

Hegeman Plaza LLC v Burgan
2020 NY Slip Op 31161(U)
May 4, 2020
Supreme Court, Kings County
Docket Number: 512100/2017
Judge: Carolyn E. Wade
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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 4th day of May 2020

PRESENT:
HON. CAROLYN E. WADE,

Justice

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HEGEMAN PLAZA LLC,

Plaintiff,

Index No. 512100/2017

-against-

DECISION and ORDER

EUCLID BURGAN and BERNADETTE BURGAN,

Defendants.

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Recitation, as required by CPLR ' 2219 (a), of the papers considered in the review of plaintiff HEGEMAN PLAZA LLC's order to show cause (seq. #4) to stay the enforcement of the Decision and Order of this Court, dated September 16, 2019, and its motion to reargue (seq. #5):

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

Upon the foregoing cited papers, and after oral argument, plaintiff HEGEMAN PLAZA LLC moves, by order to show cause (seq. #4), to stay the enforcement of a Decision and Order of this Court, dated September 16, 2019. Plaintiff further moves (seq. #5), pursuant to CPLR 2221, to reargue the same Order, which granted defendants' motion 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 (collectively, "Defendants") entered into a written contract of sale (the "Contract," Emanuel's aff in motion seq. #2, 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, ¶10). Plaintiff was prohibited from assigning the Contract to a third party without Defendants' written consent (*id.*, ¶8¹). Moreover, in the event that the agreement was terminated due to the fault of Plaintiff, Defendants shall retain the down payment (*id.*, ¶12)².

On March 6, 2017, an addendum was added to the Contract (the "Exchange Addendum," Emanuel's aff in motion seq. #2, exhibit "2") and was signed by the parties. It documented Defendants' intent to utilize the transaction as an Internal Revenue Code § 1031 tax-deferred

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

² ¶12. (c): "Upon termination of this agreement due to the fault of the PURCHASER which would entitle SELLER to retain the down payment, to SELLER."

property exchange³ (“1031 exchange”). The Exchange Addendum also 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 in motion seq. #2, 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 in motion seq. #2, exhibit “4”).

The heart of the dispute in this matter involves a series of e-mails between Mr. Stein and Mr. Emanuel on April 24, 2017 (Emanuel’s aff in motion seq. #2, exhibit “5”). On that day, at 10:23 a.m., Mr. Stein’s office informed Mr. Emanuel that Plaintiff would take title under an entity named Linden Development of Queens LLC (the “LLC”). After an unsuccessful attempt to confirm whether Mr. Schwartz was the sole member of said entity, Mr. Emanuel, at 1:13 p.m., told Mr. Stein that Plaintiff was in violation of the Contract, and that Defendants might consider selling to the LLC under different terms, but would not guarantee entering into another agreement. At 1:25 p.m., Mr. Stein replied that “since your client won’t consent to an assignment please do the deed to the contract vendee.” At 3:30 p.m., Mr. Emanuel emailed to Mr. Stein a “Notice of Termination of Contract of Sale,” and asked where he should return the down payment. At 3:35 p.m., Mr. Stein responded that his client was filing an action for specific performance. At 3:50 p.m., Mr. Emanuel indicated that, “per [the] conversation [between him and Mr. Stein],”

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.”

Defendants agreed to follow through with the sale. At 5:28 p.m., Mr. Stein agreed to close on the following day, and also requested an assignment of the Contract to the LLC. At 5:36 p.m., Mr. Emanuel maintained that his client refused such an assignment. At 7:49 p.m., Mr. Stein stated:

“i understand that your client desires to do a 1031 exchange. I'm familiar with the process from past transactions and understand that a purchasers consent of notice of assignment is required. am i correct or has the IRS procedure changed?”

At 8:09 p.m., Mr. Emanuel maintained that his clients refused to assign the contract.

At 8:44 p.m., Mr. Stein stated the following:

“...based on present facts, if my clients consent to the Notice of Assignment [regarding the 1031 exchange] is still an IRS requirement i dont know if my client is interested in signing it and the tax bill may be something that they didn't anticipate. i have my thoughts on this matter and the way it can get resolved. i hope by tomw attitudes and tone changes so that closing goes well for all the parties. of course that will mean consenting to the contract assignment and changing your 1031 docs. Easy shmeezy. if your client doesn't then purchaser really doesnt need their consent for him to accomplish his goals and needs but you can bet the Purchaser won't cooperate with the Seller. kind of a tit for tat. you know what i mean?”

At 10:55 p.m., Mr. Emanuel responded by maintaining that his clients stood by their position, and made reference to the Exchange Addendum.

On April 25, 2017, Mr. Emanuel requested that the closing be postponed for two weeks to address the issue, and Mr. Stein consented. The closing was never rescheduled. On June 20, 2017, Plaintiff filed the instant lawsuit seeking specific performance and a *lis pendens* against the Property.

By Decision and Order (“September 16th Decision”), this Court denied Plaintiff’s motion for summary judgment (seq. #3), and granted Defendants’ motion for summary judgment (seq. #2), which awarded them the down payment. The ruling was based upon the following findings:

(1) Plaintiff failed to obtain a mortgage commitment as required by the Contract; and (2) “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 as required by the Exchange Addendum.” The instant applications ensued.

Arguments

At the outset, the Court notes that Defendants submitted written opposition to Plaintiff’s order to show cause (seq. #4), but not to its motion to reargue (seq. #5). During oral argument, it was disclosed that, instead of filing opposition, Defendants made a cross-motion (seq. #7) for an order denying the motion to reargue, which is returnable on a later date. Consequently, the Court will not consider the merits of the cross-motion at this juncture. Since oral argument was held on Plaintiff’s order to show cause (seq. #4) and its motion to reargue (seq. #5); and both applications are being decided herein, this Court, in the interest of justice, will not hold Defendants in default with respect to the motion to reargue (seq. #5).

Plaintiff made essentially the same arguments in both of its applications. It contends that this Court misinterpreted the Contract to allow Defendants to cancel the sale, and keep the down payment. It maintains that the Contract provides that Defendants shall refund the down payment if Plaintiff could not obtain a mortgage commitment. It also asserts that Defendants’ motion for summary judgment cannot procedurally be granted, because issue had not been joined at the time Defendants made their motion for summary judgment. Plaintiff further avers that parties were merely negotiating in good faith concerning the possibility of an assignment, and that by an e-mail, dated April 24, 2017, at 1:25 p.m., it agreed to not assign the Contract. Lastly, Plaintiff

asserts that the Contract was terminated on April 24, 2017, either by Mr. Stein's e-mail at 3:35 p.m. or by Defendants' e-mail at 3:30 p.m.

Defendants, in opposition, claim that their summary judgment application was procedurally proper, as Plaintiff filed a Note of Issue on October 23, 2018, and issue was joined on July 21, 2017. They also cite paragraph 12 of the Rider to the Contract, which states that the "Seller's attorneys shall hold down payment until closing of title in an interest-bearing account with the interest earned thereon to be paid over by such attorneys as follows:... (c) Upon termination of this agreement due to the fault of the PURCHASER which would entitle SELLER to retain the down payment, to SELLER." Defendants further contend, in opposition to the order to show cause for a stay, that Plaintiff will not suffer irreparable injury in the absence of a stay.

Analysis

"A motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion' " (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014] [citations omitted]). Moreover, "[t]o be entitled to a preliminary injunction, the movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (*Ruiz v Meloney*, 26 AD3d 485, 485-86 [2d Dept 2006] [citations omitted]).

With respect to the issue of the timeliness of Defendants' motion for summary judgment, while the application was technically premature since issue had not yet been joined, under the particular facts of this case, the Court properly entertained the motion "where the plaintiff was clearly on notice that the motion was made pursuant to CPLR 3212, submitted opposition papers

thereto, and ‘deliberately chartered a summary judgment course’ ” (*Feitner v Town of Smithtown*, 23 AD3d 431, 432 [2d Dept 2005], quoting, *inter alia*, *Hickey v Travelers Ins. Co.*, 158 AD2d 112, 114 [2d Dept 1990]; Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C3212:12, at 21). Here, Plaintiff was on notice that Defendants moved for summary judgment, and submitted written opposition, which did not address the timeliness of its adversaries’ motion.

Plaintiff’s argument that the Contract provides that Defendants shall refund the down payment if it could not obtain a mortgage commitment is unavailing. The September 16th Decision was not only based on a finding that Plaintiff failed to obtain a mortgage commitment, but also 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 as required by the Exchange Addendum.” Significantly, the Rider to the Contract explicitly provides that Defendants shall retain the down payment in the event that the agreement was terminated due to the fault of Plaintiff (see Rider to the Contract, ¶12[c]⁵).

Furthermore, Plaintiff’s contention that parties were merely negotiating in good faith concerning the possibility of an assignment is unpersuasive. The April 24, 2017 e-mail exchange reflects that Plaintiff threatened not to cooperate with the 1031 exchange provision in the Exchange Addendum, unless the Defendants consented to a contract assignment (see e-mails spanning from 7:49 p.m. to 8:44 p.m., Emanuel’s aff in motion seq. #2, exhibit “5,” p. 9-11). Plaintiff’s


⁵ ¶12. (c): “Upon termination of this agreement due to the fault of the PURCHASER which would entitle SELLER to retain the down payment, to SELLER.”

withdrawal of its assignment request at 1:25 p.m. is of no moment, as it later persisted on assigning the Contract to the LLC (see e-mails spanning from 5:28 p.m. to 8:44 p.m., *id.*, p. 9-12)

Lastly, Plaintiff's argument that the Contract was already terminated on April 24, 2017 either by Mr. Emanuel's e-mail at 3:30 p.m. or by Mr. Stein's e-mail at 3:35 p.m. is belied by the fact that both parties subsequently agreed to proceed with the closing (see e-mails spanning from 3:50 p.m. to 5:36 p.m., *id.*, p. 12-14), until Plaintiff threatened not to cooperate with Defendants, if they would not consent to a contract assignment.

After a meticulous examination of the respective submissions, this Court finds that Plaintiff failed to show that this Court overlooked or misapprehended any fact or law in determining the prior motion. Thus, Plaintiff's motion to reargue is granted, and upon reargument, is **DENIED**. The court adheres to its prior determination. It necessarily follows that the likelihood of success on the merits is not in Plaintiff's favor. Therefore, Plaintiff's order to show cause to stay the enforcement of the September 16th Decision is also **DENIED**.

This constitutes the Decision and Order of the court.



HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE