Jean v Csencsits
2020 NY Slip Op 33466(U)
March 9, 2020
Supreme Court, Orange County
Docket Number: 02154/2016
Judge: Sandra B. Sciortino
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ORIGINAL

To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
---X

MICHAEL JEAN,
Plaintiff,

-against-

WILLIAM AUGUST CSENCSITS a/k/a
WILLIAM A. CSENCSITS,
Defendant.
---X

DECISION AFTER INQUEST

INDEX NO.: 02154/2016

SCIORTINO, J.

On February 17, 2015, the parties to this matter entered a contract for the transfer of title to 34 Furnace Trail, Greenwood Lake, New York to plaintiff. The purchase price was $63,000. A down payment of $6,300 was paid at the time of signing and held in escrow by the defendant's real estate attorney.

Pursuant to the contract, closing was to take place "on or about February 16 or later up to May 1, 2015 or, upon reasonable notice (by telephone or otherwise) by Purchaser... ." (EXHIBIT 3) Purchaser forwarded a "time is of the essence" letter on March 10, 2016 setting a closing for April 12, 2016. Plaintiff and his counsel appeared for closing. Neither the defendant nor his attorney appeared. In the interim, according to the complaint, the defendant attempted to cancel the contract; the plaintiff refused.

On March 31, 2016, prior to the failed "time of the essence" closing, plaintiff filed a summons and complaint containing two causes of action seeking specific performance and punitive damages. The first alleges that the defendant attempted to cancel the contract in March of 2016 and

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the plaintiff refused to do so. The second alleges that the defendant refused to clear title objections.

Leave for alternate service was granted by Order of this Court dated August 26, 2016. By Order dated July 27, 2017, application allowing the affidavit of service to be filed *nunc pro tunc* to September 29, 2016 was granted. Service was completed 10 days thereafter.

By Decision and Order dated November 28, 2017, application for default judgment was granted and Randall V. Coffill, Esq., was appointed receiver. Receiver's deed transferring title to the property was executed on June 22, 2018. (Exhibit 4) Funds are currently held by the receiver.

Defendant's application to vacate the default was denied on June 5, 2018. The denial was upheld by the Appellate Division of the 2nd Judicial Department on April 24, 2019.

Settlement conferences were held in vain. Inquest on the issue of damages was held on September 9, 2019. Post trial submissions were submitted on December 10, 2019.

INQUEST

TESTIMONY OF PLAINTIFF MICHAEL JEAN:

The plaintiff, who identified the contract of sale, visited the property once before signing the contract, in November or December of 2014. He again visited the property in June 2015 after hearing there had been damage from a fallen tree. A photograph (Exhibit 5) taken at the June 2015 visit shows a one-story structure with a ladder leaning against the eaves; a blue tarp thrown over a porch roof, and at least one hole in the screening. Lattice covers the foundation. The lawn is overgrown.

The plaintiff again visited in August 2015, approximately three years prior to closing. At this last visit before taking possession, the premises, as described by the plaintiff, was "pristine." (Page 16, line 17) No photographs showing the condition of the property at the last visit were introduced into evidence.

Plaintiff next visited the property in June 2018, after the closing. The exact date of the visit was not given. According to Jean, the house was not in the same condition as in August 2015. "It had no utilities at all. It was flooding. The house was open to the elements. There was animal – signs of animals in the interior of the house. It had no water. We had standing water on the property. There was no electricity." (Page, 56, lines 1 - 6)

The plaintiff continued to detail changes to and the condition of the property after he took possession. One photograph (Exhibit 6) displayed a meter box ; the meter itself was "gone" and the power line disconnected. Exhibit 10 is a photograph of the house foundation. Foundation cinder blocks are shown as "disconnected from the house and leaning against the propane tank. There are multiple cracks around. " (Page 58, lines 20 - 240). No repairs had been made to the foundation as of the date of inquest. The photograph marked as exhibit 9 shows disconnected copper pipes under the house, which allegedly contributed running water.

The plaintiff described the property as having "standing water." (Page 59, line 21) The reason for the water problem was given as twofold: a "catch system" in the front of the house was overgrown with vegetation and a drainage pipe that apparently led from the well to a stream was broken in two places. It is unclear how the vegetation overgrowth differed from that depicted in the photograph marked as Exhibit 5. After calling in both septic and drainage experts, the plaintiff was allegedly advised the well had collapsed onto the drain pipe. No expert testimony was presented on the issue.

The topography of the property also creates a water issue. Water was running off "the mountain to the front of the house, bypassing the drainage in the front and collecting under the house and running along the top of the grass into the stream in the back of the house, ..." (Page 62, lines

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5 - 10) In 2019, the plaintiff had a skirt drain installed; perforated pipe was installed eight feet deep, covered with gravel and, then, soil. Pipe was then run to the stream. Plaintiff described this improvement as "a little too late." No expert testimony was presented as to how or if the defendant or the delay in any way contributed to the need for this work

The landscaping prior to signing of the contract was described by the plaintiff as "grass ... neatly manicured ... neatly manicured ... nice open land, ... neat and level." After he took possession, plaintiff found a pool of water under the house and "all above the foundation it was like water-logged and rotting." (Page 66, lines 3 - 10)

Two videos, one taken in 2018 after the closing and one taken on June 1, 2019, were entered into evidence. (Exhibit 8) The plaintiff alleges both depict the water situation in 2018. The first video, showing the basement, was very dark and, but for the sound of running water, minimally informative. The second documented the plaintiff following the movement of water from the mountain bordering the front of the property through various underground piping and/or over ground to a stream. The over ground path of the water seems to be through the yard and/or under the house. The plaintiff claims to have temporarily corrected the water movement.

Exhibit 9 shows disconnected copper pipes under the house which allegedly contributed to the running water heard in the video. The plaintiff contends that all of the pipes "have" to be replaced. "Eight or nine breaches" in the pipe are alleged to have occurred when the pipes were not drained over the winter. The plaintiff does not specify which winter. It was also not explained why a limited number of breaches required the replacement of "all of the pipes in the house." The work has not yet been done. No expert testimony as to the damage, the work required, the cause of the damage, or the cost was presented.

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Cross examination of the plaintiff offered both clarification and confusion of the issues. The structure of the house was clarified. The foundation consisted of cinder block piers and block walls:

Q. So basically the house is a wooden box sitting on these piers and cinder blocks.
A. Yes.
Q. ... And so there's not a foundation, per se, as – at least not a foundation that would – that we would consider as such?
A. It's not a dug out foundation, no. It's just like four feet high cinder block foundation on top of the – the earth.
Q. And so it's basically, the piers and the cinder blocks are sitting on the earth and on rock? What's under the house?
A. Bedrock.
Q. Are the cinder blocks and piers sunk into the bedrock?
A. No. They're cemented to the bedrock.
(Page 94, lines 8 - 23)

Cross-examination clarified, as shown on the second video (Exhibit 8), that water flows from the mountain at different rates at different times:

Q. Was the stream coming down from the mountain when you inspected the property before the contract?
A. Um-hum, yeah, and there was water in the back yard.
Q. Was it the same rate of flow?
...
A. At times it looked like a waterfall. At times it was dry, as dry as a rock.

Q. So, this stream that runs under the property , in effect, varies cyclically, is that an accurate statement?
Q. Its flow appears to vary from time to time, is that correct?
A. Yes.
Q. Do you believe that [the defendant] has, in any way, effected the flow of the stream?
A. No.
(Page 107, lines 19 - 24; page 108, lines 2 - 14)

Cross examination clarified that the ravine at the bottom of the mountain in front of the property was not transferred to the plaintiff as part of the closing:

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Q. Mr. Jean, in the second video which is in Plaintiff's Exhibit 8, at the beginning of the video, before you cross the street, is there a trench there? It would be adjacent to the road.
A. Yeah. It's a ravine.
Q. Who owns that?
A. Not me.
Q. Is that a city trench?
A. I don't know.
Q. Well, but it certainly doesn't belong to you, correct?
A. No.
Q. And it didn't belong to Mr. Csencsits, is that correct?
A. I don't know.
(Page 129, 10 - 25; page 130, line 1)

Neither direct nor cross examination clarified the condition of the property at the time the contract was signed; after the plaintiff's visits in the summer of 2015 or at the time the plaintiff took title in June of 2018:

Q. And you didn't notice, in August of 2015, water ponding on the property?
A. Like I said, it was a little mushy, but it didn't seem - - you know, I thought - -like I said, I thought it was just like an overflowing septic.
Q. In August 2015 you thought it was an overflowing septic?
A. Yeah.
(Page 118, lines 19 - 25; page 119, line 1)

Q. Did you ask the defendant to fix it?
A. I made a lot of attempts to contact the seller, and I was never successful, ever.
(Page 119, lines 2 - 4)

Q. When you took possession of the house, was the water on?
A. No.
Q. So then, logically, the seller had turned it off at some point, correct?
A. I don't know.
Q. Who turned the water off before you purchased the house?
A. I don't know.
(Page 123, lines 10 - 17)

Q. So, the cinder blocks, are those bolted into the bedrock, or into the soil?
A. They were connected to the bedrock, but I guess the concrete came lose when the tree hit.
Q. The tree hit the porch?
A. Hit the porch, right, in the corner.
Q. Do you know if that was loose when you signed the contract?

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A. It wasn't loose when I signed the contract.
(Page 121, lines 18 - 25; page 122, lines 1 - 2)

Q. Your testimony, though, is that [the loose cinder blocks] must have happened when the tree fell on the house, correct?
A. My testimony is, it did happen when the tree fell on the house.
Q. You visited this house two times after the tree fell on it, correct?
A. Right, and I noticed it the first time.
Q. You didn't notify the seller of that?
A. Through my attorney.
Q. Was that in writing?
A. I don't know.
(Page 122, lines 21 - 25; page 123, lines 1 - 9)

Q. Now what caused damage to the pipes?
A. Lack of care. That's, the pipes were left filled during a freeze and pipes burst.
Q. Do you know when that happened?
A. It happened after November 2014.
Q. Do you know if it happened between November of 2014 and February of 2015?
A. It happened sometime between November of 2014 and when I took possession in June of 2018... .
(Page 126, lines 3 - 11)

Testimony of Michael G. Pavlakos:

Michael G. Pavlakos is a certified New York State real estate appraiser, a position he has held for over 25 years. He has testified numerous times and is on the Part 36 list of court approved real estate appraisers. His qualifications as an expert were recognized without objection.

Plaintiff retained Pavlakos to conduct a fair market value appraisal of 34 Furnace Lane as of August 15, 2018, the date of his inspection, and the fair market rental value from February 1, 2015 to August 15, 2018.

The property inspection included walking of the grounds, observing the site and its surroundings. Plaintiff was present during the inspection. Both the exterior and interior were inspected. Pavlakos summarizes his observation: a 630 square foot, two bedroom cottage in "lower

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average fair condition ... [which is] a "safety hazard to any occupants ... [with an] "interior [which] is in below average dated condition, original fixtures." He observed "substantial structural issues." (Page 8, lines 14 -23) Pavlakos recommended retention of an engineer and hydrologist.

After researching Greenwood Lake, Pavlakos sought properties comparable in condition, size, location, room count and appeal. He set a fair market value of $35,000 as of August 15, 2018.

Pavlakos followed a similar procedure in determining the rental value of the property:

> I conducted market search into fair market rental, ..., what did these bungalows or cottages rent for on an annual basis, monthly basis, et cetera, and I compared them to what we have, our subject property, and reconciled to a fair market rental value over time period. (Pavlakos, page 14, lines 23 - 25; page 15, lines 1 - 3)

The fair market rental value was determined to be $40,250. The time period for that rental value was from February 13, 2015 (four days before the contract was executed) through June 31, 2018. The rental value is also under the "extraordinary assumption that the property was in average habitable condition for those time periods cited." (Page 17, lines 7 - 9) Pavlakos did not make "a definitive statement, because [he] is not sure." (Page 17, lines 12 - 17) He conceded that the property could not be rented in its current state.

Pavlakos conceded on cross-examination that he did not know whether the property in this matter or the comparable properties he used were year round rentals. He also did not know the value of the subject property in February 2015, the date of the contract.

The structural damage referred to by Pavlakos was damage caused by the tree as described by the plaintiff. Pavlakos had no knowledge of what portion of the house the tree fell on or if any repairs were completed after the incident.

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As to the calculations of rents, Pavlakos conceded that he determined the annual rental value of the comparable properties by taking the listed monthly rent and multiplying by twelve. He annualized the properties without determining whether they were seasonal rentals.

Finally, upon questioning by the Court, Pavlakos described the water supply as seasonal.

DISCUSSION

The plaintiff is seeking the loss of value of the property he purchased and the loss of rental income.

The behavior of the two parties in this matter defies understanding. A real estate contract for a summer bungalow has turned into two lawsuits; years of litigation; numerous motions; a default; an appeal; appointment of a receiver; hiring of an expert, and a hearing. The sale price of the summer bungalow was $63,000. If it could be measured in dollars, the turmoil caused by the litigations far surpassed that amount.

The contract of sale , dated February 17, 2015, has no mortgage contingency.

Paragraph 11c reads, "Except as otherwise expressly set forth in this contract, none of Seller's covenants, representations, warranties or other obligations contained in this contract shall survive the closing." The seller's representations and warrantees can be summarized as follows: the property abuts or has access to a public road; the seller has sole ownership of the property with the right to sell title; the seller is not a "foreign person;" no abatements or tax exemptions affect the property, and the seller has not been known by any other name for the last ten years. (see Exhibit 3, ¶11(a)(I through v))

In paragraph 12, entitled Condition of the Property, the plaintiff purchaser "acknowledges and represents" that he is "fully aware of the physical condition and state of repair of the premises."

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The provision advises that no representation "made by the Seller personally, or by a representative," is relied upon. And, transfer of the property is being made "as is in their present condition" subject to "reasonable use, wear, tear and natural deterioration."

Paragraph 16, Entitled "Conditions to Closing," delineates the conditions that the seller must meet to be able to enforce the plaintiff/purchaser's obligation to complete the purchase. The following are relevant to this matter:

> (a) The accuracy, as of the date of Closing, of the representations and warranties of Seller made in this Contract; ...
>
> (d) The delivery of the Premises and all building(s) and improvements comprising a part thereof in broom clean condition, vacant and free from leases of tenancies, together with keys to the Premises.
>
> (e)All plumbing (including water supply and septic systems, if any), heating and air conditioning, if any, electrical and mechanical systems, equipment and machinery in the building(s) located on then property and all appliances which are included in the sale being in working order as of the date of the Closing.
>
> (f) If the Premises are a one or two family house, delivery by the parties at the Closing affidavits in compliance with state and local law requirements to the effect that there is installed in the Premises a smoke detecting alarm device or devices.

The contract entitles the plaintiff purchaser to inspections, essentially at his convenience. "Purchaser and its authorized representatives shall have the right, at reasonable times, and upon reasonable notice (by telephone or otherwise) to Seller, to inspect the Premises before Closing." (Exhibit 3, ¶12) Handwritten as paragraph (h) of Paragraph 12 is the following: "Purchaser shall have the right to inspect the premises within 48 hours prior to the closing." Clearly, the plaintiff did not take advantage of the right to inspect immediately prior to closing.

The receiver deed (Exhibit 4) is dated June 22, 2018. The plaintiff visited the property a total of three times, over three years, prior to that date. No evidence of the completion of a professional inspection was entered. The plaintiff visited the property in November or December of 2014, two

to three months before the signing of the contract. No testimony as to the condition of the property on February 17, 2015 was given; a contrast cannot be made. Plaintiff apparently did not visit or inspect the property before having his counsel send a "time is of the essence" letter. No testimony as to the condition of the property on March 10, 2016 was given. No evidence was given as to the condition of the property at the time plaintiff fought for, and was granted, specific performance.

The plaintiff visited the property in June and August of 2015, after learning that a tree fell on the house. While his expert testified that, according to the plaintiff, structural damage resulted from the fallen tree, no evidence of such structural damage was given. Furthermore, the plaintiff did not present any professional opinion as to the structural integrity of the building at any time, either before or after the tree. The plaintiff believes that the foundation was damaged when the tree fell on the house in June 2015. He noticed the damage when he visited the house in June 2015, prior to transfer of title. (Page 122, line 23) No expert testimony was given as to the connection between the tree and the foundation.

The plaintiff knew a stream ran from the mountain and acknowledges that the flow varies. Sometimes "it looked like a waterfall." (Page 107, line 24) When he saw water ponding on the property in his August 2015 visit, he thought it was an overflowing septic. (Page 118, line 25) No expert testimony was given as to the natural flow or water or the septic.

The defendant argues that the plaintiff's claims are voided by the doctrine of merger. The contract includes representations and warrantees to which the seller is bound. Paragraph 11(c) of the contract also provides, that "none of Seller's covenants, representations, warranties or other obligations contained in this contract shall survive the closing." "Since title to the property had closed and the deed was delivered, in the absence of any clear intent by the parties that a relevant

provision of the contract of sale would survive delivery of the deed, any claims the plaintiffs might have had arising from the contract of sale were extinguished by the doctrine of merger (citations omitted) (*Rojas v Paine*, 101 AD3d 843, 846-47 [2d Dept 2012]) Plaintiff has not pointed to a contract provision which allows the plaintiff's claims to survive.

The plaintiff argues, essentially, that transfer by a receiver does not constitute compliance. The merger doctrine, therefore, is inapplicable. It should be noted that no legal precedent was provided for the concept and none was found by the Court.

In *Joseph v Cr. & Pines, Ltd.*, (217 AD2d 534, 535 [2d Dept 1995]), a post closing breach of warranty claim was allowed by the Second Department. "[I]t is well-settled that when interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized (*citations omitted*). (*Joseph v Cr. & Pines, Ltd.*, 217 AD2d 534, 535 [2d Dept 1995]) However, there is no breach of contract claim in this matter. Here, plaintiff sought specific performance (which he received) and $50,000 for compensatory damages. The only representation referred to in the plaintiff's second cause of action is the defendant's representation that he would "deliver a proper deed and convey fee simple" of the premises.

Plaintiff relies on the matter of *Freidus v Eisenberg*, (123 A.D.2d 172 [2d Dept 1986]). The facts in *Friedus*, as in this case, involve the delay of the transfer of real property. The Appellate Division, acknowledging the lower court's award of specific performance, stated:

> At the outset of our analysis, it is important to note that the underlying action is in equity for specific performance of a contract to convey real property, and the issue at the jury trial was the amount of damages flowing from the delay in complying with

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> the contract. The action is not one at law to recover damages for breach of contract. In a breach of contract action, the purchaser is compensated for loss of bargain by recovering the difference between the value of the property and the contract price, together with such incidental damages as flow from the breach *(citations omitted)*. Here, with specific performance granted, the contract is being performed, and the purchaser has not lost the value of the bargain. (*Freidus v Eisenberg*, 123 AD2d 174, 177 [2d Dept 1986], *affd as mod*, 71 NY2d 981 [1988])

In this matter, the plaintiff has not lost the value of the bargain. Especially since, the value of his bargain has not been proven.

The *Freidus* court continues, "To achieve that end, the court will award to the purchaser, in addition to specific performance of the contract, such items of damage as naturally flow from the breach, are within the contemplation of the parties, and can be proven to a reasonable degree of certainty *(citations omitted)*." (*Id.*)

Plaintiff has failed to establish damages. No expert testimony was brought in establishing the condition of the property; defects and necessary repairs, or the cost of the repairs. Plaintiff testified to an out of pocket cost for installation of a skirt drain. He also testified that he did not hold the defendant responsible for drainage issues created by the flow of water from the mountain in front.

Most important is the lack of proof as to when the alleged property damages occurred or why the plaintiff insisted on the delivery of title. When asked when particular damage occurred, he repeatedly responded, "sometime between November of 2014 and June of 2018." In short, he does not know. The videos placed into evidence to show water damage were taken a year after transfer of title. Reason for the water damage was never definitively established; was it the natural flow of the water, broken pipes, or both?

The testimony of plaintiff's expert must be rejected. His fair market value is as August 15, 2018, a somewhat random date. The value on the date of contract or date of the order granting

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specific performance or the date of transfer of title is unknown. No comparison can be made to determine a diminution is valuation. The purchase price of $63,000 does not alone mean that the house fair market value was $63,000 at any time. And, as set forth in *Freidus*, plaintiff has not lost the value of his bargain.

The fair market rental value must also be rejected. The rental value, set at $40,250, is based on annual rentals. The premises in this matter has no heat and the water supply is seasonal. The expert did not now if the properties he used as comparables were only seasonal.

No evidence was given as to what months seasonal rentals are typically available. Finally, the period of time used to calculate the total sum is arbitrary at best. The term used by the expert runs from February 13, 2014, presumably meant to be the date of the contract, to June 31, 2018. There is no way the property would have been available for the plaintiff to rent four days before the contract was signed or even on the day the contract was signed. No evidence has been presented as to when the property would have been available at any time during this time period. Additionally, the contract sets a closing date as "on or about February 16 or later up to May 1, 2015 or, upon reasonable notice (by telephone or otherwise) by Purchaser... ." (Exhibit 3, ¶15) Time of the essence letter was not sent until March 10, 2016, a date of the plaintiff's choosing.

"The law does not require that [damages] be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation *(citations omitted)*." (*Ashland Mgt. Inc. v Janien*, 82 NY2d 395, 403 [1993]) The plaintiff has failed to provide reliable facts which would allow for determination of his damages.

Finally, the plaintiff, in his post trial submission, makes reference a portion of paragraph 1(a) of General Obligations Law § 5-1311. He fails to recite, however, the first portion of paragraph 1(a),

"When neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser... ." Title has transferred in this matter and was transferred without the plaintiff seeking an abatement in the purchase price.

Nor does the section of General Obligations Law § 5-1311 which relates to destruction of property before transfer of title provide relief. Paragraph 1(b) allows for a purchaser's recovery for "any breach of contract by the vendor prior to the destruction ... ." The plaintiff has failed to specify any specific breach or the time of the alleged breach.

It is the finding of the Court that the plaintiff has failed to prove entitlement to any monetary award in this matter.

The receiver shall release the funds held in escrow to the defendant, except the defendant shall bear the cost of the receiver and the receiver's fees shall be deducted from the escrow funds, prior to release to the defendant.

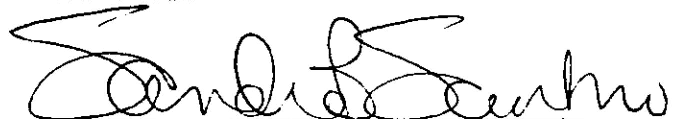
Counsel shall retrieve the trial evidence from the Part Clerk within 20 days after the date of this Decision. Failure to do so will result in the evidence being destroyed.

All matters not mentioned herein are deemed denied.

The foregoing constitutes the Decision of the Court.

Dated: March 9, 2020
Goshen, New York

E N T E R:



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