

Impact Equities 2016 LLC v Johnson

2020 NY Slip Op 34286(U)

December 23, 2020

Supreme Court, Kings County

Docket Number: 523634/18

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

_____ X

IMPACT EQUITIES 2016 LLC,
Plaintiff,

- against-

TRENIA JOHNSON
a/k/a TRENIA JOHNSON-NORFORD
and MARCUS GARVEY 346 BLVD LLC,

Defendants.

_____ X

DECISION / ORDER

Index No. 523634/18
Motion Seq. No. 2
Date Submitted: 11/12/20

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Johnson's motion for summary judgment.

| Papers | NYSCEF Doc. |
|---|--------------------|
| Notice of Motion, Affirmation and Exhibits Annexed..... | <u>31-38</u> |
| Affirmation in Opposition and Exhibits Annexed..... | <u>41-42</u> |
| Reply Affirmation..... | <u>43</u> |

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

With regard to the moving party, defendant Johnson, this is an action for specific performance brought by the purchaser pursuant to a written contract of sale. Defendant Johnson moves for an order granting her summary judgment dismissing the complaint and canceling the notice of pendency. The contract of sale is dated March 29, 2017 and is annexed to the motion as Exhibit D (E-File Doc 37). The property at issue is 346 Marcus Garvey Boulevard, Brooklyn, NY. It is known as Block 1831, Lot 42. It is listed as a three-family house on the NYC HPD website. Ms. Johnson does not live there.¹

Plaintiff's second cause of action seems to be asserted against defendant Johnson as well as the other defendant, Marcus Garvey 346 Blvd LLC, for a declaratory

¹ In her complaint in Ind. 510882/20, discussed below, she states she resides in Florida.

judgment declaring that a document recorded against the property on October 31, 2018 is null and void. It appears to be a memo of a contract of sale of sorts, which was allegedly executed by defendant Johnson in 2018. Under Real Property Law § 294(5), if this were determined to be a proper memorandum of contract, its effectiveness in creating a priority among purchasers expired 30 days after the anticipated closing date therein. Plaintiff has not moved for a default judgment against this co-defendant, who was served in December 2018 by service upon the Secretary of State, and it has been more than a year since this defendant defaulted. Thus, the CPLR deems this action to have been abandoned with regard to this defendant, and the complaint is hereby dismissed as against it (see CPLR 3215 [c] [“the court shall . . . dismiss the complaint as abandoned.”]).

Background

Defendant Johnson purchased the property in 2005 (E-File Doc 36 [the deed]). In early 2010, a foreclosure action was commenced by One West Bank (8354/2010). Defendant did not answer, and an order of reference on default was applied for in May of 2010, which was, according to the court’s computer, denied in 2012. On September 3, 2010, defendant allegedly executed a quitclaim deed to an entity called Jett 346 Corp. In 2014, a court order in a case brought by Ms. Johnson, under Ind. 29520/2010, was recorded against the property, which restored defendant’s ownership and canceled the deed to Jett 346 Corp. On May 12, 2014, the pending (2010) foreclosure action was dismissed by the court for plaintiff bank’s failure to prosecute. On June 10, 2014, a Contract of Sale for the property was recorded against the property, which states that Ms. Johnson agreed to sell the property to Dalton Development LLC for \$250,000. That deal apparently did not go through, and Ms. Johnson has recently brought an action against

this entity under Ind. 510882/2020. The complaint seeks a declaratory judgment that the contract of sale was properly cancelled and is null and void. A Preliminary Conference Order was very recently issued in that case, on December 15, 2020, and provides a discovery schedule. Again, the court notes that Real Property Law § 294(5) states that the effectiveness of a recorded contract of sale as establishing a priority for the purchaser therein expires thirty days after the closing date stated in the recorded contract.

In December 2017, after the contract of sale at issue in this action was executed (March 29, 2017), a new foreclosure action was commenced by the Federal National Mortgage Association (Fannie Mae, who had been assigned the mortgage after the prior foreclosure action was dismissed) against Ms. Johnson, under Ind. 524203/2017. That action was dismissed following a cross motion by defendant Johnson, by order dated August 13, 2019. The Justice assigned found that the mortgage had been accelerated in 2010 when the prior foreclosure action was commenced (8354/2010), and that the 2017 action was barred by the statute of limitations. Defendant Johnson has not brought an action for an order discharging the mortgage. It is not known if the dismissal of either foreclosure action was appealed.

Defendant now moves for summary judgment dismissing the complaint. Counsel argues that defendant is entitled to dismissal for several reasons. First, he states that “in moving for summary judgment on a complaint seeking specific performance of a contract, the plaintiff purchaser must submit evidence demonstrating financial ability to purchase the property in order to demonstrate that it was ready, willing, and able to purchase such property.” This is totally inapplicable, as he is making this motion on behalf of the seller, and unless he makes a prima facie case for summary judgment, the plaintiff’s papers need not be considered.

Second, counsel argues that plaintiff failed to close after plaintiff was sent a “time is of the essence letter.” This letter was sent after the action for specific performance was commenced and after the court issued an order dated September 5, 2019 which denied defendant’s prior motion, mot. seq. #1, a motion to dismiss the complaint which claimed that defendant did not have to close as the Rider to the Contract of Sale required approval of a “short sale” and such approval was not granted. The Order stated that defendant failed to make a prima facie case for dismissal, as she had not provided any evidence that a short sale had been applied for or denied, or that she had terminated the contract for this reason. Apparently there was either no application for short sale approval or no denial or no letter cancelling the contract. So, defendant’s counsel instead sent plaintiff a “time is of the essence letter” dated October 14, 2019 (E-File Doc 38), and in this motion, defendant claims plaintiff was not ready, willing and able to close, and did not close, on November 4, 2019 (almost a year after this action was commenced), entitling defendant to cancel the contract. But it seems no cancellation letter was sent. Defendant’s counsel does not mention the mortgage, which has not been paid since 2010 or earlier, and whether the defendant was going to be able to deliver title free and clear of it on November 4, 2019. But it is clear from the contract of sale that the buyer expects good title, without the mortgage encumbering the property. Paragraph 15 of the form contract (there is no rider in Doc. 37) states that the closing will take place 45 days after “obtaining short sale approval.” Without this approval, a time is of the essence letter is invalid and unenforceable in any event.

It is noted that it is unusual to move to dismiss an action for specific performance by claiming that you want to sell the property and the plaintiff doesn’t want to buy it.

The court does not find that defendant’s counsel’s arguments have merit, nor does

he make a prima facie case for summary judgment dismissing the complaint. Therefore, the court need not read the opposition papers. Nonetheless, the court has reviewed the opposition, mostly out of curiosity. Counsel for plaintiff opposes the motion and points out that the “time is of the essence” letter was not sent to counsel for plaintiff in this action, but to plaintiff’s (purchaser’s) transactional attorney listed in the contract of sale. He also notes that the letter does not say who the sender represents, nor who the recipient represents. Counsel also points out that there is no transcript of the scheduled closing to demonstrate that the seller was there, and that, therefore, there is no evidence that defendant was ready, willing, and able to close. Counsel also argues that defendant acknowledged that the contract of sale was valid and enforceable in October of 2019 by sending the time is of the essence letter. Finally, he states that the letter only gave twenty days’ notice, which makes it insufficient as a matter of law.

If the mortgage is determined to be unenforceable, the absence of a “short sale” approval would not be a bar to closing. The “time is of the essence” letter sent a year after plaintiff commenced this action for specific performance, but which only gave plaintiff twenty days’ notice, is an insufficient basis for this motion. Without a court order that the mortgage is canceled and discharged, a short sale approval is required, as the balance due on the mortgage is more than the purchase price. It is also an insufficient time is of the essence notice, as a matter of law, as it was not properly drafted and does not properly identify the transaction. It does not provide the short sale approval that is a contract prerequisite to setting a closing date. Nor was it sent to plaintiff’s litigation counsel.

If defendant wants to sell, and plaintiff wants to buy, they should be able to work this out. However, as Dalton Development is still in litigation with defendant, as

described above, and there is an issue whether the lien of the mortgage is still valid, there are some matters that need to be resolved before a closing can be held. Defendant Johnson is still the property owner. She is still in a position to consummate this transaction.

Accordingly, it is **ORDERED** that the motion is denied.

It is further **ORDERED** that the complaint, as asserted against defendant Marcus Garvey 346 Blvd LLC, is dismissed.

This constitutes the decision and order of the court.

Dated: December 23, 2020

ENTER:



Hon. Debra Silber, J.S.C.