

<b>Roger v Burgundy Plaza Mgt., Inc.</b>
2020 NY Slip Op 30897(U)
March 9, 2020
Supreme Court, Kings County
Docket Number: 470/19
Judge: Carl J. Landicino
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At an IAS Term, Part 81 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 9<sup>th</sup> day of March, 2020.

P R E S E N T:

HON. CARL J. LANDICINO,  
Justice.

-----X

DONNA ROGER, SHERWIN ROGER,  
  
Plaintiffs,

- against -

BURGUNDY PLAZA MANAGEMENT, INC.,  
  
Defendant.

-----X

The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	7-33, 36
Opposing Affidavits (Affirmations) _____	40-46
Other Papers (Memoranda of Law) _____	34, 48

DECISION AND ORDER

Index No. 470/19

MOTION SEQUENCE #1

NYSEF NO.

KINGS COUNTY CLERK  
FILED  
2020 MAR 19 AM 8:20

Upon the foregoing papers, plaintiffs Donna and Sherwin Roger (plaintiffs or the Rogers) move (Mot. Seq. #1) for an order: 1) declaring that the memorandum of contract prepared and recorded by the defendant, Burgundy Plaza Management, Inc. (Burgundy) is ineffective and void pursuant to section 294 of the Real Property Law, 2) directing the County Clerk to cancel the June 1, 2019 notice of pendency pursuant to CPLR 6514(b) and, 3) granting such other equitable relief as may be deemed appropriate.

### *Background*

Plaintiffs, the purported title holders of the premises known as 711 East 52<sup>nd</sup> Street, Brooklyn, New York (the “Premises”), executed a contract for the short sale of same on February 24, 2016, to Burgundy while they were in the midst of foreclosure. The parties then executed a memorandum of contract that Burgundy recorded on March 7, 2016 (the 2016 memorandum).

Plaintiffs argue that they are entitled to an order declaring the 2016 memorandum void and cancelling the notice of pendency because, among other things, the defendant persuaded them to execute the agreement without counsel and in bad faith. They further claim that defendant failed to tender any consideration or deposit when it executed the agreement, that defendant had constructive or actual knowledge that prior notices of pendency were already filed against the property, and that defendant later failed to close on the sale. The Plaintiffs also argue that the 2016 memorandum does not comply with the requirements of Real Property Law (RPL) § 294 because it does not reflect the purchase price, consideration or closing date.

On or about November 5, 2018, the plaintiffs executed another contract for the sale of the Premises, by short sale, to non-party, 711 East 52<sup>nd</sup> Street LLC (hereinafter “52<sup>nd</sup> Street”). However, the Plaintiffs contend that they were unable to close by January 15, 2019, as required by the Plaintiffs’ lender, because Burgundy ignored multiple requests by Plaintiffs to withdraw the 2016 memorandum. In support of withdrawal, the Plaintiffs argue that, if the closing date of Defendant’s prior contract was implied to be thirty days from

February 24, 2016 (date of execution of the initial contract) or March 7, 2016 (when defendant recorded the 2016 memorandum), Plaintiffs' sale of the Premises to a subsequent ready, willing and able buyer (52<sup>nd</sup> Street) over two years later should not have been hindered by Defendant's recorded memorandum of contract, given that the recording of said memorandum was only effective for 30 days from the actual or implied closing date.

Although the Plaintiffs concede that the memorandum of contract is not a lien, Plaintiffs contend they need an order to declare it void because it is a cloud on the title and impedes insurable title, free from encumbrances, from title underwriters for the closing of any sale of the Premises. Plaintiff Sherwin Roger (Sherwin), in his affidavit, claims that the Defendant did not communicate with him at all after the parties executed the 2016 memorandum. Plaintiffs commenced this action after Defendant purportedly told the attorney for their new buyer that it would withdraw the 2016 memorandum if Plaintiffs paid the sum of \$90,000. Defendant has answered the complaint, interposed a counterclaim for specific performance of the initial contract, and filed a notice of pendency against the subject Premises.

Plaintiffs argue that the counterclaim is not meritorious and the notice of pendency is improper because the memorandum of contract upon which they are based is void. Further, Plaintiffs argue that Defendant's lack of good faith is demonstrated by Defendant's failure to produce a copy of the contract even though Plaintiffs requested same. Plaintiffs ask that this court also award them damages, costs and attorneys' fees in an amount to be determined after they are provided with a chance to submit evidence of the damages they

purportedly have suffered as a result of the notice of pendency filed by Defendant.

Burgundy opposes Plaintiffs' motion and contends that the recording of the 2016 memorandum, effective or not, does not effect the enforceability of the contract, which is still binding and has not been terminated. Moreover, in light of their counterclaim, defendant argues that the 2016 memorandum's alleged deficiencies are irrelevant, because Burgundy was ready, willing and able to purchase the Premises under the contract, and it therefore has a valid claim for specific performance and properly filed the notice of pendency.

Defendant avers that, since there was no definitive closing date in the contract, the memorandum could not reflect one. Further, Defendant argues that there is a presumption that a closing will occur within a reasonable time, and short sales typically take a considerable amount of time. Defendant alleges that it assisted the Plaintiffs in securing a mortgage and presents a financing letter dated October 27, 2017 approving the short sale. In an affidavit by its president, Solomon Jacobowitz, Burgundy claims it tried to contact the Plaintiffs to arrange their closing by the loan servicer's deadline, December 15, 2017, but that the Plaintiffs did not return its calls. As a result, Defendant contends that it was Plaintiffs who failed to abide by the contract terms and Burgundy is thus entitled to specific performance. In its opposition, Defendant provided a copy of its contract to buy the Premises from Plaintiffs and explained that its delay in disclosure was only due to the automatic stay of discovery pending resolution of the instant motion.

### *Discussion*

Although the Plaintiff moves for a declaratory judgment, without specifically requesting summary judgment pursuant to CPLR 3212, it is clear that the parties have charted their own procedural course (*see Becher v Feller*, 64 AD3d 672 [2d Dept 2009]). Accordingly, pursuant to the authority of CPLR 2001, the court will overlook this mere irregularity and treat the instant motion as one for summary judgment, given that the submissions make it clear they are laying bare their proof and deliberately charting a summary judgment path (*see Myers v BMR Bldg. Inspections, Inc.*, 29 AD3d 546 [2d Dept 2006]).

A party seeking summary judgment has the burden of establishing his or her defense “sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; *see* CPLR 3212[b]). The moving party bears the burden of a *prima facie* showing of its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]; *Point Holding, LLC v Crittenden*, 119 AD3d 918, 919 [2d Dept 2014]). Once the movant has made its *prima facie* showing, the burden shifts to the

non-moving party to show “facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *see Greenberg v Coronet Prop. Co.*, 167 AD2d 291 [1st Dept 1990]). Conflicting inferences and issues of credibility will preclude summary judgment to a party and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*see Open Door Foods, LLC v Pasta Machs., Inc.*, 136 AD3d 1002, 1004-1005 [2d Dept 2016]; *see also Benetatos v Comerford*, 78 AD3d 750, 751 [2d Dept 2010]). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

Although New York Real Property Law dictates that a contract for the sale of real property is void against a subsequent purchaser if it is not recorded (RPL §294[3]), section 2 of the Real Property Law states :

In lieu of the recording of an executory contract, there may be recorded a memorandum thereof, executed by the parties, and acknowledged or proved, and certified, in the manner to entitle a conveyance to be recorded, containing at least the following information with respect to the contract: the names of the parties to the contract, **the time fixed by the contract for the conveyance of title**, and a description of the property. The executory contract shall be deemed duly recorded upon the recording of a memorandum in conformity with this subdivision.

(RPL § 294[3][emphasis added]).

The recording of a memorandum is enforceable against a subsequent party seeking to purchase a property “up to and including the thirtieth day after the day fixed by the contract for conveyance of title” (RPL § 294 [5]). “The failure of the parties to specify a closing date in the contract is not a fatal defect because the law will presume that the closing will take

place within a reasonable time” (*Simpson v 1147 Dean, LLC*, 116 AD3d 835, 836 [2d Dept 2014]). “What constitutes a reasonable time to perform turns on the circumstances of the case” (*Point Holding*, 119 AD3d at 919; *see also Rodrigues NBA, LLC v Allied XV, LLC*, 164 AD3d 1388, 1389 [2d Dept 2018]). However, in order to claim a buyer is in default, the seller must take affirmative action to give the buyer a reasonable time to perform, and the seller must inform said buyer that failure to do so will be considered a default (*see Rodrigues*, 164 AD3d at 1389).

The February 2016 contract between the parties did not identify a closing date and provided for no downpayment from Burgundy. Although the contract was never recorded, Burgundy filed the 2016 memorandum, satisfying the recording requirements. Plaintiffs’ central argument, in sum, states that the 2016 memorandum is void because while no closing date was set - to invoke the 30 day closing deadline of RPL § 294 [5] - under the authority in *Simpson*, title had to close within a “reasonable” amount of time and the Defendant did nothing in response to Plaintiffs’ efforts to close until providing the financing letter in October of 2017. Plaintiffs, however, failed to show that they set a closing date and warned Defendant that failure to close would result in default (*see Weiss v Feldbrand*, 50 AD3d 673, 674 [2d Dept 2008]; *cf. Brickstone Group, Ltd. V Randall*, 172 AD3d 671 [2d Dept 2019]). Further, Plaintiffs failed to provide sufficient evidence of the particular facts and circumstances of this case which show that Defendant was not a ready, willing and able buyer within a reasonable amount of time of execution of the contract (*see Zev v Merman*,

73 NY2d 781, 783 [1988]). More importantly, Plaintiff includes no support to substantiate that twenty months (the time between the February 24, 2016 contract signing and the October 27, 2017 finance letter procured by defendants) is an “unreasonable” amount of time so as to consider the 2016 memorandum void as a matter of law (*see Simpson, supra*). As a consequence of the foregoing, Plaintiffs have failed to meet their *prima facie* burden, thus, their motion must be denied.

### *Conclusion*

As the Rogers have failed to meet their initial burden of demonstrating entitlement to judgment as a matter of law (*see Giuffrida*, 100 NY2d at 81; *Zuckerman*, 49 NY2d at 562), that burden never shifted to the Defendants to establish the existence of a material question of fact which would require a trial (*see Greenberg* at 291; CPLR 3212 [b]). Accordingly, the Plaintiff’s motion for summary judgment is denied in all respects without regard to the sufficiency of the Defendants’ opposition papers (*see Vega*, 18 NY3d at 502; *Point Holding*, 119 AD3d at 920).

The court, having considered the Plaintiffs’ remaining contentions, finds them without merit. All relief not expressly granted herein is denied.

This constitutes the Decision and Order of the Court.

ENTER:

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