

First Am. Props. Group, Inc. v NLO Holding Corp.

2017 NY Slip Op 31169(U)

May 12, 2017

Supreme Court, New York County

Docket Number: 158493/2014

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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FIRST AMERICAN PROPERTIES GROUP, INC., Index No. 158493/2014

Plaintiff

- against -

DECISION AND ORDER

NLO HOLDING CORP., as contract vendee,
and ANNA L. BOONE,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendants for specific performance of a contract and for damages due to defendants' breach of the contract, in which defendant NLO Holding Corp. agreed to sell to plaintiff premises previously owned by defendant Boone. Non-party Manhattan Homes & Estates, LLC, moves to intervene, C.P.L.R. §§ 1012, 1013; to dismiss the first claim for specific performance, C.P.L.R. § 3211(a)(1) and (7); and to cancel plaintiff's notice of pendency filed August 28, 2014. C.P.L.R. § 6514. Plaintiff cross-moves to join Manhattan Homes & Estates as a defendant and to amend the amended complaint to add claims against the proposed defendant and a further claim against NLO Holding. C.P.L.R. §§ 1002(b), 3025(b). Boone and NLO Holding, each separately cross-move to dismiss the current amended complaint based on its failure to state a claim against each of them. C.P.L.R. § 3211(a)(1) and (7). For the reasons explained below, the court grants Boone's cross-motion, grants in part and

denies in part both Manhattan Homes & Estates' motion and NLO Holding's cross-motion, and denies plaintiff's cross-motion.

II. DEFENDANTS' CROSS-MOTIONS TO DISMISS THE COMPLAINT

Plaintiff's first claim against each defendant, for specific performance, requires plaintiff to show its own substantial performance under the contract and willingness to perform any remaining obligations; defendants' ability to perform their obligations, here to convey specified real property; and the absence of an adequate remedy at law. EMF Gen. Contr. Corp. v. Bisbee, 6 A.D.3d 45, 51 (1st Dep't 2004). As plaintiff conceded at oral argument, the specific performance claim against Boone is not viable because she never executed a contract with plaintiff. Although NLO Holdings did execute a contract with plaintiff, plaintiff nowhere alleges that NLO Holdings owns the property. NLO Holding, moreover, points to proposed intervenor Manhattan Homes & Estates' current ownership, based on an undisputed recorded deed. These combined facts demonstrate NLO Holdings' inability to convey the property and thus to perform its contractual obligation, defeating plaintiff's specific performance claim against NLO Holding. 2386 Creston Ave. Realty, LLC v. M-P-M Mgt. Corp., 58 A.D.3d 158, 162 (1st Dep't 2008); Del Pozo v. Impressive Homes, Inc., 86 A.D.3d 622, 623 (2d Dep't 2011); Xiao Yuan v. Li Dan Zhang, 58 A.D.3d 723, 723 (2d Dep't 2009).

Absent plaintiff's showing of a contract between Boone and plaintiff, its second claim against Boone, for breach of

contract, also fails. ABL Advisor LLC v. Peck, 147 A.D.3d 689, 690 (1st Dep't 2017); Johnson v. Law Off. of Kenneth B. Schwartz, 145 A.D.3d 608, 610 (1st Dep't 2016); PK Rest., LLC v. Lifshutz, 138 A.D.3d 434, 437 (1st Dep't 2016); Underhill Holdings, LLC v. Travelsuite, Inc., 137 A.D.3d 533, 533 (1st Dep't 2016). Despite NLO Holding's inability to convey the premises, however, the alleged breach of its contract with plaintiff permits recovery of damages from NLO Holdings. Credit Suisse First Boston v. Utrecht-America Fin. Co., 84 A.D.3d 579, 580 (1st Dep't 2011); Fruition, Inc. v. Rhoda Lee, Inc., 1 A.D.3d 124, 125 (1st Dep't 2003). While NLO Holding contends it cancelled the contract and returned plaintiff's downpayment, it fails present an authenticated, admissible contract, which plaintiff does not incorporate in the complaint. AQ Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015); IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 637-38 (1st Dep't 2011); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009); Bermudez v. Ruiz, 185 A.D.2d 212, 214 (1st Dep't 1992). See People v. Frye, 94 A.D.3d 589, 589 (1st Dep't 2012); People v. Pierre, 41 A.D.3d 289, 291 (1st Dep't 2007); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001). Even were the contract admissible, see C.P.L.R. § 3211(a)(1); Art & Fashion Group Corp. v. Cyclops Prod., Inc., 120 A.D.3d 436, 438 (1st Dep't 2014); Amsterdam Hospitality Group, LLC v. Marshal-Alan Assoc., Inc., 120 A.D.3d 431, 433 (1st Dep't 2014);

Regini v. Board of Mgrs. of Loft Space Condominium, 107 A.D.3d 496, 497 (1st Dep't 2013); Flowers v. 73rd Townhouse LLC, 99 A.D.3d 431, 431 (1st Dep't 2012), NLO Holding does not identify any contractual provision allowing such a cancellation.

NLO Holding nonetheless relies on correspondence dated July 11, 2014, from NLO Holding's attorney to plaintiff's attorney and a check dated June 30, 2014, for the amount of the downpayment plaintiff previously paid. Even if this correspondence and check are considered admissible and the type of documentary evidence contemplated by C.P.L.R. § 3211(a)(1), they do not establish that plaintiff accepted NLO Holding's return of the downpayment or that the check was cashed. United States Fire Ins. Co. v. North Shore Risk Mgt., 114 A.D.3d 408, 409 (1st Dep't 2015); Regini v. Board of Mgrs. of Loft Space Condominium, 107 A.D.3d at 497; Flowers v. 73rd Townhouse LLC, 99 A.D.3d at 431; Correa v. Orient-Express Hotels, Inc., 84 A.D.3d 651 (1st Dep't 2011). NLO Holding thus fails to demonstrate a conclusive defense to plaintiff's breach of contract claim. Kolchins v. Evolution Mkts., Inc., 128 A.D.3d 47, 59 (1st Dep't 2015); Anderson & Anderson, LLP-Guangzhou v. North Am. Foreign Trade Corp., 106 A.D.3d 503, 504 (1st Dep't 2013); McCully v. Jersey Partners, Inc., 60 A.D.3d 562, 562 (1st Dep't 2009).

III. THE PROPOSED INTERVENOR'S MOTION TO INTERVENE

Absent a viable claim for specific performance, plaintiff's action to enforce its purchase contract with NLO Holding does not affect title to real property and thus provides no basis to file

a notice of pendency. C.P.L.R. § 6501; 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313, 323 (1984); Sehgal v. Sehgal, 200 A.D.2d 201, 201 (1st Dep't 1995). Since the court dismisses plaintiff's specific performance claim, and C.P.L.R. § 6514(a) does not require intervention for "any person aggrieved" to move to cancel plaintiff's notice of pendency, the court grants proposed intervenor Manhattan Homes & Estates motion to that extent. Knopf v. Sanford, 132 A.D.3d 416, 417 (1st Dep't 2015); 3801 Review Realty LLC v. Review Realty Co. LLC, 111 A.D.3d 509, 510 (1st Dep't 2013); Jericho Group Ltd. v. Midtown Dev., L.P., 67 A.D.3d 431, 432 (1st Dep't 2009). See C.P.L.R. § 6514(b); Guberman v. Rudder, 85 A.D.3d 683, 684 (1st Dep't 2011); Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v. 31 Mount Morris Park, LLC, 76 A.D.3d 465, 465 (1st Dep't 2010); 551 W. Chelsea Partners LLC v. 556 Holding LLC, 40 A.D.3d 546, 548 (1st Dep't 2007). For the same reasons, Manhattan Homes & Estates' motion to intervene and to dismiss plaintiff's specific performance claim is academic. Bridge St. Contr. Inc. v. Everest Natl. Ins. Co., 132 A.D.3d 500, 501 (1st Dep't 2015); Adjmi 936 Realty Assoc. v. New York Prop. Ins. Underwriting Assn., 224 A.D.2d 319 (1st Dep't 1996).

IV. PLAINTIFF'S CROSS-MOTION TO AMEND ITS AMENDED COMPLAINT

Without that first claim, for specific performance, plaintiff also lacks grounds to join the proposed intervenor as a defendant. Insofar as plaintiff's proposed additional claim alleges a civil conspiracy, New York does not recognize such a

claim. Alexander & Alexander of N.Y. v. Fritzen, 68 N.Y.2d 968, 969 (1986); Johnson v. Law Off. of Kenneth B. Schwartz, 145 A.D.3d at 611; Wilson v. Dantas, 128 A.D.3d 176, 188 (1st Dep't 2015); Abacus Federal Sav. Bank v. Lim, 75 A.D.3d 472, 474 (1st Dep't 2010).

Insofar as plaintiff's proposed additional claim alleges NLO Holding's tortious interference with a contract, plaintiff fails to demonstrate the merit of this proposed claim. Such a claim requires allegations of (1) a valid contract to which plaintiff was a party; (2) an actual breach of that contract by another party to the contract; (3) NLO Holding's knowledge of that contract between plaintiff and another promisor; (4) NLO Holding's intentional procurement of the breach; and (5) damages to plaintiff from that interference. White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 426 (2007); Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996); Foster v. Churchill, 87 N.Y.2d 744, 749-50 (1996); Burrowes v. Combs, 25 A.D.3d 370, 373 (1st Dep't 2006). Since plaintiff and NLO Holding are the parties to the contract allegedly breached, NLO Holding's procurement of the breach would amount to its breach of the contract, not its tortious interference with a contract between plaintiff and another party to the contract. Wilson v. Dantas, 128 A.D.3d at 188; Ashby v. ALM Media, LLC, 110 A.D.3d 459, 459 (1st Dep't 2013); UBS Sec. LLC v. Highland Capital Mgt., L.P., 86 A.D.3d 469, 476-77 (1st Dep't 2011).

Plaintiff also seeks to claim that the proposed intervenor

tortiously interfered with the contract between plaintiff and NLO Holding, by purchasing the real property that was the subject of the contract, and alleges that the proposed intervenor received actual or constructive notice of that unrecorded contract. A purchaser's notice of that contract, however, is irrelevant, because executory unrecorded contracts for the purchase of real property are void against subsequent purchasers or purchase contracts for the same real property. N.Y. Real Prop. Law § 294(3); 2386 Creston Ave. Realty, LLC v. M-P-M Mgt. Corp., 58 A.D.3d 158, 160 (1st Dep't 2008). Filing a notice of pendency does not replace the recording requirement. Id.; TCJS Corp. v. Koff, 74 A.D.3d 1188, 1189 (2d Dep't 2010). More importantly, plaintiff fails to allege the requisite causal connection: that NLO Holding would have performed the contract but for the proposed intervenor's interference. PK Rest., LLC v. Lifshutz, 138 A.D.3d at 438; Pursuit Inv. Mgt. LLC v. Alpha Beta Capital Partners, L.P., 127 A.D.3d 580, 581 (1st Dep't 2015); Sun Gold, Corp. v. Stillman, 95 A.D.3d 668, 669 (1st Dep't 2012); Pitcock v. Kasowitz, Benson, Torres & Friedman, LLP, 80 A.D.3d 453, 454 (1st Dep't 2011).

V. CONCLUSION

For the reasons set forth above, the court grants defendant Boone's cross-motion to dismiss the amended complaint against Boone based on its failure to state a claim against her. C.P.L.R. § 3211(a)(7). The court also grants defendant NLO Holding Corp.'s separate cross-motion to the extent of dismissing

the first claim, for specific performance, against NLO Holding based the amended complaint's failure to allege the elements of this claim. C.P.L.R. § 3211(a)(1) and (7). Absent a specific performance claim against either defendant, the court grants the motion by Manhattan Homes & Estates, LLC, to cancel plaintiff's notice of pendency, C.P.L.R. § 6514(a), but denies the motion to intervene and to dismiss plaintiff's specific performance claim, since the relief to defendants renders academic this remaining relief sought by the proposed intervenor. The court also denies plaintiff's cross-motion to join Manhattan Homes & Estates as a defendant and to amend the amended complaint to add claims against the proposed defendant and a claim for tortious interference with a contract against NLO Holding, based on plaintiff's failure to allege the elements of the claim. C.P.L.R. §§ 1002(b), 3025(b).

The amended complaint's breach of contract claim against NLO Holding remains. This decision constitutes the court's order and judgment of dismissal of the claims against defendant Boone and dismissal of the first claim, for specific performance, against defendant NLO Holding Corp.

DATED: May 12, 2017



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.