

**Rha v Blangiardo**

2015 NY Slip Op 32911(U)

December 7, 2015

Supreme Court, Queens County

Docket Number: 700306/15

Judge: Diccia T. Pineda-Kirwan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

**NEW YORK SUPREME COURT - QUEENS COUNTY**

Present: Honorable **DICCIA T. PINEDA-KIRWAN**  
Justice

IA PART 36

-----X  
HUANG C. RHA, ET AL,

Plaintiff(s),

-against-

ALESSIO BLANGIARDO, ET AL,

Defendant(s).  
-----X

Index No.: 700306/15  
Motion Date CMP: 7/9/15  
(Rcv'd Pt. 36 8/3/15)  
Motion Cal. No CMP: 145  
Motion Seq. No.: 3

**Settlement Conference**  
**Date 10/8/15 #13**

The following numbered papers read on this application by defendants to vacate the notices of pendency pursuant to CPLR 6514(b) for failure to commence or prosecute the action in good faith.

PAPERS	NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	1 - 3
Answering-Affidavits-Exhibits.....	4 - 11
Replying.....	12 - 13
Orders.....	14 - 15

In the interest of judicial economy, as well as the case being ripe for settlement, this matter was set down for a settlement conference by order dated August 4, 2015 for August 11, 2015, which was adjourned for a hearing, and then ultimately for a settlement conference on October 8, 2015. However, despite the Court's best efforts, no settlement was reached. The action against Maria Patelis has been discontinued by so-ordered stipulation dated August 11, 2015 and the caption is hereby amended to reflect same.

Now, upon the foregoing cited papers and after hearing and conference, it is ordered that defendants' application, is determined as follows:

On October 23, 2014, the parties executed a contract of sale, wherein plaintiffs, Heung C. Rha and Suhn O. Rha (the Rhas), agreed to purchase the property located at 16-17 Bell Blvd., Bayside, New York 11360 from defendant, Alessio Blangiardo. The plaintiffs' obligations under the contract were conditioned upon their receipt of a written mortgage loan commitment on or before November 30, 2014. Pursuant to the contact, the Rhas tendered a \$110,000.00 down payment, which was deposited into non-party Salvatore E. Strazzullo, Esq.'s escrow account. The contract included an Internal Revenue Code Section 1031 Exchange Addendum, wherein the parties acknowledged that the Rhas intended to purchase the subject property as part of a tax deferred exchange. The closing was set to occur on December 10, 2014. The parties contest what transpired after the contract was signed, but it is undisputed that the closing did not occur on December 10, 2014.

On or about January 14, 2015, the Rhas simultaneously filed a notice of pendency against the subject property and commenced the instant action, seeking, among other things, specific performance of the contract, due to Blangiardo's alleged failure to cooperate with their efforts to obtain financing. The plaintiffs ultimately obtained a mortgage commitment from Emigrant Bank on February 9, 2015. They subsequently filed a supplemental summons and amended complaint and an amended notice of pendency on or about February 24, 2015. On March 16, 2015, Blangiardo sent the Rhas a letter, wherein he declared time is of the essence, and set a closing date of March 30, 2015. Plaintiffs rejected Blangiardo's time is of the essence by letter dated March 17, 2015. Defendants now seek to vacate the notices of pendency on the grounds that plaintiffs have not commenced or prosecuted the action in good faith, pursuant to CPLR 6514(b).

The parties appeared for a settlement conference on August 11, 2015. Upon request of the parties, a hearing was scheduled to allow them to provide testimony establishing what transpired, and to determine whether plaintiffs' commencement and prosecution of the action was in good faith, and thus entitled plaintiffs to retain their notices of pendency.

Mr. Rha testified that after the contract was signed, he and his wife had difficulty obtaining a mortgage loan commitment because Blangiardo denied plaintiffs, their agents, and their lender, Emigrant Bank, access to the property to conduct an appraisal, survey, and mold inspection. He also states that Blangiardo changed attorneys twice, thereby further complicating communications. While he concedes that access was ultimately provided, and that a survey and appraisal were obtained, a mold inspector was still denied access. He added that since the 1031 exchange deadline of February 17, 2015 was not met, he and his wife suffered significant tax consequences.

Helene Fields, Esq., testified that she was the plaintiffs' attorney for the purchase of the subject property. She stated that Blangiardo frustrated plaintiffs' efforts of obtaining a mortgage commitment by delaying an appraisal of the property. Plaintiffs submitted copies of emails and letters from Ms. Fields to Blangiardo and his prior attorneys reminding them of the 1031 exchange deadline, and raising concerns of Blangiardo's delays in getting the property appraised. She stated that in an email to Blangiardo's prior counsel dated December 29, 2014, plaintiffs agreed, at Blangiardo's request, to extend the closing date to January 31, 2015. Ms. Fields conceded that an appraisal of the property was completed on or about January 14, 2015, but testified that Blangiardo continued to prevent a survey and mold inspection from being completed by denying access to the property. The survey was ultimately completed on February 2, 2015.

Walter Seifert, the listing broker for the property, also testified that Blangiardo frustrated efforts to obtain an appraisal of the property. Mr. Seifert testified that he made numerous efforts to contact Blangiardo to have the appraisal completed, including via phone, text, email, and even stopping by Mr. Blangiardo's home, at one point on a daily basis for about a week. He stated that in response to an email, Mr. Blangiardo sent him an email dated December 16, 2014 that plaintiffs had breached the contract by not obtaining an appraisal, and therefore the deal was off, which he then forwarded to Ms. Fields.

Mr. Blangiardo testified that on December 16, 2014, he sent an email communicating that the deal was dead since plaintiffs failed to secure a mortgage commitment. He claims the plaintiffs visited the property numerous times before the contract was signed but never came thereafter. He did not recall any requests to access his property, but stated that he scheduled the appraisal on or about January 14, 2015. He further testified that he never granted an extension for the time to close.

Pursuant to CPLR 6501, a notice of pendency can only be filed when the judgment demanded would affect, among other things, the title or possession of real property. In both their original and amended summons and complaint, plaintiffs seek specific performance of a contract to convey land which falls within the scope of the statute (*see Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 535 [2013]; *RKO Properties, Ltd. v Boymelgreen*, 37 AD3d 580, 581 [2007]; CPLR 6501). While a notice of pendency may be cancelled pursuant to CPLR 6514(b), where plaintiffs have not commenced or prosecuted the action in good faith, the party seeking to cancel the notice of pendency must demonstrate the requisite lack of good faith (*see Lazar v Maragold Group*, 150 AD2d 645 [1989]; *Weksler v Yaffe*, 129 Misc2d 633, 635 [1985]). This is a difficult burden to maintain as any cognizable claim is sufficient for good faith and there must be at least a substantial question to show lack of good faith (*see Weksler* at 635).

In determining if an action has been commenced in good faith, the court is limited to reviewing the pleading to see if the action falls under CPLR 6501, and cannot investigate the underlying transaction, but limit its analysis to face of the pleading (*See 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320-21 [1984]; *see also Nastasi v Nastasi*, 26 AD3d 32, 36 [2005]). The plaintiff's likelihood of success on the merits is irrelevant (*see 551 W. Chelsea Partners LLC v 556 Holding LLC*, 40 AD3d 546, 548 [2007]).

In their complaint, plaintiffs allege that they have performed all of their obligations under the contract but that Blangiardo has frustrated their efforts to obtain a mortgage loan by not cooperating with plaintiffs in order to conduct an appraisal of the property. Blangiardo argues that plaintiffs' failure to get a mortgage commitment prohibits them from seeking specific performance, and compels cancellation of the notice of pendency. Indeed, purchasers seeking specific performance must ordinarily show that they are ready, willing, and able to perform, and plaintiffs' performance included obtaining a mortgage commitment (*see Zeitoune v Cohen*, 66 AD3d 889, 891 [2009]). However, when the purchasers' inability to obtain a mortgage commitment is not due to their own fault, but rather is frustrated by the seller's conduct, including an unwillingness to permit access to the property to conduct an inspection or appraisal, the purchasers are still entitled to seek specific performance (*see Wells v Meader*, 192 AD2d 827, 829 [1993]; *Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1010, 1015 [2010]; *Dairo v Rockaway Blvd. Properties, LLC*, 44 AD3d 602, 603 [2007]).

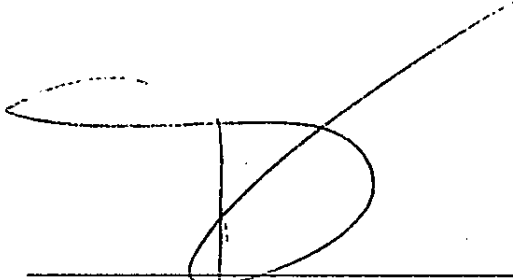
Since plaintiffs' claims fall within the purview of CPLR 6501, defendants have not established that the matter was not properly commenced (*see Weksler* at 635;

*Nastasi* at 41), and as the parties offer sharply conflicting factual accounts as to why the contract failed, it cannot be determined that plaintiffs commenced the action in bad faith or are using the notice of pendency for an ulterior purpose (*see 551 W. Chelsea Partners LLC* at 548).

Furthermore, defendants have not demonstrated that the plaintiffs failed to prosecute the action in good faith by engaging in dilatory tactics following the commencement of the action, or otherwise failing to prosecute it diligently (*see 551 W. Chelsea Partners LLC* at 548; *see e.g. Williams v Harrington*, 216 AD2d 761, 765 [1995]), and are therefore not entitled to relief pursuant to CPLR 6514(b).

Accordingly, defendants' application is denied.

Date: December 7, 2015



DICCIA T. PINEDA-KIRWAN, J.S.C.

FILED

JAN 28 2016

COUNTY CLERK  
QUEENS COUNTY