

522 Realty, LLC v Heurtelou
2020 NY Slip Op 31834(U)
June 12, 2020
Supreme Court, Kings County
Docket Number: 523175/2018
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 12 day of

June, 2020.

PRESENT: HON. LOREN BAILY-SCHIFFMAN

JUSTICE

522 REALTY, LLC,

Plaintiff,

- against -

ANTONINE HEURTELOU,

Defendant.

Index No.: 523175/2018

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, 522 Realty, LLC, moves this Court for an Order:

- a) consolidating the instant action with Isak Developer Corp. & How To Sell Realty, LLC v Antonine Heurtelou, Index #519878/2017 pursuant to CPLR § 602; b) issuing a declaration that Plaintiff's contract of sale is superior to that entered into in the aforementioned action; and c) granting summary judgment pursuant to CPLR § 3212 in its favor striking Defendant, Antonine Heurtolu's answer.

BACKGROUND

Plaintiff, the buyer, entered into a contract with Defendant, the seller, to purchase the property known as 522 East 51st Street, Brooklyn, New York (Block 4722, Lot 28) on or about November 27, 2017. Although the Defendant made representations in the contract that there

were no agreements or prior obligations that impaired her ability to enter into the contract with Plaintiff, the title report revealed otherwise. The title report revealed that the Defendant had executed a previous contract on or about November 16, 2016 to sell the same property to a third party, Isak Developer Corp. As a result of Ms. Heurtelou's failure to close on the subject property, Isak Developer Corp. commenced an action against the Defendant on or about October 13, 2017 in Supreme Court, Kings County under Index # 519878/2017 including a Notice of Pendency.

By letter dated July 20, 2018 Plaintiff's attorney in the case at bar sent a "Time of the Essence" letter and scheduled the closing for August 23, 2018. The closing was adjourned to September 5, 2018 and at that time Plaintiff and his attorney, as well as a representative of the title company appeared at the designated time and location. However, neither Defendant nor her attorney appeared for the closing on September 5, 2018. Plaintiff notified Defendant that she was in default of the contract that very same day. On or about November 15, 2018 Plaintiff commenced the instant action.

Analysis

CPLR § 602 (a) provides in relevant part that the court, upon motion, may order actions pending before the same court consolidated when they involve a common question of law or fact for the purposes of judicial economy. The only opposition submitted by Defendant and her attorney is that the 2017 action by the prior purchaser is almost settled and resolved. However, Plaintiff submitted an affirmation by Anthony DiPaolo, Esq, attorney for Isak Developer Corp., stating that the case is not resolved nor settled. Courts have consistently held that where common questions of law and fact exist, a motion to consolidate should be granted absent a

showing of prejudice to a party. ***Oboku v New York City Transit Authority*, 141 AD3d 708, 709 (2d Dept 2016); *Kally v Mt. Sinai Hosp.*, 44 AD3d 1010 (2d Dept 2007).** The court has broad discretion in determining whether to consolidate actions. ***Rhoe v Reid* 166 AD3d 919, 920-921 (2d Dept 2018); *Best Price Jewelers v Internet Data Storage & Systems, Inc.*, 51 AD3d 839, 840 (2d Dept 2008).**

The burden for showing that consolidating the actions would result in prejudice to a substantial right, rests upon the party opposing the motion. ***Leeco Const. Co. v U.S. Liability Ins. Co.*, 22 Misc3d 611 (S. Ct., N.Y. County, 2008).** Defendant argues that consolidation would be prejudicial because the companion action "...has been resolved and will be discontinued..." is not supported by the evidence. Plaintiff submitted the Affirmation of Anthony DiPaolo, attorney for the Plaintiffs in the companion action. Mr. DiPaolo specifically states that the action by Isak Development Corp. is not resolved. Therefore, Defendant has failed to demonstrate that prejudice will result from an order of consolidation. This Court finds that the mandates of judicial economy would be best served by consolidating the actions.

Plaintiff also seeks an order declaring its contract of sale for the property in dispute is superior to the contract entered into in the action, *Isak Development Corp., et. Al v Heurtelou*, referenced above. Real Property Law §§ 291 and 294 clearly provides that when two or more prospective buyers contract to purchase a certain property, priority is given to the buyer whose conveyance or contract is recorded first. ***139 Lefferts, LLC v Melendez*, 156 AD3d 666, 666 (2d Dept 2017).** Plaintiff in the companion action filed a Notice of Pendency in the Kings County Clerk's Office on October 13, 2017. The contract of sale for the same property was recorded and filed in the Office of the City Register on September 6, 2018. However, the filing of a Notice

of Pendency will not substitute for the recording of the contract of sale or the actual conveyance, **2386 Creston Ave. Realty LLC v M-P-M Mgt. Corp., 58 AD3d 158, 160-61 (1st Dept 2008)**. Having failed to avail themselves of the protection of either Real Property Law §§ 291 or 294, the Plaintiffs in the companion action may not successfully contend that their filing of a Notice of Pendency serves as a substitute for the recording of a conveyance or a contract. **Avila v Arsada Corp., 34 AD3d 609, 610 (2d Dept 2006)**. Accordingly, Plaintiff in the instant action is entitled to a declaration that its contract of sale for the property in dispute is superior to the contract entered into in the action, Isak Development Corp., et. Al v Heurtelou.

Plaintiff seeks an order granting summary judgment and striking Defendant's answer. A plaintiff moving for summary judgment on a specific performance cause of action for the sale of real property must submit evidence that establishes that he/she was ready, willing and able to close on the premises. **Kaygreen Realty CO v IG Second Generation Partners LP, 78 AD3d 1010, 1015 (2d Dept 2010)**. In order to demonstrate being ready, willing and able, the purchaser must produce evidence in admissible form that establishes the financial ability to perform under the contract. **Grunbaum v Nicole Brittany Ltd., 153 AD3d 1384 (2d Dept 2017)**. Even an anticipatory breach of contract by the Seller will not relieve a Purchaser from his/her burden of proof establishing the financial ability to perform on the closing date. **Jannetti v Whelan, 131 AD3d 1209, 1210(2d Dept 2015)**. Plaintiff has not provided any evidence whatsoever to establish that it had the financial ability to perform under the contract and is therefore not entitled to summary judgment on its 1st cause of action for specific performance.

The second and third causes of action in the case at bar are fraudulent inducement and fraud, respectively. The elements of a fraud cause of action are 1) the defendant made a false

representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, and (4) there was justifiable reliance on the part of the plaintiff resulting in an injury for which compensable damages are sought. *Connaughton v Chipolte Mexican Grill*, 29 NY3d 137, 142 (2017); *McSpedon v Levine*, 158 AD3d 618, 620 (2d Dept 2018); *Mariano v Fiorvante*, 118 AD3d 961, 962 (2d Dept 2014); *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996).

Courts have consistently held that such allegations are sufficient to state a cause of action for fraud in the inducement. *Caboara v Babylon Cove Development*, 82 AD3d 1141, 1142 (2d Dept 2011); *Bhandari v Ismael Leyva Architects*, 84 AD3d 607, 608 (1st Dept 2011); *Bd. of Managers of Marke Gardens Condominium v 240/242 Franklin Ave LLC*, 71 AD3d 935, 936 (2d Dept 2010). In order to prevail on its motion for summary judgment, Plaintiff must eliminate all questions of fact that the elements of the fraud allegation have been met. In opposition to the motion, Defendant submitted an affidavit stating that she did not know that the contract she entered into with Isak Development Corp. was still in effect. Accordingly, a question of fact has been raised as to whether Defendant had knowledge of the falsity and Plaintiff is, therefore, not entitled to summary judgment on the Fraud or Fraudulent Inducement causes of action.

The fourth and fifth causes of action are for Breach of Contract and to Foreclose on a Vendee Lien, respectively. Plaintiff has failed to eliminate all questions of fact with respect to these causes of action and is therefore not entitled to judgment as a matter of law. The sixth cause of action is untitled and is duplicative of the Specific Performance claim. Summary judgment on the sixth cause of action fails for the same reasons as that previously set forth with reference to the Specific Performance claim.

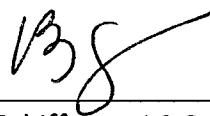
Plaintiff's remaining contentions are without merit. Plaintiff's motion for consolidation is granted as set forth below. By operation of law Plaintiff's contract for the sale of the property in dispute is superior to the contract executed in the companion action and the motion for summary judgment is denied in its entirety. This is the Decision and Order of the Court. Accordingly, it is

ORDERED, that the within action, 522 REALTY LLC v ANTONNE HUERTELOU, Index # 523175/2018 is hereby Consolidated with the action entitled ISAK DEVELOPER CORP & HOW TO SELL REALTY LLC v ANTONNE HUERTELOU, Index # 519878/2017 for a joint trial, and it is further

ORDERED that the motion for summary judgment is denied in all respects, and it is further

ORDERED that Plaintiff is entitled to a declaration that its contract of sale for the property in dispute is superior to the contract entered into in the action, Isak Development Corp., et. Al v Heurtelou.

ENTER



Loren Baily-Schiffman, J.S.C.