

Widewaters Props., Inc. v Scheinberg

2020 NY Slip Op 32770(U)

May 6, 2020

Supreme Court, Dutchess County

Docket Number: 50390/2017

Judge: Maria G. Rosa

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF DUTCHESS

WIDEWATERS PROPERTIES, INC.

Plaintiff

DECISION AND ORDER

-AGAINST-

INDEX NO. 50390/2017

STANLEY SCHEINBERG, MERWIN SMITH, MELVIN ATLAS
a/k/a MELVIN BOGURSKY, BARBARA SMITH, as personal
representative of The ESTATE OF MERWIN SMITH,
and STAN SCHEINBERG, LLC,

Defendants

The following papers were read and considered on Plaintiff's motion for specific performance, civil contempt, sanctions and counsel fees.

Order to Show Cause
Affirmation in Support
Exhibits A-M
Affidavit in Support
Memorandum of law

Affirmation in Opposition
Exhibits 1-2
Millspaugh Affidavit in Opposition
Exhibits A-C
Daly Affidavit in Opposition
Scheinberg Affidavit in Opposition
Memorandum of Law in Opposition

Reply Affirmation

On or about February 2, 2013, with Plaintiff as the buyer and Defendants Stanley Scheinberg, Merwin Smith and Melvin Atlas (the "individual defendants") as the sellers, these parties entered into a contract for the sale of real property located at 777 South Road, Poughkeepsie, N.Y. ("the property") for 1.9 million dollars. The individual defendants represented that the property was not contaminated and hadn't been used as a dump site. After entering into the contract, Plaintiff learned the site was contaminated and had been used as a dump site. What ensued were further negotiations, litigation, and, on June 5, 2019, an open court stipulation of settlement of that litigation according to the following terms. The parties agreed that the court would choose a neutral engineer from a list of engineers proposed by each side's retained experts. The engineer selected by the court was to inspect the

property and determine the contamination remediation necessary to render the property suitable for commercial development and was to determine the estimated cost of the remediation. The parties further agreed that once the court-appointed engineer completed the initial analysis, the defendants would pay for the remediation as proposed by that expert. Then, after remediation had been done at defendant's expense, the closing of the sale of the property would take place pursuant to the terms of the February 2, 2013 purchase and sale agreement. This is all set forth in the transcript of the June 5, 2019 open court stipulation of settlement annexed as exhibit E to Plaintiff's moving papers. By Order of Appointment dated August 6, 2020 (Exhibit F to the moving papers), the court appointed JMT of New York, Inc. ("JMT") with Robert LaFleur as the lead engineer. Once Mr. LaFleur had issued his report as to the remediation necessary the costs up to that point were to be divided equally between the parties. Then Mr. LaFleur was to act as general contractor and, at Defendants' expense, the remediation work was to be performed. Once the work was complete and approved by Mr. LaFleur the closing was to take place per the February 2, 2013 contract. Following closing a stipulation of discontinuance of this action was to be filed.

On or about December 30, 2020, JMT/Mr. LaFleur completed the analysis and estimated the cost to be between one million and 1.9 million dollars. (See Exhibit G to the moving papers.) In addition, as much as \$400,000.00 would be needed for 10,000 cubic yards of replacement fill.

On or about January 9, 2020 Defendants' counsel wrote a letter to the court and advised opposing counsel that it had no intention of complying with the settlement due to the high cost of remediation. Several days later Defendants' counsel told JMT to stop all work.

Plaintiff's counsel avers that Plaintiff recently learned that Defendants owe real property taxes and that Defendants mortgaged the property in violation of the purchase agreement. The mortgage taken in or about August of 2016 was \$310,000.00. The property taxes due are admitted by Defendants' counsel to total \$160,048.03.

Throughout the litigation and negotiation Plaintiff and its counsel have maintained that the cost of remediation could meet or exceed the purchase price. This was part of the discussions with the court and is demonstrated in the discovery responses annexed as exhibits L and M to the moving papers.

Courts favor stipulations of settlement and will not lightly set them aside. It is black letter law that a stipulation of settlement entered into in open court is just as binding as a written stipulation of settlement signed by the parties. See CPLR 2104; McCoy v. Feinman, 99 NY2d 295, 302 (2002); Hallock v. State, 64 NY2d 224 (1984). Courts so steadily uphold open court stipulations that "a stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority." Hallock, supra.

As Plaintiff's counsel argues, when one party commits an anticipatory breach of an agreement, such as by stating they refuse to perform in accordance with that agreement, the opposing party must demonstrate that it is ready, willing and able to perform its obligations under the agreement. (See Zev v. Merman, 134 AD2nd 555, 557 [2nd Dept. 1987]). The affidavit of Marco Marzocchi, the Director of Development for Plaintiff Widewaters Properties, Inc., provides that Plaintiff has the funds and/or the financing to satisfy the terms of the contract and complete the purchase and wants to proceed.

Counsel is correct that the remedy of specific performance is particularly suited to disputes regarding the purchase and sale of real estate as each parcel of real property is unique, and that a court's discretion to deny specific performance is limited to circumstances where doing so would result in harshness or injustice. Counsel cites EMF Gen. Contr. Corp. v. Bisbee, 6 AD3d 45, 52 (1st Dept. 2004). "The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law." Id. Citing Piga v. Rubin, 300 AD2d 68 (2002), *lv denied* 99 NY2d 646 (2003).

Defendants aver, through their attorney's affirmation in opposition to this motion, that Defendant Stanley Scheinberg does not have the financial ability to fund the remediation. He argues that the estimate providing that the cost of remediation could be in excess of the purchase price renders the contract a nullity. In a memorandum of law, Defendant's counsel asserts that good cause to relieve a party from a contract may be found even absent proof of fraud, collusion, mistake, or other recognized basis "if it appears that either party has inadvertently, inadvisably, or improvidently entered into agreement...or it would be inequitable to hold the parties to it." (memo of law page 1) In fact, even an improvident stipulation of settlement will not be set aside unless it is unconscionable. See Shuler v. Dupree, 14 AD3d 548 (2nd Dept. 2005). Contracts are enforceable particularly where entered into by knowledgeable parties represented by counsel. Town of Clarkstown v. M.R.O. Pump & Tank, Inc. 287 AD2d 497, 498 (2nd Dept. 2001). That the estimate was different than what defendants hoped or expected does not render the agreement void. Throughout this litigation there have been competing estimates as to the cost of remediation. Some estimates exceeded the purchase price.

It is undisputed that an unconscionable agreement may be set aside. An unconscionable agreement means "one that no person in his senses and not under a delusion would make on the one hand, and no fair person would accept on the other; it must shock the conscience and confound the judgment of any person with common sense." See Hardenburgh v. Hardenburgh, 158 AD2d 585, 586 (2nd Dept. 1990) citing Christian v. Christian 42 NY2d 63, 72 (1977). This court cannot set aside the parties' agreement simply because the defendants gambled that JMT's estimate would agree with their own expert's estimate nor because in hindsight the defendants have decided that their agreement was improvident. See Town of Clarkstown, Supra.

Although defendants' counsel asserts that the settlement is unconscionable and impossible to perform, the only arguments in support of that claim are that the price of remediation is more than expected and that defendant Stanley Scheinberg is unable to fund the remediation. First, although Defendants' attorney represents all the named defendants, the opposition papers only speak to the question of whether Stanley Sheinberg and Stan Sheinberg, LLC are contractually bound to the settlement agreement. The motion appears to be unopposed with respect to the remaining defendants. No admissible proof of Stanley Scheinberg's nor the LLC's financial condition is provided. The opposition papers do not even assert that the other defendants are unable to fund the remediation. As Plaintiff's counsel argues, all that has been submitted are conclusory statements by Defendants' attorney and an affidavit by Scheinberg's son which is not in proper form.

All the defendants were subject to the settlement agreement. All the defendants were to pay for the remediation. On that basis alone, Defendants' counsel's argument that performance of the contract is impossible must fail. The doctrine of impossibility excuses a party from a contract where either destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. The impossibility must occur due to an unforeseeable and unanticipated event. Kel Kim Corp. v. Cent. Mkts., Inc., 70 NY 2nd 900, 902. Further, under the doctrine of impossibility, financial difficulty is not sufficient to afford a party relief from a contractual obligation particularly where it was not "produced by an unanticipated event that could not have been foreseen or guarded against in the contract." See Kel Kim Corp. v. Cent. Mkts., Inc., 70 NY 2nd 900 (1987); 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 NY2d 275 (1968). Defendants, well aware of the vastly different estimates for remediation, could have bargained for a cap in the agreement as to the cost of remediation.

The agreement at bar is not unconscionable. Specific performance is the proper remedy as the property at stake is unique and there is no other adequate remedy. No injustice or harshness exists by enforcement of the contract and agreement. Defendants agreed to sell the property to the plaintiff free of contaminants. Then, on the eve of trial Defendants settled the case with the understanding that they would do just that, remedy the erroneous representation in the contract by decontaminating the property, paying for that remediation, and then selling it to the plaintiff in the condition agreed upon and for the same purchase price. This court agrees that it is not an excuse for non-performance that it is possible that the entire purchase price could be subsumed by the cost of remediation. The papers and proceedings in this case are replete with examples of defendants' knowledge of the potential costs of remediation. The defendants knowingly and advisedly entered into the stipulation of settlement after years of discovery and years of litigation and negotiation. As Defendants' counsel says, "The defendants have been trying to sell their property to the Plaintiff for over 20 years." (Defendant's counsel's affirmation in opposition, Paragraph 6.) Further, Defendants will be reimbursed 1.9 million dollars of their costs at closing.

According to the affidavits of Mark Millspaugh, licensed professional engineer, and Kevin Daly, licensed waste and recycling contractor, JMT can keep its costs at or below the lower end of their estimate, that is at or below one million dollars. This may be accomplished in several ways including by allowing concrete, brick, asphalt pavement, sand, gravel, rock, slag, ash, glass, ceramic tile, or other granular non-soil constituents to remain on the property and be used as fill. (Millspaugh Affidavit paragraphs 4-6 and referring to Exhibit C, the September 19, 2019 letter from the NYSDEC regarding Regulatory Flexibility for Certain Solid Waste Management Activities, paragraph V.) In addition, in Daly's affidavit, paragraph 7, cost-saving measures are outlined for this project.

Based upon all of the foregoing, it is hereby

ORDERED that Defendants shall immediately direct JMT to proceed with the remediation work and shall pay JMT for the remediation as previously agreed by the parties and as ordered by this court. However, it is incumbent upon JMT and Mr. LaFleur as the court-appointed engineer and contractor to perform the work for the lowest reasonable price by not removing any waste that the NYSDEC does not consider

a contaminant and by taking into consideration and, where possible and in JMT's discretion, implementing the cost-saving measures available including those highlighted above.

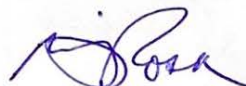
As to Plaintiff's application to hold the defendants in contempt, Plaintiff's counsel points out that Defendants deliberately stopped JMT from proceeding with the work that was required by the stipulation of settlement. There were no conditions to allow the defendants to avoid performance, for example if the costs were higher than expected. This court issued an order on August 6, 2019 requiring that the work to decontaminate the property be performed at the defendants' expense, based upon the open court stipulation. As a fine, Plaintiff seeks the cost of remediation, including the replacement fill, satisfaction of the mortgage and payment of back taxes. The foregoing requests should be moot upon completion of JMT's work and the closing per the June 5, 2019 stipulation, the August 6, 2019 order and the specific performance ordered herein.

Plaintiff also seeks sanctions and counsel fees for what Plaintiff alleges is Defendants' frivolous conduct claiming that defendants engaged in negotiation and, on the eve of trial, agreed to a settlement they knew or should have known they wouldn't voluntarily perform "primarily to delay or prolong the resolution of the litigation." 22 NYCRR 130-1.1 (c)(2). The court is deferring determination of the imposition of sanctions and counsel fees to a hearing to be scheduled following the completion of the remediation and the closing of sale. Plaintiff's counsel shall advise the court when this has occurred so that a court date may be set, if necessary.

The foregoing constitutes the decision and order of this court.

Dated:
May 6, 2020
Dutchess County, N.Y.

Enter:



Maria G. Rosa

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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