

Duffy v Leteri
2018 NY Slip Op 34607(U)
August 3, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 602741-2017
Judge: William G. Ford
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SHORT FORM ORDER**INDEX NO.: 602741-2017****SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY****PRESENT:****PUBLISH****HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT****Motion Date: Conference held on 3/29/18
Motion Seq #: 001 - MD****GRACE DUFFY as TRUSTEE OF THE
MARGARET ACERRA IRREVOCABLE
TRUST AND MARGARET GESUALE a/k/a
MARGARET ACERRA****Plaintiff,****-against-****ANTHONY LETERI****Defendant.****PLAINTIFF'S ATTORNEY:
SOMER HELLER & CORWIN LLP
By: Melissa Corwin, Esq.
2171 Jericho Turnpike, Suite 350
Commack, NY 11725****DEFENDANT'S ATTORNEY:
TERRENCE M. QUINN ESQ.
275 Lake Avenue
St. James, NY 11780**

Read on this Motion brought by Order to Show Cause seeking a Preliminary Injunction pursuant to CPLR §6301, 6311, 6313; Affirmation in support of Melissa Corwin Esq. Affidavit in Opposition of Anthony Leteri, Affirmation in Opposition of Terrence M. Quinn Esq., Reply Memorandum of Law of Melissa Corwin Esq., Reply Affidavit of Margaret Acerra

ORDERED that the Motion is determined as outlined below.**FACTUAL BACKGROUND**

Plaintiff Grace Duffy, as Trustee of the Margaret Acerra Irrevocable Trust and Margaret Gesuale a/k/a Margaret Acerra (hereinafter referred to as "plaintiff") brought this action via Order to Show Cause against defendant Anthony Leteri (hereinafter referred to as "defendant").

On or about June 15, 2011, John Gesuale, as sole Trustee of the Trust known as Margaret Acerra Irrevocable Trust created March 8, 2011, and Margaret Gesuale a/k/a Margaret Acerra by John Gesuale, as Power of Attorney, entered into a Contract of Sale with defendant Leteri, where defendant was to purchase property located at One Lawrence Road, Kings Park. On January 15, 2013, John Gesuale was removed as Trustee of the Trust and Rosemarie Gilardi was named Trustee in his place.

On November 6, 2015, Grace Duffy was named as Trustee in place of Rosemarie Gilardi. John Gesuale passed away on or about November 14, 2015, rendering any Power of Attorney over Margaret Gesuale null and void.

The parties to the Contract of Sale agreed to a purchase price of \$390,000 and a \$15,000 down payment. The Contract of Sale was contingent on defendant obtaining from the Town of Smithtown, at his own cost and expense, a zoning change from residential (R-21) to Light Industrial (LI). The parties also agreed that the closing would take place 30 days after defendant obtained building permits from the Town of Smithtown.

Approximately 25 years prior, Defendant purchased the adjoining property located at 499 Lawrence Road, Kings Park. It took about three years for the Town of Smithtown to approve a zoning change from residential zoning (R-21) to Light Industry (LI) for that piece of land. Before signing the Contract of Sale, Defendant spoke with Mrs. Acerra regarding the property to explain that the entire process would be lengthy. Also, defendant's attorney made it clear to plaintiff's attorney that it would take time to acquire the permits based on past experience with obtaining permits from the Town of Smithtown.

In June 2011, Defendant went to the Town of Smithtown and paid the fees required of the application and applied for the zoning change. Defendant appeared in front of the Town of Smithtown Planning Board in November 2011 and the Smithtown Town Board in April 2013, both of which were opposed to the application. Defendant believes that John Gesuale attended the Town Board meeting, making him aware of the difficulty in obtaining the permits.

On or about April 23, 2014, plaintiffs, through their counsel, attempted to return defendant's down payment on the property, asserting that there is no proof defendant filed any applications and that there had not been any contact for about three years. On June 25, 2014, defendant, through his counsel, alleged a right to proceed under the Contract of Sale. There was no further communication between defendant and plaintiff from June 25, 2014 through April 17, 2015. On April 17, 2015, plaintiff sent a Time of the Essence letter to defendant setting a closing date of April 27, 2015, which defendant objected to on April 22, 2015, asking for a "reasonable adjournment." On April 24, 2015, plaintiff made a new Time of the Essence closing date of May 18, 2015, which defendant objected to on May 11, 2015, asserting that an application to change zone was previously filed by defendant in July 2011 and that additional time was needed to determine the status of the application. Defendant's counsel sent a copy of the application for a zoning change on May 27, 2015. On December 29, 2016, defendant claimed that he was "ready, willing and able" to purchase the property.

On January 17, 2017, defendant advised plaintiff that he was unable to obtain a zoning change or building permit from the Town of Smithtown and set a Time of the Essence closing for February 15, 2017. On January 23, 2017, plaintiff, in writing, rejected defendant's closing date of February 15, 2017, returned the down payment, and proclaimed that the Contract of Sale was null and void. Subsequently, defendant rejected the termination of the Contract of Sale on January 26, 2017, reasserting the closing date of February 15, 2017.

PROCEDURAL HISTORY

Plaintiff commenced the instant action via Order to Show Cause seeking injunctive relief, with the motion being fully submitted on September 5, 2017. On February 10, 2017, Plaintiff brought the instant declaratory action seeking a declaratory judgment by filing a Summons and Complaint dated February 9, 2017. On or about March 20, 2017, Defendant appeared by service of an Answer with Counterclaims. Plaintiff served a Verified Reply to Counterclaims and Affirmative Defenses on March 17, 2017. The Attorney Affirmation in Support of plaintiff's motion for a preliminary injunction and restraining order and the Affidavit in Support by Grace Duffy were filed on February 9, 2017. Plaintiff's attorney submitted an Affirmation of Notice presenting its Order to Show Cause to defendant on February 10, 2017.

On February 14, 2017, a Temporary Restraining Order was issued by Supreme Court (Hon. Daniel Martin AJSC). By Stipulation between the parties dated September 27, 2017, the Temporary Restraining Order was extended through the determination of plaintiff's Order to Show Cause.

On October 20, 2017, plaintiff Grace Duffy was issued formal Letters of Administration by the Circuit Court of the County of Martin, State of Florida, Probate Division. Defendant submitted an Affidavit in Opposition on March 22, 2017 and an Attorney Affirmation in Opposition to Plaintiff's Motion for a Temporary Restraining Order, a Preliminary Injunction, and a Declaratory Judgment seeking to terminate a Real Property Contract of Sale on March 22, 2017. Plaintiff Margaret Acerra submitted a Reply Affidavit on April 6, 2017. In support of Plaintiffs' Order to Show Cause, a Reply Memorandum was submitted on April 12, 2017.

On November 13, 2017, plaintiff Grace Duffy, as Trustee of the Margaret Acerra Irrevocable Trust and Margaret Gesuale a/k/a Margaret Acerra, by Administrator, Grace Duffy, filed a Notice of Motion seeking that Grace Duffy be substituted in place of co-plaintiff Margaret Acerra, as plaintiff Margaret Acerra died on August 19, 2017. On April 3, 2018, this Court granted the substitution of Grace Duffy in place of co-plaintiff, Margaret Gesuale a/k/a Margaret Acerra.

DISCUSSION

The issue is whether plaintiff's application for a preliminary injunction staying the Time of the Essence Closing set by defendant should be granted. Pursuant to CPLR § 6301, plaintiff may obtain a preliminary injunction if defendant threatens or is doing "an act in violation of the plaintiff's rights respecting the subject of the action" and such harm could "render the judgment ineffectual." A preliminary injunction may also be granted "in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." CPLR § 6301.

Accordingly, in order to obtain a preliminary injunction, plaintiff has to show the likelihood of success on the merits, irreparable harm without the preliminary injunction, and a balancing of the equities in plaintiff's favor; *see Aetna Ins. Co. v Capasso*, 75 NY 2d 860, 862 [1990]. Thus, "A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers" *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, 335 [2d Dept 2004]).

In opposition to plaintiff's Order to Show Cause seeking a preliminary injunction staying the Time of the Essence Closing, defendant asserts that plaintiff has not presented viable evidence to obtain a preliminary injunction. Primarily, defendant argues that plaintiff failed to demonstrate a likelihood of success on the merits. *Yedlin v Lieberman*, 102 AD3d 769, 769 [2d Dept 2013]. Namely, the parties have a valid contract contingent on defendant obtaining a zoning change and subsequent building permits. After waiving that contingency, defendant expressed to plaintiff that he was ready, willing, and able to close. After plaintiff ignored these requests, defendant set a time of the essence closing, which resulted in plaintiff's cancellation of the contract. However, based on the factual evidence, plaintiff's theory that there is no obligation to close title without the contingency is insufficient to prevail on the merits. In fact, plaintiff's termination of the contract after defendant expressed his willingness to close demonstrates that the balance of equities are not in plaintiff's favor see *U.S. Re Companies, Inc. v. Scheerer*, 41 AD3d 152, 154 [1st Dept 2007]. Lastly, defendant argues that plaintiff failed to show that any irreparable harm would be suffered without the preliminary injunction *Rowland v Dushin*, 82 AD3d 738, 739 [2d Dept, 2011].

Specifically, plaintiff only alleges that it will be in default by defendant on the date set for closing, however this can be avoided if plaintiff appears and closes. Thus, plaintiff failed to satisfy the requirements to be entitled to a preliminary injunction.

Further, "A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (*Klewin Bldg. Co., Inc. v Heritage Plumbing and Heating, Inc.*, 42 AD3d 559 [2d Dept 2007]). Generally, when a specific occurrence is expressly agreed by the parties to be "a condition precedent to the creation or enforceability of a right or obligation," and the language of the contract is unambiguous, the only issue the court has to determine is whether that condition precedent has been fulfilled *David Fanarof, Inc. v Dember Const. Corp.*, 195 AD2d 346, 348 [1st Dept 1993]. Applied here, the Contract of Sale between the parties specified that there was a condition precedent, a zoning change, and subsequent procurement of building permits for the property. Thus, plaintiff's attempt to terminate the contract was unlawful since defendant's obligation to close title to the property did not arise until the condition precedent of procuring the zoning change was performed.

Additionally, when the condition precedent is for the sole benefit of the purchaser of the property, the purchaser can waive the condition and compel specific performance even if the condition is not fulfilled. *Lieberman Properties, Inc. v Braunstein*, 134 AD2d 55, 60 [2d Dept 1987]. Unlike in *Lieberman*, the parties in this case did not set outside closing dates in the contract establishing that either party could terminate if the condition precedent was not met within those dates. Therefore, since the condition precedent was for the sole benefit of defendant, he appropriately waived the condition precedent and demonstrated his willingness to close on the property.

Moreover, plaintiff's cancellation of the contract was unlawful. Plaintiff's termination of the Contract of Sale on January 23, 2017 was untimely since the cancellation was made after defendant notified plaintiff on December 29, 2016 that he sought to close title and that he was "ready, willing and able" to purchase the property (*Yitzhaki v Sztaberek*, 38 AD3d 535, 536 [2d Dept 2007]). The Court of Appeals has held that in a contract "where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language" *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002]. Here, the language in the Contract of Sale was clear and unambiguous as both parties agreed that the property would close 30 days after defendant, at his own cost and expense, obtained

the building permits from the Town of Smithtown.

Arguably, plaintiff might have demonstrated entitlement to a preliminary injunction by showing a probability of success on the merits. See *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]. Namely, defendant improperly waived the condition precedent. The Second Department has held that "where the relevant circumstances reveal that the condition has been inserted for the benefit of both parties to the agreement, either party may validly cancel the contract upon failure of the condition, and the condition may be waived only by the mutual assent of both parties" (*Oak Bee Corp v. N.E. Blankman & Co., Inc.*, 154 AD2d 3, 7 [2d Dept 1990]). Here, both defendant and plaintiff agreed for the property to be rezoned solely for light industrial use in order to protect plaintiff from direct competition of residential improvement. Thus, plaintiff argues that defendant could not unilaterally waive the condition precedent.

Further, plaintiff argues that the condition precedent was not satisfied in a reasonable period of time. When a contract of sale does not set a closing date, the courts interpret the closing to be held within a reasonable time *Lieberman Properties, Inc. v Braunstein*, 134 AD2d 55, 59 [2d Dept 1987] (citing *Cohen v. Kranz*, 12 NY2d 242 [1963])). The Second Department previously held that the seller properly terminated the contract when the purchaser failed to obtain subdivision approval within 2 1/2 years (*B.S.P. Dev. Corp. v. Orphan Asylum Soc. Of City of Brooklyn*, 165 AD2d 850, 851 [2d Dept 1990]). Thus, the plaintiff argues that the six years to satisfy the condition precedent in this case should be considered unreasonable.

Nevertheless, "all contracts imply a covenant of good faith and fair dealing in the course of performance" *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). Defendant maintains that plaintiff violated that inherent duty of fair dealing and good faith when attempting to terminate the contract. Previously, defendant advised plaintiff that it would be a lengthy process to obtain the permits. However, when defendant expressed to plaintiff that he was still ready, willing, and able to close, without the permits, plaintiff responded by cancelling the contract, demonstrating bad faith.

CONCLUSION

For all the foregoing reasons, plaintiff's Order to Show Cause is denied. Pursuant to CPLR § 6301, plaintiff has not shown the likelihood of success on the merits, irreparable harm without the preliminary injunction, and a balancing of the equities in its favor. The Contract of Sale contained a condition precedent that defendant obtain a zoning change and subsequent building permits. As this was for the sole benefit of defendant, he properly waived the condition precedent. Further, plaintiff acted in bad faith and unfair dealing when terminating the contract after defendant expressed that he was ready, willing, and able to buy the property. Accordingly it is

ORDERED that the Temporary Restraining Order is vacated, the Preliminary Injunction is **denied**, and the Declaratory Judgment is likewise **denied**; and it is further

ORDERED that a copy of this decision with notice of entry be served on counsel for the plaintiff forthwith.

The foregoing constitutes the decision and order of this Court.

Dated: August 3, 2018
Riverhead, New York



HON. WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION**

_____ **NON-FINAL DISPOSITION**