449 Court St. Assoc., LLC v 449-451 Court St. Corp.
2020 NY Slip Op 32140(U)
July 2, 2020
Supreme Court, Kings County
Docket Number: 511149/19
Judge: Kathy J. King
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At an IAS Term, Part 64 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 2nd day of July, 2020.

P R E S E N T:

HON. KATHY J. KING,

Justice.

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449 COURT STREET ASSOCIATES, LLC,

Plaintiff,

DECISION/ORDER

Index No.: 511149/19

-against-

449-451 COURT STREET CORPORATION,

Defendants.

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	Papers Numbered
Notice of Motion/Cross Motion, Affirmation (Affidavit), and Exhibits Annexed	24-25, 40-41 & 50
Affirmation (Affidavit) in Opposition and Exhibits Annexed	45 52
Reply Affirmation (Affidavit) and Exhibits Annexed	
Additional Documents Memoranda of Law	Unnumbered

Plaintiff 449 Court Street Associates, LLC moves for summary judgment pursuant to CPLR 3212, declaring the contract of sale with defendant 449-451 Court Street Corporation terminated, directing return the down-payment paid by plaintiff and dismissing all affirmative defenses and counterclaims (Mot. Seq. No. 2).

Defendant cross-moves for summary judgment pursuant to CPLR 3212, declaring plaintiff committed anticipatory breach, dismissing plaintiff's action and directing its escrow agent to release the down-payment (Mot. Seq. No. 3).

Background

This dispute relates to a failed real estate transaction between plaintiff and defendant. In October 2018, the parties entered into a contract of sale wherein the defendant agreed to convey title to 449-451 Court Street, Unit 451/2R, Brooklyn, New York to plaintiff for a purchase price of $6.4 million. Pursuant to the contract of sale, plaintiff tendered a down-payment of $600,000. Ultimately, after a series of adjournments, the parties agreed to a closing date and time of May 20, 2019 at 11:00 a.m. ("the Law Day").

The relevant provisions of the contract of sale provide as follows: *Sections 13.01 (b)* and *13.05* provides that a purchaser serve a notice of default on the seller and provide the seller an opportunity to cure any alleged default. *Section 13.04* provides that in the event a purchaser is found in default, the seller's sole remedy is to retain the down payment as liquidated damages. *Section 6.02* provides that the contract of sale grants the purchaser the right to consent or reject any proposed leases for portions of the premises entered into by defendant during the period of time between the entry of the contract of sale and the closing date.

The contract of sale exhibited several schedules, including Schedule C, which stated, among other information, the tenancy status of each unit within the premises. It identified apartment 451/2R ("the unit") as vacant. In January 2019, without first seeking consent from plaintiff, the defendant entered into a lease agreement ("subject lease agreement") for the unit. The defendant's broker, on April 11, 2019, purportedly delivered certain documents to plaintiff which indicated the existence of the subject lease agreement. On May 6, 2019, the defendant advised plaintiff about the execution and existence of the subject lease agreement and provided plaintiff a copy of same. Thereafter, on May 17, 2019, plaintiff delivered to defendant a notice of termination itemizing defendant's purported breaches, terminating the contract of sale, and demanding the return of the down-payment. Among other purported breaches, the notice of

termination provided that by entering into the subject lease, defendant defaulted on its obligations pursuant to *Section 6.02*, and that, as a result, plaintiff elected "to terminate the Contract of Sale in accordance with the provisions of Section 13.02."

Thereafter, defendant sought to treat the notice of termination as a notice of default, and attempted to cure the breach by relocating the tenants of the unit to another building. Plaintiff rejected these acts, asserting that the defendant's breaches were incurable and its termination of the contract of sale was appropriate and valid. Plaintiff again demanded return of the down-payment.

On the day scheduled for closing or the Law Day, plaintiff filed the instant action. with an together with order to show cause seeking a stay to enjoin the closing. Upon the signing of the order to show cause, this court granted plaintiff's application for a stay.

Plaintiff's complaint raises three causes of action. Plaintiff's first cause of action for declaratory judgment seeks a judgment declaring the contract of sale null and void and ordering the return of the down payment as provided in the contract of sale. The second cause of action for declaratory relief seeks an order declaring that plaintiff was not in default under the contract of sale, since defendant cannot perform the conditions of the contract of sale due to the unauthorized subject lease agreement. The third cause of action seeks a permanent injunction prohibiting defendant from taking any action to declare plaintiff in default of its obligations under the contract of sale.

Defendant interposed an answer to the within action with various affirmative defenses and counterclaims. The counterclaims seek reformation of the contract of sale and, declaratory relief in the form of a judgment declaring the plaintiff breached the contract of sale and is entitled to retain the down-payment as liquidated damages; or alternatively, that defendant is entitled to an

order declaring the notice of termination a nullity and declaring defendant-seller must cure its default and plaintiff must take ownership of the Premises.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his day in court and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*see Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]); *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. The motion should be granted only when it is clear that no material and triable issue of fact is presented (*see Di Mena & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*see Phillips v Kantor & Co*, 31 NY2d 307, 311 [1972]; *Museums at Stony Brook v Vil of Patchogue Fire Dept*, 146 AD2d 572 [2d Dept 1989]).

Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman* 49 NY2d at 557).

"A declaratory judgment action may be an appropriate vehicle for settling justiciable disputes as to contract rights and obligations" (*Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727, 731 [1988]). Once a contractual relationship is entered into between the parties, that contract defines the scope of the duties owed by each party (*see Vought v Teachers Coll., Columbia Univ.*, 127 AD2d 654, 655 [2d Dept 1987]). "When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Gristede's Operating Corp. v*

Scarsdale Shopping Ctr. Assoc., LLC, 176 AD3d 1185, 1187 [2d Dept 2019] [internal citations and quotation marks omitted]). "[T]his rule is applied with special force 'in the context of real property transactions, where commercial certainty is a paramount concern, and where the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length'" (*Riverside S. Planning Corp. v CRP/Extell Riverside*, L.P., 13 NY3d 398, 403 [2009], quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). "Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Gristede's Operating Corp.*, LLC, 176 AD3d at 1187-1188 [internal citations and quotation marks omitted]). To be entitled to relief pursuant to a party's alleged breach of a contract the aggrieved party must demonstrate, among other essential elements, that they performed their obligations pursuant to the contract (*see Larsen v Ciolli*, 165 AD3d 1247, 1248 [2d Dept 2018]; *All Seasons Fuels, Inc. v Morgan Fuel & Heating Co., Inc.*, 156 AD3d 591, 594 [2d Dept 2017].

Declaratory Judgment

Here, plaintiff in support of its motion has failed to demonstrate its prima facie entitlement for summary judgment as a matter of law for termination of the contract of sale and the return of down payment, since plaintiff failed to show that it complied with *Sections 13.01 (b) and 13.05* of the contract of sale, requiring plaintiff to serve a notice of default and provide defendant with an opportunity to cure its default.

Similarly, defendant failed to establish its prima facie entitlement to summary judgment as a matter of law to retain the down-payment, since *Section 13.04* of the contract expressly provides that defendant is only entitled to retain the down-payment where plaintiff defaulted on its obligations....and defendant was not otherwise in default of the contract of sale. Defendant

admittedly breached the contract of sale by entering into the subject lease agreement in contravention of, among other provisions, *Section 6.02* of the contract of sale.

Reformation

"[T]he purpose of reformation is to 'restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties'" (*see John, LLC v Exit 63 Dev., LLC*, 35 AD3d 538, 539 [2d Dept 2006], quoting *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). "For a party to be entitled to reformation of a contract on the ground of mutual mistake, the mutual mistake must be material, i.e., it must involve a fundamental assumption of the contract" (*Asset Mgt. & Capital Co., Inc. v Nugent*, 85 AD3d 947, 948 [2d Dept 2011], quoting *True v True*, 63 AD3d 1145, 1147 [2d Dept 2009]). "A party seeking to invoke equity to reform a written agreement based upon a purported mistake bears the burden of showing a mutual mistake by clear and convincing evidence" (*Migliore v Manzo,* 28 AD3d 620, 621 [2d Dept 2006], citing *Ross v Food Specialties*, 6 NY2d 336, 343 [1959]).

"A party need not establish the parties entered into the contract because of the mutual mistake, only that the material mistake … vitally affects a fact or facts on the basis of which the parties contracted" (*Asset Mgt. & Capital Co., Inc.*, 85 AD3d at 948 [internal quotation marks and citations omitted)].

Here, plaintiff proffers sufficient evidence demonstrating its prima facie entitlement to summary judgment, dismissing the defendant's counterclaim for reformation. In support of its position, plaintiff proffers the affidavit of its member Jack Cohen ("Cohen") and the affidavit of Kim Esposito ("Esposito") to demonstrate that the contract of sale does not contain any mistakes or errors in memorializing the bargain. Cohen attests that the contract of sale constitutes the terms negotiated and agreed to between the parties. Further, he attests to the development of the terms in the contract of sale, exhibiting a redlined version of a preliminary contract of sale. The affidavit

of Esposito avers that there were many versions of the contract of sale and that defendant's eventual breach resulted from an inability to remember the terms and obligations of the final agreement, not any error in the drafting of the contract of sale.

In opposition, defendant failed to raise any triable issues of fact to defeat plaintiff's prima facie entitlement to summary judgment regarding the reformation cause of action.

To the extent not specifically addressed herein, the parties remaining contentions and arguments were considered and found to be without merit and/or moot.

Conclusion

Based on the foregoing, it is hereby,

ORDERED that plaintiff's motion for summary judgment is granted to the extent that defendant's counterclaim for reformation is hereby dismissed. In all other respects, plaintiff's motion is denied; and it is further,

ORDERED that defendant's motion for summary judgment is denied; and it is further,

ORDERED that the matter is set down for a settlement conference via Skype on Thursday, July 23, 2020 at 11 a.m.; and it is further

ORDERED that all stays are vacated forthwith.

This constitutes the decision and order of the court.

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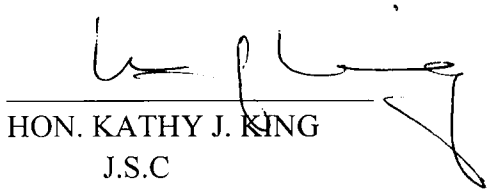

HON. KATHY J. KING
J.S.C