Silvershore Props. LLC v Dunning
2018 NY Slip Op 30715(U)
April 18, 2018
Supreme Court, Kings County
Docket Number: 508384/2014
Judge: Sylvia G. Ash

At an I.A.S. Term, Com 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 18th day of April, 2018.

P R E S E N T :

HON. SYLVIA G. ASH, J.S.C.

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SILVERSHORE PROPERTIES LLC,
Plaintiff,

- against -

EUGENE DUNNING AND FRED D. WAY III,
Defendant.

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Index No.: 508384/2014

DECISION AFTER TRIAL

APPEARANCES:

WACHTEL MISSRY, ESQ.
Attorney for the Plaintiff
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New York, NY 10017
By: Steven T. Cohen, Esq.
Sara Spiegelman, Esq.

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HON. SYLVIA G. ASH, J.S.C.:

In this commercial action Silvershore Properties LLC, (hereinafter "Plaintiff"), seeks specific performance for a contract of sale between Plaintiff and Eugene Dunning (hereinafter "Dunning"). Dunning seeks to dismiss the complaint with costs and disbursements.

PROCEDURAL BACKGROUND

On September 14, 2014, Plaintiff commenced the above-captioned action by filing a summons and complaint against Dunning as the sole defendant. On November 4, 2014, Dunning,

through his attorney Fred D. Way III (hereinafter "Way"), filed an answer with counterclaims. On November 13, 2014, Plaintiff filed a supplemental summons and amended complaint, asserting a breach of fiduciary duty, breach of good faith and fair dealings, conversion, and aiding a breach of contract against Way, an additional defendant.

On January 29, 2015, Plaintiff filed a notice of motion (Mot. Seq. No. 1) seeking: (1) a default judgment against Fred D. Way III with respect to the first through fifth claims for his failure to answer the amended complaint; (2) a default judgment against Fred D. Way III with respect to the sixth and seventh claims; and (3) setting the matter down for an inquest to assess Plaintiff's damages upon payment of the appropriate fees by Plaintiff. On February 12, 2015, Dunning and Fred D. Way III (hereinafter "Defendants") filed opposition to Mot. Seq. No. 1 and an amended answer to the amended complaint. On February 18, 2015, the court denied Mot. Seq. No. 1.

On February 16, 2016, Plaintiff filed a notice of motion (Mot. Seq. No. 2) seeking leave to serve the proposed second amended complaint. On March 23, 2016, the court granted Mot. Seq. No. 2. On March 24, 2016, Plaintiff filed a second amended complaint. On April 16, 2016, Defendants filed a second amended answer. On July 20, 2016, Plaintiff filed a notice of motion (Mot. Seq. No. 3) seeking an order: (1) granting Plaintiff specific performance of the contract; (2) declaring the letter void and unenforceable; (3) dismissing Defendants' affirmative defenses; and (4) setting this matter down for a hearing to determine the appropriate reduction of the purchase price. On September 23, 2016, Defendants filed an affirmation in opposition to Mot. Seq. No. 3 and Plaintiff filed a reply on November 14, 2016. On April 3, 2017, this court denied Mot. Seq. 3 in its entirety.

This matter continued to trial on November 27th, 28th, and concluded November 29, 2017.

EVIDENCE

Plaintiff introduced the following exhibits:

Exhibit	Description
1	Contract of Sale
1A	Check for $200,000 deposit
2	Lease agreement between ED and Agatha Baptiste
3	Lease to purchase option agreement btwn ED and Agatha Baptiste
4	Lease agreement between ED and R. Andrew Heidel
5	Lease agreement between ED and 689 Washington Ave. Corp.
6	Addendum to lease changing tenant from 689 Washington Ave. Corp. to Café Fika Corp.
7	Commercial sublease agreement between Eat Happy Inc. and the Winey Husband
8	Letter from Martin Friedman to Agatha Baptiste for failure to pay rent
9	Letter from Michael Adeyemi to Agatha Baptiste terminating lease option to purchase agreement
10	Seven Day Notice to Cure and related court documents
11	Commercial lease between ED and Joseph Couston
12	689 Washington Ave. Non-payment Documents
13	Lease between ED and Darlene Dorsett
14	Rider to Commercial/ Store lease between ED and Lunetta LLC
15	Lease between ED and Eric Harvey and Tanya Ann Seymour
16	Assignment and Assumption of lease between ED and Six Brothers Deli
17	Lease release between ED and Hole in the Wall Grocery
18	Commitment for Title Insurance- Royal Abstract
19	Emails between Jonathan Cohen and FDW re: access to the property
20	Emails between Jonathan Cohen and FDW re: lack of communication
21	Emails from Jonathan Cohen requesting that a portion of the escrowed funds be released pre-closing
22	Unsigned tenant estoppel letter to Agatha
23	Letter to Seymour Hurwitz enclosing proposed commitment from Intervest National Bank
24	Loan commitment letter from Intervest National Bank
25	Email from Jonathan Cohen to FDW re: estoppel certificate to be signed by Agatha Baptiste
26	Agatha Baptiste 5 day notice to cure. Total amount due $273,647
27	Email from Jonathan Cohen to FDW re: Attaching draft tenant estoppel letters
28	Email from Jonathan Cohen to FDW
29	Letter from FDW to Seymour Hurwitz setting August 11, 2014 closing date
30	Loan Commitment letter from Tryon Capital
31	Letter from Mark Abrams to ED and FDW re: time is of the essence
32	First amendment to the contract of sale between ED and Plaintiff
33	Summons and Complaint
34	Verified Answer, Affirmative Defenses and Counterclaims
35	Amended Complaint
36	Affadavit of ED in opposition to motion for a default judgment
37	Amended verified answer, affirmative defenses
38	Second amended complaint

39	Second amended answer, affirmative Defenses
40	Plaintiff's First Notice for Discovery and Inspection
41	Response to Plaintiff's first notice for discovery and inspection
42	Supplemental response to document request
43	Second supplemental response to Plaintiff's first notice of discovery and inspection
44	Lease between ED and Jasmin 22 Corp.
45	Plaintiff's second notice for discovery and inspection
46	Defendants' response to Plaintiff's Second notice for discovery and inspection
50	Affadavit of Jason Silverstein in support of summary judgment motion
51	Affadavit of Morris Betesh
52	Affadavit of Morris Betesh and FDW in opposition to summary judgment motion

Defendant presented the following exhibits:

Exhibit	Description
1	Eugene Dunning Deposition
2	Fred Way III deposition
3	Jason Silverstein Deposition
4	Jonathan Cohen Deposition

TESTIMONY

Plaintiff's contentions

Plaintiff contends that the parties entered into a written contract on May 22, 2014, whereby Plaintiff would purchase from Dunning, the real property and improvements located at 671-689 Washington Avenue, Brooklyn, NY, 11238. Plaintiff claims that the parties agreed on a sale price of $5.5 million based on the information provided by Dunning regarding the calculated price per square foot that each tenant was paying according to the rent roll. The parties agreed to modify the contract to increase the amount that Dunning would have to pay to cure any violations on the property and to increase the amount that Dunning would have to spend to cure any title defects.

Plaintiff claims that it rendered a down payment to the seller for $200,000 to be held in escrow in accordance with the terms of the Contract and the applicable laws and that Way was and is the escrow agent responsible for holding said down payment. However, Plaintiff alleges that Way breached his fiduciary duty by releasing the down payment to Defendant in violation of section 2.05 of the Contract.

Plaintiff alleges that in order for the closing to have occurred, Dunning was required to fulfill the "Seller's Closing Obligations" set forth in Section 10 of the Contract. One of the conditions

was to provide fully executed tenant estoppel certificates for all commercial tenants in a form acceptable to Plaintiff's attorney. Plaintiff claims that Dunning breached this specific condition by failing to provide a tenant estoppel certificate from a commercial tenant named Agatha Baptiste.

In addition to the alleged breach of the seller's closing obligations, Plaintiff claims that Dunning made several material misrepresentations regarding the rent roll as it related to three of the eight commercial tenants on the premises. Specifically, Plaintiff claims that Dunning represented that Agatha Baptiste was current on her rent with no arrears when in fact she owed $273,647 as of July 10, 2014 and was actively litigating this issue with Dunning. Plaintiff also claims that Dunning represented that Dympna C. Goba was current with her rent when in fact she owed Dunning $89,432.91 in arrears as of July 10, 2014. Plaintiff further claims that Dunning represented that Darlene Dorsett was current with her rent when in fact she owed $2,800 as of June 1, 2014 and continued to default on her rent obligations.

Plaintiff contends that it obtained a mortgage commitment for $3,425,000 from Intervest National Bank based on the information provided in the rent roll and contract, however, that commitment was later lost after Dunning's material misrepresentations were discovered. After losing the Intervest National Bank commitment, Plaintiff acquired Tryon Capital as a financing source for $4,250,000 and received a letter of interest. Plaintiff later paid a $15,000 application deposit to Tryon Capital and claims that it had investors available to fund the remaining portion of the purchase price. Plaintiff claimed to have negotiated an amendment to the purchase price after learning of Dunning's alleged misrepresentations, however, the proposal was rejected, the tenant estoppel certificates were never produced, and an actual closing date was never set. Plaintiff, seeks an abatement of $700,000 on the grounds that the misrepresentation in the rent roll should not be subject to the $50,000 cap agreed upon because this misrepresentation is not classified as a title defect.

Defendants' contentions

Defendants contend that Plaintiff was not ready, willing, and able to perform its contractual obligations because Plaintiff never secured the funds required to complete the transaction and there was never a closing date set to complete the transaction. Defendants also claim that the language of the contract is clear regarding any abatement of the contracted price and that the maximum expense allowed under the contract is $50,000. Moreover, Defendants contend that the provision in the contract limiting seller's expense to cure at $50,000 is not solely limited to cure defects in title, as evidenced by the word "etc." contained therein. Finally, Defendants contend that they informed Plaintiff of the changes in the rent roll and that Plaintiff anticipatorily repudiated the contract by refusing to close on the original contract without a reduction in the purchase price beyond the agreed upon $50,000.

FINDINGS OF FACT

The court has had a full opportunity to consider the evidence presented with respect to the issues in this proceeding, including the testimony offered and the exhibits received. The court, over three days of trial, had an opportunity to observe the demeanor of the parties and their witnesses during their testimony and has made determinations on the issue of credibility with respect to the parties and evidence. The court now makes the following findings of fact.

On May 22, 2014, Plaintiff and Dunning entered into a contract of sale (hereinafter "the Contract") whereby Plaintiff agreed to purchase the real property and improvements located at 671-689 Washington Avenue, Brooklyn, NY, 11238 (hereinafter "Premises") from Dunning. The Contract provided that the closing would be set for June 24, 2014, however, the parties did not complete the closing on June 24, 2014 and never set a subsequent closing date.

Although the Contract did not state that time was of the essence, Defendants sent a letter dated July 28, 2014 (hereinafter "the Letter"), which purported to designate August 11, 2014 as the time-is-of-the-essence closing date. Plaintiff, however, contends that the Letter is not a valid

and enforceable attempt to set a time-is-of-the-essence closing date and Defendants conceded the same.

The parties agreed to modify several provisions in the contract to ensure that the remedies were appropriate in the event of a breach of the contract. Specifically, schedule D of the contract states in relevant part that the "maximum amount which seller must spend to cure violations, **etc.** (emphasis added) (§7.02): $10,000" and the "maximum expense of seller to cure title defects, **etc.** (emphasis added) (§13.02): $50,000". Furthermore, paragraph 13.02 further outlines the remedies available to Plaintiff in the event that seller is unable to convey title in accordance with the provisions of the contract. Paragraph 13.02 states as follows:

> If Seller shall be unable to convey title to the Premises at the Closing in accordance with the provisions of this contract or if Purchaser shall have any other grounds under this contract for refusing to consummate the purchase provided for herein, Purchaser, nevertheless, may elect to accept such title as Seller may be able to convey with a credit against the monies payable at the Closing equal to the reasonably estimated cost to cure the same (up to the Maximum Expense described below), but without any other credit or liability on the part of the Seller. If Purchaser shall not so elect, Purchaser may terminate this contract and the sole liability of Seller shall be to refund the Down payment to Purchaser and to reimburse the Purchaser for the net cost of title examination, but not to exceed the net amount charged by Purchaser's title company therefor without issuance of a policy, and the net cost of updating the existing survey of the Premises or the net cost of a new survey of the Premises if there was no existing survey or the existing survey was not capable of being updated and a new survey was required by Purchaser's Institutional Lender. Upon such refund and reimbursement, this contract shall be null and void and the parties hereto shall be relieved of all further obligations and liability other than that arising under section 14. Seller shall not be required to bring any action or proceeding to incur any expense in excess of the Maximum Expense specified in Schedule D (or if none is so specified, the Maximum Expense shall be one half of one percent of the Purchase Price) to cure any title defect or to enable Seller otherwise to comply with the provisions of this contract, but the foregoing shall not permit Seller to refuse to pay off at the Closing, to the extent of the monies payable at the Closing, mortgages on the Premises, other than Existing Mortgages, of which Seller has actual knowledge.

In addition to the expressed language of the contract, section R-15 of the contract states that "all representations, understandings and agreements had between the parties with respect to the subject matter of this agreement are merged in this agreement which alone fully and completely expresses their agreement."

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DISCUSSION

It is a well-established principle that "written agreements are construed in accordance with the parties' intent and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing'" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]). "As such, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*Id.*). An unambiguous contract provision may qualify as documentary evidence under CPLR 3211(a)(1) (*413 Throop LLC. v Triumph, Church of the New Age*, 153 AD3d 1306, 1307 [2d Dept 2017]). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). This rule imparts a stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses, infirmity of memory [and] the fear that the jury will improperly evaluate the extrinsic evidence" (*Id.* citing *Fisch, New York Evidence '42*, at 22 [2d ed]).

Typically, "a contract is not breached until the time set for performance has expired" (*Palmetto Partners, L.P. v AJW Qualified Partners*, LLC, 83 AD3d 804, 806 [2d Dept 2011]). To prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff purchaser must establish that it substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the vendor was able to convey the property, and that there was no adequate remedy at law (*1107 Putnam, LLC v Beulah Church of God in Christ Jesus of the Apostolic Faith, Inc.*, 152 AD3d 474, 475 [2d Dept 2017]). Before specific performance of a contract for the sale of real property may be granted, a purchaser must demonstrate that it was ready, willing, and able to perform on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter (*Nuzzi Family Ltd. Liab. Co. v Nature Conservancy, Inc.*, 304 AD2d 631, 632 [2d Dept 2003]). However, when a purchaser submits no documentation or other proof to substantiate that

it had the funds necessary to purchase the property, it cannot prove, as a matter of law, that it was ready, willing, and able to close (*Fridman v Kucher*, 34 AD3d 726, 728 [2d Dept 2006]).

In the present matter, the court finds that the parties agreed to waive their original closing for June 24, 2014, however, the parties failed to establish a new closing date whereby performance would be due. Furthermore, the court finds that Plaintiff is not entitled to specific performance due to its inability to show that it was ready, willing and able to purchase the property on the closing date set forth in the contract or a reasonable time thereafter. The court reasons similar to the court in *Internet Homes, Inc. v Vitulli,* 8 AD3d 438, 439 [2d Dept 2004], in finding that "even assuming that the defendants improperly cancelled the contract, the plaintiff still bore the burden to show that it had the financial capacity to purchase the property. The plaintiff's unsubstantiated assertions that a line of credit could be secured or that a closely-related corporation would supply the funds and the conclusory allegation that it was ready, willing, and able to perform were insufficient to satisfy its burden."[1] It should also be noted that Plaintiff never obtained a loan commitment for the remaining amount required to purchase the property. Moreover, the language in paragraph 13.02 of the Contract clearly outlines the remedies available in the event that Dunning did not convey title in accordance with the terms of the contract. It should also be noted that the parties specifically agreed to modify the maximum amount of money to be deducted to "cure title defects, etc.", therefore, the court holds that the word "etc." encompasses other defects in conveying the property in accordance with the terms of the Contract other than possible title defects. Therefore Plaintiff is precluded from being awarded a $700,000 abatement in the purchase price.

This court also finds that Dunning's allegation that he informed Plaintiff of the rental arrears are without merit because the rent roll explicitly contradicts any testimony that Plaintiff should

[1] *Internet Homes, Inc. v Vitulli*, 8 AD3d 438, 439 [2d Dept 2004]

have known that several tenants were in arrears. Moreover, section R-15 of the contract explicitly states that the parties' written agreement fully and completely expressed their agreement. With regards to Plaintiff's claims against Way, the court finds that Way properly released Plaintiff's down payment to Defendants' attorney, Mr. Krisel, after being suspended.

The court further finds that the doctrine of unjust enrichment must be addressed given the facts of this case. The essential inquiry in any action for unjust enrichment or restitution is whether "it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distributing Corp. v. State*, 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388, 285 N.E.2d 695 [1972]). The plaintiff "must show that (1) the [defendant] was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered" (*Ehrlich v Froehlich*, 19 Misc 3d 1130(A) [Sup Ct 2008]). As such, the court finds that Plaintiff is entitled to the return of its down payment. It would be against equity and good conscience to permit Defendants to retain such monies due to the fact that Dunning made material misrepresentations in the Contract.

Accordingly, it is hereby ORDERED that Plaintiff is entitled to a refund of all unreimbursed expenses it expended in pursuing this contract including, but not limited to, Plaintiff's down payment, Plaintiff's application deposit (if it cannot be refunded), any funds paid to survey the land, and any other costs which Plaintiff can show it expended in pursuing the contract excluding any fees and costs associated with this litigation. Any other relief sought is hereby DENIED.

This constitutes the decision of the court. Settle judgment accordingly.

ENTER:

HON. SYLVIA G. ASH, J.S.C.