Ambroise v Palmana Realty Corp.
2019 NY Slip Op 30172(U)
January 7, 2019
Supreme Court, Kings County
Docket Number: 518775/18
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 11

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PAUL AMBROISE,

Plaintiff, Decision and order

- against - Index No. 518775/18

mS #2 & 3

PALMANA REALTY CORP.,

Defendant, January 7, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has cross-moved seeking to amend the complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On April 19, 2018 the plaintiff and defendant entered into a contract whereby the plaintiff agreed to buy property located at 3320 Atlantic Avenue in Kings County. The location was an abandoned former gas station. The contract provided a closing date and specifically stated that "time being of the essence" (see, Agreement of Sale, ¶3). Indeed, on May 29, 2018 the defendant sent the plaintiff a closing notice scheduling the closing for July 31, 2018. On July 30, 2018 the plaintiff rejected the closing notice and the closing date. The defendant rejected such rejection letter and on July 31, 2018 the plaintiff did not appear at the closing. The plaintiff initiated the instant lawsuit alleging the defendant presented false documents

regarding the environmental status of the property and that the defendant breached the contract. The complaint further alleges the plaintiff maintains an equitable lien upon the premises. The defendant has moved seeking to dismiss the complaint on various grounds. The plaintiff has moved seeking to amend the complaint further elaborating upon the causes of action enumerated.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The plaintiff asserts the defendant provided misleading information, specifically environmental reports concerning the

status of the property. The plaintiff has introduced an environmental report dated September 2008 prepared by Merritt Environmental Consulting Corp. [hereinafter 'MECC']. The report's scope of work included essentially six items, a physical inspection of the property, an investigation of historical usage, a review of applicable federal and state environmental databases, a visual inspection for the presence of electrical transformers that may contain PCB's, a visual inspection of water supply, gas supply, garbage disposal practices and a visual inspection for petroleum storage tanks. This scope of work is contained in Section 2.2 of the report. The report concluded that two Recognized Environmental Conditions (RECs) were noted at the time of the inspection. The first concerned the eleventh underground storage tank and the second concerned two active underground hydraulic lifts in the repair shop area and an unaccounted for monitoring well (see, Phase I Environmental Site Assessment (ESA) dated September 2018, pages 45 and 46). The plaintiff states in his affidavit that "following the execution of the contract of sale, as part of the preparations for the closing, my title company required me to obtain a "Phase I report" of my own, with respect to the Subject Property. This report detailed serious environmental concerns, multiple oil tanks present on the Subject Property, and underground and soil contamination. This report showed not all environmental remediation had occurred" (see,

Affidavit of Paul Ambroise, ¶7). The court cannot evaluate whether the two RECs were indeed "detailed serious environmental concerns" as alleged, however, the existence of such a report does not mean the defendant committed fraud. It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). The report submitted by the defendant was prepared by an expert environmental consultant, J.C. Broderick & Associates, Inc. There has been no evidence the report was fraudulently procured. The only evidence suggesting any fraud consists of the report presented by MECC which allegedly presents differing conclusions. However, experts disagreeing about the environmental status of the property, if true, is not fraud. Moreover, even though the report prepared by MECC listed two RECs the RECs were restrained in their conclusions since admittedly they were not provided with all necessary information. Thus, concerning the underground storage tank REC, the report notes that "it is unknown if this is the tank is [sic] registered as

being empty of product and registered as "Closed in Place" (Tank No. 11) identified in MECC's records review. MECC has not been provided with any documentation regarding the "fuel oil UST" or "Closed in Place UST". This constitutes a Recognized Environmental Condition (REC)" (see, Phase I Environmental Site Assessment (ESA) dated September 2018, page 45). Concerning ths site observations again the report notes that "MECC has not been provided with any documentation regarding the lifts" and "MECC has not been provided with any documentation regarding the monitoring well observed" (see, Phase I Environmental Site Assessment (ESA) dated September 2018, page 46).

Thus, while there can be expert disagreement concerning the environmental status of the property such disagreement does not constitute fraud. The proposed amendment does not create any fraud since it merely expands upon the original claim. Therefore, the motion seeking to dismiss the third cause of action is granted and the motion to amend the third cause of action is denied.

Concerning the remaining causes of action, as the above analysis makes plain there are significant factual issues concerning the contract, whether any breaches occurred and whether the environmental issues, however they prevail, impact the obligations of the parties. Therefore, at this stage of the proceedings, without any discovery, it cannot be stated as a

matter of law the allegations of the complaint contain no merit. The defendant argues the existence of any such RECs is irrelevant since the contract provided for the property to be sold 'as is' rendering any RECs, should they exist, as something accepted by the buyer. However, the agreement also provides for the premises to be delivered in "broom clean condition" (see, Agreement of Sale, ¶5(a), 21©). The plaintiff has presented allegations there was a failure of defendant to deliver the premises in such condition. Thus, notwithstanding any inconsistency between provisions that demand broom clean conditions and 'as is' delivery, surely the plaintiff has presented viable allegations concerning the first two causes of action. The defendant further argues the time of the essence clause demands a dismissal of the lawsuit since the plaintiff breached that clause by failing to appear at the closing. However, in light of the above considerations that is an improper basis upon which to dismissal the lawsuit.

Lastly, considering the above analysis the motion seeking to amend the complaint concerning the first two causes of action is granted.

So ordered.

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DATED: January 7, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC