

27-15 Jackson Ave LLC v Jackson Bounty, LLC
2015 NY Slip Op 32926(U)
May 21, 2015
Supreme Court, Queens County
Docket Number: 14604/2014
Judge: Leonard Livote
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE
Acting Supreme Court Justice

IA Part 33

27-15 Jackson Ave LLC, x
Plaintiff,

Index
Number 14604/2014

- against -

Motion
Date January 15, 2015

Jackson Bounty, LLC, Vincent
Tomasino, Jr. As Managing Member,
Defendants, x

Motion Seq. No. 1

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QUEENS COUNTY CLERK
FILED

The following numbered papers read on this motion by defendants Jackson Bounty, LLC (Jackson Bounty) and Vincent Tomasino, Jr., as Managing Member, to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(1) because a defense is founded upon documentary evidence and pursuant to CPLR 3211(a)(7) based upon failure to state a cause of action, to cancel the notice of pendency filed on October 3, 2014, and pursuant to 22 NYCRR 130-1.1 for an award of costs, including reasonable attorneys' fees.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-9
Reply Affidavits	10-12

Upon the foregoing papers it is ordered that the motion is determined as follows:

Defendant Jackson Bounty had been formed to combine the two adjoining real property lots known as 27-49 Jackson Avenue, Long Island City (Parcel I) and 27-51 Jackson Avenue, Long Island City, New York (Parcel II) into one parcel ("the subject property"), demolish existing buildings and build a condominium building. James Cortazar, as a member of Jackson Bounty, and Cojam Realty Inc. (Cojam Realty), as the prior owner of Parcel I, brought an action (*Cortazar v Tomasino* [Supreme Court, Queens County, Index No. 700375/2013] [First Action]) against Tomasino, the managing member of Jackson Bounty, to, among other things, rescind an agreement whereby Jackson Bounty had been

formed, and return Parcel I from Jackson Bounty to Cojam Realty. By order dated November 8, 2013, the complaint in the First Action (Index No. 700375/2013), was dismissed. Cortazar filed a notice of appeal from that order on December 10, 2013.

It is against this backdrop that plaintiff, as purchaser, and defendant Jackson Bounty, as seller, entered into a contract of sale dated March 7, 2014, of the subject property. The contract of sale disclosed the prior litigation ([First Action] [Index No. 700375/2013]).

On March 12, 2014, in the wake of the contract signing, Cortazar and Cojam Realty commenced an action against Tomasino, Jackson Bounty and 27-51 Jackson Ave LLC (sued therein as 27-51 Jackson Ave, Corp.), among others, entitled *Cortazar v Tomasino*, (Supreme Court, Queens County, Index No. 701692/2014) (Second Action), again seeking to rescind an agreement, by which Jackson Bounty was formed, and the deed for Parcel I into Jackson Bounty. By order dated May 20, 2014 in the Second Action (Index No. 701692/2014), the motion by Cortazar and Cojam Realty for a preliminary injunction to prevent the sale of the subject property was denied. On May 29, 2014, Cortazar and Cojam Realty filed a notice of pendency against the subject property in the Second Action (Index No. 701692/2014). By letter of the same date, counsel for defendants advised the attorney representing plaintiff in relation to the purchase of the subject property that Cortazar had filed the notice of pendency under Index No. 701692/2014 "which prevents the seller from selling the property which is the subject of a contract of sale dated March 7, 2014."

Thereafter, on June 12, 2014, Jackson Bounty and Tomasino moved within the confines of Second Action (Index No. 701692/2014) to vacate the notice of pendency. While that motion was sub judice, defendant seller, by letter of its counsel dated September 3, 2014 to the transactional attorney who represented plaintiff purchaser in the negotiation of the contract of sale, cancelled the contract of sale because "the [n]otice of [p]endency filed [against the subject property] has not been vacated within the ninety (90) days of [n]otice to the [s]eller of its filing," enclosing the \$700,000.00 down payment. By letter dated September 5, 2014, plaintiff's transactional attorney rejected the notice purporting to cancel the contract of sale, refused to accept the contract deposit and returned it to defendants' attorney.

Plaintiff purchaser commenced this action on October 3, 2014 for specific performance, breach of contract and breach of implied covenant of good faith and fair dealing, and an award of attorneys' fees.

By order dated October 28, 2014 and entered on November 6, 2014 in the Second Action (Index No. 701692/2014), the notice of pendency was vacated.

In lieu of serving an answer, defendants Jackson Bounty and Tomasino move to dismiss the complaint asserted against them on the grounds of failure to state a cause of action and a defense based on documentary evidence.

On a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). A motion pursuant to CPLR 3211(a)(1) to dismiss based on documentary evidence may be appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326; *see YDRA, LLC v Mitchell*, 123 AD3d 1113 [2d Dept 2014]).

Defendants Jackson Bounty and Tomasino contend that under section 4.03B of the contract of sale, the seller has a right to cancel due to the existence of the notice of pendency against the subject property beyond 90 days of its filing. They further contend that because the notice of pendency still existed against the subject property on the 97th day after filing, defendant seller was within its legal right to cancel the contract of sale by the September 3, 2014 letter. According to defendants, they are entitled to dismissal of the action because they did not breach the contract of sale by cancelling it, and plaintiff purchaser is not entitled to specific performance of it, due to defendant seller’s cancellation of it.

Plaintiff purchaser opposes the motion asserting that the notice of pendency filed against the property in the Second Action was defective from inception and thus subject to mandatory cancellation at all relevant times, and ultimately was vacated.¹ Plaintiff purchaser argues defendants’ reliance upon section 4.03B of the contract to justify the cancellation of the contract of sale is misplaced. It asserts that the “Purchaser’s Rider” (the rider) to the contract of sale, by its express terms as set forth in its first paragraph, supercedes the contract of sale in the event that any of its provisions are in conflict. It argues, therefore, that to the extent section 4.03B permits cancellation based upon the continued existence of a notice of pendency, section 21 of the rider grants the purchaser the right to try to “salvage the purchase” for a period of 45 days after receiving notice of the seller’s inability to close title due to the existence of the notice of pendency. Plaintiff purchaser contends that defendant seller never provided it with notice, in accordance with section 21 of the rider, of its right to elect to salvage the purchase, and therefore defendant seller’s attempted cancellation was

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Plaintiff also asserts that no stay was obtained in the Second Action (Index No. 701692/2014) within 30 days of the entry of the October 28, 2014 order.

ineffectual, and made in bad faith. Plaintiff purchaser also asserts it is ready, willing and able to close on its purchase.

At the outset, the court notes that the causes of action asserted against defendant Tomasino, as managing member, fail to state a claim against him: Defendant Tomasino is not a party to the contract of sale. Defendant Tomasino executed the contract of sale in his capacity as managing member of defendant Jackson Bounty, and plaintiff purchaser makes no allegation that defendant Tomasino bound himself individually to the contract (*see Panasuk v Viola Park Realty, LLC*, 41 AD3d 804 [2d Dept 2007]). Defendant Tomasino cannot be held liable for the contractual obligations of defendant Jackson Bounty merely by virtue of his status as a managing member of Jackson Bounty (*see Grammas v Lockwood Associates, LLC*, 95 AD3d 1073, 1074 [2d Dept 2012]; *Matias v Mondo Props., LLC*, 43 AD3d 367, 367–368 [1st Dept 2007]; *see also* Limited Liability Company Law §§ 609, 610). Plaintiff purchaser has made no allegations to hold defendant Tomasino liable by application of the doctrine of piercing the veil with respect to the LLC form on an alter-ego theory (*see Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073). That branch of the motion by defendants to dismiss the complaint insofar as asserted against defendant Tomasino for failure to state a cause of action is granted.

With respect to that branch of the motion by defendant Jackson Bounty to dismiss the complaint insofar as asserted against it, section 4 of the contract of sale, in pertinent part, provides:

“Section 4. Representations and Warranties of Seller

Seller represents and warrants to Purchaser as follow [sic]:

...

§4.03B. The Purchaser has been advised by the Seller that there exists an action in the Supreme Court of Queens County entitled “James Cortazar individually and derivatively on behalf of Jackson Bounty LLC and Cojam Realty Inc. vs. Vincent Tomasino, Jr.” under Index #700375-2013 which was dismissed in favor of Defendant Vincent Tomasino, Jr. and is currently under appeal to the Appellate Division of New York State, 2nd Department (the “Cortazar Action”). Seller represents that as of the execution of the Contract it has received no notice and has no knowledge that any stay, restraining order, injunction or notice of pendency has been filed in the Cortazar Action or in any other proceeding which would prevent or delay this closing.

In the event that:

(1) a Court of competent jurisdiction issues an order for preliminary or permanent injunction in the Cortazar Action or any other proceeding or (2) a notice of pendency or lis pendens is filed in the Cortazar Action or any other proceeding which is not vacated within 90 days of notice to Seller of its filing then either party may cancel this contract without further liability and Seller, upon such cancellation, shall promptly authorize the escrowee to return the contract down payment to the Purchaser.

....”

The rider, in relevant part, provides:

“1. Superseding: The terms of this [rider] shall control in the event of any conflict between the Contract of Sale and the [rider] (collectively the ‘Contract’).”

...

2. Purchaser’s Right to Salvage Purchase: In the event the Seller is unable to close title due to ... the contemplated concerns as stated in Contract section 4.03A² or Contract section 4.03B, then the Purchaser shall have the right for forty-five (45) days after receiving notice of Seller’s inability to close title to use its good offices to remedy the problem, thus allowing all concerned parties to proceed to title closing. Purchaser shall have no obligation to undertake to use its good offices and if such efforts are undertaken they will be at Purchaser’s sole cost. Purchaser agrees that its efforts will not include the commencement, participation or intervention in any litigation among the parties and related parties comprising the Seller whether pending as of the Contract Effective Date or commenced the Contract Effective Date and the date of title closing.”

It is long-settled that when interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized (*see Matter of John E. Andrus Mem. Home v De Buono*,

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Section 4.03A of the contract relates to the seller’s promise to deliver the premises to the purchaser at closing vacant and free of all tenancies.

260 AD2d 635 [2d Dept 1999], *lv to appeal denied* 93 NY 2d 813 [1999]; *Joseph v Creek & Pines*, 217 AD2d 534, 535 [2d Dept 1995]). In addition, a contract should be construed, wherever possible, in such a way as to reconcile and give effect to all of its provisions (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]; *Two Guys from Harrison-NY v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *Novelty Crystal Corp. v PSA Institutional Partners, L.P.*, 49 AD3d 113 [2d Dept 2008]).

To the extent plaintiff argues, in effect, that the right to cancel provided under section 4.03B does not exist when a notice of pendency is invalid from its outset, such argument is without merit. Section 4.03B does not call for an analysis of the validity of the notice of pendency, but rather allows for either party to cancel the contract without further liability based upon the notice of pendency's continued existence (i.e. without vacatur) for a period of 90-days of notice to the seller of its filing.

The fact that the notice of pendency was pending for more than 90 days does not end the matter. The implied covenant of good faith and fair dealing between parties to a contract encompasses a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 153, [2002], quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389[1995] [additional citation omitted]). In the instant case, this implies an obligation by defendants to use diligent, good faith efforts to vacate the notice of pendency (*Sciales v. Foulke*, 217 A.D.2d 693, 694 [2 Dept. 1995]). The complaint does not allege any bad faith by defendants in their attempt to vacate the notice of pendency. Accordingly, the right of cancellation was properly exercised and the documentary evidence disproves the first and second causes of action.

With respect to the salvage clause contained in section 21 of the rider, exercise of this clause presupposes that both sides are willing to close. Section 21 does not affect the defendants right to cancel due to the existence of the notice of pendency.

The third cause of action alleges a breach of the implied covenant of good faith and fair dealing. The alleged breach is the defendants' failure to encourage the tenants to vacate the premises. However, this breach is immaterial because defendants had a separate, valid grounds on which to cancel the contract.

The fourth cause of action asserted in the complaint seeks to recover attorneys' fees incurred in this action. The general rule is that a plaintiff is not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization or court rule (*see Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Crispino v*

Greenpoint Mortg. Corp., 2 AD3d 478 [2d Dept 2003]). Although plaintiff purchaser alleges in the complaint that the contract provides the remedy of an award of expenses suffered by it based upon defendant seller's willful breach of contract, the contract of sale and rider do not include any agreement to entitle plaintiff purchaser to recover counsel fees incurred in prosecuting an action against defendant Jackson Bounty for breach of that contract. Plaintiff purchaser has failed to cite to any statutory authorization or court rule which provides a basis for an award of attorneys' fees under the claimed facts.

Accordingly, the motion by defendants to dismiss the complaint is granted and the action is dismissed.

This constitutes the Decision and Order of the Court.

Dated: May 21, 2015



A.J.S.C.

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