Carr v Hoshyla
2015 NY Slip Op 30676(U)
April 21, 2015
Supreme Court, Suffolk County
Docket Number: 23718/2010
Judge: Joseph Farneti
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[* 1]

SHORT FORM ORDER

INDEX NO. 23718/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ERIC CARR and MARYANN GITTERS, Individually and as Trustees of the ANNA C. CARR FAMILY TRUST,

Plaintiffs,

-against-

PETER PAUL HOSHYLA,

Defendant.

FURTHER ORDER

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Upon the following papers numbered 1 to 10 read on this motion FOR SUMMARY JUDGMENT. Notice of Motion and supporting papers 1-3; Plaintiffs' Memorandum of Law in Support 4; Affirmation in Opposition and supporting papers 5, 6; Defendant's Memorandum of Law in Opposition 7; Plaintiffs' Reply Memorandum of Law in Support 8; Other Order dated December 15, 2014 - 9; Conference held on February 26, 2015 - 10; it is,

ORDERED that this motion by plaintiffs, ERIC CARR and MARYANN GITTERS, Individually and as Trustees of the ANNA C. CARR FAMILY TRUST, for an Order: (1) pursuant to CPLR 3212 and RPAPL 901, granting summary judgment on plaintiffs' claims and dismissing defendant's counterclaim; and (2) pursuant to RPAPL 1201, compelling defendant to pay one-half of the carrying charges for the subject premises, is hereby **DENIED** in its entirety for the reasons set forth hereinafter. The Court has received opposition to this application from defendant PETER PAUL HOSHYLA.

Plaintiffs commenced this action for partition and a declaratory judgment in connection with seven lots which formerly comprised the "Hoshyla Family Farm" in Manorville, New York. Plaintiffs Eric Carr and Mary Ann Gitters are the nephew and niece of defendant Peter Paul Hoshyla and hold a fifty (50%) percent interest in the seven lots as trustees of a January 31, 2008 family trust from their mother Anna C. Carr (who died in 2010), the sister of defendant. Defendant holds a fifty (50%) percent interest in one of the seven lots (which is improved by a farmhouse) as a legatee under his father's will, and he holds a fifty (50%) percent interest in the remaining six lots (unimproved) by deed from him and his sister, as surviving trustees under a revokable trust of their now deceased father. Plaintiffs claim that they are entitled to partition; however, defendant asserts that a February, 2007 contract of sale between he and his now deceased sister, Ann C. Carr, relating to two of the tax lots entitles him to acquire certain lots and to sell certain other lots ("Contract"). Plaintiffs maintain that the Contract is unenforceable as it lacked consideration and had an unsigned rider. Plaintiffs seek rescission of the Contract.

Plaintiffs have now filed a motion for summary judgment on their claims and to dismiss defendant's counterclaim. On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2d Dept 2004]; *Roth v Barreto*, 289 AD2d 557 [2d Dept 2001]).

Here, the Contract was signed by both parties and the rider was internally referenced. This Contract contains all the essential and customary elements of a contract of sale and is a writing sufficient to satisfy the requirements of the General Obligations Law. Pursuant to General Obligations Law § 5-703 (2), any contract for the sale of an interest in real property "is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing" (General Obligations Law § 5-703 [2]; *see e.g. DeMartin v Farina*, 205 AD2d 659 [2d Dept 1994] [finding that the purported

contract failed to satisfy the Statute of Frauds and was, therefore, unenforceable]; *Argent Acquisitions, LLC v First Church of Religious Science*, 2013 NY Slip Op 33368[U] [Sup Ct, New York County] [holding that a term sheet was not an enforceable agreement because it did not include all terms material to a contract of sale]). The Contract itself contains all the essential terms and no further negotiation was contemplated or undertaken. All negotiation had culminated and resulted in this binding Contract. This was a completed Contract and the parties had previously exchanged revisions and the current agreement resulted therefrom. The parties did not contemplate any additional terms nor did they engage in any additional negotiation. The meeting of the minds was complete. The issue of consideration herein is of no consequence, as the parties were each title holders of the property in question to the extent of their then-existing interests. This Contract is in the nature of a reallocation of the property in which each had an existing partial interest.

Essentially, consideration "consists of either a benefit to the promisor or a detriment to the promisee" (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458 [1982]), which has been bargained for by the parties to the contract (*see Payne v Connelly*, 32 AD2d 693 [3d Dept 1969]; Restatement [Second] of Contracts § 71). "Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny" (*Apfel v Prudential-Bache Sec*, 81 NY2d 470, 476 [1993] [citation omitted]; *see Janian v Barnes*, 294 AD2d 787 [3d Dept 2002]). However, an agreement cannot be said to be supported by any consideration unless "something of 'real value in the eye of the law' was exchanged" (*Apfel v Prudential-Bache Sec*, *supra* at 476 [citations omitted]; *see Von Bing v Mangione*, 309 AD2d 1038 [3d Dept 2003]; *Saltalamacchia v Miceli*, 2013 NY Slip Op 31688[U] [Sup Ct, New York County]. The contractual consideration herein is in the form of both monetary and like-kind transfer and each party gained more than they were originally entitled to by law by virtue of their pre-existing co-tenancy.

Plaintiffs' attempt to negate the Contract for the additional reason of absence of default is without legal basis. The Court of Appeals has frequently used the words "rescind" "rescinded" and "rescission" in connection with an anticipatory breach as expressive of the election to treat the repudiation as a complete breach of the contract which would give rise to an immediate right of action for damages (*see Wester v Casein Co. of America*, 206 NY 506 [1912]; *Rubber Trading Co. v Manhattan Rubber Manufacturing Co.*, 158 AD 925 [1st Dept 1913]; *Estes v Curtiss Aeroplane & Motor Corp.*, 191 AD 719 [4th Dept 1920] *affd* 232 NY 572 [1922]; *Plunkett v Comstock, Cheney Co.*, 211 AD 737

[1st Dept 1925]. Plaintiffs brought this lawsuit to declare the Contract a nullity; that is the very definition of anticipatory breach.

The Court finds that the Contract is binding as between the parties herein. The additional arguments concerning the status and capacity of the parties is no more persuasive than the assertion of lack of consideration or the unsigned rider. Fulfilling the terms of the Contract will resolve the dispute between these parties. It is a solution contemplated by the decedent and the defendant, and the successors-in-interest are bound by its terms as stated in the body of the Contract.

As set forth in *Warner v Kaplan*, 71 AD3d 1 (1st Dept 2009):

> "[t]he crux of this matter lies in contract paragraph 15.2, which expressly makes the contract binding on the parties' 'heirs, personal and legal representatives and successors in interest.' The inclusion of this provision indicates that the parties explicitly contemplated, and provided for, the possibility of either party's death before closing, by specifying that the death would not terminate the contract, but that the contract would survive, to be performed by the successors or heirs of the deceased party. This provision makes the contract binding on Altman's estate. While a contract for personal services is terminated by the death of the servant (*see Minevitch v Puleo*, 9 AD2d 285, 287, 193 NYS2d 833 [1959]), a contract of sale is not terminated by the death of the purchaser. On the contrary, as a general rule,
>
> '[w]here the proposed purchaser dies before the closing of title, his executor or administrator may pay the balance of the purchase price and take the deed in his own name holding it in trust for the heirs at law or devisees. It is the duty of the fiduciary for a deceased vendee to complete payments under a contract entered into by such vendee for the purchase of real property' (4-35 Warren's Weed New York Real Property § 35.24 [1] [2009] [footnote omitted]; *see Di Scipio v Sullivan*, 30 AD3d 660, 816 NYS2d 576 [2006])."

Paragraph 23 of the Contract herein states in pertinent part:

> "This contract shall also apply to and bind the heirs, distributees, legal representatives, successors and permitted assigns of the respective parties."

Furthermore, there are no allegations of fraud or overreaching. The Contract is binding upon the parties to this action as to the terms and conditions. The plaintiffs herein derive their interest in the property through the trust dated January 31, 2008. Anna Carr had the power and authority to enter into this Contract, and her successors-in-interest are fully bound thereby.

The defendant is ready, willing and able to perform his obligations under the Contract. The plaintiffs are constrained to honor the terms and conditions of the Contract whether or not they find the monies due defendant excessive under the circumstances. That was the deal struck by their mother and it is the deal which they are obligated to honor.

Defendant's additional arguments concerning title reports and title insurance do not impair or negate the effect of the Contract. Defendant is entitled to consummate the transaction. The issue herein is not money alone but the re-alignment and exchange of parcels requiring the cooperation of the parties. The resulting ownership scheme was both contemplated and contracted for by Anna Carr and Peter Hoshyla.

As set forth in the depostitions of the parties, there is no mystery as to the resulting ownership of certain parcels. The carve out two-acre building lot was to run with the farmland. Adding additional property to both the Ryerson and South Street parcels to bring each of them into compliance with the two-acre zoning requirement was the arrangement contemplated by all parties and confirmed in the depositions by all parties. All parties are entitled to the bargain as set forth in the Contract. Anna Carr had the power and authority to enter into the Contract; she did so and it remains a binding obligation.

The parties herein are co-tenants and as such are not entitled to an independent judgment as against each other unless properly pleaded. Here, it is clear that the plaintiff Eric Carr has had the exclusive use and enjoyment of the South Street residence and has exercised independent dominion and control over the premises including the installation of a dead bolt lock. As such, he may be responsible for all the costs of utilities, insurance and real property taxes.

However, "[m]ere occupancy alone by one of the tenants does not make that tenant liable to the other tenant for use and occupancy absent an agreement to that effect or an ouster" (*see Gamman v Silverman*, 98 AD3d 995 [2d Dept 2012]; *Misk v Moss*, 41 AD3d 672 [2d Dept 2007]; *Degliuomini v Degliuomini*, 12 AD3d 634 [2d Dept 2004]). Absent an ouster, tenants-in-common equally bear the costs incurred in maintaining the property (*see Degliuomini v Degliuomini*, *supra*; *Klein v Dooley,* 120 AD3d 1306 [2d Dept 2014].

Candidly, the parties are in agreement as to the contemplated final arrangement and ownership of the parcels. Plaintiffs are unhappy with the purchase price. The Contract contained a provision concerning damages in the event of a default. As of the date of the commencement of this action, there is a basis for computation as contemplated.

Although not required, defendant allowed the Contract to remain in effect while waiting for his sister Anna Carr to sell her home. The home was not sold during her lifetime but was sold after her death. Why the successors did not use those resulting funds to honor this Contract is unknown to the Court. Eric Carr acknowledged in his deposition that there was forebearance on the part of the defendant; however, upon the sale of the Port Washington property, Eric Carr did not honor the obligation to complete the Contract. Mr. Carr acknowledges as much in his deposition. He knew of the obligation. However, he sought to avoid paying the contracted-for price. Based upon the foregoing, the Court finds that plaintiffs are not entitled to summary judgment on their claims, or for an Order compelling defendant to pay one-half of the carrying charges. Accordingly, plaintiffs' motion is **DENIED** in all respects.

The foregoing constitutes the decision and Order of the Court.

Dated: April 21, 2015

HON. JOSEPH FARNETI
Acting Justice Supreme Court

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