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SHORT FORM ORDER

INDEX No. 28545/12

ORIGINAL WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.,
Acting Justice Supreme Court

MOTION DATE 7/7/14
ADJ. DATE 10/9/14
Mot. Seq. # 003 - MD

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CONTINENTAL MARBLE, INC.,

Plaintiff,

- against -

USA ASSOCIATES, LLC and BENJAMIN RUSSO, as Escrow Agent,

Defendants.

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Upon the following papers numbered 1 to 14 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 7 - 11 ; Replying Affidavits and supporting papers 12 - 14 ; Other Pltf's Memo of Law 5 - 6 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for summary judgment on the causes of action in its complaint and to dismiss the counterclaims of defendant USA Associates, LLC, is denied; and it is further

ORDERED that all counsel shall appear for a Compliance Conference on **APRIL 28, 2015,** at **9:30AM,** for the purpose of scheduling discovery which shall be completed within 60 days.

On March 30, 2011, defendant USA Associates, LLC ("USA") as the seller and plaintiff as the buyer entered into a contract of sale (the "Contract") for the premises known as 2107 Montauk Highway in Brookhaven, New York, District 0200, Section 974, Block 02.00, Lots 16, 17 and 9 (the "Premises"). The sales price was $1,095,000 with a $75,000 down payment deposited in an escrow account controlled by defendant Benjamin Russo, USA's then-attorney[1]. Pursuant to the Contract, on the closing date set for on or about May 20, 2011, USA was to convey both an insurable and marketable title to the plaintiff for the metes and bounds description therein. The Contract also provides that the plaintiff is not obliged

[1]Benjamin Russo, Esq. is now deceased; the money has been transferred to USA's current attorney, Karen Gunkel, Esq.

to accept title to the Premises if any fence encroachments exceed one (1) foot. However, the Contract allows for a 30-day extension of the closing date (until June 30, 2011) to remove objections to title. Additionally, the Contract contains a mortgage contingency clause which affords the plaintiff 60 days to obtain a firm unconditional first mortgage loan from a lending institution, and a second firm unconditional mortgage commitment under the Small Business Administration program (the "SBA"). In the event USA is unable to convey a marketable, insurable title, or the plaintiff can not obtain the first mortgage loan and the SBA loan commitment, the Contract could be canceled, in writing, and the $75,000 deposit returned to plaintiff.

On April 15, 2011, plaintiff's counsel applied for title insurance. On April 29, 2011, a title report was generated (the "Title Report") by Intracoastal Abstract Co., Inc. ("Intracoastal"), the agent of First American Title Insurance ("First American"). The Title Report raised multiple objections and exceptions, some of which purportedly affected USA's ability to convey a marketable and insurable title.

By letters dated May 31, 2011 and June 30, 2011, plaintiff informed USA that it had not obtained a firm mortgage commitment from its lender, Suffolk County National Bank (the "Bank"). Plaintiff's request for an extension to June 17, 2011 and then to July 22, 2011 was granted by USA. On June 3, 2011, the SBA loan commitment was issued conditioned upon what the plaintiff characterizes as factors outside of its or its principal's control. Thereafter, on September 28, 2011, the plaintiff obtained a mortgage loan from the Bank, conditioned on factors which, again, the plaintiff characterizes as outside of its or its principal's control.

By letter dated October 12, 2011, plaintiff's counsel notified USA's counsel that pursuant to ¶ 13.01 of the Contract, plaintiff was opting to cancel the transaction on the grounds that USA had failed to deliver marketable title within thirty days of the on or about May 20, 2011 closing date, and demanded a refund of the $75,000 down payment. USA's counsel responded by letter dated October 14, 2011, informing that the cancellation of the Contract for the reasons stated is an anticipatory breach which results in plaintiff's forfeiture of its down payment. USA's counsel also points out that a closing date had not been established, thus, the cancellation notice and request of the down payment constituted a breach of the Contract.

Plaintiff's counsel responded on October 31, 2011, rejecting USA's contention of an anticipatory breach or a breach of contract as according to communications with the attorney working on USA's behalf to clear the title defects, it would take three months to a year to resolve and would involve a court action to quiet title, which was too long for plaintiff. Thus, plaintiff's counsel posited, cancellation is a contractual right regardless of whether a law date to close title was established. In any event, plaintiff's counsel communicated, plaintiff is declaring the Contract null and void under an alternative provision, i.e., ¶ 3 of the Rider to the Contract, based on the inability of plaintiff to obtain a firm, unconditional commitment within the time frame allotted in the Contract.

USA maintains that the Title Report did not disclose any substantial defects in title, and that the only notable exception raised was the overlapping filed maps, which Intracoastal wanted "explained." USA's counsel advised plaintiff's counsel by letter dated November 9, 2011, that it obtained a title report from Safe Harbor Title Agency ("Safe Harbor"), an agent of Fidelity Title Insurance Company

("Fidelity"), which purportedly agreed to insure the Premises as it exists. Plaintiff's counsel disagreed with USA's position, asserting that based on the conversation with Fidelity the same objections and exceptions existed which inhibited USA from conveying insurable and marketable title. Plaintiff's counsel again demanded return of the client's down payment.

Further communication between the parties' counsel was futile and as the down payment was not returned, the instant action was commenced by plaintiff against USA for breach of contract, attorneys fees and unjust enrichment, and against USA's counsel as escrow agent for the return of the $75,000 deposit. In its answer, USA interposes affirmative defenses alleging that any damages suffered by plaintiff were the result of its own culpable conduct and unclean hands, and asserts counterclaims for breach of contract and slander of title. Plaintiff now moves for summary judgment in its favor on all causes of action in the complaint, and to dismiss USA's counterclaims.

In support of its motion, plaintiff submits, *inter alia*, the Contract, Title Report, the letters of counsel, and the affidavit of Teresa Cacciopolli, who in 2011 was the head title clearance officer for Intracoastal and integrally involved in the title aspects of plaintiff's proposed purchase of the Premises. Cacciopolli asserts that due to a widening deed to the Town of Brookhaven and a corner cut deed to the County of Suffolk, land was taken away from the Premises, thus the description of the tax map and lot numbers in the Contract are incorrect and represent more land than USA owns. Cacciopolli also asserts that the metes and bounds description of the Premises in the Contract includes land that USA does not own. These title defects, Cacciopolli avers, are incurable unless the land is deeded back to USA. She also asserts that First American was unwilling to insure the strip of land between the fence boundary line without excepting a possible adverse possession claim from a third-party. First American also raised an objection to insurance with respect to the overlap of maps filed in the Suffolk County Clerk's Office which risk it was unwilling to insure.

Cacciopolli also avers that the Title Report contained an objection involving a road which needed to be abandoned. Cacciopolli points out that a road abandonment certificate was filed with the County Clerk's office on October 18, 2011, which was after plaintiff's cancellation notice. Other than the road abandonment issue, Cacciopolli states, USA's counsel did not contact her office to resolve any of the aforementioned title defects, and instead, sought to resolve the defects by suggesting that plaintiff use a different insurance company.

In opposition, USA has submitted, *inter alia*, the affirmation of counsel, Tara A. Kavanagh, and the affidavit of Lori Colletti, the Senior Vice President and chief clearance officer of Safe Harbor. Colletti asserts that it is not unusual to find properties where two or three maps overlap, and when such an event occurs, the abstract company should continue researching until a good title is found. If that is not possible, the problem oftentimes is remedied by abandoning the underlying maps and proceeding with a property as a described parcel. In the instant case, Colletti asserts, Safe Harbor's search revealed litigation in 1955-1956 wherein the issue of the overlapping maps was resolved finding that title vested in a predecessor-in-interest. The search also found an unbroken chain of title which reveals that USA owns the entire Premises. Colletti opines that Intracoastal did not search far enough back to discover the decisions and judgments in the litigation. Colletti further asserts that if requested, Safe Harbor, through

First American, was prepared to issue a fee title insurance policy with no exception for the overlapping map issue.

As to the fence encroachment, Joseph Ainoris, a manager/member of USA states in his affidavit in opposition that he was ready at all times to remove the fence to clear up the title issue and proceed to closing. Ainoris also asserts that plaintiff is being disingenuous as to its lack of knowledge about the road widening. Ainoris states that the plaintiff inspected the Premises prior to entering into the Contract and that the road widening is obvious. Moreover, Ainoris states the road widening is depicted and labeled on the survey that is attached to the Contract signed by the plaintiff, which he notes is the same survey attached to the moving papers.

USA's counsel maintains plaintiff has no legitimate legal basis for canceling the contract, but appears to have simply decided not to proceed with the transaction. Counsel maintains the parties agreed that Lot 17.01 is the correct lot number for the Premises. Indeed, counsel points out that this lot number is handwritten on Rider II to the Contract and is reflected in the Title Report. Counsel also argues that the issue of the lot number for the Premises was never raised until plaintiff made the instant motion. In any event, USA's counsel argues, whether the parties agreed and understood that Lot 17.01 was correct raises a factual issue to be decided at trial. Similarly, counsel argues that the survey annexed to the Contract reflects the road widening. Moreover, § 5.01 of the Contract provides that plaintiff "has inspected the Premises, is fully familiar with the physical condition and state of repair thereof." Thus, USA maintains, plaintiff was aware of the Premises' dimensions.

Additionally, USA's counsel argues that as Ainoris was prepared to remove the fence prior to closing, the existence of this encroachment is not a legitimate basis to cancel the Contract. Again, USA's counsel argues that at a minimum the fence encroachment raises an issue of fact as to whether its existence is an impediment to the conveyance of marketable title.

USA's counsel also argues that although Intracoastal, plaintiff's chosen title company, did not offer a clean title policy, USA was able to obtain a policy from Old Republic Title Insurance Company ("Old Republic") to insure the Premises without exception. Thus, counsel argues, the overlapping maps justification for plaintiff's cancellation of the policy is a red herring. It is the position of USA's counsel that as a title insurance policy from Old Republic was available to plaintiff, summary judgment must be denied.

As to the mortgage commitment, USA's counsel posits that an issue of fact exists as to whether plaintiff made a diligent effort to obtain mortgage financing from the Bank as required by ¶ 3 of Rider 1 to the Contract. The mortgage commitment from the Bank dated September 28, 2011 required the plaintiff to accept the terms thereof, in writing, within 15 days which was October 13, 2011; plaintiff first attempted to cancel the Contract on October 12, 2011. Further, counsel posits, the first indication of any activity on the Bank loan is an email dated June 3, 2011, more than three months after the Contract date, and the same date that plaintiff received the SBA commitment. Thus, counsel argues, there is an additional issue as to plaintiff's motivation for attempting to cancel, and as to whether plaintiff breached the Contract by failing to diligently perform its obligations under the Contract, thereby precluding the grant of summary judgment.

The motion is denied for several reasons. Where a contract for the sale of real property does not contain a specific declaration that time is of the essence, one party may unilaterally notify the other that time is of the essence provided that the notice is clear, distinct, unequivocal, fixes a reasonable time in which to perform, and informs the other party that a failure to perform will result in default (***Revital Realty Group, LLC v Ulano Corp.***, 112 AD3d 902, 978 NYS2d 77 [2d Dept 2013, *lv denied* 22 NY3d 866, 986 NYS2d 20 [2014]; ***Charchan v Wilkins***, 21 AD2d 668, 669, 647 NYS2d 550 [2d Dept 1996]; ***Standsky v Mallon***, 133 AD2d 392, 519 NYS2d 387 [2d Dept 1987). Here, the Contract set a closing date which was extended several times by mutual agreement to give USA an opportunity to clear the objections and exceptions to title. However, neither the Contract nor the correspondence between counsel set a date making time of the essence. Indeed, the letters by plaintiff's counsel purporting to cancel the Contract never set a closing date but declared USA in breach for failure to deliver a marketable title within thirty days of the on or about May 20, 2011 closing date. Thus, not only was there a failure to set a time is of the essence closing date, no closing date whatsoever was set after the agreed upon extensions. Therefore, USA cannot be considered in breach of the Contract (*see* ***Revital Realty Group, LLC v Ulano Corp.***, *supra*).

Moreover, "a party may not frustrate the performance of an agreement by bringing about the failure of a condition precedent" (***Rachmani Corp. v 9 East 96th St. Apt. Corp.***, 211 AD2d 262, 269, 629 NYS2d 382 [1st Dept 1995]). Here, as the parties included a mortgage contingency in the Contract, plaintiff implicitly promised to use its good-faith best efforts to obtain the mortgage loan. The evidence submitted by USA raises an issue of fact as to whether the plaintiff resisted this contractual obligation by failing to timely provide the documentation requested by the Bank.

Furthermore, as Intracoastal would not insure title without the objections or exceptions, USA should have been afforded the opportunity to demonstrate that a qualified title company would insure title free and clear of the offending objections and exceptions (*see* ***Gundel v Grady***, 184 AD2d 548, 585 NYS2d 63 [2d Dept 1992]; ***Kopp v Barnes***, 10 AD2d 532, 204 NYS2d 860 [2d Dept 1960]). Based on Colletti's affidavit and the affirmation of USA's counsel, Old Republic, a qualified title company, was willing to provide such a policy, and indeed, did write a policy insuring the Premises.

Considering all of this evidence, and viewing it in a light most favorable to USA as the non-moving party, issues of fact exist which preclude the grant of summary judgment in plaintiff's favor.

Accordingly, the motion must be denied.

Dated: APR 17 2015

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**