

Space Realty Corp. v Cherry

2015 NY Slip Op 32390(U)

November 20, 2015

Supreme Court, Queens County

Docket Number: 709670/14

Judge: Howard G. Lane

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

SUA SPONTE ORDER

SPACE REALTY CORP.,

Plaintiff,

-against-

MICHELE CHERRY AS EXECUTOR,

Defendant.

Index No. 709670/14

Motion
Date August 13, 2015

Motion
Cal. No. 114

Motion
Seq. No. 2

The Court sua sponte recalls its decision/order dated November 10, 2015 and hereby issues the following decision/order in its place:

	<u>Papers Numbered</u>
Notice of Motion.....	EF 26
Aff. In Support.....	EF 27-29
Exhibits.....	EF 30-36
Notice of Cross Motion.....	EF 38
Aff. In Opp. To Motion.....	EF 39
Aff. In Support of Cross Motion..	EF 40
Mem of Law in Support.....	EF 41
Aff. In Support of Cross Motion..	EF 42
Exhibits.....	EF 43-53
Affidavit.....	EF 54
Aff. In Reply.....	EF 55
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Aff. In Reply.....	EF 59

FILED
NOV 30 2015
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers it is ordered that this motion by defendant, Michele Cherry as Executor for an order pursuant to CPLR 3212 granting her summary judgment against plaintiff, Space Realty Corp. and vacating the lis pendens on the property at 147-17 Foch Boulevard, Jamaica, New York 11432, Section 10, Block

12007, Lot 22 is hereby decided as follows:

The underlying action involves a cause of action for breach of contract of sale of property located at 147-17 Foch Blvd. wherein the plaintiff, Space Realty Corp. was the buyer and defendant, Michelle Cherry as Executor, was the seller. The contract of sale was entered into between the parties on or about November 6, 2014. Plaintiff alleges via the Verified Complaint that: "The plaintiff demanded that he [sic] defendant perform his obligations under the contract allowing an inspection of the premises and to close title and the defendant has refused to do so."

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

"The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages" (*Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd.*, 801 NYS2d 243 [Sup Ct, NY County 2004][internal citations omitted]). Plaintiff must plead "the terms of the

agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant" (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]).

Defendant established a prima facie case in support of the motion. Defendant presented inter alia, the affidavit of Edward Ligon, a sales agent with Exit Realty Genesis, the broker in the transaction between plaintiff and defendant, who avers that: on November 20, 2014, plaintiff had a thorough walk through of the subject premises wherein he examined the basement, the first floor, the second floor, and the backyard.

In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff does not deny that it received a walk through inspection on November 20, 2014, but contends that because defendant's brother was occupying the subject premises at that time, the plaintiff was entitled to a final walk through prior to closing, after defendant's brother had vacated the premises.

The Court finds plaintiff's argument is unavailing as The Rider to the Contract of Sale states that the defendant's brother could remain in possession with all his personal property until 7 days after the closing. Nowhere is it stated, that plaintiff would be entitled to another walk through after the premises were completely vacated. As such, defendant did not breach the contract.

Accordingly, defendant's motion is granted and summary judgment is granted to defendant.

It is Ordered that the County Clerk of Queens County is directed, upon payment of proper fees, if any, to cancel and discharge a certain Notice of Pendency filed in this action against property known as 147-17 Foch Boulevard, Jamaica, NY 11432, Section 10, Block 12007, Lot 22 and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this Order.

It is further Ordered that the Clerk of the County of Queens be served with a copy of this Order with Notice of Entry.

That branch of plaintiff's cross motion for an order pursuant to CPLR 3024(b) striking from the defendants responses any allegations pertaining to the officer's entry of a guilty plea over 20 years ago is hereby denied. Pursuant to CPLR 3024(b), "A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." As plaintiff seeks to strike material submitted in an Affirmation, and not a pleading, this branch of the plaintiff's cross motion

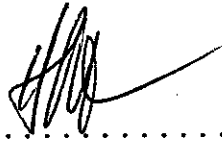
is denied.

The remaining branch of the plaintiff's cross motion to amend the Complaint pursuant to CPLR 3025(b) to change the caption to read "Michele Cherry as Executor of the Estate of Mosella Cherry" and as named defendant is rendered moot.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: November 20, 2015



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Howard G. Lane, J.S.C.

FILED
NOV 30 2015
COUNTY CLERK
QUEENS COUNTY