

Weinberger v Escort

2017 NY Slip Op 30639(U)

March 21, 2017

Supreme Court, Kings County

Docket Number: 503129/14

Judge: Johnny Lee Baynes

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This opinion is uncorrected and not selected for official publication.

At a(n) IAS Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings at the Courthouse thereof, at 360 Adams Street, Brooklyn, NY 11201, on the 21st day of March, 2017.

PRESENT:

HON. JOHNNY L. BAYNES,

JSC.

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Index No. 503129/14

SAM WEINBERGER,

Plaintiff,

-against-

DECISION AND ORDER

Estate of IRMA ESCORT; BERTHA ESCORT as Co-Administrator of the Estate of Irma Escort; and BARBARA ESCORT-WRAY as Co-Administrator of the Estate of Irma Escort,

Defendants,

-----x

Defendants, Estate of Irma Escort, Bertha Escort and Barbara Escort-Wray, as Co-Administrators (hereinafter "Defendants") move by Notice of Motion dated October 11, 2016, for an Order pursuant to CPLR § 3212, granting Summary Judgment in favor of Defendants; and for an Order pursuant to CPLR § 6514, directing the County Clerk to cancel the Notice of Pendency with respect to the subject property herein.

Plaintiff, Sam Weinberger (hereinafter "Plaintiff") Cross-Moves by Notice of Cross-Motion dated January 4, 2017, for an Order extending the Notice of Pendency for an additional three years or permitting Plaintiff to file a new Notice of Pendency with respect to the subject

property herein.

The action arises out of a Contract of Sale entered into between the parties herein on the 19th day of July, 2011, (hereinafter "the Contract") for purchase of the premises located at 295 Franklin Avenue, Brooklyn, NY 11205 with Tax Map Designation Block 1941, Lot 001 (Hereinafter "the Premises") for the sum of Four Hundred Ninety Five (\$495,000.00) Dollars.

Paragraph 2 of the Rider to the Contract of Sale provides as follows:

2. OBJECTIONS TO TITLE: Purchaser shall furnish to Seller's attorney a list of objections to title at least ten (10) days prior to closing *by delivery of title report*, and Seller shall be entitled to a reasonable adjournment for the purpose of removing objections or violations. HOWEVER, IT IS EXPRESSLY AGREED, that notwithstanding any other provisions of the within Contract, Seller shall not be required to perfect any defects in the title and ownership of the within premises, and in such event the sole responsibility of the Seller shall be to return the Contract sum paid herein, together with the net cost of the title examination, and upon the payment of said amounts, the within contract shall be deemed null and void and no further liability shall exist against the Seller with respect to the provisions of this Contract. (Italics not in original, added for emphasis. Terms in capital letters in original).

The parties also modified Paragraph Two of the Rider with hand-written changes which stated as follows:

Except to satisfy voluntary liens, real estate tax and water sewer (Illegible) monies due under NYC Admin Code and as otherwise required in this contract to the contrary. Monies due under NYC Admin Code is limited to \$2,500. If same exceeds \$2,500 and Seller refuses to pay the excess, Purchaser may cancel the contract and receive back their deposit or close title with seller's limit of \$2,500 liability.

As reflected in the Contract of Sale, the contract sum was Twenty-Five Thousand (\$25,000.00) Dollars. The Closing was scheduled to occur approximately sixty days of the date the Surrogates Court approved the transfer of the premises by the Estate of Irma Escort. That

approval was granted on August 14, 2012. Thereafter, a title report was ordered by plaintiff and that title report was prepared by Infinity Land Services LLC. That report revealed multiple issues, including, *inter alia*, several judgments, for NY State Tax Warrant equaling \$39,251.55, ECB violations and Federal Tax Liens for over \$55,980. As a result, unwilling to pay the liens, which they were not required to do pursuant to the Contract of Sale, Defendants canceled the Contract and returned the downpayment to plaintiff along with the net cost of the title search.

It is uncontested that plaintiff rejected the return of the downpayment and net cost of title search and returned same to counsel for defendants. What neither plaintiff nor his attorney state is that they were willing to take the property subject to the liens. Given that this was a condition of the Rider, in order for plaintiff to make any claim, he would have to show that it was unreasonable for defendants to cancel the contract given his willingness to accept same subject to the liens on the premises without contribution from Seller above the \$2,500 liability limit set forth in Paragraph 2 of the Rider.

Summary judgment, while a drastic remedy, is warranted when there are no factual disputes to be resolved by the trier of fact. *Mallard Construction Corp v County Fed Savings*, 32 NY2d 285 [1973], whether all issues to be resolved are strictly issues of law, *Long Island RR Co v Northport Industrial Corp.*, 42 NY2d 455 [1977], or when the uncontroverted facts can only be determined in one fashion as a matter of law. *Alvord and Swift v Stewart and Miller Constr. Co., Inc.*, 46 NY2d 276 [1978]. “It is well settled that ‘the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.’” *Olan v Ursino*, 235 AD2d 406 [AD2d 1997].

Once this showing is made, the burden shifts to the party opposing the motion for

Summary Judgment. *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]. In considering a motion for summary judgment, the Court must view all facts in a light most favorable to the non-moving party. *See, Zuckerman v City of New York*, 49 NY2d 557 [1980].

Defendants-Movants make a prima facie showing that they were within their rights to cancel the Contract. They show that the limits set forth in paragraph 2 of the Rider limit any requirement to clear liens on their part to \$2,500. In order for plaintiff to overcome that showing, he would have to show that he offered to take the property even without clearance of the liens. And while plaintiff states he is ready, willing and able to purchase the premises in accordance with the Contract, he makes no showing that he is willing to do so, or ever offered to do so, subject to the liens disclosed by the title search. Thus, plaintiff has not met his burden to overcome the showing made by defendants.

WHEREFORE, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment dismissing the Complaint is granted in all respects; and it is further

ORDERED and ADJUDGED that Plaintiff's Cross-Motion for an Order extending the Notice of Pendency for an additional three years or permitting Plaintiff to file a new Notice of Pendency with respect to the subject property herein is denied; and it is further

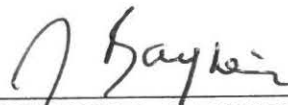
ORDERED and ADJUDGED that Defendants are to remit and Plaintiff is to accept return of the contract deposit herein and the net cost of the Title Report as provided by the Contract; and it is further

ORDERED and ADJUDGED that the Clerk of Court is to enter dismissal of the instant Action; and it is further

ORDERED and ADJUDGED that the Notice of Pendency herein is canceled and that the County Clerk shall enter said cancellation in its ledgers.

The foregoing constitutes the Decision and Order of the Court.

ENTER



JOHNNY L. BAYNES, JSC

HON. JOHNNY LEE BAYNES

KINGS COUNTY CLERK
FILED

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