

**Birnbaum v Perl**

2021 NY Slip Op 30130(U)

January 14, 2021

Supreme Court, Kings County

Docket Number: 502853/2019

Judge: Karen B. Rothenberg

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plaintiff cancelled the contract pursuant to its terms<sup>1</sup>. This action was commenced against the defendant to recover the down payment amount of \$30,000, and incidental and/or consequential damages from the date of the breach in an amount no less than \$150,000, attorneys' fees, costs and disbursements. Simultaneous with the filing of the action, plaintiff filed a notice of pendency against 758A 39<sup>th</sup> Street, Brooklyn, New York, Block No. 915, Lot No. 125.

In the moving papers, defendant claims that in 2018 he was the record title holder of two adjacent properties 758 39<sup>th</sup> Street, Brooklyn [Block 915, Lot 25] (758) and 758A 39<sup>th</sup> Street, Brooklyn [Block 915, Lot 125] (758A). Counsel asserts that on February 2, 2018 defendant entered into a short-sale contract with 758A39ST Realty, LLC to sell 758A for \$230,000 with a down payment of \$1000. Counsel further asserts that on March 23, 2018, defendant entered into a real estate contract with an unknown buyer to sell 758 for \$575,000, with a down payment of \$30,000, and a time of the essence closing date of April 30, 2018. It is alleged that neither sale closed, as the buyer of 758A failed to get approval for the short sale, and the buyer of 758 failed to close on April 30, 2018. Counsel states that defendant filed for Chapter 13 bankruptcy on May 31, 2018 in order to avert a foreclosure auction sale of 758A. The bankruptcy petition was dismissed on July 26, 2018. Counsel asserts that defendant then entered into two new contracts with one buyer for both properties; a contract of sale for 758 was entered into on or about December 26, 2018 and a contract of sale for 758A was entered into on January 22, 2019. Counsel contends that 758 was successfully sold, and that plaintiff commenced the instant action and filed a notice of pendency against 758A.

Counsel argues that although the parties purported contract for 758 identified the parcel of land as situated on Block 915, Lot 25, the plaintiff wrongfully filed a notice of pendency against 758A - Block 915, Lot 125. Counsel further argues that the two adjacent properties 758 and 758A each carry their own unique block and lot identification and annexes to the moving papers printouts from the Automated City Register Information System [ACRIS] search results under both the 758 and 758A, as well as copies of the New York City tax map designations, to evidence same. Counsel asserts that if plaintiff has any legitimate claim to maintain a notice of pendency in this matter, then it should be filed against 758, Block 915, Lot 25 and not against 758A, Block 915, Lot 125. It is also argued that because plaintiff is seeking money damages only, and not a claim that seeks to "affect title, possession, use or enjoyment of real property" as proscribed by CPLR §6514, the notice of pendency should be cancelled.

In addition, counsel contends that the 758 contract contained a clear and unambiguous time of the essence provision and, while plaintiff's attorney sought additional time to close, defendant's prior attorney agreed to an extension only on

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<sup>1</sup> Attached to the complaint is the alleged contract of sale entered into between the parties. Notably, the contract, dated March 23, 2018, has no named buyer and makes reference to a property located at 758 39th Street, Brooklyn, Lot 915, Lot 025.

condition that the down payment would be released to defendant. Counsel argues therefore, that the plaintiff forfeited his down payment and even though defendant filed for voluntary bankruptcy, it had no bearing on defendant's right to retain the deposit.

Lastly, counsel argues that the complaint should be stricken and the notice of pendency should be cancelled due to plaintiff's failure to prosecute his own case. Counsel contends that plaintiff has failed to comply with six discovery orders and failed to provide adequate responses as per the final pre-note order.

In opposition, plaintiff submits an affidavit in which he attests that he and the defendant entered into a contract wherein defendant was to sell him the property located at 758 39<sup>th</sup> Street, designated on the tax map as Block 915, Lot 125, for which he made a \$30,000 down payment. Plaintiff further attests that he and the defendant entered into a separate contract wherein defendant was to sell him the property located at 758A 39<sup>th</sup> Street, which is also designated on the tax map as Block 915, Lot 125, despite the different address. Plaintiff asserts that the contract for 758 erroneously lists the lot number as Lot 25, which is for unrelated property located at 756 39<sup>th</sup> Street. Plaintiff argues that defendant should not be allowed to cancel the notice of pendency as he has a claim to title of the property designated on the tax map as Block 915, Lot 125, and that ACRIS and the Department of Building's website indicate that the notice of pendency is on the correct premises. Plaintiff asserts that both addresses 758 and 758A are on Block 915, Lot 125 and that the tax map designation defendant claims covers the property, Block 125, Lot 25 is for 756 39<sup>th</sup> Street, Brooklyn and not 758A.

Plaintiff further asserts that the time of the essence closing was originally set for April 30, 2018 but was later postponed to June 18, 2018, and again to June 26, 2018. However, due to defendant's bankruptcy filing, plaintiff was advised by his attorney that defendant was unable to convey title on June 26, 2018. Plaintiff claims that once he found out that the defendant was no longer in bankruptcy, he instructed his attorney to move ahead and set a closing date. Plaintiff contends that his attorney received an email from defendant's counsel stating that defendant would not convey title and that the deposit would not be returned because the closing did not take place on the time of the essence date.

Initially, despite defendant's contention, a plaintiff seeking, inter alia, to foreclose a vendee's lien to recover a down payment made on a contract for the sale of real property is an action in which a judgment demanded would affect title to real property and, thus, a notice of pendency is appropriate (*see Wilson v Power House Dev. Corp.*, 12 AD3d 505 [2d Dept 2004]). Nonetheless, here, even assuming that plaintiff has established that the block and lot number listed on the notice of pendency is correct, it is undisputed that the claims arises out of the contract of sale for the 758 property. The notice of pendency, however, wrongly identifies the property in issue as 758A; a different

parcel. In light of this defect in the notice of pendency, cancellation of the notice of pendency is warranted.

With respect to that portion of the motion seeking summary judgment, the defendant has failed to establish prima facie entitlement to dismissal of the complaint as a matter of law. The defendant's argument that plaintiff forfeited the down payment by failing to close at the time of the essence closing date, despite the defendant having filed for Chapter 13 bankruptcy, is without merit. Defendant submits no evidence that a sale of the 758 property at that time was approved by the bankruptcy trustee and/or bankruptcy court (*see* 11 USC § 363). Moreover, although defendant further argues that the plaintiff agreed to release the deposit that was held in escrow as a condition of adjourning the time of the essence closing date from April to June, the submitted emails do not support this claim.

Turning to that portion of the motion seeking dismissal of the complaint pursuant to CPLR §3126, a review of the parties' submissions indicate that plaintiff has failed to adequately comply with discovery orders issued by the court including the final pre-note discovery order dated February 13, 2020. However, as there is no showing of willfulness and because of the disruptions caused by the COVID-19 pandemic, the court is providing plaintiff one last chance to be compliant (*see Almonte v Pichardo*, 105 AD3d 687 [2d Dept 2013]; *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Accordingly, plaintiff shall provide defendant full and complete responses to the items specified in the February 13, 2020 final pre-note order, on or before February 15, 2021, or the complaint shall be dismissed pursuant to this self-executing order.


In view of the foregoing, that portion of defendant's motion seeking to cancel the notice of pendency is granted. The portion of the motion seeking summary judgment is denied. The portion of the motion seeking to dismiss the complaint for failure to provide discovery is granted, unless plaintiff provides defendant with the outstanding discovery as directed herein. All other relief sought herein is denied.

The Clerk of the Court is directed to cancel the notice of pendency filed against 758A 39<sup>th</sup> Street, Brooklyn, Block 915, Lot 125.

This constitutes the decision/order of the Court

Dated: January 14, 2021

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Karen B. Rothenberg  
J.S.C.