

<b>139 Lefferts LLC v Melendez</b>
2016 NY Slip Op 31562(U)
July 26, 2016
Supreme Court, Kings County
Docket Number: 511732/14
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 26<sup>th</sup> day of July, 2016.

**PRESENT:**

Hon. LARRY D. MARTIN, J.S.C.

139 LEFFERTS LLC,

Plaintiff,

Motion Sequence #2

-vs-

INDEX No. 511732/14

SAHIDAN MELENDEZ,

Defendant,

CRAIG BOLENDER,

Intervenor-Defendant.

The following papers numbered 1 to 4 read on this motion  
Notice of Motion, Affirmation,  
and Affidavits \_\_\_\_\_

Papers Numbered

1-2

Answering Affidavit (Affirmation) \_\_\_\_\_

3

Reply Affidavit (Affirmation) \_\_\_\_\_

4

Upon the foregoing papers, defendant-intervenor Craig Bolender, ("Bolender") moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff 139 Lefferts LLC's ("plaintiff") first cause of action for specific performance and dismissing the complaint as against Bolender.

Plaintiff commenced this action to compel specific performance, and, in the alternative, to recover compensatory damages, for the alleged breach of a contract for the sale of real property located at 139 Lefferts Place in Brooklyn, New York (Block 2016, Lot 86), (hereinafter, the "subject property"), which plaintiff entered into with defendant-seller Sahidan Melendez ("Melendez"). The contract at issue was executed by the parties on August 5, 2014, wherein Melendez agreed to sell the subject property to plaintiff for \$1,050,000 (Michaeli Aff, Exhibit A: Contract of Sale, ¶¶ 2-3). At

the time of execution, plaintiff provided Melendez’s real estate attorney with a down payment check in the amount of \$10,000 (Michaeli Aff, Exhibit A: Contract of Sale, ¶¶ 2-3). The contract provided that an additional sum of \$15,000 was due “upon completion of [the] due diligence period,” and was to be held in escrow until closing (Michaeli Aff, Exhibit A: Contract of Sale, ¶¶ 2-3; Rider to Contract of Sale). The contract contained a time-is-of-the-essence provision for the closing date of on or before October 1, 2014 (Michaeli Aff, Exhibit A, Contract of Sale, ¶15). There is no indication by any of the parties as to whether this sales contract had ever been fully performed, whether the parties went forward with closing, or whether plaintiff ever acquired a deed to the Property. Nonetheless, Melendez subsequently entered into another contract of sale on November 11, 2014, to sell the subject property to Bolender for a purchase price of \$1,000,000 (Bolender Aff, Exhibit A, ¶ 3). The deed to the subject property was delivered to Bolender on November 21, 2014 (Bolender Aff, ¶ 3). Thereafter, plaintiff commenced this action by filing the summons, complaint and a Notice of Pendency on December 11, 2014. Bolender recorded his deed in the Office of the City Register of New York on December 27, 2014 (Bolender Aff, ¶ 3).

As an initial matter, the Court notes that New York is a “race-notice” jurisdiction, wherein, as outlined in Real Property Law (“RPL”) 291, a conveyance of real property that is not recorded will be deemed “void as against any person who subsequently purchases or acquires by exchange or contracts to purchase . . . the same real property or any portion thereof . . . in good faith and for a valuable consideration . . . and whose conveyance, contract or assignment is first duly recorded” (RPL 291; *Goldstein v Gold*, 106 AD2d 100, 101-102 [2d Dept 1984]; *Finkelman v Wood*, 203 AD2d 236, 237-238 [2d Dept 1994]; *2386 Creston Ave. Realty, LLC v M-P-M Management Corp.*, 58 AD3d 158, 160 [2d Dept 2008]). Thus, “[a] person claiming to be a bona fide purchaser for value in a case involving a prior contract of sale must demonstrate, prima facie, that he or she purchased

the property for valuable consideration, that he or she did not have notice of the prior contract and that he or she did not have ‘knowledge of facts that would lead a reasonably prudent purchaser to make inquiry’ about the prior contract” (*141 Sunnyside LLC v M. Zoarez, Inc.*, 41 Misc 3d 1224[A] \*4, 2013 NY Slip Op 51826[U] [Sup Ct, Kings County 2003] quoting *TCJS Corp. v Koff*, 74 AD3d 1188, 1189 [2d Dept 2010]).

Pursuant to CPLR 6501, once a notice of pendency has been filed in an action, it serves as constructive notice to “[a] person whose conveyance or incumbrance is recorded after the filing of the notice” (CPLR 6501; *Matter of Jenkins v Stephenson*, 293 AD2d 612, 614 [2d Dept 2002]). However, the Court notes that such filing “does not substitute for the recording of the contract of sale or the conveyance,” but rather, merely “preserves an existing property right” by subjecting all subsequently recorded interests to the proceedings in the action (*2386 Creston Ave. Realty, LLC*, 58 AD3d at 160-161; *Goldstein*, 106 AD2d at 102; *TCJS Corp.*, 74 AD3d at 1189). Thus, if a party files a notice of pendency but fails to record its interest in the property, then that party’s property right is unenforceable against that of a “good faith purchaser for value from the same vendor who recorded a conveyance” (*2386 Creston Ave. Realty, LLC*, 58 AD3d at 161; see *TCJS Corp.*, 74 AD3d at 160-161).

Based upon a review of the record submitted by the parties, the Court finds that Bolender has satisfied his prima facie burden of demonstrating that he is a bona fide purchaser for value of the property at issue in this matter. In support of the instant motion, Bolender submits an affidavit originally produced in support of his underlying motion to intervene in this action. In his affidavit, Bolender confirms that he is the owner of the subject property, and that at the time he purchased the property he did not have any knowledge of any claims to the property being made by plaintiff (Bolender Aff, ¶ ¶ 1-2). Bolender also confirms that the deed was in fact delivered to him and

subsequently recorded (Bolender Aff, ¶ 2). Annexed to his affidavit, Bolender includes: (1) a copy of the contract of sale between him and Melendez, which indicates the purchase price of the property as well as the \$100,000 down payment amount to be held in escrow until the closing date; (2) a copy of the executed and acknowledged deed conveying the property to Bolender; and (3) proof of filing of the deed with the Office of the City Register. Bolender also submits the following documents as further evidence of his claim of title: (1) the Customer Registration Form for Water and Sewer Billing for the subject property; (2) a fully executed Real Property Transfer Report, indicating the date of the transfer of the subject property to Bolender; and (3) an Affidavit of Compliance with Smoke Detector Requirement for One- and Two-Family Dwellings, listing Bolender as the grantee and Melendez as the grantor of the subject property. Furthermore, Bolender's Answer was verified by him and not his attorney (*see* CPLR 3020[d]). The Court finds that this evidence is sufficient to establish Bolender's prima facie burden of demonstrating that he purchased the subject property in good faith and for valuable consideration, without prior notice of plaintiff's alleged interest in the property, and without knowledge of facts that would lead a reasonably prudent purchaser to make such an inquiry (*see TCJS Corp.*, 74 AD3d at 1189; *Kissling v Leary*, 289 AD2d 377, 377 [2d Dept 2001]).

In opposition, plaintiff submits an affidavit from Mr. Yotam Michaeli ("Mr. Michaeli"), the managing member of 139 Lefferts LLC, in which Mr. Michaeli avers that plaintiff and Melendez entered into a contract for the sale of the subject property (Michaeli Aff, ¶ 3). Mr. Michaeli insists that the contract was valid, binding and had never been terminated (Michaeli Aff, ¶¶ 4-5). Plaintiff proffers a copy of the contract of sale, as well as the \$10,000 down payment check that it paid (Michaeli Aff, Exhibit A). Plaintiff also submits a copy of the Notice of Pendency, which was filed with the Kings County Clerk's Office on December 11, 2014 (Michaeli Aff, Exhibit C). According

[\* 5]  
to plaintiff, because the Notice of Pendency was filed prior to the date that Bolender recorded the deed, Bolender was either on constructive or actual notice of plaintiff's claims to the subject property.

Based upon a review of the parties' papers and the relevant law, the Court finds that plaintiff has failed to offer any evidence that it ever acquired a deed to the property or that it ever recorded its contract of sale (*see Finkelman*, 203 AD2d at 238). Moreover, in opposition to Bolender's prima facie showing that he is a bona fide purchaser for value of the subject property, the Court finds that plaintiff has failed to submit sufficient evidence in admissible form to raise a triable issue of fact (*see Kissling*, 289 AD2d at 377).

Accordingly, defendant-intervenor Bolender's motion for summary judgment dismissing plaintiff's first cause of action of the complaint for specific performance, and also dismissing the complaint insofar as asserted against Bolender, is granted. The first cause of action is severed and the action shall continue as against the remaining defendant. The foregoing constitutes the decision, order and judgment of the Court.

For Clerks use only

MG

MD

Motion Seq. # 2

JUL 26 2016

ENTER,



HON. LARRY D. MARTIN

J.S.C.