

**Town of North Hempstead v Corona Realty Holding,
LLC**

2020 NY Slip Op 35796(U)

January 29, 2020

Supreme Court, Nassau County

Docket Number: Index No. 611659/2018

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TOWN OF NORTH HEMPSTEAD,TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 611659/18

MOTION DATE: 12/20/19

Motion Sequence 001, 002

-against-

CORONA REALTY HOLDING, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion.....XX
 Affirmation in Support.....XX
 Memorandum of Law in Support.....X
 Reply Affirmation.....X

Upon the foregoing papers, the motion (Seq. No. 001) by plaintiff, Town of North Hempstead (hereafter as "Town"), which seeks a declaratory judgment pursuant to CPLR §3001; and the cross-motion (Seq. No. 002) by defendant, Corona Realty Holding, LLC (hereafter as "Corona") which seeks an order for summary judgment dismissing plaintiff's action are determined as follows.

The within action involves an agreement between the parties for the purchase and sale of real property owned by Corona known as Roslyn Country Club, located at 33 Club Drive, Roslyn, Town of North Hempstead, New York. The Town agreed to purchase the subject property for Two Million Dollars. Plaintiff alleges that pursuant to the agreement Corona made certain material representations and warranties, including, but not limited to maintaining, at its sole cost and expense, the "Recreational Area" portion of the subject property; that as a condition to closing under the agreement, Corona agreed that three lawsuits shall have been dismissed within six (6) months of the date of the Agreement; and that the seller agreed to cooperate with the plaintiff to

TOWN OF N. HEMPSTEAD v CORONA REALTY**Index No.: 611659/18**

subdivide the subject property. Plaintiff alleges that it has complied with its obligation under the subject agreement, but that Corona has failed to perform its obligations. Plaintiff asserts causes of action sounding in specific performance, breach of contract, fraudulent inducement, and negligent misrepresentation.

Plaintiff seeks a declaratory judgment declaring that defendant Corona's failure to have the litigations dismissed, along with its failure to maintain the "Recreational Area" and to cooperate with plaintiff to subdivide the subject property, constitutes a breach of contract. In support of its application, plaintiff submits, *inter alia*, the subject agreement; and various correspondences related to the subject contract.

Defendant, Corona, moves for summary judgment as to its ninth and eleventh affirmative defenses (that the plaintiff is not entitled to consequential damages and that the agreement precludes plaintiff's action); seeking to dismiss plaintiff's third and fourth causes of action for fraudulent inducement and negligent misrepresentation based upon defendant's fourteenth and fifteenth affirmative defenses; and that plaintiff's action is barred by laches pursuant to its sixth affirmative defense.

Initially, this Court notes that nowhere in plaintiff's complaint is there a prayer for declaratory relief. Each of the cases that plaintiff cites to in justifying its request for declaratory relief by its motion, arise from matters which state a cause of action for declaratory judgment. That is simply not the case here. The plaintiff's causes of action allege specific performance, breach of contract, fraudulent inducement and negligent misrepresentation.

"A cause of action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties' (*Westhampton Beach Assoc., LLC v Incorporated Vil. of Westhampton Beach*, 151 AD3d 793, 796, 56 NYS3d 518 [2017], quoting *Zwarycz v Marnia Constr., Inc.*, 102 AD3d 774, 776, 958 NYS2d 440 [2013]; see CPLR 3001). 'To constitute a 'justiciable controversy,' there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect' (*Chanos v MADAC, LLC*, 74 AD3d 1007, 1008, 903 NYS2d 506 [2010])."(Chana v. Machon Chana Women's Inst., Inc., 162 A.D.3d 635, 636-37, (A.D. 2d Dept. 2018)

Notwithstanding the fact that plaintiff's complaint does not seek declaratory relief, the instant motion does not request this Court to declare the rights of the parties with respect to the contract but whether defendant has breached the actual contract. Said relief is dispositive and essentially a request for summary judgment as to plaintiff's second cause of action for breach of contract.

TOWN OF N. HEMPSTEAD v CORONA REALTY

Index No.: 611659/18

Further, “a declaratory judgment action may be an appropriate vehicle for settling justiciable disputes as to contract rights and obligations (*see, Matter of Public Serv. Commn. v Norton*, 304 NY 522, 529; *see also*, Restatement [Second] of Contracts § 345, comment d, at 107-108; 5 Corbin, Contracts § 991, at 4-5; 4 Williston, Contracts § 601, at 316-317 [3d ed]). **But parties to an agreement may not seek a declaration of their contract rights when their agreement specifies a different, reasonable means for resolving such disputes** (*see, e.g., Rifkin v Rifkin*, 118 NYS2d 322 [Sup Ct], *affd* 281 App Div 1035; 16 Williston, Contracts § 1919A, at 155-156). **A declaratory judgment in such circumstances may be unnecessary** (*see, Walsh v Andorn*, 33 NY2d 503, 507; *James v Alderton Dock Yards*, 256 NY 298, 305), **and could also enable parties to circumvent their contractual undertakings** (*see, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:14, at 364-365*). (*Kalisch-Jarcho, Inc. v. New York*, 72 N.Y.2d 727 [1988])(*emphasis added*).

The subject contract contains provisions in case of default by Purchaser or Seller in reference to any of the terms of the contract, including a breach of the contract. The relevant provisions also include a waiver of all claims against the Purchaser or Seller including specific performance. Specifically, the subject agreement states as follows at Section 15 B, entitled “Default by Seller”:

If Seller fails or refuses to substantially comply with and perform all of the material terms, provisions, conditions, agreements and obligations on Seller’s part to be observed, kept and performed pursuant to this Agreement, and does not cure such failure or refusal within thirty (30) days from Seller’s receipt of written notice of such failure or refusal (which thirty (30) day period may be extended by a reasonable period if the default cannot be cured within thirty (30) days provided Seller commences to cure the default within said thirty (30) days), Purchaser may terminate this Agreement upon written notice to Seller, however, there shall be no damages or liquidated damages for such failure or refusal, or for any non-compliance, non-performance, breach or default by Seller, including, without limitation, for Purchaser’s loss of its bargain as embodied hereinafter. Purchaser will have no further rights or causes of action against Seller under this Agreement (and Purchaser’s vendee’s lien will terminate after its default hereunder), nor will Seller have any further rights under this Agreement or otherwise, with respect to Purchaser or the Premises. Purchaser specifically acknowledges that the foregoing is a waiver of all claims or remedies against Seller, including claims for specific performance, arising out of Seller’s failure to perform its obligations hereunder.

TOWN OF N. HEMPSTEAD v CORONA REALTY

Index No.: 611659/18

Based upon plaintiff's submissions, it appears that plaintiff and defendant agreed to extend plaintiff's time to satisfy the subject "litigation condition" to December 31, 2014. It appears that Seller did not satisfy the subject "litigation condition" by the aforesaid date. This "litigation condition" was not waived by either party and it appears that based upon the parties' agreement, the only remedy plaintiff had was to terminate the agreement.

Finally, "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records v Capital Records*, 137 AD2d 50, 54; see also, *Levey v Leventhal & Sons*, 231 AD2d 877, 878). (*BGW Dev. Corp. v. Mount Kisco Lodge No. 1552 of the Benevolent & Protective Order of Elks of the United States*, 247 A.D.2d 565, 669 N.Y.S.2d 56 [App. Div. 2nd Dept. 1998]).

Accordingly, plaintiff's motion for declaratory relief is **denied**.

Defendant moves for summary judgment on its ninth and eleventh affirmative defenses and seeks dismissal of plaintiff's third and fourth causes of action based upon defendant's fourteenth and fifteenth affirmative defenses and also seeks dismissal of plaintiff's action based upon its sixth affirmative defense.

Defendant's ninth affirmative defense states that plaintiff is not entitled to consequential damages and its eleventh affirmative defense states that the terms of the agreement preclude plaintiff's claim. In support of its contentions, defendant refers to the aforementioned Section 15(B) of the subject agreement. Defendant also provides correspondence dated June 13, 2018 addressed to plaintiff herein terminating the subject agreement based upon Section 5A(E) of the subject agreement.

In its complaint, the plaintiff alleges, *inter alia*, that defendant failed to satisfy the "litigation condition" as per paragraph 5A(E) in the subject agreement. Section 5A(E) of the subject agreement entitled "Pending Litigation" states as follows:

It shall be a condition of the closing that the pending litigation known as: 1. Corona Realty Holdings LLC v. Shalom Nektalov, Index No. 011458/2007; 2. Corona Realty Holdings LLC v. 28 Stirrup Lane LLC, Index No. 020972/2006; 3. Corona Realty Holdings LLC v. Abrishamain Kamran, Index No. 003344/2007 and all counterclaims (together, the "Pending Litigation") shall have been dismissed by an order of a justice of the New York State Supreme Court, Nassau County. ***If such dismissal has not occurred within six (6) months of the effective Date of this Agreement, either party may terminate this Agreement upon notice to the***

TOWN OF N. HEMPSTEAD v CORONA REALTY

Index No.: 611659/18

other made in accordance with this Agreement. On the effective date of such termination, the parties shall cease to have any rights against or responsibilities to the other party. (emphasis added)

The parties, by written agreement, extended the time within which the subject litigation was to be caused to be dismissed up to and including December 31, 2014. From the record before the Court, it appears that said litigation was not dismissed by December 31, 2014; and Corona did not waive its rights to said condition as per their correspondence to plaintiff dated March 24, 2015 (annexed to movant's papers as Exhibit "3"). Finally, it appears that the parties did not correspond for several years pertaining to the agreement; no closing occurred prior or up to December 31, 2014; and defendant, Corona, on June 13, 2018 sent a letter to plaintiff terminating the transaction effective January 1, 2015 in accordance with the aforesaid Section 5A(E).

The complaint also alleges that pursuant to Section 14(B)(1) of the agreement that defendant was to maintain at its sole cost and expense, the "Recreational Area" portion of the subject property in substantially the same condition, including by providing gardening, landscaping, and snow and ice removal services. Plaintiff alleges that defendant failed to maintain the "Recreational Area" pursuant to the agreement.

Defendant, Corona, contends that the Town has submitted no evidence to establish that Corona did not comply with this provision and that Section 15(B) of the subject agreement precludes this claim.

In the papers submitted to this Court, there is no evidence submitted that supports the Town's claim that Corona did not maintain the Recreational Area other than the affirmation of plaintiff's counsel; nor is there any evidence of a Notice to Cure the alleged default by Corona being sent by plaintiff to defendant in accordance with Section 15 (B) of the agreement.

Further, although not specifically alleged in plaintiff's complaint, the defendant addresses the arguments in plaintiff's moving papers regarding the "Subdivision Cooperation Obligation". The town contends that pursuant to Section 5A(B) of the subject agreement Corona was obligated to cooperate with the Town in obtaining the Subdivision of the subject property. Section 5A(B) entitled "Subdivision" states as follows:

Purchaser shall have obtained the Subdivision of the Recreational Area from the Premises. Upon Town Board Approval, Seller and Purchaser shall cooperate in obtaining the Subdivision of the Premises as shown in the Acquisition/Easement Map and shall use their best efforts to

TOWN OF N. HEMPSTEAD v CORONA REALTY

Index No.: 611659/18

obtain approvals from any other persons in interest whose approval is required including, but not limited to, tenants, mortgagees and secured parties.

Town contends that in order to satisfy the obligation in the aforesaid section of the agreement, Corona needed to execute the Subdivision Documents, return them to the Town, and the Town would have recorded the Subdivision Documents. The Town contends that despite numerous emails to Corona's counsel, Corona failed to execute the required documents in violation of the aforesaid provision.

Initially, there is no evidence in any of the submissions of either party of the documents in question, nor that they were sent to Corona for execution. The Town's Exhibit "E" which is correspondence from the Town to Corona indicates that the "remaining major roadblock to closing is the resolution of certain litigation" (which was addressed earlier in this Court's decision). In said correspondence, dated March 13, 2015, there is no mention of any paperwork or documents as an impediment to closing or a notice to cure this alleged violation of the subject agreement. Finally, there is no evidence that plaintiff availed itself of Section 15 (B) of the subject agreement by sending Corona a Notice to Cure this alleged default.

The proponent of a summary judgement motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. Where...the contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence. The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court. The court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert...extrinsic evidence will be considered only if the contract is deemed

TOWN OF N. HEMPSTEAD v CORONA REALTY

Index No.: 611659/18

ambiguous” (*Maser Consulting, P.A. v. Viola Park Realty, LLC* 91 A.D. 3d 836, 837, 936 N.Y.S.2d 693 [2nd Dept. 2012])(internal citations omitted).

Here, this Court finds that the terms of the parties’ agreement are unambiguous and that Corona has satisfied it’s prima facie entitlement to summary judgment on its ninth and eleventh affirmative defenses and that plaintiff’s claims are precluded. Further, plaintiff’s claims of negligent misrepresentation and fraudulent inducement are duplicative of plaintiff’s breach of contract claims. Plaintiff’s arguments supporting the aforesaid causes of action cite to cases in which the “negligent misrepresentation” or “fraud” is collateral to the contract. Here, each of plaintiff’s claims are based on terms that are within the parties’ agreement.

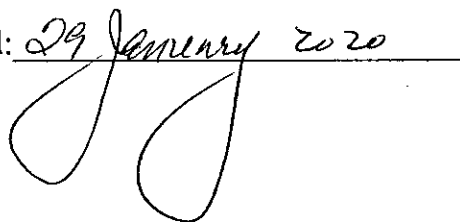
The plaintiff does not submit any admissible evidence in opposition to defendant’s cross-motion for summary judgment which supports its contentions other than the affirmation of counsel. The affirmations of counsel have no probative weight and are insufficient to raise a triable issue of fact to defeat the instant motion. (*See, Bates v. Yasin*, 13 A.D.3d 474, 788 N.Y.S.2d 397 (2d Dept. 2004); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

Accordingly, the cross-motion by defendant, Corona, for summary on its ninth, eleventh, fourteenth and fifteenth affirmative defenses is **granted** in its entirety and plaintiff’s action is dismissed.

Any relief requested herein not expressly granted by this Court is denied and any arguments not addressed herein are deemed without merit.

So ordered.

Dated: 29 January 2020




J.S.C.

XXX

ENTERED

JAN 30 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE