Barraclough v Jarrett
2017 NY Slip Op 30056(U)
January 12, 2017
Supreme Court, New York County
Docket Number: 150405/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MICHELE BARRACLOUGH,

Plaintiff,

-against-

RICHARD A. JARRETT,

Defendant.

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Index No.: 150405/2016

DECISION AND ORDER

Motion #001

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for, *inter alia*, breach of contract and specific performance of a real estate contract.

Defendant, Richard A. Jarrett ("Defendant") now moves, pursuant to CPLR § 3211(a)(7) to dismiss Plaintiff's, Michele Barraclough, Complaint.

Factual Background

On February 26, 2014, Defendant agreed to sell Plaintiff the property located at 193 Edgecombe Avenue, New York, NY 10030, for the purchase price of $1,200,000 pursuant to a Residential Contract of Sale ("Contract"). The property was to be sold pursuant to a short sale, which required Defendant's lender, Specialized Loan Servicing, LLC ("SLS") to approve the sale as follows:

> [t]hen the entire transaction is subject to and contingent upon the approval by Seller's existing mortgage Lender(s) since the proceeds of the sale are currently insufficient to satisfy all liens against the subject property. If the Lender(s) does not approve of

> the transaction and does not agree to accept the proceeds of this transaction (after all costs, commissions, fees and taxes have been paid) which is an amount that is less than currently owed by the Seller, the Purchaser will have the option to increase the purchase price to such an amount as is sufficient to satisfy the Lender(s) and modify the terms of the contract accordingly, or may elect to terminate this Contract and receive back the Contract Deposit. All parties are aware that there may be delays in receiving Lender(s) approval and seller shall endeavor to obtain such approval as expeditiously as possible. However, if said approval is not received within 4 MONTHS from the date of fully executed contracts, then either party may cancel this contract of sale and the seller's only obligation to the purchaser is to return purchaser's real estate deposit.
> (Contract Rider, at ¶ 9).

More than a year and a half later, on September 15, 2015, Plaintiff's attorney e-mailed Defendant's attorney requesting an update on the process of the short sale, to which Defendant's attorney replied on the same day, indicating that, "we have investor approval as of a few days ago" (Complaint, at ¶ 8; Pla. Aff. Exh. A).[1]

Two months later, by letter dated November 9, 2015, SLS denied approval of the short sale. The reason for denial was simply "[t]erms [c]hanged" (the "Denial Letter") (Def. Aff. Exh. B).

The following month, on December 14, 2015, Defendant's attorney provided Plaintiff's attorney with SLS's denial, and gave "notice of [defendant's] cancelation of the contract of sale on the ground that more than four months have passed since the execution of the contracts of sale without short sale approval." (the "Cancellation Letter") (Def. Aff. Exh. C).

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[1] Days before, on September 10th, Defendant's attorney (and defendant) received an email from Defendant's real estate broker advising that SLS approved the short sale as of September 1, 2015 (Pla. Aff. Exh. A).

Consequently, Plaintiff filed the instant action, alleging that Defendant acted in bad faith in his dealing with Plaintiff (Complaint, at ¶ 17). She alleges that as early as June 6, 2014, Defendant was aware of the two liens on the title report that would affect the title to the property: first, a *lis pendens* filed by the New York City Department of Housing Preservation and Development, and second, a family court judgment ("Judgment") in the amount of $146,456.24, docketed in Downsview, Canada (*Id.* at ¶ 5, 9). Plaintiff also alleges that Defendant lead her to believe that he was working to resolve both liens in order move forward with the short sale, but as of October 19, 2015, both remained on the title (*Id.* at ¶ 9). Plaintiff also alleges that Defendant delayed the short sale by "[f]ailing to communicate with the lender and his representatives, and failing to provide necessary documentation in a timely fashion causing the file to have to be resubmitted on multiple occasions" (*Id.* at ¶ 6). Further, in early December 2015, Defendant, while in contract with Plaintiff, sought to reactivate the listing to sell the property to another buyer at a higher price (*Id.* at 10).[2]

In support of dismissal, Defendant argues that the allegations that he failed to act in good faith are "patently false" and conclusory. Citing to SLS's November 9, 2015 Denial Letter, Defendant argues that if SLS denied Defendant's request because of Defendant's failure to communicate or provide documentation as alleged, SLS would have so indicated or checked the corresponding box relating to the non-receipt of documentation. However, because SLS's letter did not attribute its denial to missing documents or Defendant's actions, the denial was not the

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[2] Except for the one reference in the breach of contract claim that Defendant failed to "fulfill . . . his obligations under the contract," each of the causes of action, *to wit*: specific performance, breach of contract, punitive damages, and attorney fees, rest on the claim that Defendant failed to act in good faith and that Defendant deprived Plaintiff of an investment opportunity.

result of Defendant's actions.

Defendant further argues that documentary evidence, *i.e.*, Defendant's attorney's December 14, 2015 Cancellation Letter, contradicts Plaintiff's assertion that Defendant canceled the contract for sale because of the Judgment against the property. Such letter states that the contract was being canceled pursuant to paragraph 9 of the Rider, not because of the Judgment.

Also, Defendant did not cancel the contract based on the Judgment, but waited until the SLS sent notice of the disapproval. If it were his intent to cancel the sale due to the Judgment, he would have done so sooner. Therefore, plaintiff does not have a cause of action for bad faith.

Finally, Defendant acted pursuant to the Contract. The sale was contingent on SLS's approval, and could not go through. Although Defendant could have cancelled the Contract in June 2014 when the sale had not yet been approved, Defendant only chose to cancel the Contract after learning that SLS would not approve the sale.

In opposition, Plaintiff argues that Defendant's reliance on the SLS's Denial Letter to demonstrate that he did not act in bad faith is misplaced, as the letter simply states that the short sale was denied because "terms changed," with no further explanation. Further, Defendant's reliance on the Rider to claim a right to cancel to the Contract is also misplaced, since SLS approved the short sale in September 2015 before Defendant canceled the Contract. Defendant should not receive the benefit of paragraph 9 if he caused the reversal of approval. And, if SLS reversed its approval because the purchase price was deemed insufficient, Defendant was required to notify Plaintiff to permit Plaintiff to increase the purchase price to satisfy SLS. Plaintiff notes that Defendant re-listed the property close in time to his cancellation of the

Contract.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack,* 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83,

88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

Accepting the facts as alleged in the Complaint as true, and according "plaintiffs the benefit of every possible favorable inference," as required (*Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 AD3d 401), the Court finds that Plaintiff sufficiently states a claim for failure to act in good faith.

"Implicit in every contract is a promise of good faith and fair dealing that is breached when a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party from receiving the benefits under their agreement" (*767 Third Avenue LLC. v. Orix Capital Markets, LLC.*, 6 Misc.3d 1019(A), 2005 WL 287393, 2005 N.Y. Slip Op. 50123(U) [N.Y.Sup. Jan 21, 2005] *citing Skillgames, LLC v. Brody*, 1 AD3d 247 [1st Dept 2003]). "The implied covenant of good faith and fair dealing between parties to a contract embraces 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" (*Moran v. Erk*, 11 N.Y.3d 452, 456, 872 N.Y.S.2d 696, 901 N.E.2d 187 [2008]).

Defendant failed to demonstrate that the allegations pleaded in the Complaint are false (*see Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 20 [1977]). Notably, SLS's Denial Letter does not defeat Plaintiff's allegations that Defendant delayed the short sale

by by failing to communicate with the lender and failing to timely provide required documentation. Nor does Plaintiff's Cancellation Letter defeat Plaintiff's claim that Defendant lead her to believe that he was attempting to resolve both liens; the Letter is silent as to such Liens. Therefore, as Defendant failed to show that the documentation on which he relies absolves Defendant of culpability for the denial of the short sale, or that the allegations alleged in the Complaint are conclusory, it cannot be said that Plaintiff does not have a claim based on Defendant's alleged bad faith.

Conclusion

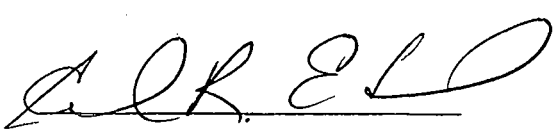
Based on the foregoing, it is hereby

ORDERED that the Defendant's motion to dismiss the Complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7), is denied. And it is further

ORDERED that Defendant shall serve a copy of this order with notice of entry upon Plaintiff within 20 days of entry.

This constitutes the decision and order of the court.

Dated: January 12, 2017



Hon. Carol R. Edmead, J.S.C

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