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| Freeman On LLC v KAE Invs., LLC |
| 2021 NY Slip Op 30278(U) |
| January 15, 2021 |
| Supreme Court, Kings County |
| Docket Number: 506598/20 |
| Judge: Leon Ruchelsman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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FREEMAN ON LLC,

Plaintiff, Decision and order

- against - Index No. 506598/20

KAE INVESTMENTS, LLC and SYLVESTER J.
SICHENZE, ESQ., as Escrow Agent,
-----x
Defendants,

January 15, 2021

PRESENT: HON. LEON RUCHELSMAN

In November 2018 the plaintiff agreed to purchase property located at 214 Freeman Street from the defendant for an agreed upon sum of \$2,225,000. A contract was signed by the parties on December 20, 2018 and the plaintiff paid a deposit of \$225,000. The contract stated the closing would take place approximately nine months later. Thereafter on September 23, 2019 plaintiff served a time of the essence letter demanding the closing take place prior to October 24, 2019. On October 21, 2019 the plaintiff withdrew the time of the essence letter and sought information from the defendant. Specifically, the plaintiff sought written authorizations to obtain records from the Division of Housing and Community Renewal. On November 9, 2019 the defendant responded that such request demonstrated a lack of due diligence and was duplicative. In any event the defendant stated they would provide the plaintiff with an updated certified registered rent roll from the Division of Housing and Community Renewal. Thus, the closing did not take place on October 24,

2019. The defendant served a time of the essence letter demanding the closing take place January 31, 2020. The plaintiff then terminated the contract arguing the lack of a certificate of occupancy permitted such termination since the property was not marketable. The defendant sought another closing on March 1, 2020. The plaintiff instituted this action and has asserted three causes of action, for a declaratory judgement they are entitled to a return of the down payment, for breach of contract and for rescission of the contract.

Both parties have moved seeking summary judgement. The plaintiff argues since there is no certificate of occupancy there is no question the title was not marketable and consequently the were entitled to terminate the contract. The defendant asserts there are no questions of fact the plaintiff had no basis upon which to terminate the contract and thus should not be entitled to the down payment. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary

judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

The primary issue that must be considered is whether the cancellation of the contract was reasonable. Pursuant to the cancellation letter, the basis for such cancellation was that the building did not have a certificate of occupancy. However, paragraph 8 of the First Rider to the Contract entitled 'Legal Occupancy' states that "seller represents that the property being sold is a legal SIX (6) FAMILY DWELLING". (id). Further Paragraph 8 of an additional rider states that "seller represents that the premises to be a legal six (6) FAMILY dwelling. If the building on the premises was erected prior to the effective date of the necessity of the issuance of a Certificate of Occupancy in the municipality in which the premises lie, the notations of the tax department shall be sufficient to dispense with such certificate. If the building on the premises was constructed after the effective date of the necessity of the issuance of a Certificate of Occupancy, then the Seller represents that a Certificate of Occupancy has been issued and covers the building and all of the other improvements located on the property" (id). There is no dispute the building in this case was constructed in 1930 prior to the effective date of the necessity to obtain a certificate of occupancy. Further, the notations of the tax department for this property which concern

Block 2513, Lot 28 indicates the property contains 6 residential units. Thus, there is really no issue of fact that the property does not require a certificate of occupancy. In opposition the plaintiff presents two certificates of occupancy, one dated 1936 and the other dated 1977. The certificate of occupancy clearly states that it concerns property with Block 2513 and Lot 26, a different property entirely even if it contains the same postal address. The Certificate of Occupancy from 1977 concerns Block 2513, and Lots 28, 29 and part of 30. The postal address contained on this certificate is 214-216 Freeman Street. That certificate is for accessory parking for eight motor vehicles. Clearly, the property that is the subject of this lawsuit is not a parking lot. Thus, the certificate that lists a parking lot does not concern the same location as the building in this case, but rather an adjacent lot. Thus, there is no question of fact the property in this case did not require a certificate of occupancy. Thus, the plaintiff had no basis upon which to terminate the contract and defaulted upon the contract by improperly terminating it. Paragraph 7 of the First Rider to the contract states that "if the purchaser willfully fails to close title, except through the fault of the Seller, then and in such event, all sums of money paid or deposited on account of the purchase price shall be retained by Seller as liquidated damages" (id).

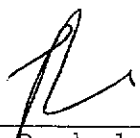
The plaintiff has failed to present any evidence at all why that provision should not govern the facts of this case.

Consequently, based on the foregoing, the plaintiff's motion seeking summary judgement is denied and the defendant's motion seeking summary judgement is granted.

So ordered.

ENTER:

DATED: January 15, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC