

Monroe 485 LLC v Hall
2020 NY Slip Op 30102(U)
January 10, 2020
Supreme Court, Kings County
Docket Number: 502912/19
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of January, 2020.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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MONROE 485 LLC,

Plaintiff,

- against -

Index No. 502912/19

SEAN HALL,

Defendant.

-----X

The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-2 3-4

Opposing Affidavits (Affirmations) _____

4 5

Upon the foregoing papers, defendant Sean Hall (Hall) moves (in motion sequence ["MS"] 001) for an order, pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7), dismissing the complaint. Plaintiff Monroe 485 LLC ("Monroe 485") cross-moves (in MS 002) for an order, pursuant to CPLR 3211 (d), granting it a continuance to conduct discovery.

Background

On February 8, 2019, Monroe 485 commenced this action against Hall, the owner of the property at 485 Monroe Street in Brooklyn ("premises"), by filing a summons and a

verified complaint seeking specific performance of the parties' February 2, 2016 contract for the sale of the premises ("Contract").

The complaint alleges that the parties "entered into a fully executed and legally binding contract of sale . . ." under which Hall "agreed to sell the Subject Premises to Plaintiff . . . in a short sale, a closing date [for] which was not specifically determined" (complaint at ¶¶ 4-5). The complaint alleges that, under the Contract, "Plaintiff agreed to pay \$275,000.00 . . . in due consideration for the subject premises or an amount acceptable to Nationstar, the bank holding the lien, to pay off the default loan" and that Monroe 485 paid Hall's counsel a \$1,000.00 down payment for the purchase of the Premises (*id.* at ¶¶ 6-7). The complaint further alleges that "Plaintiff has already performed activities that demonstrate [its] intent to honor the contract, as well as additional professional services" (*id.* at ¶ 9). Additionally, the complaint alleges, upon information and belief, that Hall "represented through statements and or entered [into] a written agreement to unilaterally terminate, breach or otherwise violate the terms of the contract of sale . . ." (*id.* at ¶ 10).

The Contract, a copy of which was annexed to the complaint, provides at paragraph 15 that "[c]losing shall take place . . . on or about 60 DAYS *from short sale approval*" (emphasis added). Notably, paragraph 23 (b) of the Contract specifically provides that "[i]f Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity, including, but not limited to, specific performance."

According to Monroe 485’s affidavit of service in the record, Hall was served with process on February 9, 2019 at 9:37 a.m. when the summons and verified complaint were delivered to “Nicholas,” a person of suitable age and discretion, at the Premises and were subsequently mailed to Hall on February 9, 2019. On May 22, 2019, more than 20 days after delivery and mailing, Monroe 485 belatedly filed proof of service upon Hall.¹

Meanwhile, on March 18, 2019, prior to the date on which Hall’s answer was due, he moved for an order, pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7), dismissing the complaint.² Hall submitted an attorney affirmation contending that the \$275,000.00 sale price in the Contract is “grossly inadequate [because] according to a Comparative Market Analysis the house is worth between \$900,000.00 and \$950,000.00.” Defense counsel, citing cases from the 1800’s, argues that “[s]pecific performance of a contract for the sale of lands will not be decreed in cases of fraud or mistake, or of hard and unconscionable bargains, or where the decree would produce injustice or would be inequitable under all the

¹ According to CPLR 308 (2), Monroe 485 was required to file proof of service within twenty days of either delivery or mailing, and service is deemed complete ten days after filing of proof of service. The Second Department has held that “the failure to file a timely proof of service is a curable procedural irregularity[.]” a late filing is a nullity, and thus, the defendant’s time to answer never began to run (*Zareef v Lin Wong*, 61 AD3d 749, 749 [2009]). This procedural irregularity is hereby cured by permitting the late filing of proof of service nunc pro tunc (*see Discover Bank v Eschwege*, 71 AD3d 1413, 1414 [2010]; *see also* CPLR 2001 and 2004).

² Hall failed to annex a copy of the complaint to his dismissal motion. As here, “[s]ince the pleadings were electronically filed and available to all concerned, it is appropriate to overlook this error” (*Champion v Take Two Interactive Software, Inc.*, 64 Misc 3d 530, 535 [Sup Ct, New York County 2019]).

circumstances.” Essentially, Hall argues that the Contract should not be enforced because the \$275,000.00 sales price is unconscionably low.

Hall further argues that Nationstar’s approval of the proposed short sale is a condition precedent to the Contract based on the unambiguous terms of paragraph 15 of the Contract. Defense counsel thus contends that “inasmuch as [Hall] did not obtain the approval by the holder of the mortgage, he was entitled to cancel [the Contract] because a condition precedent for closing was not satisfied.”

Finally, Hall asserts that the Contract is unenforceable because the font size does not comply with Real Property Law (RPL) § 265-a (3), which mandates that such contracts shall be written in at least twelve-point type. Hall submits a “first generation copy” of the Contract with a ruler showing the alleged deficiency in the font size.

Monroe 485, in opposition to the dismissal motion, argues that “[t]he time for Defendant to file an answer or responsive pleading expired on March 11, 2019 [and] Defendant is therefore in default and must first move to set aside his default before seeking reliefs under waivable defenses” Although Hall’s time to answer never began to run (*see supra* at n 1), Monroe argues that Hall waived the defenses of lack of standing and capacity because he failed to timely answer the complaint. On the merits, Monroe 485 argues that the complaint alleges the requisite elements for a cause of action for specific performance.

Monroe 485 also cross-moves, pursuant to CPLR 3211 (d), for an order granting it a continuance to conduct discovery on the ground that “certain facts and evidence are within Defendant’s knowledge and possession, and with[out] such information, the motion cannot be fully adjudicated . . .” Monroe 485 requests that Hall’s dismissal motion be denied without prejudice to renewal upon the completion of certain discovery. Specifically, Monroe 485 asserts that “[i]t is difficult to determine the actual size of the fonts [in the Contract] from viewing the electronic PDF documents” and that “[a]n in-camera review of the original contract is needed . . .” Monroe 485 further asserts that RPL § 265-a is not applicable if the Premises was not Hall’s residence when the Contract was executed and, thus, discovery is needed to ascertain whether and when Hall resided at the Premises. In addition, Monroe 485 seeks discovery from Hall’s mortgage company “to confirm whether the short sale was in fact denied or not approved . . .”

Discussion

“In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211 (a) (7) ‘the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail’” (*Quinones v Schaap*, 91 AD3d 739, 740 [2012] [quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). “The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference”

(*Hense v Baxter*, 79 AD3d 814, 815 [2010]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*EBCI, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

“The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law” (*E & D Grp., LLC v Violet*, 134 AD3d 981, 982-983 [2015] [internal quotations omitted]). “[A] purchaser seeking specific performance of a real estate contract must demonstrate that he or she was ready, willing, and able to perform on the contract, regardless of any anticipatory breach by the seller” (*533 Park Ave. Realty, LLC v Park Ave. Bldg. & Roofing Supplies, LLC*, 156 AD3d 744, 747 [2017]).

Here, the complaint alleges that the parties entered into the Contract for the sale of the Premises and that Monroe 485 tendered a \$1,000.00 down payment to Hall’s counsel. While the complaint alleges that Monroe 485 “has already p[er]formed activities that demonstrate [its] intent to honor the contract, as well as additional professional services” (see complaint at ¶ 9), the complaint does not allege that Monroe 485 was *able* to perform its obligations under the Contract. Consequently, the complaint fails to state a cause of action for specific performance.

Although Hall’s evidentiary submissions raise questions of fact as to whether the Contract is enforceable as alleged in the complaint, his evidentiary submissions do not

establish that Monroe 485 does not have a cause of action for specific performance. E&D Grp., 134 AD3d at 983. Hall's assertions that the Contract is unenforceable due to the unconscionably low sale price, the font size of the Contract and/or the mortgage holder's purported lack of approval for the short sale are questions of fact that cannot be resolved on a dismissal motion. Id. Accordingly, it is

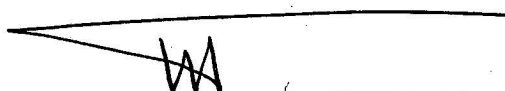
ORDERED, that Monroe 485's late filing of proof of service upon Hall is permitted, nunc pro tunc; and it is further

ORDERED that Hall's motion (in MS 001) to dismiss the complaint, pursuant to CPLR 3211 (a) (7), is granted, and the complaint is hereby dismissed without prejudice and with leave to replead; and is further

ORDERED that Monroe 485's cross-motion (in MS 002) for an order, pursuant to CPLR 3211 (d), granting a continuance to permit disclosure is denied as moot.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**Hon. Wavny Toussaint
J.S.C.**