

**Schweid v Bainbridge St Realty II Inc.**

2021 NY Slip Op 30387(U)

February 8, 2021

Supreme Court, Kings County

Docket Number: 518103/2020

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 518103/2020  
Motion Date: 2-1-21  
Mot. Seq. No.: 1

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PINCHAS SCHWEID,

Plaintiff,

-against-

**DECISION/ORDER**

BAINBRIDGE ST REALTY II INC. SELLER and  
AVINOAM, ROSENFELD, ESQ., AS ESCROWEE,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 16-39, the motion is decided as follows:

In this action involving a contract for sale of real property located at 543 Bainbridge Street Brooklyn, New York, the plaintiff-buyer, PINCHAS SCHWEID, moves, *inter alia*, for summary judgment on his claim of breach of contract against the defendant-seller, BAINBRIDGE ST REALTY II INC., and seeks the return of his down payment as well as attorney’s fees. Defendant AVINOAM, ROSENFELD, ESQ. was sued by the plaintiff in his as Escrowee.

**Background:**

The plaintiff buyer and the defendant seller executed a contract for the sale of real property located at 543 Bainbridge Street, Brooklyn, New Yor pursuant to which the defendant agreed to sell and the plaintiff agreed to buy the property for the sum of \$925,000.00. The plaintiff gave the seller a down payment in the amount of \$46,250.00. The contract scheduled the closing on April 20, 2020 but time was not of the essence.

The contract of sale provided: “Seller shall give and Purchaser shall accept such title as any reputable title insurance or abstract company licensed to do business in the state of New York to be selected by Purchaser shall be willing to approve and insure in accordance with its standard form of title policy approved by the New York State Insurance Department, subject only to the matters provided for in this contract.” Paragraph 21 of the contract obligated the buyer to obtain a title report and provide the results to the seller. Paragraph 21 also set forth the

seller's remedies if the seller could not convey title due to title defects on the closing date.

Paragraph 21 stated, in relevant part:

Seller shall have the right, at Seller's sole election, either to take such action as Seller may deem advisable to remove, remedy, discharge or comply with such Defects or to cancel this contract; (ii) if Seller elects to take action to remove, remedy or comply with such Defects. Seller shall be entitled from time to time, upon Notice to Purchaser, to adjourn the date for Closing hereinunder for a period or periods not exceeding 60 days in the aggregate (but not extending beyond the date upon which Purchaser's mortgage commitment, if any, shall expire), and the date for Closing shall be adjourned to a date specified by Seller not beyond such period. If for any reason whatsoever, Seller shall not have succeeded in removing, remedying or complying with such Defects at the expiration of such adjournment(s), and if Purchaser shall still be unwilling to waive the same and to close title without abatement of the purchase price, then either party may cancel this contract by Notice to the other given within 10 days after such adjourned date"

The plaintiff thereafter attempted to procure title insurance from two companies. First, plaintiff ordered a title examination search from TSA Agency Corp., a licensed New York State abstract company, who declined to insure title due to multiple litigations related to the property that were discovered during the title search. At the request of defendant's attorney, plaintiff's counsel ordered and obtained a second title report from Adar Land & Tree Abstract, Inc. ("Adar"), which also set forth various title defects, and sent the report to defendant's counsel.

On May 27, 2020, plaintiff's counsel sent an email to defendant's counsel inquiring as to whether the exceptions noted in the Adar title report were cleared or being cleared. On June 3, 2020, after receiving no response to the inquiry, plaintiff's counsel sent another email to defendant's counsel inquiring whether the exceptions had been cleared. On June 23, 2020, having heard nothing from defendant's counsel, plaintiff's attorney sent a time is of the essence letter to defendant's counsel setting a firm closing date of July 24, 2020. Plaintiff's counsel advised that the plaintiff would be ready, willing, and able to accept the delivery of the deed to the property and to sign any and all documentation necessary to transfer title to the property in accordance with the terms, provisions and conditions of the contract of sale, and would tender the balance of the purchase price due the defendant.

It wasn't until July 6, 2020 that defendant's attorney sent an email to Adar attempting to address the exceptions in the title report. In this email, defendant's counsel acknowledged that there were pending litigations involving the property but maintained that the various actions were without merit. In response, on July 16, 2020, Adar issued a letter declining to insure title "due to litigations on this file". The defendant did not appear on the time is of the essence closing date.

**Discussion:**

When, as here, a seller contracts to deliver title that an insurance company retained by the buyer would insure, the seller breaches the contract when the buyer's title insurance company refuses to insure title unconditionally and without exception, unless the exception is contemplated by the contract (*see, Eurovision 426 Dev., LLC v. 26-01 Astoria Dev., LLC*, 80 A.D.3d 656, 657–58, 915 N.Y.S.2d 288, 290; *Laba v. Carey*, 29 N.Y.2d 302, 307, 327 N.Y.S.2d 613, 277 N.E.2d 641; *Stenda Realty, LLC v. Kornman*, 67 A.D.3d 996, 999, 889 N.Y.S.2d 639; *Newmark v. Weingrad*, 43 A.D.2d 983, 352 N.Y.S.2d 660, *affd.* 35 N.Y.2d 832, 362 N.Y.S.2d 863, 321 N.E.2d 784; *Kopp v. Barnes*, 10 A.D.2d 532, 534–535, 204 N.Y.S.2d 860). The exceptions in the Adar title report were not contemplated by the contract.

The plaintiff buyer made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the seller could not deliver title that a reputable title insurance or abstract company licensed to do business in the state of New York would insure, either on the time is of the essence closing date or within 60 days thereafter, the period the defendant would have had to cure the various defects to title if it had chosen to do so (*Eurovision 426 Dev., supra.*).

The defendant seller failed to raise a triable issue of fact. In order to defeat the motion, the defendant had the burden to demonstrate by admissible proof that a title insurance company of the class mentioned in the contract would insure title (*see, Gundel v. Grady*, 184 A.D.2d 548, 550, 585 N.Y.S.2d 63, 65; *Gilchrest–Great Neck v. Byers, supra; cf., DeJong v. Mandelbaum*, 122 A.D.2d 772, 774, 505 N.Y.S.2d 659). Defendant submitted no such proof. The conclusory allegations of defendant's counsel that the title was marketable notwithstanding the title defects referred to in the Adar title report failed to raise an issue of fact precluding summary judgment.

Since the proof sufficiently demonstrated that the seller could not have cured the title defects within the time provided for by the contract, even if the defendant elected to do so, the buyer's failure to tender performance on the time is of the essence closing date was immaterial on the issue of whether it was entitled to a return of the down payment (*see Eurovision 426 Dev., LLC*. 80 A.D.3d at 658, 915 N.Y.S.2d at 290; *Cohen v. Kranz*, 12 N.Y.2d 242, 246, 238 N.Y.S.2d 928, 189 N.E.2d 473; *Ilemar Corp. v. Krochmal*, 44 N.Y.2d 702, 703–704, 405 N.Y.S.2d 444, 376 N.E.2d 917; *Matter of Hicks*, 72 A.D.3d 1085, 1087, 899 N.Y.S.2d 371; *Kopp v. Barnes*, 10 A.D.2d at 534–535, 204 N.Y.S.2d 860; *cf. Steinberg v. Linzer*, 27 A.D.3d 450, 452, 812 N.Y.S.2d 565).

The plaintiff did not demonstrate his entitlement to attorneys' fees. Contrary to defendants' contention, since there is no written agreement between the parties requiring them to arbitrate this matter before a Beth Din, simply because the plaintiff is an Orthodox Jew is not a valid basis to require the parties to proceed to arbitration.

The court has considered defendants' remaining arguments in opposition to the motion and find them to be without merit.

Accordingly, it is hereby

**ORDRED** that plaintiff's motion for summary judgment is **GRANTED** and the defendants are directed to return to the plaintiff his down payment within 10 days of service of this order.

This constitutes the decision and order of the Court.

Dated: February 8, 2021



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020