

Jean v Csencsits

2020 NY Slip Op 33467(U)

August 31, 2020

Supreme Court, Orange County

Docket Number: 2154/2016

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

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-

INDEX NO.: 2154/2016
Motion Date: 8/6/2020
Sequence No. 3

WILLIAM AUGUST CSENCISITS a/k/a
WILLIAM A. CSENCISITS,

Defendant.

DECISION AND ORDER

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SCIORTINO, J.

The following papers numbered 1 to 5 were considered in connection with the defendant's application, brought pursuant to Civil Practice Law and Rules §4404(b), for an order setting aside the Decision after Inquest dated March 9, 2020, and, if deemed necessary, ordering a new trial on damages:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation(Bramante)/Exhibits 1-4	1 - 6
Affirmation in Opposition (Treybich)/ Notice of Settlement of Judgment	7 - 8

Upon the foregoing papers, the plaintiff's application is denied:

Background and Procedural History

The history of this matter is long. 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... ." 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 and seeking specific performance and compensatory and punitive damages in the sum of \$50,000. Leave for alternate service was granted by Order 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.

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.

Inquest on the issue of damages was held on September 9, 2019. By Decision after Inquest, dated March 9, 2020, this Court held that plaintiff had failed to establish damages and entitlement to any monetary award.

Motion

By Notice of Motion dated July 6, 2020, plaintiff seeks an order setting aside the decision of March 9, 2020 and, if deemed necessary, ordering a new trial pursuant to CPLR § 4404(b).

In support of his application, while acknowledging that the contract contains no provisions for survival beyond closing, plaintiff argues that the doctrine of merger is inapplicable in this transaction because the deed was tendered by a receiver, not by the actual seller. Because the defendant/seller did not participate in the execution and tender of the deed, the doctrine of merger “cannot abide.” Additionally, this action was commenced prior to the tender of the deed and the appointment of a receiver. (Notably, plaintiff provides no authority supporting his theory of the inapplicability of the merger doctrine.)

Since the tender was to be accomplished by the receiver, plaintiff fears that an inspection of the premises before the transfer may have been a trespass. In light of the circumstances, plaintiff argues, this Court is putting an undue burden on plaintiff concerning the condition of the premises both prior and subsequent to contract execution.

Plaintiff argues General Obligations Law 5-1311 allows plaintiff to pursue an abatement in purchase price after the tender of the deed. Further more, the Decision After Inquest does not provide for the payment of the real estate broker’s commission and payment of income taxes to New York State on the transfer of realty by a nonresident.

Opposition

Defendant argues that adopting plaintiff’s argument about the merger doctrine requires the Court to disregard precedent; the argument is appropriate for the Court of Appeals. The argument is not supported by the plain language of the contract, which provides, “Except as otherwise

expressly set forth in this contract, none of the Seller's covenants, representations, warranties or other obligations contained in this Contract shall survive Closing." (Exhibit 4 to moving papers) "Closing" is defined in the contract as "the settlement of the obligations of Seller and Purchaser to each other under this contract, including the payment of the purchase price to seller, and the delivery to Purchaser of a deed in proper statutory short form for record [sic], duly executed and acknowledged, so as to convey to Purchaser fee simple title to the Premises..." (Exhibit 4 to moving papers) Defendant argues as a matter of law, delivery of the deed constituted a closing as defined by the underlying contract.

Defendant points out that plaintiff has not made mention of any new evidence which could not have been presented at trial. Nor did plaintiff provide any excuse for failing to adduce relevant evidence at inquest with respect to damages. Therefore, plaintiff is barred from re-litigating this matter under CPLR 4404(b) based on newly discovered evidence.

With respect to the General Obligations Law 5-1311, the defendant argues that application of the section is limited to situations in which neither the legal title nor possession of the subject matter of the contract has been transferred to the purchaser. The plaintiff's interjection of the statute is an unpleaded cause of action, and plaintiff failed to move to conform the pleadings to the proof at the inquest. Even if this issue were properly before the court, plaintiff has failed to prove when the purported damages to the premises occurred or what the condition of the premises were on the contract date.

With respect to the real estate broker's commission, defendant argues, the broker is not a party to this action. Nor did plaintiff provide any information on which the Court could rely. With respect to the payment of income taxes, defendant argues that counsel is unaware of any portion of

the New York State Tax Law which would purport to give plaintiff standing on this issue.

The Court has fully considered the submissions of the parties.

Discussion

Plaintiff, relying only on CPLR 4404(b), seeks an order setting aside this Court's March 9, 2020 Decision After Inquest. Section 4404(b) reads, in pertinent part: "After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon." Case law allows such an order to be based on "newly discovered evidence." (*Mangra v. Mangra*, 170 AD3d 1156; 1159 [2d Dept 2019]; citing *Da Silva v. Savo*, 97 A.D.3d 525 [2d Dept 2012]) Newly-discovered evidence may be considered upon a showing that it could not have been previously discovered and the evidence is in admissible form. (*Da Silva* at 526) The plaintiff introduces no newly discovered facts or documents in his papers.

"A court's decision after a nonjury trial that misapprehends the theory of liability and fails to address a key component thereof can provide a ground for the court to set aside its decision pursuant to CPLR 4404 (b)." (*Paterno v Strimling*, 107 AD3d 1233, 1234 [3d Dept 2013]) As the plaintiff has provided no new evidence, it is assumed that he relies on an argument of misapprehension. Specifically, plaintiff argues that the Court improperly applied the merger doctrine. The Court rejects the assertion.

Plaintiff has provided no authority supporting the proposition that the doctrine of merger is inapplicable to situations in which the deed was tendered by a receiver or after the commencement of the action. The plaintiff sought, and was granted, specific performance.

He then sought damages and therein lies his true dilemma. While the plaintiff argues against the Court's application of the merger doctrine, he ignores the Court's finding that he has "failed to

establish damages.”

The testimony of his only expert, a real estate appraiser, was rejected. The properties used as comparable rental property had minimal, if any, similarities to the property which was the subject of this action. The fair market value proffered was based on a random date.

No experts were brought in to give testimony as to the condition of the property, necessary repairs or the cost of repairs. As stated in the decision, "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 Court stated then, and repeats now, “plaintiff has failed to provide reliable facts which would allow for determination of his damages.” In short, plaintiff failed to prove his case.

As to the realtor commission and New York tax liability, the plaintiff has never even remotely suggested that he has any liability for those debts.

The application of plaintiff to set aside the Decision After Inquest is denied.

Any relief not specifically addressed herein is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 31, 2020
Goshen, New York

ENTER


HON. SANDRA B. SCIORTINO, J.S.C.