

Classon Ave. 1148 Corp. v Felder
2019 NY Slip Op 31989(U)
June 25, 2019
Supreme Court, Kings County
Docket Number: 508153/2015
Judge: Bernard J. Graham
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

CLASSON AVENUE 1148 CORP.,

Plaintiff(s),

-against-

CALVIN FELDER, KARL FELDER, FRANKIE
FELDER, JR., and LAURIE FELDER as heirs of
FRANKIE FELDER, deceased,

Defendant(s).

Index No.:508153/2015
Motion Calendar No.
Motion Sequence No.

DECISION / ORDER

Present:

Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: direct the defendants to quiet title and for an award of specific performance

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1-2 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits & cross-motion.....	_____ 3 _____
Replying Affidavits.....	_____ 4,5 _____
Exhibits.....	_____
Other:(memo).....	_____

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Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

The plaintiff, Classon Avenue 1148 Corp., ("1148 Corp.") has moved for an Order, pursuant to CPLR § 3212, to quiet title to the subject property known as 826 Putnam Avenue, Brooklyn, New York ("subject premises"); to award specific performance; as well as to dismiss defendants' counterclaim. The defendants oppose the relief sought in plaintiff's motion, contending that there is a triable issue of fact as to whether the parties had entered into a valid contract for the sale of the subject premises, as Frankie Felder, Sr., the owner thereof, died prior to the time that the contract was fully executed, and as a result, the proposed contract became null and void.

Background:

It is alleged that on or about May 2014, Frankie Felder, Sr., allegedly agreed to the sale of the subject property to the plaintiff. The plaintiffs have maintained that the parties thereafter entered into a valid contract of sale. The defendants contend that while portions of the contract of sale were executed, prior to the parties agreeing to an Occupancy Rider which was essential to the consummation of this transaction, Frankie Felder, Sr., passed away on August 9, 2012, resulting in any agreement becoming null and void. As a result, the defendants have refused to convey the subject premises to the plaintiff.

The within action was commenced on or about July 1, 2015, by the plaintiff, by the filing of a summons and complaint and a notice of pendency with the Clerk of the Court, who seeks to quiet title and for specific performance. On or about July 13, 2015, defendant Calvin Felder filed a pro-se hand written answer to the complaint. On July 16, 2015, Calvin Felder moved to dismiss the complaint alleging that the contract of sale should have been voided based upon the death of Frankie Felder, Sr.

On or about January 25, 2016, plaintiff moved to enter a default judgment as against defendants Karl Felder, Frankie Felder, Jr., and Laurie Felder, who failed to interpose an answer to the complaint nor did they seek additional time within which to respond.

On or about March 30, 2016, defendants Karl Felder, Frankie Felder, Jr., and Laurie Felder each cross-moved, pursuant to CPLR §§ 2004 and 3012, for leave to re-serve a late answer and to compel the plaintiff to accept the late answer.

By order of this Court dated April 4, 2016, defendant Calvin Felder's motion to dismiss the complaint was denied, as this Court found there are questions of fact as to whether a binding real estate contract exists. The plaintiff's motion for a default judgment as against defendants Karl Felder, Frankie Felder, Jr., and Laurie Felder was denied in light of the determination by this Court to afford these defendants an opportunity to serve and file an answer.

On or about April 21, 2016, Karl Felder, Frankie Felder, Jr., and Laurie Felder, served their answers which included counterclaims, seeking to void the contract, pursuant to RPL §265-

a. On or about May 2, 2016, plaintiff served a reply to the counterclaim.

On or about May 5, 2016, defendant Calvin Felder moved to amend his answer dated July 13, 2015, as well as to assert a counterclaim to void the contract of sale, pursuant to RPL § 265-a.

On or about June 7, 2016, plaintiff cross-moved to dismiss the counterclaim asserted by Karl Felder, Frankie Felder, Jr., and Laurie Felder, and opposed the motion by Calvin Felder to amend his answer.

The plaintiff and the defendants entered into a preliminary conference order dated October 27, 2016, whereby there were dates to complete discovery, and the dates for the parties to be deposed was scheduled.

On November 28, 2016, this Court issued an order in which the motion of Calvin Felder to amend his answer to assert a counterclaim was granted and plaintiff's motion to dismiss the counterclaim that was asserted by defendants Karl Felder, Frankie Felder, Jr., and Laurie Felder was denied.

On or about December 16, 2016, defendant Calvin Felder filed an amended answer which included a counterclaim, pursuant to RPL § 265a.

On or about August 18, 2017, plaintiff filed a Note of Issue.

Facts:

In May 2014, the plaintiff through its representative (a broker employed by the plaintiff), sent a mailing to homeowners in the neighborhood of the subject premises, offering to purchase properties. The representative then allegedly received a phone call from Calvin Felder, which resulted in the representative coming to the subject premises to inspect. Thereafter, it is alleged

that a sales price of \$725,000.00 was agreed upon by the representative and Frankie Felder, Sr., the owner of the subject premises.

On June 2, 2014, both Frankie Felder, Sr. and Calvin Felder appeared at one of plaintiff's offices, for the purposes of executing the contract of sale. It was at that office that the Felders met Laurie Bakhchi, Esq., for the first time.¹ Ms. Bakhchi was to represent the Felders in the sale of the subject premises. Ms. Bakhchi prepared the contract of sale in advance and allegedly reviewed the terms of the contract of sale with Frankie Felder, Sr., for approximately thirty minutes, before he executed that portion of the contract. It is further alleged that after observing the physical condition of Frankie Felder, Sr., Ms. Bakhchi, while at that office, prepared a Rider to the Contract of Sale. This proposed Occupancy Rider provided that Frankie Felder, Sr., his family as well as a tenant in possession had the option to remain in possession of the subject premises for a period of thirty days after closing with \$2,000 to be deducted from the sales price. It was further proposed that the sum of \$60,000.00 was to be deposited in the escrow account of seller's attorney, which sum was to secure the vacatur of the premises by the seller, his family and the tenant, with the sum of \$7,500 to be deducted from escrow for each month after the initial 30 days that the premises were not vacant.

Ms. Bakhchi forwarded the proposed Occupancy Rider to the attorney for the purchaser for approval but the terms specified in the Rider were rejected. Ms. Bakhchi asserted that approval by the purchasers of the Occupancy Rider was essential to the completion of the Contract of Sale and until there was consent, Ms. Bakhchi would not release the Contract of Sale nor did she execute the Escrow Rider or deposit the down payment.

Frankie Felder, Sr., died on August 9, 2014. Thereafter, there are allegations that the purchaser discussed alternative options with defendant Calvin Felder in September 2014 in an attempt to complete this deal, but in the absence of the appointment of an administrator for Calvin Felder, Sr., nothing materialized. In addition, it appears that a counter proposed

¹ Laurie Bakhchi was a real estate attorney who was recommended by plaintiff's representative.

Occupancy Rider was forwarded to Ms. Bakhchi by purchaser's counsel, but that did not occur until after the death of Frankie Felder, Sr.

Plaintiff's contentions:

In support of the motion to direct the defendants to convey the premises to the plaintiff, the plaintiff alleges that the Contract of Sale remains a valid and enforceable contract which the defendants have wrongfully repudiated. Pursuant to paragraph 15 of the Contract of Sale, the closing was to occur "about 30 days from the date of receipt of fully executed contracts by purchaser's attorney". Paragraph 28 thereof provides that neither the contract nor any provision may be waived, changed or canceled except in writing and is binding on the heirs, legal representatives, successors and permitted assigns of the respective parties. The plaintiffs contend that they exhibited good faith efforts to close on the sale of the premises and were willing to assist the defendants who may have lacked the necessary funds to vacate the premises. They offered to provide funds to Calvin Felder to assist him in his day to day living and offered monetary assistance to Laurie Felder in finding her a new place to live.

The plaintiffs maintain that pursuant to Paragraph 23 of the contract, if the Seller defaulted, they have remedies in both law and equity, which includes specific performance and that they are entitled to this relief as have been ready, willing and able to perform under the terms of the Contract of Sale and the defendants have wrongfully refused to convey the premises to the plaintiff.

The plaintiff asserts that there is no claim that the Contract of Sale is the product of forgery and therefore void ab initio.

The plaintiffs maintain that the defendants' counterclaim should be dismissed under RPL § 265-a because: (a) the contract of sale is not a covered contract; (b) plaintiff is not an equity purchaser; and (c) defendants are not equity sellers. The Home Equity Theft Prevention Act, which is a remedial statute, and which arose from mortgage rescue schemes was designed to

protect equity sellers (see Lucia v. Goldman, 68 AD3d 1064, 1066, 893 NYS2d 90 [2nd Dept. 2009]). A covered contract as defined by RPL § 265-a (2)(c) is any contract, agreement or arrangement between an equity purchaser and equity seller which (i) is incident to the sale of a residence in foreclosure or (ii) is incident to the sale of a residence in foreclosure or default where such contract, agreement or arrangement includes a reconveyance agreement. Here, the foreclosure action that was commenced in February 2015 by Ocwen Loan Servicing LLC was filed after the plaintiff and Frankie Felder, Sr., had entered into the contract of sale on June 2, 2014. Thus, the foreclosure action would not have been listed in a title search and would not have provided notice to the plaintiff that the mortgage was in foreclosure. In fact, the foreclosure action was discontinued by Ocwen or about July 6, 2016. Further, the plaintiff did not seek to purchase the premises through a foreclosure, as defined by RPL § 265-a(2)(g) or sold pursuant to a reconveyance arrangement. Instead the premises were to be purchased pursuant to a private, non-judicial residential contract of sale.

Defendants' contentions:

The defendants, in opposition to the plaintiff's motion, maintain that no contract of sale of the subject property exists. To support this contention, the defendants rely in part upon the deposition testimony of Laurie Bakhchi, the attorney for the Seller, who testified that her office prepared the Contract of Sale, delivered it to the purchasers who unilaterally made at least two changes to the contract, executed the contract and returned it to Ms. Bakhchi's office. Thereafter, Ms. Bakhchi met with Frankie Felder, Sr., for the first time at the office of the plaintiff where she observed him to be both elderly and sickly and maneuvered with an oxygen tank. It resulted in Ms. Bakhchi preparing and drafting an Occupancy Rider, as she made the assessment that as a result of his physical condition it would not have been possible for the defendants (especially Frankie Felder, Sr.,) to deliver the premises vacant at closing.

Ms. Bakhchi testified that she had Frankie Felder, Sr., execute the Occupancy Rider simply to avoid the inconvenience of another meeting with him. Ms. Bakhchi then communicated with plaintiff's counsel that her client would not to be bound to the Contract of Sale until the Occupancy Rider was executed, and that until the Rider was signed she would not execute the escrow provision or deposit the down payment check. Ms. Bakhchi further testified that purchaser's counsel did not agree with the terms of the Occupancy Rider, and instead forwarded their own version of the Occupancy Rider to Ms. Bakhchi, but that did not occur until after the death of Frankie Felder Sr., who died on August 9, 2014. As such, it is asserted that no contract was formed.

The defendants maintain that they did not intend to be bound by the Contract of Sale without the inclusion of the Occupancy Rider. This statement is supported by the affidavit of Drew Lantos, on behalf of the plaintiff, who noted the contract had been on hold status because the parties had not come to an agreement with respect to the Occupancy Rider. Thus, when "determining whether the parties entered into a contractual agreement and what were its terms, it is important to look to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds". (Metropolitan Lofts of NY, LLC v. Metroeb Realty 1, LLC, 160 AD3d 632. Here, the defendants maintain that there was no meeting of the minds on an essential term of the contract. Mr. Bakhchi did not receive the original executed contract until October 2014,² and since Frankie Felder Sr. was deceased at that time, the delivery of the document did not create a binding contract.

Discussion:

This Court has considered the submissions of counsel for the respective parties, the arguments presented herein, as well as the applicable law, in making a determination with

² Ms. Bakhchi testified that she was not advised as to the death of Frankie Felder, Sr., until a few months after it had occurred.

respect to the motion by plaintiff which seeks an Order of this Court to quiet plaintiff's contract vendee interest in the subject premises and direct that the plaintiffs be awarded specific performance.

At issue before this Court is whether there was a binding contract of sale which was fully executed prior to the death of the owner of the subject property, Frankie Felder, Sr.

Summary judgment should only be granted where there are no triable issues of fact (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498 [1957]). In order to prevail on a motion for summary judgment, the movant must present a prima facie case demonstrating entitlement to judgment as a matter of law (Prince v. Di Benedetto, 189 AD2d 757, 759, 592 NYS2d 388 [1993]). Once the movant has established their prima facie case, the party opposing the motion bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (see Zuckerman v. City of New York, 40 NY2d 557, 562, 427 NYS2d 595 [1980]). In addition, the evidence presented must be scrutinized in the light most favorable to the party opposing the motion (Goldstein v. Monroe County, 77 AD2d 232, 236, 432 NYS2d 996 [1980]). Since summary judgment deprives a party of his or her day in court (Henderson v. City of New York, 178 AD2d 129, 576 NYS2d 562 [1991]), it is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law (Barclay v. Denckla, 182 AD2d 658, 582 NYS2d 252 [1992]).

In reaching its determination, this Court considered the argument of the plaintiff that the defendants entered into a contract of sale and that Frankie Felder, Sr., agreed to the terms thereof, of his own free will and volition and had the assistance of counsel in doing so. The plaintiffs further allege that they have always been ready, willing and able to complete the transaction and have had the funds available to pay to the Sellers.

These arguments were addressed by the defendants through the testimony of Ms. Bakhchi, who provided crucial details as to what transpired in the negotiation and execution of

the contract of sale. Ms. Bakhchi testified that she had received a referral from “Danny” who was a representative of the plaintiff, to prepare a contract of sale on behalf of the seller (see Ms. Bakhchi EBT p. 24). Ms. Bakhchi stated that she had been given the details as to the sale from Danny and prepared a contract of sale based upon those terms. She then arranged with seller to meet with him at one of plaintiff’s offices, located on St. John’s Place in Brooklyn, as that office was near the subject premises (see Ms. Bakhchi EBT pgs.44-45). At that office, Ms. Bakhchi met with Frankie Felder, Sr., and Calvin Felder and she discussed with them such terms as the purchase price, down payment and personal property (see Ms. Bakhchi EBT p. 45). It was during their conversation that Calvin Felder advised Ms. Bakhchi that upon Frankie Felder, Sr. vacating the subject premises, he would have to live with an aid or with assistance. It became apparent to Ms. Bakhchi that the defendants would need money from the sale of the premises in order to pay for their moving and living expenses. As a result, Ms. Bakhchi prepared an Occupancy Rider while still at that office, and had Frankie Felder, Sr., execute it to avoid him having any further travel inconvenience. The Rider was then allegedly forwarded to the office of the attorney for the purchaser, and it was communicated that until there was an agreement and execution by all parties of the occupancy Rider, there was no contract of sale and the down payment check would not be deposited. Ms. Bakhchi was then advised by purchaser’s counsel that the proposed Rider was not acceptable, and it was not until a later period of time that they offered a Rider with other terms (see Ms. Bakhchi EBT p. 57-58).

In October 2014, Ms. Bakhchi voided the down payment check because she believed it was stale due to the length of time (the check was dated May 12, 2014). Ms. Bakhchi then reached out to Calvin Felder to ascertain if there had been an approval of the contract of sale, allegedly unaware that Frankie Felder had died two months earlier.

To create a binding contract, there must be a manifestation of mutual assent sufficiently definite that the parties are truly in agreement with respect to all material terms (see Martin

Delicatessen v. Schumacher, 52 NY2d 105, 436 NYS2d 247 [1981]; Brands v. Urban, 182 AD2d 287 [2nd Dept. 1982]).

This Court finds that based upon the evidence submitted to the Court that the inclusion of the Occupancy Rider was crucial to the parties agreeing to the sale of the premises. Once Frankie Felder, Sr. had died, Ms. Bakhchi could no longer utilize his signature in executing this contract, and instead would have had to take steps for the appointment of an administrator or executor to act on behalf of the Estate of Frankie Felder, Sr. Further, none of the other family members could bind the defendants until the appointment by the Court of a representative.

Thus, based upon the testimony of Ms. Bakhchi, no such agreement appeared to occur prior to the death of Frankie Felder, Sr.

The deposition of Ms. Bakhchi is corroborated by her actions in not releasing the contract to the plaintiff and the plaintiff has not offered any evidence that the Occupancy Rider was not a material and necessary component of the contemplated sale.

This Court, in finding there is no meeting of the minds and a binding agreement does not exist can search the record and conclude that pursuant to CPLR § 3212(b), summary judgment must be granted to the defendants herein. In a case such as this, the plaintiff is seeking specific performance and has moved for summary judgment. It is appropriate for the Court to search the record and grant summary judgment to the non-movant where no cause of action exists (see Dunham v. Hilco Const. Co., 89 NY2d 425, 654 NYS2d 335 [1996]; Carnegie Hall Corp., v. City Univ. of N.Y., 286 AD2d 214, 729 NYS2d 93 [1st Dept. 2001]).

The portion of the motion which seeks a dismissal of the defendants' counterclaim, is not relevant in light of the decision herein and is therefore moot. This Court finds nevertheless that contrary to the argument espoused by the plaintiff, RPL § 265-a applies to mortgagors who are delinquent in the payment of their mortgage and is not simply limited to those mortgagors who are the subject of a foreclosure proceeding. Since it has not been refuted that Frankie Felder, Sr., had been delinquent in the payment of his mortgage at the time he attempted to sell the premises

known as 836 Putnam Avenue, Brooklyn, New York, that the defense and counterclaim based upon an alleged violation of RPL § 265-a would remain in effect and not be stricken or dismissed.

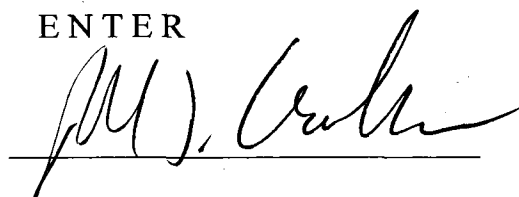
Conclusion:

The motion by plaintiff, Classon Avenue 1148 Corp., for an Order pursuant to CPLR § 3212, to quiet title to the subject property known as 826 Putnam Avenue, Brooklyn, New York, to award specific performance; as well as for a dismissal of defendants' counterclaim is denied. This Court in searching the record awards summary judgment to the defendants and a dismissal of plaintiff's complaint.

This shall constitute the decision and order of this Court,

Dated: June 25, 2019
Brooklyn, New York

ENTER



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

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