

Natan 5 LLC v Edwards
2020 NY Slip Op 31222(U)
April 27, 2020
Supreme Court, Kings County
Docket Number: 518579/18
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 27th day of April, 2020.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X
NATAN 5 LLC,

Index No. 518579/18

Plaintiff,

- against -

VALERIE EDWARDS A/K/A VALERIE M.
EDWARDS A/K/A VALERIE MARY EDWARDS,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Other Papers: Plaintiff's Memorandum of Law _____

11, 12, 13, 14, 16
33, 34
44, 45, 46

Upon the foregoing papers, plaintiff Natan 5 LLC (Natan) moves, in motion sequence (mot. seq.) 1, for an order: (1) pursuant to CPLR 3212, granting it summary judgment for specific performance on a contract to purchase residential real property; (2)

dismissing all of defendant's affirmative defenses and counterclaims pursuant to CPLR 3211 (b) and CPLR 3212; and (3) directing an inquest to determine reasonable attorney's fees and other damages as the court may deem necessary.

Facts and Procedural Background

On June 22, 2018, defendant Valerie Edwards (Edwards), as seller, entered into a residential contract of sale (the contract) with Natan, as buyer, for the premises located at 760 Crown Street, Brooklyn, New York 11213 (the property). Among other provisions, the contract: (1) specified a purchase price of \$780,000, with a \$20,000 deposit to be held in escrow by defendant's real estate attorney, Alex Ngati (Ngati); (2) listed that Edwards would receive \$10,000 of the down payment upon its execution by both parties; and (3) directed that closing was to take place "on or about 45 days" or "upon reasonable notice (by telephone or otherwise) by purchaser," but did not state that time was of the essence. While the contract mostly resembled a standard form contract widely used in the New York real estate industry, unlike the standard form contract, it allowed Natan to unilaterally assign the contract, without prior written notice to Edwards. The intent of this provision is evidenced in the contract where the "purchaser" is identified as "Natan 5 LLC or other entity to be formed."

Plaintiff tendered the down payment check for \$20,000 on June 22, 2018, issued by "NC Homes LLC," to Ngati. In turn, Ngati issued three checks from his IOLA account: two checks to Edwards for \$5,000 each, issued on July 2, 2018 and August 15, 2018, and one check to "Rapid Realty Bedford Stuyvesant" (Rapid) for \$5,000, issued on

August 31, 2018. The backs of the checks issued to Edwards indicate that they were deposited to Municipal Credit Union in New York County.

By early September, 2018, the closing had not occurred as contemplated by the contract. On September 13, 2018, Natan commenced this action for breach of contract, specific performance, and for an injunction restraining defendant from conveying the property. Alternatively, Natan sought prompt return of its contract deposit and \$330,000 in damages. On October 21, 2018, Edwards filed an answer alleging that she was fraudulently induced into executing the contract for a sum substantially below the property's market value. Edwards also asserts a counterclaim for a declaratory judgment that the contract is void because it was fraudulently induced. On November 19, 2018, Natan filed a reply to the counterclaim. A review of NYSCEF indicates that a preliminary conference has not been held, nor has formal discovery commenced, prior to the filing of the instant motion.

Parties' Contentions

A. Plaintiff's Contentions

Alvin Brereton (Brereton), a former mortgage broker and Edwards' longtime friend, submits an affidavit alleging that in May, 2018, Edwards told him that she was interested in selling the property and moving back to Trinidad. Brereton offered to assist Edwards in finding a buyer, and told Edwards that he would not accept payment for his services. Brereton asserts that he introduced Edwards to Avi Ishta, a/k/a Abraham Sellassie (Ishta), an "authorized signatory" for Natan, because he knew Ishta to be

interested in the type of property that Edwards was selling. During their initial meeting, Edwards showed Brereton and Ishta an appraisal report valuing the property at \$1,140,000 as of June 7, 2018. In his affidavit, Ishta avers that when Edwards insisted on a \$1,000,000 sale price, he told her that the price was too high because the property needed \$180,000 to \$200,000 worth of cosmetic repairs, new plumbing, and electrical upgrades. Ishta alleges that he showed Edwards a Chase Home Evaluation search valuing similar properties in the area between \$860,000.00 and \$1,050,000.00, less than Edwards' valuation for the subject property. Brereton states that sometime in June, 2018, Edwards and Ishta had another meeting at which time they agreed on the \$780,000 sale price.

According to Brereton, at some point during the negotiation stage, Edwards mentioned she did not have an attorney and asked him for a referral. Brereton recommended Ngati because they previously worked together. Brereton alleges that Edwards asked him to attend the contract signing, scheduled for June 22, 2018, in Ngati's office. At the contract signing, Edwards allegedly told Ishta and Brereton that she urgently needed to access her \$20,000 deposit in order to pay her bills. The parties then mutually agreed that \$10,000 would be released to Edwards for outstanding bills. Brereton alleges that on July 2, 2018 and August 15, 2018, he picked up the \$5,000 checks from Ngati, delivered them to Edwards, and then drove Edwards to the municipal credit union to deposit them.

Brereton alleges that after the contract was signed, Edwards, with his assistance, attempted to rent an apartment but that her security deposit check to the realtor bounced. This issue was further complicated because Edwards had no income and a low credit score. Edwards then requested that an additional \$5,000 be released from her security deposit to be paid toward a rental. Ishta allegedly authorized the release on the conditions that Edwards signed the lease for the apartment and that the realtor, Rapid, be paid directly from Ngati's escrow account. Brereton alleges that Ngati issued the check to Rapid for this purpose.

Ian Axelrod (Axelrod), Natan's attorney for the subject purchase, alleges that in September, 2018, Daniel Richland (Richland), Edward's litigation attorney, advised him that Edwards was no longer interested in selling the property and did not intend on proceeding with the contract. Ishta avers "on or about the second half of September," he learned from his litigation attorney that Edwards had repudiated the contract. Natan alleges that after Edwards received her checks, she became unavailable and refused to take any action to prepare for closing, thereby repudiating the contract.

In Natan's reply, Ishta asserts that Edwards herself does not contest receiving the funds, despite denying it in her answer and counterclaim. Ishta avers that he had a verbal understanding with Edwards that the \$10,000 would be used to refund her second floor tenant's security deposit and to secure her a new rental.

Natan contends that it is ready, willing and able to purchase the property. As proof of its ability to close, Natan submits a March 18, 2019 letter from Manhattan Bridge

Capital (MBC) notifying Ishta that his application for a credit line of up to \$780,000 for the purchase of purchasing a 1-4 family house has been approved. In its reply, Natan also submits a September 10, 2019 letter from ICE Lender Holdings LLC (ICE) stating that it has committed to fund \$780,000 to Natan to purchase the property. Natan further argues that paragraph 23 (b) of the contract allows specific performance as a remedy, that the property is unique, and that Natan has no adequate remedy at law.

In addition, Natan argues that Edwards' counterclaim should be dismissed because she has failed to submit adequate corroborating evidence that she was defrauded. Natan contends that the contract is valid because the sale price and other contractual terms were freely negotiated between the parties, that Edwards voluntarily agreed to the terms, and because she was not induced into retaining Ngati or signing the contract. In this regard, both Ishta and Brereton deny the existence of a commission agreement or any other type of agreement between them with respect to the property. Brereton further asserts that Edwards retained Ngati voluntarily, that he did not receive any commission from Ngati for referring Edwards and did not have any side agreement with Ngati. Natan further argues that Edwards' voluntariness is evidenced by the fact that: (1) Edwards obtained her own independent appraisal of the property prior to entering negotiations yet nevertheless agreed to a substantially lower sale price, (2) Edwards reviewed Ishta's report of neighboring properties showing valuing comparable properties lower, and (3) Edwards knew that her house required substantial repairs.

Natan further contends that it is entitled to attorney's fees and consequential damages pursuant to paragraph 23 (b) of the contract, as it incurred attorney's fees as well as a change in mortgage interest rates as a result of commencing this action.

B. Defendant's Contentions

Edwards disputes the vast majority of Natan's factual assertions and legal arguments. According to Edwards, Brereton, Ishta and Ngati conspired together to defraud her of her longtime home and steal her equity. Contrary to Brereton's allegations, Edwards states that Brereton first introduced her to Ishta by inviting Ishta to her home on June 22, 2018, the same day they executed the contract. During this initial meeting, Ishta told her that the property was not worth \$1,140,000, and that she would "save on taxes" by reducing the purchase price. In addition, Brereton allegedly advised her that as a senior citizen, she would have "no capital gain" if she reduced the sale price to \$780,000. Edwards confirms reviewing Ishta's list of comparable neighboring properties.

After Edwards agreed to sell during this initial meeting, Ishta allegedly went to his car, stating that he needed to retrieve a "form" for her to sign so that he could "check title." Returning without the form, Ishta requested that Edwards meet him at his office to sign the "form." At his office, Ishta gave her a copy of the "form," which she then recognized to be the subject contract. When Edwards told Ishta that she could not sign a contract without an attorney present, both Ishta and Brereton told her that they "have a lawyer here" that she "could use." Ishta and Brereton then allegedly telephoned Ngati,

whose office was located in the same building, and thereafter, Ngati appeared and offered to represent Edwards. Ngati saw Edwards reading the contract and encouraged her to sign it on the spot, telling her “there was nothing to read,” that “it’s a regular contract,” and that “he will deal with it later.” Edwards alleges that she therefore reluctantly signed the contract.

Thereafter, Ishta allegedly directed Edwards to Rapid to assist her with finding a rental apartment. Edwards contends that Ishta is an agent of Rapid and that his “partner” runs the company. Edwards submitted a rental application for an apartment to Rapid along with a \$2,200 check, but asserts that Rapid denied her application because she had poor credit and never attempted to cash her check. Edwards also alleges that she never gave Ngati permission to issue Rapid the \$5,000 check, and that she does not know for what purpose that check was to be used.¹

¹ In further support of this contention, Edwards’ litigation attorney, Richland asserts that in November, 2018, he spoke to Ngati and Ngati confirmed that he unilaterally released the escrow funds without Edwards’ authorization and that Ishta is Rapid’s principal. Richland further states that Ngati informed him that he and Ishta maintained an office together, have transacted many deals together, and that Ishta frequently retained Ngati in connection with real estate transactions as an attorney for sellers where Ishta was purchasing property. Ngati also allegedly conceded to Richland that the assignment provision in the contract was standard and beneficial for the purchaser as to assignment, and that he did not disclose the consequences of this change to Edwards. Richland contends that it is “curious, unusual, and supportive” of Edwards’ position that Ngati willingly relayed this information to him. Ngati, however, does not submit an affirmation, and to the extent that Richland’s allegations concerning his conversations with Ngati are unsubstantiated hearsay, the court, on the instant motion, disregards them.

As Ishta continued to pressure her to close, Edwards allegedly told him that she needed more time, especially since her rental application had been denied. Edwards alleges that instead of giving her more time, Ishta commenced the underlying action. Edwards contends that it was Natan who repudiated the contract by commencing this action prior to any alleged breach, and that Richland only told Ishta that she was no longer interested in selling the property after Natan commenced this action. Edwards further argues that the copies of the three escrow checks attached to Natan's motion demonstrate that Ngati conspired with Natan, because the copies show that they were provided to Natan by Ngati in November, 2018, *after* plaintiff commenced the action, apparently voluntarily and without a subpoena.

Finally, Edwards argues that Natan has failed to meet its burden of establishing that it was ready, willing and able to close. In this regard, Edwards contends that the MBC funding letter was unsworn, unacknowledged, and dated after litigation was commenced, and is therefore insufficient to establish that Natan had the funds to purchase the property pursuant to the contract.

Discussion

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make this prima facie showing

requires denial of the motion without regard to the sufficiency of the opposing papers (see *Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *J.P. Morgan Mortgage Acquisition Corp. v Kagan*, 157 AD3d 875, 876 [2d Dept 2018]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (see CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). “[A]verments merely stating conclusions of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the non-moving party and accord that party the benefit of every favorable inference (see *Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a “drastic remedy” that “should not be granted where there is any doubt as to the existence of such issues or where the issue is ‘arguable’; issue-finding, rather than issue-determination, is the key to the procedure” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). “The court’s function on a motion for summary judgment is ‘to determine whether material factual issues exist, not resolve such issues’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

To prevail on a cause of action for specific performance of a contract, a buyer must show that it substantially performed its contractual obligations and that it was ready, willing, and able to close the transaction on the original law day, or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter (see *MB Shtetl 1 Corp. v Singh*, 166 AD3d 604, 605 [2d Dept 2018]; *Revital Realty Group, LLC v Ulano Corp.*, 112 AD3d 902, 904 [2d Dept 2013], *lv denied*, 22 NY3d 866 [2014]); *Pesa v Yoma Dev. Group, Inc.*, 74 AD3d 769, 770 [2d Dept 2010] *affd* 18 NY3d 527, 531 [2012]; *Ferrone v Tupper*, 304 AD2d 524, 525 [2d Dept 2003]). The buyer must also establish that the seller was able to convey that property and that it otherwise has no adequate remedy at law (see *MB Shtetl*, 166 AD3d at 605; *1107 Putnam, LLC v Beulah Church of God in Christ Jesus of the Apostolic Faith, Inc.*, 152 AD3d 474, 475 [2d Dept 2017]).

In moving for summary judgment for specific performance, a plaintiff purchaser demonstrates that it was ready, willing and able to close by submitting evidence of its financial ability to purchase the property (see *GLND 1945, LLC v Ballard*, 172 AD3d 1330, 1331 [2d Dept 2019]; *MB Shtetl*, 166 AD3d at 605; *Grunbaum v Nicole Brittany, Ltd.*, 153 AD3d 1384, 1385 [2d Dept 2017]). “This showing is required regardless of any alleged anticipatory breach by the defendant” (*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]; *see also GLND 1945*, 172 AD3d at 1331).

Here, Natan has failed to meet its initial burden of demonstrating that it was ready, willing and able to close on the property within 45 days of execution or a reasonable time thereafter (*see MB Shtetl*, 166 AD3d at 605; *Pesa*, 74 AD3d at 770 [2d Dept 2010]; *Ferrone*, 304 AD2d at 525). Ishta’s self-serving statement that he and Natan had the financial ability to close is conclusory (*see GLND 1945*, 172 AD3d at 1331 [conclusory assertions of readiness and ability to close insufficient]; *Aliperti v Laurel Links, LTD*, 27 AD3d 675 [2d Dept 2008] [same]). Moreover, the March 18, 2019 letter from MBC and the September 10, 2019 letter from ICE stating that it has committed to fund \$780,000 to Natan to purchase the property fail to substantiate Ishta’s assertions because those unsworn and unverified letters are dated *after* the time period for closing as contemplated by the contract. As such, those letters do not give cause to believe that Ishta and Natan had funds to close during the time period of the anticipated closing in August or September of 2018 (*see MB Shtetl*, 166 AD3d at 605; *Fridman*, 34 AD3d at 727-728). Natan has not submitted any bank statements, funding commitment documents or other financial evidence to support its contention that it possessed the necessary funds to close on the property prior to this lawsuit.

In addition, Natan has failed to submit any evidence that they fulfilled their obligation to schedule a “law day,” or that they made efforts to close within a reasonable time rather than commence this lawsuit (*see Revital Realty*, 112 AD3d at 904; *Zeitoune v*

Cohen, 66 AD3d 889 [2d Dept 2009]; *Provost v Off Campus Apts. Co., II*, 211 AD2d 850, 851 [3d Dept 1995]). Finally, Natan's allegation that Edwards repudiated the contract is unavailing, since a purchaser seeking specific performance must demonstrate its readiness and ability to close regardless of any alleged anticipatory breach by the defendant (*see Kaygreen*, 78 AD3d at 1015). Having failed to make its prima facie burden on this motion for summary judgment, that branch of Natan's motion for specific performance is denied without regard to the sufficiency of Edwards' opposing papers (*see Alvarez*, 68 NY2d at 324; *Winegrad*, 64 NY2d at 853; *J.P. Morgan Mortgage Acquisition Corp.*, 157 AD3d at 876).

Natan's request seeking to dismiss Edwards' counterclaim is likewise denied. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the [party seeking relief] and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see also Greene v Rachlin*, 154 AD3d 814, 817 [2d Dept 2017]). At the very least, plaintiff's affidavit, along with the fact that Natan apparently obtained copies of the cancelled checks from Ngati prior to commencement of this litigation, raise factual issues as to whether Ngati is currently cooperating with plaintiff and whether Ishta, Brereton and Ngati conspired to purchase the property from Edwards at a low price, thereby divesting Edwards of her equity. Having failed to make its prima facie burden here, that branch of Natan's motion dismissing Edwards' affirmative defenses and counterclaims is denied without regard to the sufficiency of Edwards' opposing papers

(see *Alvarez*, 68 NY2d at 324; *Winegrad*, 64 NY2d at 853; *J.P. Morgan Mortgage Acquisition Corp.*, 157 AD3d at 876).

Finally, in light of the plaintiff's failure to make its prima facie showing on this motion for summary judgment, that branch of the motion seeking an inquest to determine reasonable attorney's fees and other damages is likewise denied.

Conclusion

Accordingly, it is

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR 3212, granting it summary judgment for specific performance on a contract to purchase residential real property is denied; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR 3211 (b) and CPLR 3212, (2) dismissing defendant's affirmative defenses and counterclaims, is denied; and it is further

ORDERED that the branch of plaintiff's motion for an order directing inquest to determine reasonable attorney's fees and other damages is denied.

The court, having considered the plaintiff's remaining contentions finds them unavailing. All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

ENTER:



J.S.C.