

Strassburger v Alvarez
2015 NY Slip Op 30301(U)
March 4, 2015
Supreme Court, New York County
Docket Number: 160801/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
SUZANNE STRASSBURGER,

Plaintiff,

- v -

SEAN C. ALVAREZ and JENNIFER ALVAREZ,

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Index No.
160801/2014

**DECISION
and ORDER**

Mot. Seq. 002

This is an action for breach of a residential contract of sale (the "Contract") between plaintiff, Suzanne Strassburger ("Plaintiff" or "Purchaser"), as purchaser, and defendants, Sean C. Alvarez and Jennifer Alvarez (collectively, "Defendants" or "Sellers"), as sellers, for the premises located at 35 Old Pond Road, South Salem, New York (the "Premises"). Plaintiff claims that, pursuant to the Contract, Plaintiff is entitled to terminate the Contract and receive a refund of Plaintiff's deposit (the "Deposit") if the Premises does not have a valid right of access to Lake Waccabuc, a nearby lake that does not border the Premises. Plaintiff claims to have paid \$71,500 to Defendants under the Contract as a deposit (the "Deposit") to be held in escrow by Defendants' attorney. Plaintiff alleges that there is no valid lake access easement benefitting the Premises, that Plaintiff has exercised her right to terminate the Contract, and that Defendants have failed and refused to return Plaintiff's Deposit as required under the Contract.

Defendants now move for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's complaint on the basis of documentary evidence and failure to state a cause of action; and, pursuant to CPLR § 3211(c), granting summary judgment in favor of Defendants and against Plaintiff. In support, Defendants submit: a deed from Hugo J. Von Hagen and Luella N. Von Hagen to Harry F. Beers dated January 18, 1926 and recorded January 19, 1926 in the Office of the County Clerk of Westchester County, Division of Land Records in Liber 2637 of conveyances page 188 (the "Von Hagen/Beers Deed"); a deed from C. Alfred Tips to Frederick W. Langjahr dated April 21, 1954 and recorded May 27, 1954 in Liber

5333 page 73 in the Office of the County Clerk of Westchester County, Division of Land Records (the Tips/Langjahr Deed”); a deed dated May 27, 1954 in Liber 5333 page 69 in the Office of the County Clerk of Westchester County, Division of Land Records conveying lakefront lands from Langjhar and his wife to M. Michael Tolkin (the “Langjhar/Tolkin Deed”); certified copy of deed dated February 26, 2013 and recorded March 29, 2013 under Control No. 530573003 in the Office of the Westchester County Clerk, Division of Land Records (the “DeAngelis Family Trusts Deed”); a deed from Howard I. Garrell to Sean C. Alvarez dated January 27, 2000 and recorded May 9, 2000 under Control No. 401050657 in the Office of the Westchester County Clerk, Division of Land Records (the “Garrell/Alvarez Deed”); added his wife Jennifer as a title owner of the Premises by deed dated April 29, 2011 and recorded June 17, 2011 under Control No. 511333187 in the Office of the Westchester County Clerk, Division of Land Records (“Alvarez Deed”) (collectively, the “Deeds”); A certified survey of the DeAngelis Family Trust property (which is encumbered by the subject lake access easement) locates the boundaries of said easement and travelled way and specifically references the Von Hagen/Beers Deed by Liber and Page (the “Survey”); a copy of a letter dated November 14, 2014 by Kevin B. Dwyer of Court Street Abstract, Inc., the title agency for Old Republic National Title Insurance Company; and, a copy of a surveyor’s map.

Plaintiff opposes. Plaintiff cross-moves for the imposition of sanctions pursuant to Rule 130.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38

A.D.3d 301 [1st Dep't 2007] [citation omitted]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't, 2003] [internal citations omitted]; CPLR § 3211[a][7]). "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dep't 2009]).

Plaintiff's Complaint alleges that, "on or about August 29, 2014, Purchaser and Sellers entered into a residential contract of sale for Purchaser to buy the Premises from Sellers (the 'Contract') for the agreed upon sum of \$715,000." The Contract is annexed to and incorporated in Plaintiff's complaint. Plaintiff's complaint alleges that, "pursuant to the Contract, Purchaser remitted the sum of \$71,500 to Sellers as a deposit (hereinafter, the 'Deposit'), to be held in escrow by Sellers' attorney". Plaintiff's complaint alleges that paragraph 52.G of the Contract provides:

The Premises has a right of access to and easement over Lake Waccabuc and the dock thereon, including the right to keep a row boat and canoe on said Lake. **This provision is of the essence of this Contract. If there is no right of access to the dock and Lake and permitted use thereof by Purchaser, Purchaser shall have the right to terminate this Contract and receive a refund of the Contract Deposit** plus Purchaser's net cost of examination of title, including any appropriate additional charges related thereto, and the net cost if actually paid or incurred by Purchaser for updating the existing survey of the Premises Premises [sic] or of a new survey;

(Compl. ¶ 5 [emphasis added in Plaintiff's complaint]).

Plaintiff's complaint asserts that, "the Premises did not have a valid right of access to, and easement over, Lake Waccabuc and the dock thereon, including the right to keep a row boat and canoe on said Lake, at the time of execution of the

Contract, nor did it have such right of access and easement as of October 20, 2014, the closing date provided for in the Contract.” Plaintiff’s complaint asserts that, as a result, “Purchaser, by her attorney, terminated the Contract and demanded return of the Deposit.” Plaintiff’s complaint alleges, “Sellers have neglected, failed and refused to return the Deposit to Purchaser, although due demand has been made therefore. Purchaser has fully performed all of her obligations under the Contract on her part to be performed”, and that, “[a]s a result of the foregoing, there is due and owing to Purchaser the sum of \$71,500.”

Accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff’s complaint adequately pleads a Contract between Plaintiff and Defendants, whereby “[i]f there is no right of access to the dock and Lake and permitted use thereof by Purchaser, Purchaser shall have the right to terminate this Contract and receive a refund of the Contract Deposit.” Plaintiff’s complaint alleges that Plaintiff performed her obligations under the Contract, and that Plaintiff paid a Deposit to Defendants. Plaintiff’s complaint pleads that there is no right of access to the dock and Lake, that Plaintiff exercised her right terminate the Contract, that Defendants failed to return the Deposit, and resulting damages. Accordingly, accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s Complaint adequately plead a cause of action for breach of Contract as against Defendants based on Defendants’ alleged failure to return Plaintiff’s Deposit.

As far as Defendants’ documentary submissions are concerned, Defendants argue that the Deeds, Surveys, and Title Company Letter constitute documentary evidence warranting the dismissal of Plaintiff’s complaint. Specifically, Defendants argue that these documentary submissions conclusively demonstrate a valid lake access easement granted in 1926 in favor of Premises. However, as there are missing links in the chain of title established by the Deeds, Defendants’ documentary submissions fail to conclusively establish the *continuing* existence and validity of any lake access easement granted in the Von Hagen/Beers Deed. Accordingly, accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, Defendants’ documentary submissions fail to flatly contradict the factual allegations and legal conclusions in Plaintiff’s complaint and Defendants are not entitled to a dismissal under CPLR § 3211(a)(7).

Defendant’s request to convert the instant motion to one for summary judgment is denied. Defendant is directed to answer Plaintiff’s complaint within 20 days of service of a copy of this Order with Notice of Entry.

Wherefore it is hereby,

ORDERED that Defendants' motion to dismiss Plaintiff's complaint is denied; and it is further

ORDERED that Plaintiff's cross-motion for sanctions pursuant to Rule 130 is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 7 2015

MAR 04 2015



EILEEN A. RAKOWER, J.S.C.