SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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AARON FROM

Plaintiff,

- v -

UNITED CHRISTIAN PRISON MINISTRY, INC.,

Defendant.

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INDEX NO. 654165/2020

MOTION DATE 02/23/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

The motion by defendant for *inter alia* summary judgment is denied.

Background

This action is about a contract of sale for a property located at 2308 Second Avenue in Manhattan. Plaintiff contends that he entered into a contract with defendant on *November 1, 2005* to purchase the property from defendant (over 15 years ago). He claims that he has performed under the terms of the contract, including by becoming the assignee of the purchase money mortgage on the property and making timely payments on the mortgage. Plaintiff argues that in late July 2020 defendant told plaintiff that it had contracted with another purchaser for the sale of the property. Plaintiff brings a single cause of action in this case for anticipatory breach of contract and seeks specific performance under the contract.

Defendant claims that plaintiff has not produced the contract and argues that the recorded memorandum from November 2005 referencing the transaction does not contain any of the

material terms supposedly contained in the contract. Ramon Cabrera, president of defendant, claims that "I have no recollection of signing the purported Memorandum (which Defendant only recently discovered in a title search of the Property), but may possibly have signed it at a closing in 2005 at which time Defendant sold two parcels contiguous to the Property to Plaintiff (although I have no memory of doing so). I have no recollection whatsoever of signing the underlying contract alleged in Plaintiff's Complaint, nor do I have any recollection of such an agreement ever coming to fruition" (NYSCEF Doc. No. 9, ¶ 3).

Defendant complains that the memorandum recorded by plaintiff does not contain the purchase price, the closing date or description of the property. It also argues that the consent of the New York State Attorney General is required for defendant to sell the property because it is a religious institution. Defendant insists there is no evidence that such consent was ever obtained. Defendant speculates that the transaction suggested by plaintiff is fictitious or at least unenforceable. It points out that the Statute of Frauds requires that plaintiff produce the contract upon which this case is based. Defendant also seeks summary judgment on its fifth counterclaim cancelling the notice of pendency, on its first, second, and third counterclaims cancelling the recorded memorandum and seeks severance on its fourth, sixth and seventh counterclaims.

In opposition, plaintiff attaches a copy of what he claims is the contract and which appears to contain the signature of defendant's president (NYSCEF Doc. No. 26). Plaintiff claims he is ready, willing, and able to close. He argues that he has made monthly payments on the purchase money mortgage for the premises and questions how defendant could sell the property to another entity. Plaintiff maintains that the passage of time is not a basis to invalidate this contract. He also points out that the contract expressly notes that Court approval must be garnered for the sale of the premises in order to comply with the Religious Corporations Law.

In reply, defendant claims that even if the contract is valid, it is not enforceable because of the excessive amount of time that has passed and the parties have waived their rights under the contract. Defendant argues that the memorandum that was recorded fails to comply with the Statute of Frauds and Real Property Law § 294. It asserts that the parties abandoned the contract, the doctrine of laches should invalidate the agreement and that specific performance is not permissible here. However, defendant admits that no time of the essence letter was ever sent despite the 60-day closing date in the contract.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably

conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"An anticipatory breach of contract by a promisor is a repudiation of a contractual duty before the time fixed in the contract for performance has arrived. An anticipatory breach of a contract—also known as an anticipatory repudiation—can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach"(*Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133, 65 NYS2d 89 [2017] [internal quotations and citations omitted]).

The Court denies the branch of the motion for summary judgment to dismiss the complaint. The fact is that plaintiff produced a contract in opposition to the motion that appears, at least on its face, to provide for the sale of the property. While defendant is correct that the passage of fifteen years is an extraordinary amount of time to wait for a closing on a property transaction, defendant admitted that it never sent a time of the essence letter. In fact, defendant's president claims he has no memory of signing the contract.

This case has not yet had any discovery conferences. The Court cannot make a finding about laches or whether the parties abandoned the contract without an exploration of what has happened in the last decade and a half. Plaintiff says that he took an assignment of the purchase money mortgage and has made payments. The obvious question is why didn't he try to close on the property? What efforts were made, if any, to get the required governmental approval for the sale? Why didn't the defendant ever send a time is of the essence letter? What other payments, if any, were made by the plaintiff relating to this property? What was the status of the property

taxes, and did that have anything to do with the parties apparently enjoying the status quo? Correspondence and proof of payments, if any exists, will be critical in reaching a determination. In other words, this is a case that cries out for discovery. Ideally, depositions of the parties will help reveal what happened and whether there is a basis to enforce the contract.

Counterclaims

Because plaintiff produced the alleged contract of sale in opposition, the Court denies the branch of the motion for summary judgment on defendant's counterclaim seeking to cancel the notice of pendency (fifth counterclaim). Defendant's claim is that the lis pendens should be cancelled because there is no binding real estate contract; however, as described above there is an issue of fact on that issue.

The Court also denies the motion for summary judgment on the first through third counterclaims, all of which seek to cancel the memorandum. The first cause of action claims that the memorandum should be discharged because there was never a contract executed by defendant—however, the contract produced by plaintiff in opposition contains an alleged signature from both plaintiff and defendant's president.

The second counterclaim seeks to discharge the memorandum because no approval was ever obtained by the Attorney General. However, the memorandum only claims that it is providing notice of the existence of a contract. It does not contend that the contract received the necessary sign off. Nothing in Real Property Law § 294 suggests that this memorandum should be voided on this ground.

The third counterclaim asserts that the memorandum should be cancelled because it has lapsed. As stated above, there is an issue of fact with respect to whether the doctrine of laches should compel the Court to dismiss the complaint.

To the extent that defendant argues that the memorandum does not comply with the technical requirements of the Real Property Law, the Court did not find a counterclaim that sought relief on that basis. And defendant did not cross-move for leave to amend; its request for relief via a footnote is not sufficient (*see* NYSCEF Doc. No. 28, n 8).

Similarly, the request for a hearing as to the remaining counterclaims all of which seek damages against plaintiff is denied.

Summary

A full picture of the facts in this case has yet to be uncovered. The Court has no idea what happened in the last fifteen years and, as a result, it cannot make a ruling as to whether the contract for the sale of the property should be discarded. Defendant's president initially claimed not to know about the contract and speculated that any such contract would be suspicious. After the contract was produced in opposition, defendant's president claims that he never had an intention to sell this property (since he lived there at the time) and he has no memory of signing the agreement. These unresolved issues demonstrate that the instant motion is simply premature.

Something does not add up. It may be that the contract is fictitious, that plaintiff moved on, or it could be that defendant knew full well about this contract and is hoping to make a lot more money now that property values in East Harlem have rapidly appreciated (especially since 2005). But the Court cannot reach a conclusion as a matter of law based only on these papers. The central issue will be whether plaintiff can point to a sufficient reason for why he did not try to close on the property in the last 15 years. The unusual factual scenario in this case compels the Court to deny the motion, especially where there has yet to be a preliminary conference of discovery.

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment is denied.

Remote Conference: March 23, 2021.

2/25/2021
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X] **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**