

Herman v 818 Woodward LLC
2020 NY Slip Op 32576(U)
August 6, 2020
Supreme Court, Kings County
Docket Number: 507850/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : COMMERCIAL PART 8

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SHULEM HERMAN,

Plaintiff, Decision and order

- against -

Index No. 507850/20

818 WOODWARD LLC and SUYDAM 1 LLC,

Defendants, August 6, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint and to cancel the notice of pendency. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On January 10, 2020 the plaintiff and defendants entered into a contract whereby the plaintiff agreed to purchase two properties, one located in Brooklyn and the other located in Queens. Pursuant to the contract the closing was scheduled to take place sixty days following the effective date of the contract, namely March 10, 2020 (see, Contract ¶3.01). The closing did not take place on that date and on March 13, 2020 the defendants notified plaintiff the closing date was scheduled for April 13, 2020 and 'time being of the essence' (see, Time of Essence Letter, dated March 13, 2020). Three days later the plaintiff rejected that date and sought the date of April 20, 2020 as the date of the closing. On March 30, 2020 the plaintiff sent a letter to defendants rejecting the April 20 date on the

grounds the stated date was not reasonable considering the COVID-19 pandemic and the lock down that had been imposed. That excuse was rejected in a letter dated April 16, 2020 and the closing was scheduled for April 20, 2020. The closing, which was conducted via Zoom, was not attended by the plaintiff. Indeed, the same day as the closing the plaintiff sent a letter to defendant reiterating the time of the essence was unreasonable and further presented two additional reasons the closing should not have taken place. First, a final water bill reading had not been provided and additionally there was evidence one commercial rental tenant was one month in arrears, both conditions precedent to closing. On April 24, 2020 the defendant sent a letter to plaintiff offering the plaintiff until May 11, 2020 in which to cure the failure to close. The letter indicated that a failure to close by May 11 would be deemed a default entitling the defendants to keep the deposit paid. The plaintiff rejected that letter noting there was never a default since the closing was not reasonable. On May 12, 2020 the defendants sent a letter seeking to forward the deposit from the escrow account where it was being held, to the defendants. That request was rejected and this lawsuit was commenced wherein the plaintiff seeks specific performance, declaratory judgement, breach of contract and other claims. The defendants have moved seeking to dismiss the lawsuit

on the grounds the lawsuit has no merit since there are no questions the closing date of April 20, 2020 was proper.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]).

The plaintiff opposes the motion to dismiss arguing the defendants were not ready to close and that in any event the plaintiff stands ready to close. Indeed, the causes of action of the complaint seeking specific performance and a declaratory action are allegations they are ready to close.

First, there are no conditions precedent that have not been satisfied by the defendants that prevent the closing from taking place. Any discrepancies regarding water bills or tenant rental arrears can be adjusted at the closing or post closing.

Turning to the more substantive matters of this case the plaintiff opposes the motion to dismiss and insists, in the complaint and in the opposition papers, that it is ready, willing and able to close. It is well settled that to succeed on a claim seeking specific performance the plaintiff must demonstrate that

the plaintiff has substantially performed all of its contractual obligations and was willing and able to perform its remaining obligations and that the defendant was able to convey the property, and that there was no other adequate remedy at law (see, E & D Group LLC v. Violet, 134 AD3d 981, 21 NYS3d 691 [2d Dept., 2015]). Thus, the court is hereby ordering a closing to take place within thirty days of receipt of this order. This closing will be subject to all the same terms and conditions pursuant to the Agreement. The failure to close within this time frame, or upon any other time frame agreed upon by the parties, will demonstrate plaintiff's inability to close necessitating a dismissal of the complaint.

So ordered.

ENTER:



DATED: August 6, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC