

Hegeman Plaza LLC v Burgan
2019 NY Slip Op 34869(U)
September 16, 2019
Supreme Court, Kings County
Docket Number: Index No. 512100/2017
Judge: Carolyn E. Wade
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

FILED: KINGS COUNTY CLERK 09/23/2019

NYSCEF DOC. NO. 71

INDEX NO. 512100/2017

RECEIVED NYSCEF: 09/24/2019

At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 16th day of September 2019

**PRESENT:
HON. CAROLYN E. WADE,**

Justice

-----X
HEGEMAN PLAZA LLC,

Plaintiff,

Index No. 512100/2017

-against-

Seq 2
DECISION and ORDER

EUCLID BURGAN and BERNADETTE BURGAN,

Defendants.
-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of defendants EUCLID BURGAN and BERNADETTE BURGAN's motion and plaintiff HEGEMAN PLAZA LLC's cross-motion:

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1
Cross-Motion and Affidavits/Affirmations.....	3
Answering Affidavits/Affirmations.....	4
Reply Affidavits/Affirmations.....	5
Memorandum of Law.....	2

FILED: KINGS COUNTY CLERK 09/23/2019

INDEX NO. 512100/2017

NYSCEF DOC. NO. 71

RECEIVED NYSCEF: 09/24/2019

Upon the foregoing cited papers and after oral argument, defendants EUCLID BURGAN and BERNADETTE BURGAN move, pursuant to CPLR 3212, for an Order (1) granting them summary judgment and dismissing the Complaint against them; (2) canceling a *lis pendens* filed against property located at 513 Hegeman Avenue, Brooklyn, New York; and (3) awarding the defendants the down payment made by plaintiff. Plaintiff HEGEMAN PLAZA LLC cross-moves for summary judgment.

Relevant Facts

This action arises out of a real estate transaction concerning property located at 513 Hegeman Avenue, Brooklyn, New York (the "Property"). On December 21, 2016, defendants EUCLID BURGAN and BERNADETTE BURGAN ("Defendants") entered into a written contract of sale (the "Contract," Emanuel's aff, exhibit #1) with plaintiff HEGEMAN PLAZA LLC ("Plaintiff") to sell the Property for \$900,000.00. Samuel Schwartz ("Mr. Schwartz") signed the Contract as the sole member of Plaintiff. A down payment of \$70,000.00 was made upon execution. The Contract was contingent upon Plaintiff obtaining a written mortgage commitment in the amount of \$900,000.00 within 45 days from the date of Contract (see Rider to the Contract, ¶10¹). Moreover, Plaintiff was prohibited from assigning the Contract to a third party without Defendants' written consent (see Rider to the Contract, ¶8²). On March 6, 2017, an addendum was signed and added to the Contract (the "Contract Addendum"), which documented

¹ ¶10: "This contract is CONTINGENT and SUBJECT TO the PURCHASER [o]btaining . . . a conventional first mortgage loan in the amount of \$900,000.00 . . . The PURCHASER shall be allowed 45 days, from the delivery of fully executed contract, to obtain said mortgage commitment IN WRITING. In the event that the said commitment cannot be obtained within the time allowed without fault on the part of the PURCHASER, or is declined in writing, then either party may cancel this contract, by notice in writing directed to the other party or attorney, and the SELLER will refund the contract deposit made hereunder, whereupon all rights, obligation and liabilities of the parties shall cease and terminate."

² ¶8: "This contract may not be assigned by the PURCHASER without the written consent of the SELLER."

FILED: KINGS COUNTY CLERK 09/23/2019

INDEX NO. 512100/2017

NYSCEF DOC. NO. 71

RECEIVED NYSCEF: 09/24/2019

Defendants' intent to utilize the transaction as an Internal Revenue Code § 1031 tax-deferred property exchange³ ("1031 exchange") (Emanuel's aff, exhibit #2). The addendum required Plaintiff to cooperate with Defendants to complete the 1031 exchange⁴.

On February 21, 2017, Plaintiff's attorney, Aaron M. Stein, Esq. ("Mr. Stein"), informed Defendants' attorney, Seon S. Emanuel, Esq. ("Mr. Emanuel"), that his client had not received a mortgage commitment, and requested an extension of the deadline to March 15, 2017 (Emanuel's aff, exhibit #3). Mr. Emanuel agreed, but noted that "time is of the essence" (*id.*).

The closing was originally scheduled for March 31, 2017, and was subsequently adjourned to April 25, 2017, on consent by both parties (Emanuel's aff, exhibit #4). On April 24, 2017, Mr. Stein's office informed Defendants that "[his] client will be taking title as follows: Linden Development of Queens LLC" (Emanuel's aff, exhibit #5, p.52-56). After an unsuccessful attempt to confirm whether Mr. Schwartz was the sole member of said entity, Mr. Emanuel replied that Defendants refused the proposed contract assignment to Linden Development of Queens LLC. In a reply email, Mr. Stein stated that if Defendants do not consent to the contract assignment, then "you can bet the Purchaser won't cooperate with the Seller. kind of a tit for tat. you know what i mean?" Mr. Emanuel responded by maintaining that his clients are refusing the assignment. On April 25, 2017, Mr. Emanuel requested that the closing be adjourned for two weeks to address the issue, and Mr. Stein consented. The closing was never rescheduled. On

³ Under Section 1031 of the United States Internal Revenue Code (26 U.S.C. § 1031), a taxpayer may defer recognition of capital gains and related federal income tax liability on the exchange of certain types of property, a process known as a 1031 exchange.

⁴ ¶2: "Buyer hereby acknowledges it is the intent of the Seller to effect an IRS Section 1031 tax deferred exchange. . . Buyer agrees to cooperate with the Seller and Investment Property Exchange Services, Inc. in a manner necessary to complete the exchange."

FILED: KINGS COUNTY CLERK 09/23/2019

NYSCEF DOC. NO. 71

INDEX NO. 512100/2017

RECEIVED NYSCEF: 09/24/2019

June 20, 2017, Plaintiff filed the instant lawsuit seeking specific performance and a *lis pendens* against the Property. The instant motions ensue.

Arguments

In support of their summary judgment motion, Defendants argue that there are no issues of fact as Plaintiff did not meet its obligations under the Contract. Defendants further aver that Plaintiff breached the Contract by failing to obtain a written mortgage commitment, and, in its attempts to assign the Contract to an unauthorized entity, refusing to cooperate with them in the 1031 exchange pursuant to the Contract Addendum.

By cross-motion and in opposition to Defendants' motion, Plaintiff asserts that it duly performed all its contractual obligations, and that it was ready, willing and able to close on the Property. Plaintiff cites *Tucek v. Hoffman*, 161 AD2d 588 (2nd Dept 1990), to argue that the mortgage contingency clause was strictly for its benefit, and that it had waived that contractual provision. Plaintiff submits a letter by Shaul Greenwald, Esq. of Riverside Abstract, LLC⁵, dated November 22, 2016 (the "Riverside Letter", Schwartz's aff, exhibit E); which documented that Plaintiff had \$883,748.19, in lieu of a mortgage, to be used to purchase the Property. Lastly, it asserts that Defendants breached the Contract by postponing the closing.

Defendants submits an affidavit from defendant Euclid Burgan ("Mr. Burgan"). Mr. Burgan contends that the Riverside Letter lists five target replacement properties that Mr. Schwartz was interested to purchase in his 1031 exchange, but one of those targeted properties,

⁵ In the absence of any explanation by Plaintiff, Riverside Abstract, LLC appears to be a real estate company retained by Mr. Schwartz to assist him in his 1031 exchange.

FILED: KINGS COUNTY CLERK 09/23/2019

INDEX NO. 512100/2017

NYSCEF DOC. NO. 71

RECEIVED NYSCEF: 09/24/2019

272 East 98th Street, Brooklyn, New York, had been purchased at a sale price of \$735,000.00 on February 12, 2017 by Mr. Schwartz two months before the scheduled closing date of the Property on April 25, 2017 (Burgan's aff, exhibit #1). Based on the above, Mr. Burgan argues that the Riverside Letter is insufficient to prove that Plaintiff was financially ready to close.

In reply, Plaintiff submits that the purchase of 272 East 98th Street was funded by a mortgage and not the 1031 exchange funds as indicated on the Riverside Letter. It maintains that Riverside Letter is sufficient to demonstrate that it had the funds to close on the Property.

Analysis

"To prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff purchaser must establish that it substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the vendor was able to convey the property, and that there was no adequate remedy at law" (*1107 Putnam, LLC v Beulah Church of God in Christ Jesus of the Apostolic Faith, Inc.*, 152 AD3d 474, 475 [2d Dept 2017]; see *ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006]). In moving for summary judgment on a complaint seeking specific performance of a contract, the plaintiff purchaser must submit evidence demonstrating financial ability to purchase the property in order to demonstrate that it was ready, willing, and able to purchase such property (see *Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1010, 1015 [2d Dept 2010]). "When a purchaser submits no documentation or other proof to substantiate that it had the funds necessary to purchase the property, it cannot prove, as a matter of law, that it was ready, willing, and able to close" (*Fridman v Kucher*, 34 AD3d 726, 728 [2d Dept 2006]).

FILED: KINGS COUNTY CLERK 09/23/2019

INDEX NO. 512100/2017

NYSCEF DOC. NO. 71

RECEIVED NYSCEF: 09/24/2019

First, contrary to Plaintiff's contention, "the mortgage contingency clause was a condition precedent inuring to the benefit of both parties, and therefore could not be waived unilaterally by the plaintiff" (*Degree Sec. Sys., Inc. v F.A.B. Land Corp.*, 17 AD3d 402, 403 [2d Dept 2005]; *Dale Mortg. Bankers Corp. v 877 Stewart Ave. Assoc.*, 133 AD2d 65, 66 [2d Dept 1987]). In the instant case, Plaintiff failed to show that it sought to waive the mortgage contingency clause. But even assuming that it did, in the absence of Defendants' consent, Plaintiff's unilateral waiver of the mortgage contingency clause by offering to proceed on a non-mortgage basis was ineffective as the clause was for the benefit of both parties (*Ingber v Greco*, 135 AD2d 610, 611 [2d Dept 1987]).

The Court also determines that Plaintiff's conduct qualifies as an anticipatory breach of the Contract when it proposed to assign the Contract to Linden Development of Queens LLC, and, upon Defendants' repeated refusal, threatened to not cooperate with Defendants' 1031 exchange as required by the Contract Addendum (*see Revital Realty Group, LLC, v Ulano Corp; Morgan v McCaffrey*, 14 AD3d 670, 671 [2d Dept 2005]; *Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133 [2017]).

Based upon the above, Defendants demonstrated their prima facie entitlement to summary judgment by establishing that their cancellation of the Contract pursuant to a particular contractual provision was valid (*Gold v First Stop Tire Shop, Inc.*, 50 AD3d 738, 738 [2d Dept 2008]; *Ambalu v Rosenthal*, 29 AD3d 499, 500 [2d Dept 2006]; *Nesdale v Banister*, 18 AD3d 841 [2d Dept 2005]). Therefore, Defendants' motion for summary judgment is granted, in the absence of any material issues of fact (*see generally Internet Homes, Inc. v Vitulli*, 8 AD3d 438, 439 [2d Dept 2004]; *Ferrone v Tupper*, 304 AD2d 524, 525 [2d Dept 2003]; *Zeitoune v Cohen*, 66 AD3d 889, 892 [2d Dept 2009]).

FILED: KINGS COUNTY CLERK 09/23/2019

NYSCEF DOC. NO. 71

INDEX NO. 512100/2017

RECEIVED NYSCEF: 09/24/2019

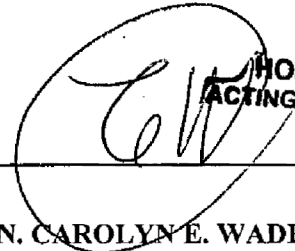
Accordingly, based on the above, it is

ORDERED that Defendants EUCLID BURGAN and BERNADETTE BURGAN's motion for summary judgment is **GRANTED** in its entirety. The Complaint is hereby dismissed. Plaintiff HEGEMAN PLAZA LLC's cross-motion for summary judgment is **DENIED**. It is further

ORDERED Defendants are awarded the down-payment of \$70,000.00; and it is further

ORDERED that the Kings County Clerk is directed to vacate the notice of pendency filed against the real property known as 513 Hegeman Avenue, Brooklyn, New York, with the tax map designation of Block 4297, Lot 39.

This constitutes the Decision and Order of the court.



HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

FILED
SEP 23 2019
KINGS COUNTY CLERK'S OFFICE