

Kushner Realty Acquisition LLC v Stallings
2019 NY Slip Op 32653(U)
September 5, 2019
Supreme Court, New York County
Docket Number: 652886/2019
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

KUSHNER REALTY ACQUISITION LLC,
Plaintiff,

INDEX NO. 652886/2019
MOTION DATE N/A
MOTION SEQ. NO. 001

- v -

PAUL STALLINGS, RENA STALLINGS, THE HOTEL
RIVINGTON MANAGING CORP., THE DOWNTOWN LLC,
FIDELITY NATIONAL TITLE INSURANCE CO.,

DECISION AND ORDER ON
MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16,
17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35
were read on this motion to/for CANCEL NOTICE OF PENDENCY / DISMISS

In this action regarding the sale of an equity interest in an entity holding title to real
property, defendants Paul Stallings, Rena Stallings, The Hotel Rivington Managing Corp., and
The Downtown, LLC (collectively, "Defendants"), move, pursuant to CPLR 6514 and
3211(a)(1), for an order (1) canceling a Notice of Pendency, dated June 21, 2019 (the "Notice of
Pendency"), filed by plaintiff Kushner Realty Acquisition, LLC ("Plaintiff"), against the
property located at 107 Rivington Street, New York, NY 10002 and having a tax lot designation
of Block 410, Lot 48, (2) dismissing Plaintiff's first cause of action seeking specific
performance, and (3) assessing compensatory and punitive sanctions against Plaintiff for the
alleged frivolous and malicious filing of the Notice of Pendency. Plaintiff opposes the motion.

BACKGROUND

On or about August 17, 2018, the parties entered into an Amended and Restated Purchase
and Sale Agreement (the "Agreement") for the purchase and sale of a minority interest in an
LLC holding the controlling and possessory interest in real property known as the Hotel

Rivington, located at 107 Rivington Street, New York, NY 10002 (the "Property"). Significantly, the Agreement does not call for a deed transfer. Under the Agreement, Plaintiff was to pay approximately \$65,000,000.00 in consideration for a 46.38% interest in the subject holding entity, including an initial down payment of \$2,275,000.00 (the "Down Payment") to be held in escrow and applied towards the purchase price at closing (Complaint, ¶¶ 13-15).

On or about April 12, 2019, Paul Billings, on behalf of Defendants, allegedly agreed in an unspecified writing to reduce the gross consideration to be provided by Plaintiff from \$65,000,000.00 to \$62,000,000.00 (Complaint, ¶ 16).

Notwithstanding the purported agreement to reduce the purchase price, on April 18, 2019, Plaintiff sent a letter to Defendants wherein Plaintiff identified a number of purported breaches by Defendants of the Agreement. Based on those breaches, Plaintiff stated it was electing to exercise its right to cancel the Agreement and, accordingly, demanded that Defendants return the Down Payment (NYSCEF Doc. No. 14, pp. 2-3).

After Defendants failed to return the Down Payment, on May 14, 2019, Plaintiff commenced this action by Summons with Notice seeking, *inter alia*, a judgment awarding Plaintiff specific performance compelling Defendants to return the Down Payment in accordance with the terms of the Agreement (NYSCEF Doc. No. 1). After Defendants filed a Demand for Complaint on May 20, 2019, on May 24, 2019, Plaintiff filed an Amended Summons with Notice and a Complaint both asserting, *inter alia*, a revised first cause of action seeking specific performance compelling Defendants to close on the sale provided for in the Agreement, but at the adjusted price allegedly agreed to by non-party Paul Billings. In the alternative, Plaintiff sought an order directing Defendants to return the Down Payment. (NYSCEF Doc. Nos. 8-10).

On or about June 3, 2019, Defendants moved by Order To Show Cause for an order, pursuant to CPLR 6514 and 3211(a)(1), canceling the Notice of Pendency and dismissing Plaintiff's first cause of action for specific performance of the Agreement at the adjusted price of \$62,000,000.00. Plaintiff opposes the motion.

DISCUSSION

I. Notice of Pendency.

"In entertaining a motion to cancel [a notice of pendency], the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501" (*5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 320 [1984]). Under CPLR 6501, "a notice of pendency is strictly limited to suits affecting title to, or possession, use or enjoyment of, real property so that an action to compel specific performance of the sale of stock, albeit representing a beneficial interest in realty, would not support this provisional remedy" (*Sansol Indus., Inc. v 345 E. 56th St. Owners, Inc.*, 159 Misc 2d 822, 823 [Sup Ct New York Cnty 1993]). CPLR 6501's requirement that the action supporting a notice of pendency must "directly affect" title to, or possession, use or enjoyment of, real property, is narrowly interpreted and must be strictly complied with (*5303 Realty Corp.*, 64 N.Y.2d at 321).

Here, Plaintiff seeks permission to file a notice of pendency on the precise grounds rejected by the Court of Appeals in *5303 Realty Corp.* (64 N.Y.2d at 313). In *5303 Realty Corp.*, the Court of Appeals affirmed the established principle that a transaction for the sale of stock in a corporation whose sole or primary asset is real estate does not support a notice of pendency, which is strictly limited to suits affecting title to, or possession, use or enjoyment of, real property (*id.* at 324). The Court of Appeals rejected the notice of pendency, even though the subject transaction was for the sale of 100% of the corporation that held title to the real property,

finding that ownership of capital stock, even complete ownership, does not operate to transfer the title to corporation property (*id.* at 323 [“ownership of capital stock is by no means identical with or equivalent to ownership of corporate property”]).

That the holding entity in the present action is an LLC whereas the entity in *5303 Realty Corp.* was a corporation does not compel a different conclusion (*see Yonaty v Glauber*, 40 AD3d 1193, 1194 [3d Dept 2007] [plaintiff’s action to enforce defendants’ promise to give plaintiff a 20% interest in an LLC that acquired real property did not support a notice of pendency because it did not directly affect title to, or possession, use or enjoyment of, real property]). Here, as in *5303 Realty Corp.* and *Yonaty*, the Agreement does not provide for the transfer of any deed to real property and concerns only Plaintiff’s purchase of an equity interest in the entity holding title, which is personal – not real – property (*id.*; *5303 Realty Corp.*, 64 N.Y.2d at 322-323). Plaintiff fails to proffer any case law to refute the well-established law that an agreement for the sale of equity in an entity holding a beneficial interest in real property does not directly affect title to, or possession, use or enjoyment of, real property. Accordingly, Defendants’ motion to cancel the Notice of Pendency is granted.

II. Specific Performance.

Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted “utterly refutes plaintiff’s factual allegations” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and “conclusively establishes a defense to the asserted claims as a matter of law” (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted]). To be considered “documentary,” evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept

2010] [citation omitted]). If the documentary evidence disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a) (1) is warranted (*Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 298 [1st Dept 2006]), even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*see McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660, 661 [2d Dept 2005]).

Contracts and letters, such as the Agreement and Plaintiff's April 18 cancelation letter, constitute documentary evidence that can be considered on a motion to dismiss (*see, e.g., Digital Nation Media, Inc. v Ploni & Assoc., Inc.*, 21715CV01, 2001 WL 1568756, at *3 [Civ Ct New York Cnty 2001] [considering agreement and letter from plaintiff canceling the agreement as documentary evidence on a motion to dismiss]).

To establish a prima facie entitlement to specific performance, the plaintiff must demonstrate "that (1) it had substantially performed under the contract and was willing and able to perform any remaining obligations, (2) [Defendants were] able to convey the property, and (3) there was no adequate remedy at law (*Union Temple of Brooklyn v Seventeen Dev., LLC*, 162 AD3d 710, 712 [2d Dept 2018]). However, "a party cannot seek specific performance of a cancelled real estate contract" (*Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 298 [1st Dept 2006]; *see also Eight Hundred Corp. v 217 State St. Realty Corp.*, 169 AD2d 810, 812 [2d Dept 1991] [dismissing complaints and canceling notices of pendency finding that purchaser's repudiation of contract deprived its assignees of any right to require specific performance of seller's obligations under the contract]).

Here, on April 18, 2019, after the purported agreement by Paul Billings to reduce the purchase price, Plaintiff sent a letter to Defendants stating that Plaintiff was exercising its right under Section 8(b)(ii) of the Agreement to cancel the sale based on Defendants' alleged failure to

complete certain conditions precedent within sixty (60) days, and demanding that Defendants return the Down Payment (NYSCEF Doc. No. 30, ¶ 8[b][ii]). Relying, *inter alia*, on *Raglan Realty Corp. v. Tudor Hotel Corp.* (149 AD2d 373 [1st Dept 1989]), Plaintiff argues that its letter cancelation does not bar Plaintiff from asserting alternative and contradictory claims seeking both specific performance of the Agreement (at the adjusted price) and the return of the Down Payment. However, in *Raglan Realty Corp.*, unlike here, the factual issues of whether seller had complied with the contract's conditions precedent to adjourn the closing, whether buyer was entitled to elect to cancel the sale and, whether buyer's letter purporting to cancel the agreement was intended as a waiver of buyer's right to specific performance or a good faith response to seller's improper adjournment of the closing, were each hotly contested by the parties.

In the present case, Defendant has never argued that Plaintiff lacked the right to cancel the Agreement and Plaintiff has never alleged that it did not intend to cancel the Agreement at the time it sent Defendants the April 18 cancelation letter, the authenticity of which is undisputed. Thus, the issue here is not whether Plaintiff can plead alternative claims, but rather, whether Plaintiff can assert a claim for specific performance that contradicts Plaintiff's prior letter to Defendants wherein Plaintiff expressly stated it was exercising its right under the Agreement to cancel the sale. Although one may be permitted to plead alternative and/or contradictory claims regarding a contract for the purchase and sale of real property, Plaintiff does not provide legal authority for permitting an alternative claim seeking specific performance of a purported real estate contract where it is undisputed that Plaintiff elected by written notice to Defendants to cancel the contract. Accordingly, Defendants' motion to dismiss Plaintiff's first cause of action for specific performance compelling Defendants to sell the Property to Plaintiff at the adjusted purchase price is granted and the first cause of action in the Complaint is dismissed.

Regarding Defendants' request for sanctions, the court finds that Plaintiff's conduct was not completely without merit in law and was supported by a reasonable argument for an extension, modification or reversal of existing law (see, e.g., King Penguin Opportunity Fund III, LLC v Spectrum Group Mgt. LLC, 2019 N.Y. Slip Op. 31899[U], 6 [Sup Ct New York Cnty 2019], citing 22 NYCRR 130-1.1[c]). Accordingly, Defendants' request for costs and sanctions is denied.

CONCLUSION

Thus, it is hereby

ORDERED that the branch of the motion seeking to cancel the notice of pendency is granted to the extent that the County Clerk of New York County, upon service upon him, of a copy of this order with notice of entry, shall cancel the notice of pendency filed by Plaintiff on June 21, 2019; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the branch of the motion seeking dismissal of Plaintiff's first cause of action for specific performance is granted and the first cause of action in Plaintiff's complaint is dismissed, and the motion is otherwise denied.

Any requested relief not otherwise discussed has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

9/5/19
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE