

Grunbaum v Brittany
2015 NY Slip Op 32780(U)
April 17, 2015
Supreme Court, Kings County
Docket Number: 30968/07
Judge: David I. Schmidt
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At an IAS Term, Part NJTRP 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 17th day of April, 2015

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

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HENRY GRUNBAUM a/k/a
HERSHE GREENBAUM,

Plaintiff,

- against -

Index No. 30968/07

NICOLE BRITTANY, LTD.,

Defendant.

-----X

The following papers numbered 1 to 9 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2, 3-4, 5-7
Opposing Affidavits (Affirmations) _____	8-9
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant Nicole Brittany, Ltd. moves for an order dismissing the complaint of plaintiff Henry Grunbaum a/k/a Hershe Greenbaum. By separate order to show cause, defendant moves to dismiss the action as abandoned. Plaintiff cross-moves for an order, pursuant to CPLR 3212, granting summary judgment on his complaint, striking the answer of defendant, directing defendant to specifically perform the subject

contract of sale and directing defendant to utilize the purchase moneys to satisfy or pay down a mortgage encumbering the subject property.

Plaintiff commenced this action seeking specific performance of a contract for the sale of real property at 455 Morgan Avenue in Brooklyn. Pursuant to the contract of sale, entered into on December 30, 2003, defendant agreed to sell the subject property to plaintiff for a purchase price of \$2,825,000.00. In accordance with the contract, plaintiff remitted a deposit to defendant's attorney in the amount of \$282,500.00. Under the contract's terms, the closing was to occur within 90 days of the date of signing. Around the time the contract was signed, the U.S. Attorney commenced a forfeiture action against defendant's principal, Michael Pescatore, related to certain criminal activities of which he was subsequently convicted. The forfeiture action was settled by stipulation dated March 9, 2006. Among the terms of the stipulation was the payment by Michael Pescatore of \$2,500,000.00 to the United States Treasury Department. On September 21, 2006, defendant executed a mortgage on the property in favor of Pasquale Pescatore in the amount of \$3,000,000.00.

Plaintiff commenced this action for specific performance on August 17, 2007. On or about April 12, 2010, defendant brought a motion to dismiss the complaint. Plaintiff cross-moved for an order granting summary judgment, directing specific performance and directing that defendant deliver the premises vacant in accordance with the terms of the contract. In a decision issued on November 4, 2010, the court denied defendant's motion and granted plaintiff's cross motion. The court directed plaintiff to settle an order on notice to both

defendant's counsel and the U.S. Attorney's office, with at least 30 days notice. The order further allowed defendant to settle a counter-order on notice to plaintiff's counsel and the U.S. Attorney's office, with at least 14 days notice.

To date, plaintiff has not settled the order granting summary judgment. The absence of a settled order resulted in defendant's second motion (motion sequence # 3) to dismiss the action. In its motion, defendant contends that the action has been abandoned by plaintiff, that plaintiff has recovered the deposit (which was misappropriated by defendant's counsel) from the Lawyer's Fund for Client Protection and refuses to redeposit the sums toward the purchase price and that defendant cannot convey marketable title due to "defects" including the mortgage and a leasehold interest by a tenant of the property. In response to the motion to dismiss, plaintiff brought a second cross motion (motion sequence # 4) for an order granting summary judgment, striking defendant's answer and for damages not less than \$375,000.00.

The parties subsequently endeavored to complete a transfer of the property under new proposals and terms but were unsuccessful. By order to show cause, defendant moved once again to dismiss the action as abandoned. Plaintiff withdrew his prior cross motion (motion sequence #4) and brought a new cross motion (motion sequence # 7) for summary judgment compelling specific performance with a direction that the sales proceeds be applied toward the September 21, 2006 mortgage.

Plaintiff contends that it was impossible to finalize an order following the November 4, 2010 decision due to certain “roadblocks” including the existence of a federal lien on the property in the amount of \$3,000,400.00, a restraining notice by the U.S. Attorney against Michael Pescatore, dated March 11, 2009, forbidding the transfer of any of his property interests valued at more than \$5,000.00. and the existence of a tenant on the property. Plaintiff asserts that these “roadblocks” are now resolved and that he is presently able and willing to close on the property.

Pursuant to 22 NYCRR 202.48 (a); “[p]roposed orders or judgments ... must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.” “Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown.” (22 NYCRR 202.48 [b]). “It is within the sound discretion of the court to accept a belated order or judgment for settlement.” (*Russo v Russo*, 289 AD2d 467, 468 [2nd Dept 2001]; *Dime Sav. Bank of New York, FSB v Anzel*, 232 AD2d 446 [2nd Dept 1996]). The court may consider whether there is a valid excuse for the delay, whether the movant’s actions were devoid of any intent to abandon the motion, and whether there is anything in the record showing that the other party was prejudiced by the delay (*see Neri’s Land Imp., LLC v J.J. Cassone Bakery, Inc.*, 65 AD3d 1312, 1314 [2d Dept 2009]; *Marzullo v General Motors Corp.*, 34 AD3d 540 [2d Dept 2006]). Additionally, a court should not deem a motion or action abandoned when such a result “would not bring the

repose to court proceedings that 22 NYCRR 202.48 was designed to effectuate, and would waste judicial resources” (*Zaretsky v Ok Hui Kim*, 17 AD3d 455, 456 [2d Dept 2005][citations and internal quotation marks omitted]; *Meany v Supermarkets General Corp.*, 239 AD2d 393, 394 [2d Dept 1997]).

Contrary to the contention of defendant, under the clear terms of 22 NYCRR 202.48, the failure of plaintiff, in the absence of good cause, to timely settle an order, as opposed to a judgment, shall result in the motion being deemed abandoned, not the action. Further, insofar as plaintiff’s prior motion for summary judgment was granted, deeming the motion abandoned would not bring repose to these court proceedings.

Even if this court were to deem the prior motion abandoned, it may nonetheless entertain the instant motion for summary judgment. Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause (*see Vinar v Litman*, 110 AD3d 867, 868 [2d Dept 2013]; *Coccia v Liotti*, 101 AD3d 664, 666 [2d Dept 2012]; *Sutter v Wakefern Food Corp.*, 69 AD3d 844, 845 [2d Dept 2010]). It is not in dispute that the “roadblocks” which plaintiff claimed prevented the settling of the prior motion have now been resolved. Under the unique circumstances of this case, the court finds sufficient cause to entertain the instant motion for summary judgment.

Plaintiff has established that he is in compliance with his obligations under the contract of sale. Defendant’s argument that the contract was terminated when plaintiff

recovered his deposit is unavailing. The contract provision cited by defendant (section 13.02) contemplates a return of the deposit by defendant upon a request by plaintiff to terminate the contract as a result of defendant's inability to convey title. In this matter, plaintiff is not seeking to terminate the contract. Further, the deposit was not returned by defendant but rather recouped by plaintiff through the Lawyer's Fund for Client Protection.

As a result, defendant's motions to dismiss this action are denied and plaintiff's cross motion for summary judgment is granted.

Section 2 of the rider to the subject contract provides that the amount of any lien appearing against the premises which can be discharged by the payment of money "shall be allowed to the Purchaser as an adjustment at the time of closing." In the order to be settled, plaintiff shall be granted the right to such adjustment with respect to the September 21, 2006 mortgage or to have the sale proceeds directed towards the satisfaction or repayment of the mortgage. The purchase price shall include the amount of the deposit recouped by plaintiff.

Settle order on notice.

E N T E R,



J. S. C.

HON. DAVID I. SCHMIDT

6  **FILED**
 MAY 05 2015
 KINGS COUNTY CLERK'S OFFICE