, no one could effectively argue that the impacts of Hurricane Sandy upon the subject premises, which compromised all of the essential systems (plumbing, heating, electrical, etc.) could be equated to "reasonable use, wear, tear and natural deterioration" or that such damage was not "material". Accordingly, based upon the heavy damage that the property suffered during the storm, defendant was entitled to cancel the contract.

Although the defendant's attorney's letter to plaintiff's counsel dated December 18, 2012 erroneously indicated that the contract was being canceled pursuant to paragraph 8, the letter indicates that the contract is canceled. Furthermore, once the property was damaged by Hurricane Sandy defendant could not enforce the contract of sale pursuant as a matter of law pursuant to General Obligations Law §5-1311 since the contract did not provide otherwise. Once the contract was canceled pursuant to defendant's December 18, 2012 letter, plaintiff was obligated to return the down payment.

Defendant's additional arguments need not be reached.

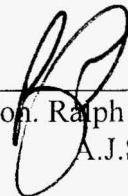
Accordingly, the motion is granted as set forth herein.

Dated: _____

Riverhead, N.Y.

1/27/14

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



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