

Ahsanuddin v Addo

2018 NY Slip Op 34599(U)

September 7, 2018

Supreme Court, Bronx County

Docket Number: Index No. 30571/2017E

Judge: Donald A. Miles

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PART 08

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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AHSANUDDIN, MOHAMMED

Index No. **0030571/2017**

-against-

Hon. **DONALD MILES,**

ADDO, JOSEPH
-----X

Justice Supreme Court

The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**
Noticed on **January 11 2018** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

**Motion is decided in accordance
with memorandum decision filed
herewith**

Dated: **SEP 07 2018**

Hon.
DONALD MILES, J.S.C.



Supreme Court of the State Of New York
County of Bronx

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MOHAMMED AHSANUDDIN,
Plaintiff,

-against-

JOSEPH ADDO and VERONICA ADDO,
Defendants.,
MORRIS FATEHA,
Stakeholder.

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Index No: 30571/2017E

Decision/Order

Hon. Donald A. Miles
Justice, Supreme Court

Defendant moves, herein, for an order dismissing plaintiff's complaint and vacating Lis Pendens Notice, pursuant to *CPLR* § 3211(a)(1) and (a)(7), in addition to awarding judgment in favor of defendant and against plaintiff and awarding costs and sanctions against plaintiff and his attorney.

In support of the motion, defendant maintains that documentary evidence and relevant facts demonstrate plaintiff's failure to state a cause of action upon which relief can be granted. It further maintains that plaintiff's filing of the *Lis Pendens Notice* was frivolous and that it is entitled to judgment, because plaintiff forfeited down payment due to said party's breach of purchase contract.

For reasons set forth below, defendant's motion is denied in all respects:

In the case at bar, defendant maintains that plaintiff failed to state a cause of action upon which relief may be granted, given the submission and existence of documentary evidence and relevant facts in opposition thereto.

Here, defendant, who filed for Chapter 13 protections under the United States Bankruptcy Code, asserts, *inter alia*, that its' obligation to perform its' duty under the sales contract was thwarted, as a result of impossibility of performance thereunder. This impossibility was predicated upon the strict time period set for notice specified by the US Bankruptcy Court (*11 U.S.C* § 363(b) and (1)) and the time limit set for closing by the defendant's bank. Approval for the short sale was

received by defendant on October 20, 2017 and the closing was required to take place on or before October 30 2017. The Bankruptcy Court, required that a ten (10) day notice be given to all the creditors of the defendant/debtor prior to any sale.

At this juncture, the Court lacks knowledge as to when the defendant/debtor commenced this Chapter 13 proceeding. However, defendant's exhibit B contains a letter, dated October 30, 2017, addressed to Hon. Chief Judge Cecelia G. Morris, United States Bankruptcy Court for the Southern District of New York, requesting a dismissal of defendants/debtors Chapter 13 case pursuant to *11U.S.C. § 1307*©. Hence, defendants'/debtors' case was dismissed on October 30, 2017. Upon information and belief, *11U.S.C. § 363* is usually employed during a Bankruptcy Proceeding, especially in a Chapter 11 case, in order to enable the Bankruptcy Court to supervise and retain jurisdiction over the case with respect to the sale or transfer of property of debtor's estate. Any attempt to sell or a subsequent sale of the subject property after October 30, 2017 was not subject to the aforementioned section of the Bankruptcy Code. Thus, defendant's reliance on an impossibility defense, based on the Bankruptcy Court restrictions, is misplaced.

Un-refuted documentation appears in defendant's motion papers(exhibit G), stating that said party was negotiating the sale of the subject real property, while in Bankruptcy, but not listing said property as an asset of debtor's estate. Based on the aforementioned revelation, the original title company declined to insure title until 14 days after the Bankruptcy Court dismissal of defendant/ debtor's Chapter 13 case.

In relevant part, *U.S.C. §541* provides that "the commencement of a case under sections 301, 302, or 303 of this title creates an estate in ... all legal or equitable interests of the debtor in property as of the commencement of the case". Defendant/debtor's case was commenced under sections 301 and 302. Moreover, pursuant to *11 U.S.C. §1306(a)* "property of the estate includes, in addition to the property specified in *§541* of this title... (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under Chapter 7, 11, or 12 of this title, whichever occurs first.

Based on the above-mentioned statutes, defendant/debtor was required to list(disclose) the subject real property as an asset in the Bankruptcy Petition it filed with the United States Bankruptcy Court. Further, the Chapter 13 Trustee must to be made privy, and grant permission, to any such short sale transaction. *11 USC §1302(b) and §1302*©; "A chapter 13 trustee acts as an agent of the debtor in the

role of disbursing agency... and... of financial reporter to the court.”, *In re Padilla*, 379 B.R. 643, 658 (Bankr. S.D. Tex.2007); *In re Laskowski*, 384 B.R. 518, 531 (Bankr. N.D. Ind. 2008). Whether or not defendant properly listed this asset calls into question the use of clean hands with respect to the entire transaction.

In the case at bar, defendant maintains that it cannot be held responsible for the promises or actions of it’s broker. Once again defendant’s reliance on this assertion may be faulty. “On October 30, 2017 at 7:46 pm, co-defendant, Fatcha, Esq., circulated an email reassuring plaintiff’s counsel that the seller was not cancelling the sale.”(See Soleymanzadeh aff, par 23, exh “G”). Further, on “October 31, 2017 at 1:26pm, plaintiff’s counsel informed co-defendant Fateha, Esq.,and the title company that plaintiff could close the following morning...”(See Soleymanzadeh aff, par 26, exh “H”). Additionally, “On October 31, 2017 at 1:41 pm , co-defendant, Fateha, Esq., circulated an email to the title company confirming and requesting that the closing take place on November 1, 2017 ...”(See Soleymanzadeh aff, par 27, exh “H”). “On November 1, 2017 at 12:46 pm, plaintiff’s counsel contacted co-defendant, Fateha, Esq., to find out the status on obtaining the updated payoff. And again, co-defendant emailed plaintiff’s counsel back confirming the transaction and stating that he was waiting on the extension from the bank.”(See Soleymanzadeh aff, par 30, exh “H”). “Apparently, on November 6, 2017, the broker Nassim Kassib, contacted the title company and informed Terry that they were still waiting on the updated payoff.” (See Soleymanzadeh aff, par 31, exh “J”). All of the above communications are substantiated by email exhibits contained in plaintiff’s papers.

Consistent with the above communications, a reasonable inference might be drawn that the subject closing could not occur prior to November 1, 2017; yet, the subject real property was purchased on October 31, 2017 by a third entity, who was not a party to the original purchase contract. Hence, it appears that plaintiff’s counsel, unaware of such transaction, may have reasonably relied on representations made by co-defendant, Fateha and the broker, Nassim Kassib. Co-defendant, Fatcha, Esq., was, and remains, counsel to, and agent for, defendant. Hence, his actions and promises are legally binding on defendant. Additionally, the broker appears to have apparent authority to, perhaps, bind the defendant. It appears that plaintiff’s reliance on promises made by co-defendant and the broker could be construed as detrimental.

The Court is granted broad discretion to allow plaintiff’s Complaint to be amended. *CPLR 3025(b)*. This provision has been construed to give leave to amend or supplement. *Murray v. City of New York*, 401 NYS2d 773, 774(1977).:

Fisher v. Carter Indus., Inc., 512 NYS2d 408 (2nd Dept. 1987).

In the case at bar, plaintiff has set forth a claim for breach of contract. Moreover, the documentary evidence and relevant facts appear to bode in favor of plaintiff, possibly establishing a cause of action, at this juncture. Moreover, any enforcement of the contract terms against plaintiff appears premature at this time since good faith, clean hands and breach of contract by either party remain in question.

Accordingly, defendant's motion is denied in all respects and it is hereby **ORDERED**, that defendant file and serve an answer within thirty days from the date of this order; and it is further

ORDERED, that defendant serve a copy of this order on plaintiff.

This constitutes the Decision and Order of the Court.

Dated: Bronx, New York
September 7, 2018



Hon. Donald A. Miles
Justice, Supreme Court