

1580 Fulton Dev LLC v Han

2020 NY Slip Op 30662(U)

February 26, 2020

Supreme Court, Kings County

Docket Number: 517502/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.:517502/2019
Motion Date: 1-27-20
Mot. Cal. No.:56

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1580 FULTON DEV LLC.,

Plaintiff,

-against-

DECISION/ORDER

PHILIP S. HAN,

Defendant.
-----x

The following papers numbered 1 to 3 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memos of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memos of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memos of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action for breach of contract and specific performance, the defendant moves by pre-answer motion for an order pursuant to CPLR §§ 3211(a)(3) and 3211(a)(7) dismissing the complaint due to plaintiff's lack of standing and for failure to state a cause of action. Defendant also seeks an order vacating the Lis Pendens, enjoining plaintiff from filing a Lis Pendens in this matter in the future and awarding attorneys fees.

In the complaint, the plaintiff alleged that the parties entered into a contact for sale of real property pursuant to which the plaintiff agreed to purchase and the defendant agreed to sell the real property located at 1580-1582 Fulton Street, Brooklyn, New York. Plaintiff further alleged and that in connection therewith, the plaintiff tendered to the defendant a

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down payment.

Plaintiff alleged that the contract was executed on May 1, 2019 and that the closing was supposed to take place within 45 days of the purchasers receipt of the fully signed contract. Plaintiff claims that when the closing did not go forward within this time frame, defendant's attorney sent a "time is of the essence" letter to plaintiff's attorney on July 18, 2019 scheduling the closing for August 2, 2019, which plaintiff rejected because it was not sent in accordance with the notice provision contained in the Rider of the contract of sale. Finally, plaintiff alleged that it is ready, willing and able to proceed to the contract and that "[d]efendants have indicated an unwillingness to close and has repudiated its obligation to deliver the Premises as required by the Contract of Sale."

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d at 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). Under this standard, the plaintiff adequately stated causes of action for breach of contract and specific performance since the complaint alleged the existence of a contract for the sale of real property, that the defendant committed an anticipatory breach of the contract, that the defendant was ready and willing to close and that there was no adequate remedy at law (*see Huntington Min. Holdings v. Cottontail Plaza*, 60 N.Y.2d 997, 998, 471 N.Y.S.2d 267, 459 N.E.2d 492; *EMF Gen. Contr. Corp. v. Bisbee*, 6 A.D.3d 45, 51, 774 N.Y.S.2d 39; *Coizza v. 164-50 Crossbay Realty Corp.*, 73 A.D.3d 678, 682, 900 N.Y.S.2d 416; *Zeitoune v. Cohen*, 66 A.D.3d 889, 891, 887 N.Y.S.2d

253; *see also Yitzhaki v. Sztaberek*, 38 A.D.3d 535, 536–537, 831 N.Y.S.2d 267; *cf. Latora v. Ferreira*, 102 A.D.3d 838, 840, 958 N.Y.S.2d 727). While the allegations in the complaint to the effect that the defendant sent a legally improper “time is of the essence” letter were an insufficient to state that the defendant committed an anticipatory breach of the contract (*see 313 43rd St. Realty, LLC v. TMS Enterprises, LP*, 163 A.D.3d 512, 514–15, 81 N.Y.S.3d 112, 114–15), plaintiff also alleged that “[d]efendants have indicated an unwillingness to close and has repudiated its obligation to deliver the Premises as required by the Contract of Sale.” This latter allegation, which the court must accept at true and accord the plaintiff the benefit of every possible favorable inference that flows therefrom, sufficiently stated that there was an anticipatory breach of the contract by the defendant.

In deciding defendant’s motion, the Court did not consider any of the evidentiary materials submitted by the defendant. “Whether the plaintiff can ultimately establish its allegations was not part of the calculus (*EBC I, Inc. v. Goldman Sacks & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26; *see also Vasomedical Inc. v. Barron*, 137 A.D.3d 778, 25 N.Y.S.3d 894; *Zellner v. Odyll, LLC*, 117 A.D.3d 1040, 1041, 986 N.Y.S.2d 592). For all of the above reasons, defendant’s motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied.

That branch of the defendant’s motion pursuant to CPLR § 3211(a)(3) to dismiss both causes of action on the ground that “the party asserting the cause of action has not legal capacity to sue” is also denied. “Capacity” regards the ability of a plaintiff to competently bring an action in a civil court, without being afflicted by a disqualifying

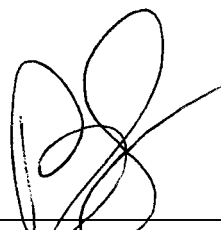
disability such as infancy or mental illness (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 N.Y.2d 148, 615 N.Y.S.2d 644; *HSBC Bank USA Nat. Ass'n v Roumiantseva*, 39 Misc.3d 1239[A], 975 N.Y.S.2d 709). There are no allegations to the effect and no evidence was presented that the plaintiff lacks capacity.

For all of the above reasons, it is hereby

ORDERED that defendant's motion is in all respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: February 26, 2020



PETER P. SWEENEY, J.S.C.

Hon. Peter P. Sweeney, J.S.C.

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