

Oster v De Viel Castel
2016 NY Slip Op 31737(U)
September 16, 2016
Supreme Court, New York County
Docket Number: 653013/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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AVI OSTER,

Plaintiff,

Index No. 653013/2016
Motion Seq: 002

-against-

CHARLES DE VIEL CASTEL

DECISION/ORDER
ARLENE P. BLUTH, JSC

Defendant.

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Defendant's motion for leave to reargue the Court's Decision dated July 14, 2016 denying defendant's motion to dismiss, and for an order cancelling the Notice of Pendency pursuant to CPLR 6515 (2) is decided as follows: the motion to reargue is granted and upon reargument, the Court adheres to its original decision. The branch of the motion to cancel the notice of pendency and to allow a bond, pursuant to CPLR 6515(2), is denied.

This action arises out of a failed real estate transaction between defendant and plaintiff at 21 Astor Place, New York, NY. Defendant allegedly attempted to sell his apartment (6D) and entered into negotiations with plaintiff (who resides in 6E). Plaintiff claims that he reached an oral agreement to purchase defendant's apartment for \$4.35 million. Plaintiff asserts that all terms were negotiated and agreed. Plaintiff then claims that on Friday, May 27, 2016, defendant's counsel informed plaintiff's counsel that defendant had received a higher offer. Defendant then accepted, via email, an offer for \$4.5 million from plaintiff and stated that "We sign today if possible and if that is the case I will not go back to the other buyer. If it's next week

I have to give the other buyer the option. Helane, [plaintiff's counsel] Please confirm that works for Avi and let's get this done.”

Plaintiff contends that he and his attorney worked feverishly from the time of this email (9:41 a.m.) to get a signed copy of the contract of sale and a deposit check by the afternoon of May 27, 2016. Plaintiff's counsel was informed by defendant's counsel that defendant's counsel's office was closing early. Plaintiff's counsel allegedly emailed a copy of the purported contract to defendant's counsel at 10:41 a.m. At 12:44 p.m., defendant's counsel sent an email to plaintiff's counsel informing her that the contract “looks good.” Plaintiff's counsel then sent a follow up email to defendant's counsel at 3:23 p.m seeking confirmation that a hard copy of the allegedly agreed-upon contract, which included a signature from plaintiff, and the deposit check of \$450,000 was received in defendant's counsel office. Defendant's counsel confirmed that it had been received.

On Tuesday May 31, 2016, defendant's counsel notified plaintiff's counsel that defendant would not be proceeding with the transaction and that he would be returning the deposit check. Plaintiff alleges that he was told to submit a signed contract of sale with his highest and best offer by 4 p.m. on June 1, 2016. Plaintiff claims that although he believed he had a contract, he submitted a new offer of \$4.825 million, which was subsequently rejected. Plaintiff commenced the instant action on June 7, 2016. On July 14, 2016, this Court granted in part and denied in part defendant's motion to dismiss and to cancel the Notice of Pendency. The Court severed and dismissed plaintiff's claims for fraud and negligent misrepresentation but denied the motion as to plaintiff's remaining causes of action and denied defendant's request to cancel the Notice of Pendency.

Discussion

“A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992] [internal quotations and citation omitted]). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted” (*id.*).

In support of its motion to reargue, defendant claims that the Court’s Order failed to grasp the controlling nature of *Argent Acquisitions, LLC v First Church of Religious Science* (118 AD3d 441, 990 NYS2d 1 [1st Dept 2014]). Defendant claims that the court relied on “quasi-distinguishable underlying facts” and “unrelated dicta” (affirmation of defendant’s counsel at 3). Defendant also claims that plaintiff demonstrated bad faith in filing the Notice of Pendency and the Court should have canceled it.

In opposition, plaintiff claims that defendant failed to address the Court’s reasoning regarding plaintiff’s claims for breach of the implied covenant of good faith and fair dealing, promissory estoppel and unjust enrichment. Plaintiff claims that those causes of action would remain even if the Court were to grant reargument. Plaintiff also asserts that defendant has not met its burden of demonstrating that plaintiff lacked good faith and, therefore, the Court properly declined to cancel the Notice of Pendency.

Regarding the branch of the motion to allow posting a bond and canceling the Notice of Pendency, plaintiff further argues this request is procedurally improper. Plaintiff asserts that defendant should have made this initial argument in its initial order to show cause and that this

new argument cannot be made in a motion to reargue. Plaintiff claims that posting a bond pursuant to CPLR 6515(1) is inapplicable because plaintiff seeks specific performance. Plaintiff argues that CPLR 6512(2), the double bonding approach, is inapplicable because plaintiff has acted in good faith under the circumstances.

Analysis

Although defendant spends considerable time detailing its disagreement with the Court's reading of the applicable case law, defendant is merely rehashing its argument from the underlying motion. In the previous order, the Court devoted substantial time to discussing *Argent Acquisitions, LLC v First Church of Religious Science* (118 AD3d 441, 990 NYS2d 1 [1st Dept 2014]), *PMJ Capital Corp. v PAF Capital, LLC*, (98 AD3d 429, 949 NYS2d 385 [1st Dept 2012]), and *Aristone Realty Capital, LLC v 9 E. 16th St. LLC*, (94 AD3d 519, 941 NYS2d 840(Mem) [1st Dept 2012]) (*see* Court's Decision and Order, dated July 14, 2016, at 5-8).

Further, defendant's argument that the Court improperly considered both "quasi-distinguishable facts" and "unrelated dicta" fails. As an initial matter, the Court is unaware of what constitutes a "quasi-distinguishable fact." A fact is either distinguishable or indistinguishable from the instant fact pattern. Of course, a fact may, or may not, be material to whether another case is controlling, but either scenario would not render a fact as "quasi-distinguishable." The Court previously held that the facts in *Argent* are distinguishable. In particular, the alleged operative agreement in *Argent* was a *letter of some proposed* terms (as opposed to a contract that defendant's attorney stated "looks good") and no agreement could be reached without approval by the Court *and* the Attorney General are both readily distinguishable facts from the instant matter (*see* Court's Decision and Order, dated July 14, 2016 at 5).

Certainly, the appellate courts may disagree with this Court's interpretation, but defendant has failed to demonstrate sufficient grounds to reject its original decision.

Moreover, defendant has failed to make the requisite showing that plaintiff lacked good faith. "CPLR 6514(b) provides that a 'court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith'" (*551 West Chelsea Partners LLC v 556 Holding LLC*, 40 AD3d 546, 548, 838 NYS2d 24 [1st Dept 2007] [quoting CPLR 6514(b)]. "In ascertaining whether an action was commenced in good faith a court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501" (*id.* [internal quotations and citations omitted]). "The plaintiff's likelihood of success on the merits is irrelevant . . . The party seeking to cancel the notice of pendency must demonstrate the requisite lack of good faith . . . This burden is not easily met since defendant must raise at least a substantial question as to whether plaintiff has not commenced to prosecute the action in good faith" (*id.* [internal quotations and citations omitted]).

Here, the conflicting factual accounts of the failed real estate transaction do not demonstrate that plaintiff exhibited bad faith in filing the Notice of Pendency or that he had an ulterior motive. Plaintiff's complaint evidences a litigant who believed that he had reached an agreement to purchase an apartment. Certainly, a party with that belief falls within the scope of CPLR 6501, which requires that a party filing a Notice of Pendency must demand judgment that would affect the title and possession of real property (*see* CPLR 6501). Plaintiff, and his attorney, scrambled in less than a day to confirm that the terms of the proposed contract were acceptable to defendant, secure plaintiff's signature on the purported contract, and arrange for and send a security deposit of \$450,000, as well as a hard-copy of the signed contract, to defendant. The

only reason that the real estate transaction did not occur without incident was that the defendant backed out. The Court does not find that these circumstances constitute bad faith on plaintiff's part.

CPLR 6515- Posting a Bond

In addition to reargument, defendant has moved under CPLR 6515(2), asking that he be allowed to post a bond in the amount of \$600,000 and that the Court cancel the Notice of Pendency. This makes no sense. Plaintiff's claim is for specific performance – the condominium in question, 6D, is next to where plaintiff now lives, 6E. This case is not about money; it is about the specific unit and \$600,000 does not protect plaintiff's interest should plaintiff prevail in the instant action.

Accordingly, it is hereby

ORDERED that defendant's motion for leave to reargue is granted and upon reargument, the Court adheres to its original decision and it is further

Ordered that the branch of defendant's motion seeking to cancel the Notice of Pendency pursuant to CPLR 6515(2) (different ground as previously requested) is denied.

This is the Decision and Order of the Court.

Dated: September 16, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC

ARLENE P. BLUTH
J.S.C.