

Velarus v Brereton

2015 NY Slip Op 32200(U)

October 28, 2015

Supreme Court, County of Kings

Docket Number: 502068/14

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

**FILED
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WILLER VELARUS,

Plaintiff,

-against-

ALVIN BRERETON,

Defendant.

-----X

DECISION/ORDER

Index No. 502068/14

Mot. Seq. No. 2

Sub. 9/10/15

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR §2219(a), of the papers considered in the review of defendant's order to show cause to dismiss the action and cancel the notice of pendency.

Papers	Numbered
Order to Show Cause, Affirmation and Exhibits Annexed	<u>1-13</u>
Answering Affidavits	<u> </u>
Reply Affidavits	<u> </u>
Other: _____	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant's order to show cause to dismiss the action and cancel the notice of pendency was signed on August 3, 2015 and was argued before the undersigned on September 10, 2015. Both sides were represented by counsel. Plaintiff's attorney provided no papers in opposition to the motion, however, defendant movant's attorney agreed on the record that plaintiff's opposition papers from the defendant's prior motion may be considered by the court as plaintiff's opposition to the instant motion. Plaintiff's attorney did not object to the service of the order to show cause.

This action was commenced in March 2014. Defendant answered the complaint in April 2014, pro se. The affidavit of service of the summons and complaint was never filed. Plaintiff then served and filed a response to defendant's counterclaims. On July 23, 2015, defendant's first motion to dismiss appeared on the court's motion calendar. The defendant's attorney doesn't describe what happened on that date in the instant motion papers. The court's records indicate that the motion was withdrawn.

Defendant now moves again to dismiss the complaint. Defendant's counsel provides an affirmation in support which goes on at length about alleged facts in the underlying real estate transaction, facts which she has no personal knowledge of. She was not defendant's attorney for the sale. Nor can she testify in an affirmation. Her affirmation fails to state which section of the CPLR the motion is made under. The next document is an affidavit from defendant. He provides a single-spaced narrative of his side of the story. Court documents should be double-spaced.

In essence, the averments of counsel are on the issue of defendant's alleged inability to convey marketable title, allegedly permitting him to cancel the contract of sale. There are no documents annexed to the motion to support defendant's attorney's claim. Annexed are the pleadings, the contract of sale for the house, correspondence between counsel and some of the papers from the prior motion.

In defendant's affidavit, he doesn't state that the reason he couldn't close was because he couldn't convey marketable title. Instead, he claims he canceled the contract and unilaterally had his attorney return the downpayment check to plaintiff's counsel because he became aware that plaintiff had a broker show the house to persons whom plaintiff hoped to assign his purchase rights to. In defendant's mind, this

was not permitted and he says (¶ 6) "I was shocked when Mr. Potter [the broker] told me that Petitioner [sic] could do so."

Defendant's counsel argues that returning the downpayment check to plaintiff's counsel resulted in "the contract was deemed void."

The court will analyze the motion as a motion to dismiss for failing to state a cause of action, as there is no other section of CPLR 3211 which seems applicable and movant has failed to specify the statutory grounds for the motion. In the complaint, plaintiff alleges that he was ready, willing and able to close, that it was a contract for an all-cash transaction without any mortgage contingency, and that defendant did not show up at the scheduled closing and refused to close and instead mailed his attorney the downpayment check with a letter that the contract was cancelled and that defendant was no longer interested in selling.¹

In determining a motion to dismiss on the grounds the complaint fails to state a cause of action, pursuant to CPLR 3211 (a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2nd Dept 2005]. See also *Leon v Martinez*, 84 NY2d 83, 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2nd Dept 2000]. The standard of review on such a motion is

¹A copy of this letter is Exhibit H to the motion.

not whether the party has artfully drafted the pleading, “but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC*, 14 AD3d 479, 480 [2d Dept 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester*, 282 AD2d 561, 562. The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez*, 84 NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

At oral argument, defendant counsel argued that the contract is not assignable by its terms. There is a clause in the “Blumberg” #125, Residential Contract of Sale that prohibits a purchaser from assigning his or her rights thereunder, Paragraph 26. However, the copy of the contract annexed to defendant’s motion as Exhibit F indicates that the contract’s pre-printed form was modified to state that the contract may be assigned without the prior written consent of Seller. However, the court also notes that Paragraph 16 of the Rider (Exhibit G) states the opposite and prohibits assignment.

This inconsistency would be construed against the Seller as preparer of the contract. However, the court cannot go beyond the papers in deciding the motion. There is no evidence plaintiff asked defendant for permission to assign the contract. Thus, it is merely defendant's speculation.

The court finds that defendant has failed to make out a prima facie case to dismiss the complaint as a matter of law.

Therefore, defendant's motion to dismiss the complaint and cancel the notice of pendency is denied.

The foregoing shall constitute the decision and order of the court.

Dated: Brooklyn, New York
October 28, 2015



Hon. Debra Silber, A.J.S.C.

**Hon. Debra Silber
Justice Supreme Court**

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