

31 Rockwell Partners LLC v Hallets Ct., LLC
2016 NY Slip Op 33162(U)
September 30, 2016
Supreme Court, Queens County
Docket Number: Index No. 701820/2016
Judge: Marguerite A. Grays
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

OCT 11 2016
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS
Justice

IAS PART 4

-----x
31 ROCKWELL PARTNERS LLC.

Index
No.: 701820/2016

Plaintiff(s),

Motion
Dated: May 2, 2016

-against-

Motion
Cal. No.: 166

HALLETS COURT, LLC and
DAVID W. GRABER, as Escrowee.

Motion
Seq. No.: 1

Defendant(s).

-----x

The following papers numbered 1-6 read on this motion by defendant Hallets Court, LLC (Hallets) for an Order: (1) pursuant to CPLR §3211(a)(1), dismissing the verified complaint; (2) pursuant to CPLR §6515, directing the Queens County Clerk to cancel the Notice of Pendency filed in this action on February 17, 2016, and (i) permitting the down payment to substitute as security for any judgment that may be entered herein in favor of plaintiff, in place and stead of the Vendee's Lien claimed by plaintiff in its complaint, or (ii) posting a surety bond in the amount of \$250,000.00 and (3) cancelling the Notice of Vendee's Lien executed on February 11, 2016 and filed in the Office of the Clerk of Queens County on February 17, 2016.

PAPERS
NUMBERED

Notice of Motion Affid.-Exhibits.....	1-4
Answering Affid.-Exhibits.....	5-6

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

This action centers on a Contract of Sale (the contract) dated July 13, 2015, executed by plaintiff as purchaser and defendant Hallets Court, LLC as seller, for premises located at 8-02 - 8-28 28th Avenue, Astoria, NY 11102. Plaintiff made a down payment in the amount of \$250,000.00, which is being held in escrow by defendant David W. Graber, as Escrowee,

Hallets' contract attorney and the escrow agent under the contract. Pursuant to the terms of the contract, plaintiff performed environmental investigations and analyses on the premises. By letter dated October 12, 2015, plaintiff terminated the Contract upon the ground that plaintiff was not satisfied with the premises after evaluating the premises from "both a developmental and environmental standpoint", and demanded the return of the down payment. Upon defendant Hallets' rejection of plaintiff's termination of the contract, this lawsuit ensued. Plaintiff's complaint asserts the following causes of action: breach of contract, the return of the down payment, and foreclosure of a Vendee's Lien.

Defendant Hallets moves herein to dismiss plaintiff's complaint pursuant to CPLR §3211(a)(1), to cancel the Notice of Pendency and to cancel the Notice of Vendee's Lien. Defendant Hallets cites the following provisions of the contract and its Rider as relevant to the issue herein: Section 5.01 of the contract states that the purchaser has inspected the premises and accepts the premises in "as is" condition. Section 13.04 of the contract states that if the purchaser defaults in purchasing the premises, the seller's sole remedy would be retention of the down payment. Section 17.02 and paragraph 1 of the Rider state that the contract embodies the parties' entire agreement.

Finally, and as Hallets states "probably most significantly", paragraph 4 of the Rider states as follows:

Purchaser, at its sole cost and expense, shall have the right during the forty five (45) day period commencing on the date a signed copy of this agreement is received by its attorney (the "Due Diligence Period) to perform a "Phase I" environmental inspection of the Property to determine the existence of hazardous waste, oil or asbestos (collectively, the "Hazardous Waste"), as defined under applicable local, state and federal laws (the "Governmental Requirements"), in excess of those levels permitted by the Governmental Requirements. In the event such an inspection is performed, Purchaser shall provide Seller a written copy of the inspection report ("Inspection Report") within three (3) *business* days if the availability of such Report.....Purchaser's obligations herein shall be contingent during the due diligence period upon purchaser being satisfied with the results of its investigation and evaluation of the premises, *including the Phase I*. In the event Purchaser *is not satisfied with the investigation and evaluation*, then at Purchaser's option, Purchaser may elect: (i) to terminate this Agreement by sending written notice to Seller prior to the expiration of the Due Diligence Period, together with a full copy of the Inspection Report, stating the specific reasons for termination, in which event all payments made by Purchaser to Seller shall be returned and all obligations of the parties shall cease;.....In the

event Seller does not receive notice from Purchaser of its election pursuant to this provision prior to the expiration of the Due Diligence Period, Purchaser's right to terminate this Agreement pursuant to this provision shall expire and shall be deemed waived.....

It is undisputed that the Phase II investigation and evaluation report dated October 2, 2015 found the premises to be free of any hazardous wastes exceeding government required levels. Plaintiff nonetheless terminated the Contract by letter dated October 12, 2015, stating that after "investigating and evaluating the Premises from both a developmental and environmental standpoint ... [plaintiff] is not satisfied."

To succeed on a motion to dismiss pursuant to CPLR §3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and utterly refutes plaintiff's claims (*Martin v. New York Hospital and Medical Center of Queens*, 34 AD3d 650 [2006]; *M. Fund, Inc. v. Carter*, 31 AD3d 620 [2006]; *Trade Source, Inc. v. Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; *Goshen v. Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *511 W 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]).

Defendant Hallets argues paragraph "4" of the Rider conclusively demonstrates that plaintiff's right to terminate the contract during the Due Diligence Period was expressly limited to plaintiff's dissatisfaction with the results of the environmental investigation and evaluation. Hallets thus contends that based on the results of the environmental report, plaintiff's termination of the contract from an environmental standpoint was improper, and plaintiff's termination of the contract and failure to close based upon any other reason constitutes a breach of the contract by plaintiff. Hallets further argues that plaintiff's October 12, 2015 termination letter was deficient under the terms of the contract in that it did not annex a copy of the October 2, 2015 Focused Phase II Subsurface Investigation (SI) Report ("environmental report"), did not state the specific reason plaintiff was terminating the contract, and was sent to Graber rather than to Hallets.

In opposition, plaintiff argues that pursuant to the clear language of the contract, plaintiff had to either timely terminate the contract or accept the premises in "as is" condition. Plaintiff further disputes that the handwritten changes to the Rider limited plaintiff's right to terminate the contract solely on the environmental investigation disclosing hazardous waste.

Based upon a reading of the plain language of the parties' agreement, plaintiff's right to terminate the contract was merely based upon plaintiff's dissatisfaction with the investigation and evaluation of the premises, and was not conditioned upon the findings of

the environmental investigation or the presence of hazardous waste in excess of government sanctioned levels in the premises.

However, defendant Hallets rightfully argues that the October 12, 2015 termination letter was invalid inasmuch as it was not delivered to defendant Hallets, did not contain a copy of the environmental report, and did not state the specific reason(s) for termination, all of which were required under the provisions of the parties' contract (Schedule D, Miscellaneous, 17.) and rider (paragraph 4). It is well settled that where a contract provides for specific steps that a party must fulfill to terminate the contract, those steps are enforced as written and the terminating party must comply with the terms (*Summit Development Corp. v. Fownes*, 74 AD3d 563 [2010]; *Mike Building and Contracting Inc. v. Just Homes LLC*, 27 Misc.3d 833 [2010]). To do otherwise is a wrongful termination (*Mike Building and Contracting Inc. v. Just Homes LLC*, 27 Misc.3d 833 [2010]). Here, inasmuch as plaintiff failed to terminate the contract in compliance with the procedures set forth in the Rider, the termination letter was invalid. In opposition, plaintiff does not deny Hallets' allegations, but merely argues that defendant belatedly asserted these arguments in its November 30, 2015 letter of rejection of plaintiff's termination of the contract, and plaintiff subsequently sent a copy of the environmental report to Hallets.

Accordingly, the branch of defendant Hallets' motion to dismiss the complaint pursuant to CPLR §3211(a)(1), is granted.

The branch of defendant's motion to cancel the Vendee's Lien is granted inasmuch as the action has been dismissed.

The branch of the motion to cancel the Notice of Pendency filed in this action on February 17, 2016, is accordingly granted.

Dated: **SEP 30 2016**



MARGUERITE A. GRAYS
J.S.C.

