Vanderbilt Brookland LLC v Vanderbilt Myrtle Inc.
2015 NY Slip Op 30629(U)
April 10, 2015
Supreme Court, Kings County
Docket Number: 500522/14
Judge: Lawrence S. Knipel
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At Comm Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of April, 2015

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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VANDERBILT BROOKLAND LLC,

Plaintiff,

- against -

Index No. 500522/14

VANDERBILT MYRTLE INC., et al.,

Defendant.

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The following papers numbered and read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	81-84, 103-105, 125-126, 141-142, 174
Opposing Affidavits (Affirmations)	120, 148, 167, 171
Reply Affidavits (Affirmations)	156
Affidavit (Affirmation)	
Other Papers Memoranda of Law	108, 127, 147, 153, 173

Upon the foregoing papers, motion sequence numbers 3, 4, 5 and 6 are consolidated for disposition. By order to show cause dated July 30, 2014, plaintiff Vanderbilt Brookland LLC (Brookland) moves for an order, pursuant to CPLR Article 63: (1) enjoining, tolling and extending the July 30, 2014 deadline to close and complete the purchase of property located on Vanderbilt Avenue in Brooklyn (the Property) pursuant to the Property Sale Agreement (the PSA) at issue herein until thirty days after a final judgment has been entered in this

action; and (2) mandating, directing and compelling defendants Cumberland Farms, Inc. (Cumberland), and Vanderbilt Myrtle Inc. (Myrtle) to tender title to and close immediately on the sale of the Property with it, subject to a later determination of the right, if any, of defendant All Year Management LLC (All Year). By order to show cause dated October 27, 2014, Brookland moves for an order, pursuant to CPLR Article 64, appointing a temporary receiver to act on behalf of Myrtle with respect to the sale of the Property, or any interest therein, including but not limited to signing, transferring any sale documents and collecting and holding the funds due to Vanderbilt Myrtle in connection with the transfer, sale or closing of the Property. By motion originally returnable November 28, 2014, plaintiff moves for an order, pursuant to CPLR 2221(e), granting leave to reargue and/or to renew its motion for preliminary injunctive relief, which resulted in a decision and order dated October 5, 2014, and granting plaintiff's underlying motion. By order to show cause dated January 9, 2015, Cumberland and All Year move for an order, pursuant to CPLR 6514, cancelling the Notice of Pendency filed by Brookland in this action on October 30, 2014.

Facts and Procedural Background

Brookland commenced this action against Myrtle on January 23, 2014 seeking to redress the alleged repudiation of a contract that entitled plaintiff to acquire sole ownership of the Property. By order and decision of this court dated March 17, 2014, plaintiff was granted a preliminary injunction enjoining and restraining defendant Myrtle from selling, assigning, conveying or transferring the Property to any person or entity other than plaintiff

(the First Preliminary Injunction Decision); an order was signed on April 4, 2014 and plaintiff posted an undertaking in the amount of $50,000. By Amended Complaint dated May 7, 2014, Brookland named Cumberland and All Year as additional defendants. By order and decision signed on October 6, 2014, Brookland's motion for an order enjoining and restraining Cumberland and All Year from transferring the Property and other ancillary relief was denied (the Second Preliminary Injunction Decision).

The underlying facts are set out in detail in the previous decisions and will only be addressed herein as is necessary to resolve the now pending motions. Briefly stated, Cumberland owns the Property, which was leased to Myrtle for use as a gas station. On September 24, 2013, Cumberland advised Myrtle that it had received an offer to purchase the Property and that Myrtle had 45 days within which to exercise its right of first refusal. Myrtle decided to exercise that right and signed the PSA with Cumberland on December 4, 2013, pursuant to which Myrtle agreed to purchase the Property for $10,000,000 and to close no later than July 30, 2014.

Brookland alleges that by agreement executed in November or December of 2013, Myrtle assigned its right to purchase the Property to it (the Myrtle Brookland Contract). Pursuant to that agreement, Myrtle agreed to sell 5% of its issued stock to Brookland for $500,000, with $50,000 payable upon the signing of the contract, $100,000 payable at the end of the due diligence period set forth in the PSA, $100,000 payable when Myrtle vacated the Property and the remaining $250,000 payable at the closing. Brookland also became

obligated to pay the $1,000,000 non-refundable escrow deposit due pursuant to the PSA. In accordance with the terms of this agreement, on November 25, 2013, Brookland made a payment of $50,000 to Myrtle. Brookland further claims that on December 10, 2013, it remitted the $1,000,000 non-refundable escrow deposit to First American Title Insurance Company (First American) in New York, as escrow agent for Cumberland; an affidavit from James Thanasules, Vice President and Agency Counsel for First American, confirmed that the deposit was received. Myrtle, however, did not execute an assignment of the PSA; Brookland never received written approval of the assignment from Cumberland; and Myrtle refused to move forward with the sale. Thereafter, Myrtle sought to return Brookland's $50,000 down payment in an effort to repudiate the sale; Brookland refused to accept the check.

All Year alleges that during a meeting held on December 23, 2013, it negotiated and executed an agreement to assign with Myrtle pursuant to which it was agreed that All Year would purchase the Property from Cumberland and that it would make an initial payment in the amount of $200,000 to Myrtle as consideration for the assignment and a final payment of $800,000 at the closing (the Myrtle All Year Agreement to Assign). On that day, All Year also signed a confidentiality agreement dated November 18, 2013 between Myrtle and Cumberland (the Confidentiality Agreement) and an Assignment of Purchase and Sale Agreement (the Myrtle All Year Assignment). The initial $200,000 check was tendered at the meeting; it was agreed that the deposit would be held in escrow until Cumberland

formally approved the assignment. On January 6, 2014, All Year was provided with the executed consent. All Year then arranged to have the $1,000,000 escrow deposit wired to First American, at its Houston, Texas office, and the $200,000 held in escrow was released to Myrtle. All Year also alleges that on April 3, 2014, a Memorandum of Contract between it and Cumberland (the Memorandum of Contract) was executed and submitted for filing with the City of New York. On April 8, 2014, the Memorandum became publically available via the Automated City Register Information System.

Brookland's Motion to Reargue

The court will first address Brookland's motion to reargue/renew, since disposition of that motion will impact upon the disposition of the other pending applications.

Brookland's Contentions

In support of its motion, Brookland argues that the Memorandum of Contract entered into between Cumberland and All Year was not executed in good faith, so that All Year did not obtain priority of its claim to purchase the Property over Brookland pursuant to Real Property Law § 294(3). More specifically, Brookland asserts that the actual contract entered into between Cumberland and All Year, as distinct from the Memorandum of Contract, contained a provision that stated that it was not to be recorded. Further, it was only after the First Preliminary Injunction Decision was issued that Cumberland and All Year executed and recorded the Memorandum of Contract, arguably in an attempt to "bypass" the judicial process. Brookland contends that from this it follows that as of the date of recording, both

Cumberland and All Year were on notice of Brookland's claim, since Brookland had provided a copy of the decision to the parties. It thus concludes that since it is clear that these facts establish that the Memorandum of Contract was not executed in good faith, it should be granted leave to reargue the underlying motion and upon reargument, it should be granted the injunctive relief that it sought. In this regard, Brookland alleges, more specifically, that in rendering the Second Preliminary Injunction Decision, the court overlooked Section 16(l) of the PSA, which provided that "Purchaser and Seller agree not to record this Agreement or any memorandum thereof" and the fact that the Memorandum of Contract was executed by Cumberland and All Year after both had knowledge of Brookland's claimed contract rights.

Brookland also argues that a review of emails exchanged between it and Regina Felton, Esq., as attorney for Myrtle, establish that Cumberland was on notice of and consented to Myrtle's assignment of the PSA to Brookland prior to Brookland's tender of the $1,000,000 to First American on December 10, 2013. Brookland goes on to assert that this argument is further supported by the fact that the original PSA provided that the $1,000,000 would be tendered to First American in Houston, Texas, and that a second version has a handwritten change indicating that the down payment should be sent to First American in New York.

Myrtle's Contentions

Myrtle argues that the Myrtle Brookland Contract is void ab initio, since Brookland failed to tender the $1,000,000 down payment to First American in accordance with the wiring instructions provided to it. More specifically, Myrtle alleges that money was wired without specifying the correct account number into which the funds were to be deposited or referencing the transaction for which the money was being tendered. Myrtle also contends that Brookland breached the Myrtle Brookland Contract when the $1,000,000 escrow deposit was tendered by Gilad Enterprises, LLC, since Gilad was not a party to the agreement with Myrtle. Myrtle thus contends that since Gilad, and not Brookland, tendered the $1,000,000, Brookland lacks standing to challenge the recording of the Memorandum of Contract. Myrtle goes on to argue that if the $1,000,000 down payment was actually tendered, as argued by Brookland, Brookland could have been expected to contact Cumberland to confirm receipt and to have joined Cumberland when it commenced the action to enforce the PSA; it did neither. Myrtle also contends that in commencing the instant lawsuit instead of contacting Cumberland directly to seek compliance, Brookland violated the Confidentiality Agreement executed in connection with the Myrtle Brookland Contract. Myrtle thus concludes that its only obligation to Brookland is to return the first payment of $50,000, which has already been tendered.

Finally, Myrtle argues that in seeking to rely upon the provision of the PSA that prohibits recording any contracts, Brookland is now improperly seeking to raise a new and

different argument. Myrtle also argues that in order to protect its rights against the litigation commenced by Brookland, the PSA was properly amended and the Memorandum of Contract was executed and recorded. Myrtle further asserts that Brookland's attempt to now rely upon copies of emails that were not included in the original motion is also improper, since the emails were not previously unavailable or newly discovered, nor is a sufficient argument raised to explain the failure to offer the emails on the earlier motion.

Discussion

CPLR 2221(d)(2) provides that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." It is well settled that "'[m]otions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision'" (*Matter of New York Cent. Mut. Ins. Co. v Davalos*, 39 AD3d 654, 655 [2d Dept 2007), quoting *Howell Co. v S.A.F. La Sala*, 36 AD3d 653, 654 [2d Dept 2007]).

The court exercises its discretion and grants reargument of the motion that resulted in the Second Preliminary Injunction Decision. In so holding, the court recognizes that the provision of the PSA that prohibited recording of the contract or any memorandum thereof was included in the PSA was not considered in rendering the earlier decision. Having so held, the court must then determine if Brookland is entitled to a preliminary injunction on the

facts now before the court. In this regard, it is noted that the showing that must be made in order to obtain a preliminary injunction has been discussed in detail in the First Preliminary Injunction Decision (p 9-11) and in the Second Preliminary Injunction Decision (p 13).

Likelihood of Success on the Merits

Turning to the merits of the arguments raised by Brookland, the court explained in the Second Preliminary Injunction Decision, that:

> "[T]he court has explained that 'New York's "race-notice" statute protects good faith purchasers who record first' (*2386 Creston Ave. Realty, LLC v M-P-M Mgt.*, 58 AD3d 158, 163 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]; *see also Transland Assets v Davis*, 29 AD3d 679 [2d Dept 2006]). In determining the issues raised herein, it must also be recognized that:
>
> > "The status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such (*see*, *Barrett v Littles*, 201 AD2d 444 [2d Dept 1994]; *United Matura Realty v Reade Indus.*, 155 AD2d 660 [2d Dept 1989]; *Morrocoy Marina v Altengarten*, 120 AD2d 500 [2d Dept 1986]; *Vitale v Pinto*, 118 AD2d 774 [2d Dept 1986]).
>
> "(*Yen-Te Hsueh Chen v Geranium Dev.*, 243 AD2d 708, 709 [2d Dept 1997]; *appeal dismissed* 91 NY2d 921 [1998], *rearg denied, motion dismissed* 91 NY2d 949 [1998]; *accord T & Constr. v Calapai*, 90 AD3d 908, 908-909 [2d Dept 2011]). More specifically:
>
> > """"Where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence

> of some right or title in conflict with [what] he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a bona fide purchaser'" (*Lucas v J & W Realty & Constr. Mgt., Inc.*, 97 AD3d 642, 643 [2d Dept 2012], quoting *Williamson v Brown*, 15 NY 354, 362 [1857])."

> "(*Mortgage Elec. Registration Sys. v Pagan*, 119 AD3d 749, 749 [2d Dept 2014]). Thus, '"a purchaser with prepurchase notice, actual or constructive, of an unrecorded instrument or encumbrance is not a good faith purchaser for value and cannot avail himself or [it]self of the benefits of the recording statutes"' (*Unique Laundry v Hudson Park NY LLC*, 55 AD3d 382, 383 [1st Dept 2008], quoting *7 Vestry LLC v Department of Fin. of City*, 22 AD3d 174, 184 [1st Dept 2005])."

(p 16-17).

Applying these general provisions of law to the facts of this case, it must first be recognized that Cumberland and All Year did not record the PSA or the other agreements executed between them in December 2013, since the PSA precluded recording. Accordingly, Cumberland and All Year executed a new agreement, the Memorandum of Contract, in April 2014, to amend the PSA and avoid this prohibition. It cannot be concluded, however, that the Memorandum of Contract was either executed or recorded in good faith, since by that time, Cumberland and All Year had been joined in the instant action and were on notice of Brookland's claim of priority (*see Yen-Te Hsueh Chen*, 243 AD2d at 709; *Mortgage Elec. Registration Sys.*, 119 AD3d at 749). Moreover, the First Preliminary Injunction Decision,

which enjoined the transfer of title of the Property, had already been rendered. In reaching this decision, it is also significant to note that in its papers in opposition to Brookland's first motion, Myrtle did not advise the court or Brookland that it had also assigned its right to purchase the Property to All Year, after it assigned the right to Brookland.

Implicit in this holding is the rejection of Myrtle's assertion that the Myrtle Brookland Contract was void ab initio because of Brookland's alleged failure to tender the escrow deposit in accordance with the wiring instructions. In the First Preliminary Injunction Decision, this court held that:

> "In resolving this issue, it must be recognized that '"the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where . . . the intention of the parties can be gathered from the instrument itself"' (*Maysek & Moran v S.G. Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001], quoting *Lake Constr. & Dev. v City of New York*, 211 AD2d 514, 515 [1st Dept 1995]). Further, it is a fundamental principle of contract construction that unambiguous contracts must be interpreted in accordance with their plain meaning (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *Ambac Assur. UK Ltd. v J.P. Morgan Inv. Mgt.*, 88 AD3d 1, 9 [1st Dept 2011]). It is equally well settled that 'the court should not, under the guise of interpretation make a new contract for the parties' (*Iacobacci v McAleavey*, 222 AD2d 406, 407 [2d Dept 1995]).
>
> "Herein, paragraph 2(a) of the Property Sale Contract states only that the money in issue should be deposited with First American; it does not reference any particular account number. The court will not, therefore, find that plaintiff breached the

> Property Sale Contract when it wired the deposit into First American's Direct Operating Account, instead of into its Agency Account. Moreover, as is established by the affidavit submitted by Mr. Thanasules, which is based upon his personal knowledge and review of the file, First American received the deposit and had no difficultly determining the transaction pursuant to which it was received."

(p 12-13).

The above finding is now binding on the parties pursuant to the doctrine of law of the case. Law of the case "is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]). Under the doctrine, "parties and their privies are precluded from relitigating an issue decided in an ongoing proceeding where there previously was a full and fair opportunity to address the issue" [*Matter of Midland Ins. Co.*, 71 AD3d 221, 225 [1st Dept 2010]; *accord Briggs v Chapman*, 53 AD3d 900, 901 [3d Dept 2008]). Thus, Myrtle's contention that Brookland breached the PSA when the $1,000,000 escrow deposit was not wired to First American in accordance with the wiring instructions provided to it is again rejected. Similarly, Myrtle points to no language in the PSA, in the Myrtle Brookland Contract or in law that would preclude Brookland from having Gilad make the deposit on Brookland's behalf.

Having so held, the court concludes that Brookland sustains its burden of establishing that it is likely to succeed on the merits in this action in that it entered into a valid and

binding contract with Myrtle for the purchase of the Property. The court further finds that the PSA, and hence the Myrtle All Year Assignment, entered into between Myrtle and All Year in December 2013, could not be recorded. In fact, defendants themselves recognized this restriction when Cumberland and All Year executed a new agreement, the Memorandum of Contract, on April 3, 2014. In this regard, it has been held that the modification of a contract results in the establishment of a new agreement between the parties (*see e.g. Cappelli v State Farm Mut. Auto. Ins. Co.*, 259 AD2d 581, 582 [2d Dept 1999]; *Beacon Terminal v Chemprene, Inc.*, 75 AD2d 350, 354 [2d Dept 1980]). Accordingly, the recording of the Memorandum of Contract entered into between Cumberland and All Year in April 2014 was not done in good faith, so that recording it does not serve to give All Year's claim to the Property priority over Brookland's claim (*see generally Greenpoint Bank v Parissi*, 256 AD2d 548 [2d Dept 1998] [a document must be properly executed in order to obtain the benefits of the recording act]).

Irreparable Injury

In the First Preliminary Injunction Decision, the court held that:

> "[T]he equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique" (*EMF Gen. Contr. v Bisbee*, 6 AD3d 45, 52 [1st Dept 2004], *lv dismissed* 3 NY3d 656 [2004], *lv denied* 3 NY3d 607 [2004], citing 3 Dobbs, Remedies § 12.11 [3], at 299 [Practitioner's 2d ed]). It has also been held that there is no adequate remedy at law when an action is premised upon a contract for the sale of real property (*see e.g. Lezell v Forde*, 26 Misc 3d 435, 441 [Sup

> Constructive Trust, New York County, 2009], citing *Delisi v Mastros*, 5 Misc 3d 1024 [A] [Sup Court, Queens County 2004], quoting 96 NY Jur 2d, Specific Performance § 69). From this it follows that plaintiff will be irreparably injured if it is not permitted to culminate its deal to purchase the contracted for Property."

(First Preliminary Injunction Decision, p 14). Having determined that the recording of the Memorandum of Contract does not serve to give All Year's claim to the Property priority over that of Brookland, Brookland has made a prima facie showing of succeeding on its claim of entitlement to specific performance of its contract with Myrtle. Accordingly, it has established irreparable injury in the absence of a preliminary injunction.

Balance of the Equities

As was recognized in issuing the First Preliminary Injunction Decision (p 15), and as is established in the papers now before the court, Brookland tendered $1,050,000 towards the purchase price of the Property in December 2013, over one year ago. The court therefore concludes that Cumberland's claimed loss of approximately $1,000 for every day that the sale does not close, while certainly a significant sum of money, is far less of a loss than Brookland is sustaining. Moreover, $1,000,000 of the sum tendered by Brookland was accepted by and is being held by First American, who is acting as Cumberland's escrow agent for the transaction. Thus, there is a factual basis raised upon which the court may conclude that Cumberland had notice of and consented to the assignment of the PSA to Brookland, prior to consenting of the assignment to All Year, since there is no other

explanation for First American agreeing to accept and hold Brookland's escrow deposit.

Conclusion

Accordingly, upon reargument, Brookland is granted an injunction enjoining and restraining Cumberland and All Year, and their respective officers, directors, members, managers, employees, agents, attorneys, and all others purporting to act on their behalf, from: (i) transferring, or purporting to transfer, the Property, or any interest therein, to any person or entity other than plaintiff; (ii) pursuing or taking any action in furtherance of any rights claimed by All Year and/or any person or entity other than plaintiff with respect to the Property; and/or (iii) closing on the transaction contemplated by Cumberland and All Year.

Order Compelling Myrtle and Cumberland to Transfer Title

As was held in the First Preliminary Injunction Decision:

> ""[T]he function of a provisional remedy is 'not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits'" (*Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011], quoting *Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121, 122 [1st Dept 1991]; *accord Pamela Equities v 270 Park Ave. Café*, 62 AD3d 620, 621 [1st Dept 2009]; *SHS Baisley, LLC v Res Land*, 18 AD3d 727, 728 [2d Dept 2005])."

(Decision, p 15). For this reason, Brookland's request for an order compelling Myrtle and Cumberland to transfer title to it, the relief ultimately sought in this action, is again denied.

Brookland's Motion to Extend the Time to Close

The Parties' Contentions

In support of its motion, Brookland argues that pursuant to the PSA, title must be transferred on or before July 30, 2014, with time being of the essence. It further asserts that Cumberland and Myrtle refuse to close by that date or to grant an extension of time in which to do so. Brookland thus believes that unless the court intervenes and extends this time, Cumberland will allow Brookland's right to acquire title to the Property to expire and it will have no recourse, despite the fact that Brookland remains ready, willing and able to close.

In opposition, Myrtle again argues that the Myrtle Brookland Contract is void ab initio because Brookland did not wire the escrow deposit in accordance with First American's instructions.

Discussion

The court has already discussed and rejected Myrtle's contention that the Myrtle Brookland Contract is void because Brookland did not wire the escrow deposit in accordance with First American's instructions, particularly in view of First American's assertion that it is in possession of the funds and knows why the deposit was wired to it. Thus, having granted Brookland a preliminary injunction enjoining Cumberland and All Year from transferring title to the Property, the court also grants Brookland's motion seeking an order extending the closing date to thirty days after the entry of a final judgment in this action, since Brookland may well be denied any relief if Cumberland chooses to take the position

that the time in which to close has expired.

Brookland's Motion for the Appointment of A Receiver

The Parties' Contentions

In support of this motion, Brookland argues that a temporary receiver is necessary to hold the funds that Myrtle receives when it closes on its sale of the Property to All Year. More specifically, Brookland asserts that since Myrtle is in the business of operating a gas station and the PSA obligates it to terminate such operation prior to closing on the sale of the Property, there will be no assets, other than the proceeds of the sale, against which Brookland will be able to enforce any money judgment that it may receive for Myrtle's alleged breach of the Myrtle Brookland Contract.

Myrtle's Contentions

In opposition to this motion, Myrtle argues that since the subject of Brookland's action is not the Property, but the proceeds of the sale, Brookland is not entitled to the appointment of a receiver. Myrtle also argues, again, that since Brookland did not properly tender the $1,000,000 escrow deposit, it will not be able to succeed on its cause of action alleging that Myrtle breached the Myrtle Brookland Contract.

Discussion

Having granted Brookland a preliminary injunction on its motion to reargue, Myrtle and Cumberland have been enjoined from selling the Property to anyone other than Brookland. From this it follows that Brookland's alleged need for a receiver to protect its

interests has been rendered academic.

Motion by Cumberland and All Year to Cancel the Notice of Pendency

Movants' Contentions

In support of their motion, Cumberland and All Year argue that Brookland did not file a Notice of Pendency in the instant action until October 30, 2014, arguing that it did so in an effort to impede the purchase of the Property, in which it has no legal interest, and to circumvent the denial of its motion for a second preliminary injunction. More specifically, movants argue that a notice of pendency is not properly filed herein, since any relief obtained by Brookland will not affect title or ownership of the Property, premised upon the contention that the court has already determined that it is not likely that Brookland will succeed on the merits in establishing a right to specific performance of the Myrtle Brookland Contract. Movants also argue that Brookland continues to act in bad faith in prosecuting this action in view of the court's denial of its request for an injunction preventing Cumberland and/or All Year from closing on their purchase of the Property, knowing that the delay is costing Cumberland approximately $1,000 a day.

Myrtle's Contentions

Myrtle also supports vacatur of Brookland's Notice of Pendency, reiterating the contention that Brookland is not seeking to protect an interest in real property and arguing that Brookland is instead continuing to litigate the instant action in an effort to extract a settlement from Myrtle.

Brookland's Contentions

In opposition, Brookland argues that it is clear the Myrtle assigned its right to purchase the Property twice, first to Brookland and then to All Year. Accordingly, this case is precisely the type of action in which the filing of a Notice of Pendency protects a litigant's claim of a superior right to Property. Brookland further asserts that although its previous motion seeking injunctive relief against Cumberland and All Year was denied, it establishes in its motion to reargue that at the time that the Memorandum of Contract was recorded, Cumberland and All Year had notice of Brookland's interest in the Property, so that the recording was not made in good faith and therefore is without effect. Brookland emphasizes that since it seeks to obtain sole title to the Property in this action, its filing of the Notice of Pendency was proper, so that there is no basis to cancel it. Brookland goes on to contend that in disposing of the motion, the court is not to look to the merits of the action, but is only to analyze the pleadings to determine whether there is compliance with CPLR 6501. Brookland further avers that this action was commenced in good faith. Finally, Brookland asserts that if the court decides to exercise its discretion and vacate the Notice of Pendency, it should condition the vacatur upon the posting of an undertaking in the amount of $5,000,000, or 50% of the purchase price.

Discussion

CPLR 6501 provides, in relevant part, that "[a] notice of pendency may be filed in any action in a court of the state . . . in which the judgment demanded would affect the title to,

or the possession, use or enjoyment of, real property." It must also be recognized that:

> "When the court entertains a motion to cancel a notice of pendency in its inherent power to analyze whether the pleading complies with CPLR 6501, it neither assesses the likelihood of success on the merits nor considers material beyond the pleading itself; 'the court's analysis is to be limited to the pleading's face' (*5303 Realty Corp. v O & Y Equity Corp.*, *supra,* 64 NY2d 313, 321 [1984]; *see Sansol Indus. v 345 E. 56th St. Owners*, *supra*, 159 Misc 2d 822, 823 [Sup Court, New York County, 1993])."

(*Nastasi v Nastasi*, 26 AD3d 32, 36 [2d Dept 2005]).

Having granted Brookland's motion for reargument and having issued the preliminary injunction that it seeks, defendants' argument that this action does not affect title to the Property is without merit. Accordingly, since this is an action in which Brookland seeks specific performance of a contract to convey land, the action affects title to, or possession, use, or enjoyment of real property. Thus, it would be error to cancel the Notice of Pendency (*see e.g. Re-Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 535 [2d Dept 2013]; *see also Luchter v Piazza*, 227 AppDiv 313 [1st Dept 1929]). Movants' reliance upon *Sansol Industries* (159 Misc 2d 822) is misplaced, since that case pertains to shares in a cooperative apartment, which have been held to be personal and not real property (*see also Savasta v Duffy*, 257 AD2d 435, 436 [1st Dept 1999). In addition, movants fail to rebut Brookland's assertion that it is ready, willing, and able to close at the purchase price within the time frame set out in the PSA (*see generally Novello v 215 Rockaway, LLC*, 70 AD3d 909, 910 [2d Dept 2010]).

As is also relevant to the pending motion, CPLR 6514(b) provides, in pertinent part, that "[t]he court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith." In applying this provision, the court has explained that:

> "Vacatur based upon the failure to prosecute the action in good faith only lies where plaintiff engaged in dilatory tactics following the commencement of the action, e.g., refused to provide bill of particulars (*see Williams v Harrington*, 216 AD2d 761 [3rd Dept 1995]), or otherwise failed to prosecute the action diligently (*see* Siegel, NY Prac § 336, at 537 [4th ed]). The party seeking to cancel the notice of pendency must demonstrate the requisite lack of good faith (*see Lazar v Maragold Group*, 150 AD2d 645, 646 [2d Dept 1989]; 13 Weinstein-Korn-Miller, NY Civil Prac, ¶ 6514.10). This burden is not 'easily met' (*Weksler v Yaffe*, 129 Misc 2d 633, 635 [Sup Constructive Trust, Kings County 1985]) since defendant must raise 'at least a substantial question' as to whether plaintiff has not commenced or prosecuted the action in good faith (13A Carmody-Wait 2d § 87:109)."

(*551 W. Chelsea Partners LLC v. 556 Holding LLC*, 40 AD3d 546, 548 [1st Dept 2007]). It has also been held that filing a notice of pendency for an "ulterior purpose" can support the conclusion that an action was not commenced in good faith (*Nastasi*, 26 AD3d at 41). Herein, movants fail to establish that Brookland has an ulterior purpose in commencing the instant law suit or that it engaged in any dilatory conduct during the pendency of the action.

Accordingly, the motion to cancel the Notice of Pendency is denied.

Conclusion

For the above discussed reasons, Brookland's motion to reargue is granted and it is granted an injunction enjoining and restraining Cumberland and All Year, and their respective officers, directors, members, managers, employees, agents, attorneys, and all others purporting to act on their behalf, from: (i) transferring, or purporting to transfer, the Property, or any interest therein, to any person or entity other than plaintiff; and (ii) pursuing or taking any action in furtherance of any rights claimed by All Year and/or any person or entity other than plaintiff with respect to the Property. Brookland's motion seeking an order extending the closing date as provided in the PSA to thirty days after the entry of a final judgment in this action is granted. All other relief requested is denied.

The foregoing constitutes that order and decision of this court.

ENTER:

J.S.C

HON. LAWRENCE KNIPEL