

Scott Randolph LLC v Gholis of Brooklyn Corp.
2017 NY Slip Op 32086(U)
October 2, 2017
Supreme Court, Kings County
Docket Number: 512250/2014
Judge: Sylvia G. Ash
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of Oct., 2017.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

-----X

SCOTT RANDOLPH LLC,

Plaintiff(s),

- against -

**GHOLIS OF BROOKLYN CORP, BUSHWACK
5 LLC, and BUSHWACK 10 LLC,**

Defendant(s).

-----X

The following papers numbered 1 to 7 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

DECISION AND ORDER

Index # 512250/2014

Mot. Seq. 4

Papers Numbered

1 - 3

4, 5

6, 7

Plaintiff, SCOTT RANDOLPH LLC, moves for an Order pursuant to CPLR 3212 granting it summary judgment against Defendant GHOLIS of BROOKLYN CORP ("Gholis") on its claim for breach of contract and dismissing Gholis's first, second and third counterclaims against it. Both Gholis and co-Defendants BUSHWACK 5 LLC and BUSHWACK 10 LLC (collectively referred to as the "Bushwacks") oppose.

Plaintiff brings this action for specific performance and breach of contract against Defendants stemming from a real estate contract entered into by Plaintiff and Gholis on July 31, 2014 ("Contract") for the purchase of real property located at 99 Scott Avenue in Brooklyn, New York ("Property") for \$8,325,000.00. It is undisputed that, on August 1, 2014, Plaintiff, as purchaser, deposited the sum of \$832,500.00, ten percent of the purchase price, with Gholis's counsel to be held in escrow.

According to Plaintiff, at around the same time, Plaintiff began negotiating a joint venture with the Bushwacks to jointly develop the Property subsequent to its acquisition by Plaintiff.

On November 6, 2014, Gholis's counsel, Stern & Stern ("Stern") emailed a notice to Jeffrey Zwick, Esq. ("Zwick"), Plaintiff's counsel, stating, in pertinent part, that: "**TIME HAS BECOME OF THE ESSENCE** for the closing of this contract. Should purchaser fail to schedule a closing of the contract within 10 days of this notice, a closing will be scheduled by Seller with deed to be tendered and Seller deemed to have defaulted in its obligations pursuant to the terms of this contract" (emphasis in original).

Thereafter, on December 1, 2014, Stern emailed Zwick a letter again declaring time to be of the essence and setting a closing date of December 11, 2014, at 3:30 p.m. at Stern's office. As the December 11, 2014 deadline approached, counsel for both parties engaged in discussions about cancelling the Contract and having Gholis return the Contract deposit to Plaintiff. However, the Contract was not cancelled. On December 9, 2014, Stern sent Zwick two emails. The first email stated that, based on their previous conversations, Stern would not have the title company or a deed tomorrow to hold Zwick's client in default but that he expected Zwick's cooperation in the "prompt rescinding of this contract." An hour later, Stern sent Zwick another email stating that his client has "decided as a result of a failure to communicate," that the "Time of the Essence Letter IS NOT RESCINDED" (emphasis in original) and the only way to avoid default and forfeiture of the contract deposit is if "this is concluded tomorrow." According to Plaintiff, the December 11, 2014 deadline "came and went" and thereafter, Plaintiff contacted Gholis to set a new closing date. In response, Gholis refused to set a new date claiming that the Contract had been terminated as a result of Plaintiff's failure to timely close on December 11, 2014. On December 19, 2014, Gholis executed a deed to transfer ownership of the Property to the Bushwacks, who have been the Property's owner ever since.

On December 26, 2014, Plaintiff commenced the instant action by the filing of its summons and complaint. Although discovery is ongoing, on November 10, 2016, Plaintiff filed the instant motion seeking partial summary judgment against Gholis as to liability on its second cause of action for breach of contract; dismissing with prejudice Gholis's first counterclaim for a judgment declaring that the Contract was cancelled; dismissing with prejudice Gholis's second counterclaim for a judgment declaring that the escrow agent currently holding Plaintiff's deposit turn over said deposit to Gholis; and dismissing with prejudice Gholis's third counterclaim for

breach of contract.

It is Plaintiff's position that Gholis breached the Contract by repudiating its obligation to sell the Property to Plaintiff and instead selling the Property to the Bushwacks. Plaintiff argues that Gholis's defenses fail as a matter of law because the email notices sent by Gholis were not clear and unequivocal as required by law. Specifically, that the first December 9, 2014 email assured Plaintiff that Gholis would not hold Plaintiff in default but that, thereafter, Stern "flip-flopped" by sending the second email stating that the Time of the Essence Letter was not rescinded. Plaintiff additionally argues that the notices failed to afford Plaintiff a reasonable amount of time to close because a mere 10 days is insufficient as a matter of law. Plaintiff also alleges that the notices were defective because they fail to explicitly warn Plaintiff that its failure to tender payment at closing would result in Plaintiff's default. Plaintiff also claims that it did not receive a 10-day notice to cure, a mandatory condition precedent in the Contract that must be met before declaring Plaintiff to be in default. Finally, Plaintiff argues that the Contract expressly required that any "notice, claim, demand or other communication which either party may be required to give or shall desire to give the other" must be sent "to the [Plaintiff]...with a copy to" Plaintiff's attorney but that Gholis breached this provision by only sending the notices to Zwick.

In opposition, Gholis submits that there are two competing versions of the Contract at issue, each with a different closing provision. That the version held by Gholis required that Plaintiff close on or before 35 days after the end of a 10-business-day due diligence period. According to Gholis, Plaintiff was afforded 35 days to close starting from November 6, 2014, when Gholis first sent Plaintiff a notice to cure declaring that time was of the essence and that Plaintiff would be held in default unless it scheduled a closing date within 10 days. Gholis contends that Plaintiff did nothing and, as a result, Gholis sent Plaintiff a follow-up letter on December 1, 2014, which incorporated the November 6th notice by reference, and which set a closing date for December 11, 2014 at 3:30 p.m. According to Gholis, three-and-a-half hours before the scheduled closing, Plaintiff attempted to revise the Contract terms, which contemplated an all cash transaction, by offering \$3,500,000.00 up front and requesting that Gholis finance the remainder of the purchase price of \$4,825,000.00 which would be paid off over a "short period of time." According to Gholis, it rejected this offer. Gholis further argues that its December 9th notices were not equivocal, especially given the context in which those emails were exchanged and as evidenced by Plaintiff's own course of conduct in requesting a

financing arrangement on the day of closing. Gholis further argues that its November 6th notice fully satisfied the Contract's notice to cure provision. Finally, Gholis contends that strict compliance with a contract's notice provision is not required and it is undisputed that Plaintiff received actual notice of all of the notices that were sent.

The Bushwacks also oppose Plaintiff's application. The Bushwacks contend that Plaintiff is in violation of multiple discovery orders because Scott Randolph, Plaintiff's principal, has refused to submit to a deposition. The Bushwacks state that his deposition is necessary to establish Plaintiff's financial wherewithal to complete the purchase of the Property, Plaintiff's communications with Gholis prior to the scheduled closing and Mr. Randolph's knowledge of Gholis's counsel's notices.

The Bushwacks further argue that Plaintiff's summary judgment motion is procedurally defective insofar as Plaintiff has failed to include a statement of material facts in violation of the Uniform Commercial Rules. Finally, in addition to arguing that triable issues exist as to the sufficiency of Gholis's notices, the Bushwacks point out that Plaintiff neglected to show that it was ready, willing and able to close, and further, that the facts indicate that Plaintiff was financially unable to close.

Discussion

"[T]he proponent of a summary judgment motion 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][citations omitted]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Id.*).

"Where time is not made of the essence in the original contract for the sale of real property, a party may subsequently give notice to that effect" (*Nehmadi v Davis*, 63 AD3d 1125, 1127 [2d Dept 2009]). "The notice setting a new date for the closing must (1) give clear, distinct, and unequivocal notice that time is of the essence, (2) give the other party a reasonable time in which to act, and (3) inform the other party that if he does not perform by the designated date, he will be considered in default" (*Id.*).

Here, Plaintiff failed to demonstrate its prima facie entitlement to judgment as a matter

of law on the issue of liability for breach of contract insofar as Plaintiff did not establish that the November and December notices sent by Gholis were insufficient to set a "time is of the essence" closing date of December 11, 2014. Plaintiff's arguments for summary judgment conveniently ignore Gholis's November 6th notice. Thus, Plaintiff's reliance on only the December notices is insufficient to merit Plaintiff summary judgment on its breach of contract claim. Moreover, Plaintiff failed to establish that strict compliance with the notice provision was required. Finally, the Court is mindful that Plaintiff's principal has yet to submit to a deposition which will undoubtedly shed some light on the issues in this case.

Accordingly, Plaintiff's motion for summary judgment must be DENIED.

This constitutes the Decision and Order of the Court.

E N T E R,

A handwritten signature in black ink, appearing to read 'SAR', is written over a horizontal line.

SYLVIA G. ASH, J.S.C.