

Dilauro v Johns

2019 NY Slip Op 32328(U)

July 22, 2019

Supreme Court, Kings County

Docket Number: 523222/2016

Judge: Loren Baily-Schiffman

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This opinion is uncorrected and not selected for official publication.

PRESENT: HON. LOREN BAILY-SCHIFFMAN

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| LOUIS DILAURO, Plaintiff, -against- CAROLANN JOHNS and ROSE MARIE RICCIO, Defendants, | Index No. 523222/2016 Motion Seq. # 6 DECISION & ORDER ¹ |
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Upon the foregoing papers, Louis Dilauro (“Plaintiff”) moves this Court for an Order (i) pursuant to CPLR S 3212 granting summary judgment in his favor and (ii) for such other and further relief as this Court deems just and proper.

Background

This is an action for breach of contract in a real estate transaction. On or about August 26, 2016, Plaintiff and Defendants entered into a contract of sale of commercial property located at 354 Sackett Street, Brooklyn, New York 11231 (Block # 428 Lot # 29). At the time the parties entered into the contract, Plaintiff gave a deposit of \$62,700.00. The contract states that “Closing shall take place at the office of Sellers’ attorney or Purchasers’ institutional lender at 2:00 o’clock on or sixty (60) days from the purchasers’ receipt of a fully executed [contract].” (*Plaintiff’s Exhibit-J*).

On September 20, 2016, Plaintiff sold his existing property at 41 King Street. On September 25, 2016, Defendants received notice of two housing code violations and an Environmental Control Board violation. Defendants cured the Environmental Control Board

¹ The Court acknowledges the assistance of Thomas Blau and Joshua Harris in preparation of this decision.

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violation. Defendants attempted to cure the housing code violations. However, a Housing Preservation and Development inspection revealed that these violations were not cured.

Section 10 of the Contract, entitled Governmental Violations and Orders, states: "Seller shall comply with all notes or notices of violations of law or municipal ordinances, orders or requirements noted or issued as of the date hereof by any governmental department having authority as to lands, housing, buildings, fire, health, environmental and labor conditions affecting the Premises. The Premises shall be conveyed free of them at [c]losing." Defendant offered to give Plaintiff money to hold in Escrow but Plaintiff refused.

On November 1, 2016, Plaintiff sent a "time is of the essence" letter giving notice that the closing on the property was scheduled for November 21, 2016. Defendants were therefore required to cure all violations prior to the law date. Defendants waited until two days prior to the law date, on a Saturday, November 19, 2016, and responded they would not be ready to close on November 21, 2016.

Defendants did not appear at the closing on November 21, 2016. On November 23, 2016, Plaintiff demanded that the Defendants return the down payment of \$62,700.00. Defendants never returned the deposit. Plaintiff also alleges in the complaint that the purchase of the subject property was intended as a 1031 exchange. Further, because Defendants failed to close on the law date Plaintiff alleges that as a result of the Defendant's breach of contract, Plaintiff was unable to complete a 1031 exchange and incurred additional tax liabilities amounting to \$627,891.00.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, therefore, only be employed when there is no doubt as to the absence of triable issues

of material fact. *O'Brien v Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 31 (2017); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957). A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant a directed judgment in favor of any party as a matter of law. *CPLR 3212 [b]*; *Botach Mgt. Group v. Gurash*, 138 A.D.3d 771, 772 (2nd Dept. 2016). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v Procassini*, 258 AD2d 577, 686 (2nd Dept. 1999). Summary judgment should be granted where the party opposing the motion fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. *Lau v Margaret E. Pescatore Parking, Inc.*, 30 N.Y.3d 1025, 1027 (2017).

“The essential elements of a breach of contract cause of action are ‘the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages.’” *Liberty Equity Restoration Corporation v Pil Soung Park*, 160 A.D.3d 628 (2nd Dept. 2018). Further, the law is clearly established that even where time is not made of the essence in the original contract and the closing date set forth therein has passed, either party can declare time of the essence by giving a clear, distinct and unequivocal notice of (1) a new closing date; (2) giving the other party a reasonable time in which to act; and, (3) informing the other party that if he does not perform by the designated date, he/she will be considered in default. *Nehmadi v Davis*, 63 A.D.3d 1125, 1127 (2nd Dept. 2009), citing *Guippone v Gaias*, 13 A.D.3d 339 (2nd Dept. 1989). Specifically, the Appellate Division has held that three (3) days’, *Smith v Lynch*, 50 A.D. 3d 881 (2nd Dept. 2008), four (4) days’, *3M Holding Corp. v Wagner*, 166 A.D.2d 580 (2nd Dept. 1990), and five (5) days’ *Guippone v Gaias*, 13 A.D.3d 339 (2nd Dept. 2004), notice

was sufficient. The failure to appear at a closing constitutes a willful default *Smith v Lynch* 50 A.D.3d 881, 882 (2nd Dept. 2008).

Defendant opposes the motion and states 20 days was inadequate notice. Defendant cites no law to support this contention. As set forth above, the Second Department has held that notice as little as three days is sufficient. Therefore, Plaintiff's time of the essence letter constitutes reasonable notice to the Defendants.

Defendant also opposes Plaintiff's motion contending that the location of the closing differed from that set forth in the contract. Defendant relies upon the decision in *Nehmadi v Davis* 63, A.D.3d 1125, 1128 (2nd Dept. 2009) for the proposition that the closing location cannot differ from the one set forth in the contract. However, *Nehmadi* does not even mention that the closing location was an issue. *Id. at 1128*. Moreover, it is notable that Defendant never objected to the location set forth in the time of the essence letter until now.

In the instant case, because Plaintiff's time of the essence letter was adequate, Defendants breached the contract by failing to appear at the closing. Plaintiff is, therefore, entitled to an Order granting summary judgment in its favor. While Plaintiff submits an affirmation by his Certified Public Accountant as evidence of the damages, this Court finds that this standing alone is insufficient proof as a matter of law. Therefore, this matter is referred to JHO/Referee to determine the amount of damages.

Accordingly, it is:

ORDERED that Plaintiff's motion for summary judgment is granted, and it is

ORDERED that Defendants' are directed to return Plaintiff's down payment within 30 days of service of this Order with Notice of Entry, and it is

ORDERED that this matter is referred to a JHO to conduct a hearing on the issue of damages.

Dated: July 22, 2019



Loren Baily-Schiffman,
JSC

HON. LOREN BAILY-SCHIFFMAN

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