

Dorestant v Rony

2020 NY Slip Op 31642(U)

April 14, 2020

Supreme Court, Kings County

Docket Number: 518059/2018

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 14th day of April, 2020.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

WEBERT DORESTANT,
Plaintiff,
- against -
JOSEPH RONY and IRINA KUSHEL, ESQ., as
Escrow Agent
Defendants.

Index No.: 518059/2018

Motion Seq. # 1

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Affirmation in Opposition to Cross-Motion	2
Plaintiff's Reply Affirmation, Affidavit and Exhibits	3

Upon the foregoing papers Plaintiff, WEBERT DORESTANT, moves this Court for an Order pursuant to CPLR § 3212 1) granting summary judgment on his specific performance cause of action; 2) striking Defendant, JOSEPH RONY's (Rony), affirmative defenses; and 3) directing the closing of the sale of the premises known as 2904 Beverly Road, Brooklyn, New York 11226 (Block: 5173, Lot: 2).

BACKGROUND

Plaintiff and Defendant, Rony, entered into a contract of sale for the subject property on or about April 24, 2018. AS per the contract of sale, upon execution plaintiff issued a check for \$30,000 and co-Defendant, Irina Kushel, Esq., as Escrow Agent, deposited same in her IOLA account. Rider A, ¶ 3 (c) to the contract specifically states that: " PROPERTY IS SOLD AS IS AND CURRENTLY EXISTS SUBJECT TO ALL VIOLATIONS, IF ANY ARE REVEALED BY THE TITLE REPORT."¹

On or about July 24, 2018 Plaintiff was approved for a mortgage and Defendants were notified that,

“...[T]he bank is willing to close with a \$2,000.00 escrow from the Seller to be held in escrow for the violations. Purchaser is willing to do the work himself. Seller to reimburse Purchaser for the costs...”

Counsel also requested that the parties close on August 6, 2018. Ms. Kushel responded that her client did not want to hold escrow or issue a credit and offered to close on August 8th or 15th. Plaintiff’s counsel replied on August 3rd stating that and that the closing should take place on the 8th. In a letter dated August 3, 2018, Ms. Kushel, Esq. responded that since her “...client was unable to clear title and the time to close has passed, my client no longer wishes to proceed with the sale.”² The letter was postmarked August 11, 2018 and received by Plaintiff’s counsel on or about August 13, 2018. A check representing Plaintiff’s down-payment was enclosed with the letter.

By letter dated August 13, 2018 Plaintiff’s counsel rejected Ms. Kushel’s attempt to cancel the contract and returned the check representing Plaintiff’s \$30,000 deposit. Plaintiff’s counsel further advised Ms. Kushel that his client would put the \$2000 in escrow himself, as required by the Lender and that the closing should go forward. Thereafter, in an attempt to schedule the closing on the subject property, Plaintiff’s counsel attempted to contact Ms. Kushel on several dates via email, calls and letters. Neither Defendants responded to any of the communications and on or about September 5, 2018 Plaintiff commenced the instant action. A Notice of Pendency was filed the same day against the subject property. An answer was

² Exhibit “F” annexed to Affirmation by Steven Lowenthal, Esq.

interposed on behalf of the Defendant Seller on or about October 29, 2018 by new counsel. Defendant Kushel has not interposed an answer to Plaintiff's complaint.

ANALYSIS

In opposition to Plaintiff's motion the Defendant argues that the time to close has passed. The contract provides in relevant part: "Closing shall take place....at 10' o clock on or about 60 days hereof or upon reasonable notice (by telephone or otherwise) by Purchaser...".³ When a contract for the sale of real property does not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date for performance. *Revital Realty Group, LLC v Ulano Corp.*, 112 AD3d 902, 904 (2d Dept 2013), Citing *Zev v. Merman*, 134 A.D.2d 555, 557 (2d Dept 1998) *affd.* 73 N.Y.2d 781 (1998). What constitutes a reasonable time to perform turns on the circumstances of each case. *Id.* at 558.

The law is clearly established that without a specific law date or "time of the essence" clause included in a contract for the sale of real property, "there must be a clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act." *Kok Chai Lee v Robertson*, 165 AD3d 639, 640 (2d Dept 2018). Moreover, what constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case. *Id.* at 640. The determination of reasonableness must by its very nature be determined on a case-by-case basis. *Hegeman v Bedford*, 5 AD3d 632, 632 2004), citing *Zev v Merman*, *supra* at 783; *Revital Realty Group, LLC v Ulano Corp.*, *supra* at 904. In the case at bar there was no

³ ¶ 15 of the Contract of Sale annexed as Exhibit "C" to Affirmation in Support by Steven Lowenthal, Esq.

clear, distinct, and unequivocal notice to Plaintiff that if closing did not take place on a certain date the contract would be deemed cancelled.

Defendant Seller relying upon the "AS IS" provision of the contract contends that Plaintiff violated the terms of the agreement when he requested that money be held in escrow for the violations. However, Plaintiff responded almost immediately and took responsibility for the violations by stating that he would use his own money for the escrow deposit required by the Lender. Defendant also contends that Plaintiff stated that he would settle this action for the return of his down payment. However, Defendant has not submitted any proof to support this claim. This Court finds that Defendant's contentions that Plaintiff breached the contract or that he cancelled the contract are without support. Therefore, the subject contract of sale is still in full force and effect. Moreover, Defendant has failed entirely to establish the existence of any question of fact that would preclude granting summary judgment in Plaintiff's favor.

The law requires that a party seeking specific performance must establish that he/she was ready, willing and able to close. *Grunbaum v Nicole Brittany, Ltd.*, 153 AD3d 1384, (2d Dept 2017), citing *Kaygreen Realty Co.; LLC v. IG Second Generation Partners, L.P.*, 78 A.D.3d 1010, 1015 (2d Dept 2010); *Tsabari v Hays*, 13 AD3d 360 (2d Dept 2004). Plaintiff's submissions include proof that he was ready, willing and able to close on the subject property. The Defendant Seller has failed to provide either a factual or legal basis to deny Plaintiff's request for specific performance. Plaintiff's motion is therefore granted in its entirety. The Defendant Seller's remaining arguments are without merit. Accordingly, it is

ORDERED that Plaintiff is granted summary judgment in his favor; and it is further

ORDERED that the contract of sale of the subject property is in full force and effect;

And it is further

ORDERED that the closing of title on the subject property shall take place within sixty (60) days of service of this Order with notice of entry; and it is further

ORDERED that Defendant shall pay the attorneys' fees and costs of the instant action.

ENTER



LOREN BAILY-SCHIFFMAN, JSC