Ballys Mgt. & Capital LLC v First Korean Church of N.Y.
2017 NY Slip Op 32734(U)
November 2, 2017
Supreme Court, Queens County
Docket Number: 711422/2017
Judge: Marguerite A. Grays
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Memorandum

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

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BALLYS MANAGEMENT AND CAPITAL LLC,

Plaintiff(s)

-against-

FIRST KOREAN CHURCH OF NEW YORK, and RICHARD SEI OUNG YOON

Defendant(s)

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Index Number 711422 2017

Motion Date September 19, 2017

Motion Cal. No.: 2

Motion Seq. No.: 1

Plaintiff Ballys Management and Capital LLC ("Ballys"), moves this Court for an Order: (1) seeking a preliminary injunction, enjoining defendants from listing the property located at 35-06/14 Parsons Blvd., Flushing, New York ("the Property"), for sale; (2) enjoining defendants from contracting with or transferring the Property to any third parties; and (3) staying any deadlines in the Ballys' Contract pending a final determination of the cause of action in the complaint. Defendant, First Korean Church of New York ("Church") cross-moves for an Order: (1) dismissing the complaint; (2); pursuant to CPLR §3211 [a][1] and [4], declaring the Contract of Sale to be null and void, and (3) canceling the Notice of Pendency.

Defendant Church, a not-for-profit religious corporation formed under Article 10 , Section 192 of the Religious Corporation Law, entered into a contract, dated July 15, 2013, with Chun Peter Dong for the sale of real property located at 35-06/14 Parsons Boulevard,

Flushing, New York ("Property"), for a purchase price of $18,700.000, plus broker's commission and a down payment of $1,870,000. The subject property is improved by two buildings: Parsons Hospital, which is vacant, and a converted residence. The Church interposed an answer and counterclaims for a judgment dismissing the complaint, rejecting the proposed sale by the Church to Dong, and awarding costs. Dong filed a Notice of Pendency in said action on December 18, 2013.

A rider to the contract acknowledged that, since one of the parties to the agreement was a church, "this sale ... is therefore subject to approval by the New York State Attorney General and the Supreme Court." The contract was executed on behalf of the Church by its President, Sei Oung Yoon. After the contract was executed, the Church obtained an appraisal valuing the property at $19,500,000. At a special meeting of the Church's board of trustees held on December 8, 2013, the trustees unanimously adopted a resolution "recommending the sale of the property, but unanimously voting not to proceed with the current contract of sale at a price below [the] appraised value of [$]19,500,000." A special meeting of the Church's congregation was scheduled and noticed for December 22, 2013, at which the members of the Church raised questions regarding the advisability of the sale, and postponed a vote to approve the sale. Thereafter, in an effort to determine its obligations under the contract, the Church submitted a proposed petition pursuant to Not–For–Profit Corporation Law § 511 to the Office of the New York State Attorney General, seeking a judicial determination as to whether the Church "should complete the sale of the Property ... to [the

plaintiff] for the sum of $18,700,000." In a letter dated May 15, 2014, the Attorney General advised that the requirements of Not–For–Profit Corporation Law §511(a)(7) and (8) had not been met and, therefore, the Attorney General would object to the granting of an Order approving the proposed sale. Based upon the Attorney General's letter, the Church chose not to file the proposed petition in the Supreme Court, and instead repudiated the contract and returned Dong's down payment.

Dong commenced an action against the Church, under Index Number 705983/2013, seeking a declaration that the contract of sale is binding and enforceable, specific performance of the contract, an order directing the Church to sell the property to him pursuant to the Not-for-Profit Corporations Law §511, and injunctive relief. The Church moved for summary judgment dismissing the complaint and declaring that the contract was not binding and enforceable. The Supreme Court granted the Church's motion. Dong appealed. The Appellate Division, Second Department held that the Church had met its prima facie burden on its motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and noted that "[a] religious corporation shall not sell ... any of its real property without applying for and obtaining leave of the court or the attorney general therefor pursuant to [N–PCL 511] as that section is modified by ... [N–PCL 511–a]" (Religious Corporations Law § 12[1]). The Appellate Division further noted that "[a] petition seeking such approval must set forth, *inter alia*, '[t]hat such sale ... has been recommended or authorized by vote of the directors in accordance with law' and that,

'[w]here the consent of members of the corporation is required by law, such consent has been given'", citing N–PCL 511 [a][7], [8]). The Appellate Division, Second Department thereupon held that notwithstanding the execution of the contract by the Church's president, the contract was not binding against the Church, since it was not approved by the Church's board of trustees or members (*cf. Church of God of Prospect Plaza v Fourth Church of Christ, Scientist of Brooklyn*, 76 AD2d 712, 714 [1980], *affd.* 54 NY2d 742 [1981]), and that in opposition, Dong failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus the Supreme Court's decision was affirmed, and the matter was remitted back for the entry of a judgment declaring that the contract of sale is not binding and enforceable (*Dong v First Korean Church of New York*, 151 AD3d 930, 930–31 [2017]). A judgment was entered on August 31, 2017, declaring that the contract of sale between Dong and the Church was not binding and is unenforceable and of no force and effect.

While the Dong action was pending in this court, Ballys entered into a contract of sale and rider with the Church, each dated October 1, 2014, whereby the Church agreed to sell the subject real property to Ballys for a purchase price of $25,000,000. Ballys paid the initial down payment of $50,000. Both the Church and Ballys were represented by their respective counsel, who witnessed the execution of said contract of sale.

The Rider to the Ballys contract states, in pertinent part, as follows:

2. The Purchaser shall take the premises subject to the following. . .

f. An existing contract between Seller and Mr. Dong for the sale of this property. That contract is currently being disputed between the Seller and Mr. Dong in Supreme Court, Queens County. This contract shall be subject to the contract. If the Seller sells to Mr. Dong (or Mr. Dong's majority owned entity), than [sic] this contract shall be null and void and the Purchaser's initial deposit shall be returned to Purchaser. If the Dong contract shall be held to be void, then this contract shall immediately become the prime contract. Notwithstanding the foregoing, Seller shall be obligated to use its best efforts to litigate, pursue and obtain a final non-appealable Court Order or settlement of the cancellation of the existing contract.

9. In furtherance of paragraph "8" of this contract, it is understood and agreed that this sale is by a church and is therefore subject to approval by the New York State Attorney General and if required, the Supreme Court. The Seller agrees to use its best efforts to obtain New York State approval but if for whatever reason that approval is withheld or denied then this contract shall be null and void, except for paragraph "9" of the rider, and Seller's sole liability shall be to return Purchaser's deposit. Seller shall be under no obligation to commence the process of obtaining New York State Attorney General

Approval of this transaction prior to Purchaser's conducting a Phase I inspection of the property. Seller's obligation to have this transaction approved shall not commence until Purchaser notifies Seller that it is satisfied with the results from the Phase I or Phase II inspections.

10. Within thirty (30) days of the date that this contract becomes the prime contract, Purchaser, at its sole expense shall cause a Phase I inspection to be conducted on the subject premises. Within thirty (30) days from the date that the results of that inspection are received by Purchasers and Sellers, Purchaser will advise Seller that it has accepted the condition of the premises or that there is a specific issue which requires a Phase II Inspection. . .

After the Dong complaint was dismissed, Ballys' counsel, in a letter dated June 29, 2015, advised the Church's counsel that Ballys was satisfied with the environmental condition at the subject premises, and waived the environmental contingency set forth in paragraph 10 of the contract's rider. Counsel requested that the Church's counsel commence the process of obtaining the approval of the Ballys sale from the Attorney General and, if required, from the Supreme Court, as provided by paragraph 9 of the rider.

Ballys counsel, in a letter dated August 7, 2015, stated that Ballys had waived its right to a Phase I and Phase II inspection, and demanded that the Church immediately "use its best efforts" to obtain the approval of the Attorney General. Counsel asserted that the Church's contractual obligation to obtain State approval for the Ballys contract was not conditioned

upon obtaining a final adjudication of the Dong action, and therefore the Church must simultaneously seek State approval of the Ballys contract and litigate the Dong appeal, if perfected. Counsel also stated that Ballys had obtained appraisals to assist the Church in obtaining the State approval.

The Church's counsel, in a letter dated August 13, 2015, stated that in an email dated June 23, 2015, and in numerous telephone conversations, Ballys had been informed that Mr. Dong had filed a notice of appeal and that pursuant to the terms of the Ballys contract, it does not become the prime contract until there is a non-appealable court order, a settlement or cancellation of the contract between the Church and Dong. Counsel further asserted that Ballys had no right to waive an inspection, as it had no right to conduct a Phase I inspection until after the Ballys contract became the prime contract. It was also stated that since the Ballys contract was not the prime contract at the time, the seller was under no obligation to commence the approval process.

Bally commenced a prior action against the Church on August 25, 2015, and filed a Notice of Pendency on August 27, 2015. In a pre-answer motion, the Church moved to dismiss the complaint pursuant to CPLR §3211 (a)(1), and also sought an Order pursuant to CPLR §3001, declaring that the Ballys contract of sale and rider is void. The branch of the motion which was to dismiss the complaint was granted by the Court. The branch of the motion which sought a declaration that the Ballys contract was void, was denied as premature.

Ballys commenced the instant action for, inter alia, specific performance of the contract of sale. By the instant Order to Show Cause, Ballys seeks to, *inter alia,* enjoin defendant Church from selling the subject property, entering into a contract for the sale of the Property with another third-party or from taking any action adverse to its interests, prior to a determination on the merits of the instant action. Defendants oppose the application for, a preliminary injunction, and cross move to dismiss the complaint. The cross-motion is opposed by plaintiff.

Discussion

The decision to grant a preliminary injunction is a matter ordinarily committed to the sound discretion of the Court hearing the motion (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Nelson v Jannace*, 248 AD2d 448, 448–49 1998]). "In the absence of unusual or compelling circumstances, [the] Court[s][are] reluctant to disturb said determination" (*Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 942 [2009], *quoting Borenstein v Rochel Props.*, 176 AD2d 171, 172 [1991]; *After Six v. 201 E. 66th St. Assoc.*, 87 AD2d 153, 155 [1982]). "The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits" (*306 Rutledge, LLC v City of New York*, 90 AD3d 1026, 1028 [2011], *quoting Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2005]; *see S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC*, 81 AD3d 629, 630 [2011]; *Ruiz v Meloney*, 26 AD3d 485, 486 [2006]). To be entitled to a preliminary injunction, a movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent

granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]). A Court evaluating a motion for a preliminary injunction must be mindful that "[t]he purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties" *(Matter of Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051, 1052 [2009]; *see Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643 [2006]).

Plaintiff sufficiently demonstrated its entitlement to injunctive relief by showing that there is a likelihood of its ultimate success on the merits, that it will suffer irreparable injury absent the preliminary injunction, and that the balance of the equities was in its favor (*Northside Studios, Inc. v Treccagnoli*, 262 AD2d 469 [1999]; *see Aetna Ins. Co. v Capasso*, 75 NY2d 860; *Doe v Axelrod*, 73 NY2d 748). Plaintiff sustained its burden of establishing a likelihood of success on the merits by its submission of evidence indicating that it is ready willing and able to proceed with the sale and has shown a high likelihood of success on the merits with its appraisal as of the date of the Contract ($3.3 million below the Contract purchase price) (*see Wolkoff v Church of St. Rita*, 132 Misc. 2d 464, 472 [1986], *affd*, 133 AD2d 267 [1987]). Contrary to defendants' contention, the value of the Property to determine if the contract is proper, is the date that the contract was entered into, not its valuation years later (see Id.). Furthermore, a balance of the equities likewise favors the granting of preliminary injunctive relief to maintain the status quo pending the resolution of

the action (*see e.g. S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc.*, 57 AD3d 642, 643 2008]; *Jiggetts v Perales*, 202 AD2d 341, 342 [1994]).

Defendants argue that injunctive relief may not be granted where the facts are in dispute. However, all that must be shown is the likelihood of success; conclusive proof is not required (*Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 604–05 [2004]; *see Terrell v Terrell*, 279 AD2d 301, 303 [2001]). "[T]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (*Egan v New York Care Plus Ins. Co.*, 266 AD2d 600, 601 [1999]), for "even when facts are in dispute, the nisi prius court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be 'conclusive' " (*Ying Fung Moy v Hohi Umeki*, 10 AD3d at 604–05, *quoting Sau Thi Ma v Xuan T. Lien*, 198 AD2d 186, 187 [1993]).

Cross-Motion

The branches of the cross-motion which are to declare the Contract of Sale to be null and void, and to cancel the Notice of Pendency, are denied, for reasons noted above. A religious society cannot terminate a contract on a whim, but rather through a two-tier test and on a case by case approach *(see Wolkoff v Church of St. Rita, supra)*. As pertinent to the instant matter, the time the contract was entered into is the moment for calculating the fair market value of the Property (*see Church of God v Fourth Church of Christ, Scientist, of*

Brooklyn, 76 AD2d 712 [1980]). Here, the fair market value of the Property at the time the contract was entered into, was less than the contract price as noted above (Emphasis Added).

The branch of the cross-motion to dismiss the complaint on the ground that there is a defense founded upon documentary evidence pursuant to CPLR §3211(a)(1) is denied. On a motion to dismiss a complaint on the ground that there is a defense founded upon documentary evidence pursuant to CPLR §3211(a)(1), the evidence submitted must "resolve all factual issues as a matter of law and conclusively dispose of the plaintiff's claim." (*Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621, 622 [2006], *quoting Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]; *Dodge v King*, 19 AD3d 359, 360 [2005]). The affidavit of realtor Don Bak who stated under oath that the current market value of the property is $39,000,000, and that he has an unidentified buyer ready willing and able to purchase the property at that price, is insufficient since affidavits do not constitute documentary evidence for the purposes of a motion to dismiss pursuant to CPLR §3211(a)(1) (*Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807, 809 [2012]; *see HSBC Bank, USA v Pugkhem*, 88 AD3d 649, 651 [2011]; *Berger v Temple Beth–El of Great Neck*, 303 AD2d 346, 347 [2003]).

The branch of the cross motion which is to dismiss the cause of action for punitive damages, is granted. It is well-settled law in New York that a demand for punitive damages may not constitute an independent cause of action (*Rocanova v Equitable Life Assur. Socy.*

of U.S., 83 NY2d 603, 616 [1994]; *Aronis v TLC Vision Ctrs, Inc.*, 49 AD3d 576 [2d Dept 2008]; *Randi A.J. v Long Is. Surgi–Ctr .*, 46 AD3d 74 [2d Dept 2007]).

Defendants also assert that the alleged injury can be "compensated in money damages." Where, as here, an agreement to purchase real property is at issue, and the buyer seeks specific performance, New York courts frequently and routinely grant preliminary injunctive relief (*see, e.g., Vincent v Seaman*, 152 AD2d 841 [1989]; *Northside Studios, Inc. v. Treccagnoli*, 262 AD2d 469 [1999]; *Nelson, L.P. v Jannace*, 248 AD2d 448 [1998]).

The branch of the cross-motion which is to dismiss the complaint pursuant to CPLR §3211 [a][4], on the ground that there is a prior action pending, is denied. The "prior action" which defendant alleges is pending was dismissed by the court in an Order dated February 23, 2017 (Taylor, J.).

Conclusion

Accordingly, the Order to Show Cause by the plaintiff is granted, and defendants, its agents, servants, employees and all persons acting on defendants' behalf, are enjoined and restrained from (a) listing the property located at 35-06/14 Parsons Boulevard, Flushing, New York (Tax Map: Block 5002, Lots 57 & 69), for sale; (b) contracting with or transferring the Property to any third parties; and (c) taking any action with regards to the subject property which would be adverse to plaintiff's interest therein, during the pendency of this action or until further Order of this Court.

The branch of the cross-motion to dismiss the complaint on the ground that there is a defense founded upon documentary evidence pursuant to CPLR §3211(a)(1) is denied.

The branch of the cross-motion which is to dismiss the complaint pursuant to CPLR §3211 [a][4], on the ground that there is a prior action pending, is denied.

Plaintiff is required to post an undertaking in an amount to be fixed in the Order to be entered herein (CPLR§6312(b); *see, Gaentner v Berkovich,* 18AD3d 424 [2005]). The parties may submit proof and recommendations as to the amount of the undertaking upon settlement of the Order.

Settle Order.

Dated: NOV 0 2 2017

J.S.C.

FILED
NOV 17 2017
COUNTY CLERK
QUEENS COUNTY