

Chic Realty 712 LLC v GSA Holding Corp.
2021 NY Slip Op 30815(U)
March 15, 2021
Supreme Court, Kings County
Docket Number: 500907/2020
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

X

CHIC REALTY 712 LLC,

Plaintiff,

-against-

GSA HOLDING CORPORATION,

Defendant.

X

**DECISION / ORDER
Index No. 500907/2020
Motion Seq. No. 1
Date Submitted: 3/12/21**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion, brought by order to show cause, for an order dismissing plaintiff's complaint, cancelling the notice of pendency, and for other relief

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation and Exhibits Annexed.....	<u>14-32</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>37-42</u>
Reply Affirmation.....	<u>43-44</u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This action was commenced on or about January 13, 2020. The complaint has three causes of action: specific performance of a real estate contract; breach of contract; and unjust enrichment. Defendant answered the complaint and asserted counterclaims for, inter alia, attorneys' fees, sanctions, damages, and to cancel the notice of pendency. Plaintiff replied to the counterclaims.

The contract of sale (E-File Doc. 2) was signed in December of 2018, for a piece of commercial real property located at 712 Third Avenue, Brooklyn, New York. The contract is an "all cash," "as is" transaction and a down-payment of \$100,000 was made with the designated escrow agent, Riverside Abstract. The contract provides that the

closing would take place within approximately 60 days. It also says "Time of the essence with attorney's approval," whatever that means. No closing took place, and the purchaser in the contract brought this action. Defendant brings this motion, by order to show cause, in essence, for an order vacating the Notice of Pendency and dismissing the complaint.

Defendant argues that plaintiff does not want to close and purchase the property at the agreed-upon price, and has filed a notice of pendency in bad faith, to prevent defendant from selling the property while plaintiff tries to negotiate a lower price. The plaintiff opposes the motion but does not provide any evidence that it is ready, willing, and able to close. Defendant also claims to have a tenant who wants to lease the property with an option to purchase, and thus this matter is preventing defendant from entering into such a lease agreement. The court, concerned that plaintiff's counsel was unaware of what is needed to properly oppose this motion, adjourned the virtual oral argument for 24 hours, for plaintiff's attorney to provide some evidence that his client has the funds to close. When everyone reconvened on Friday March 13th, plaintiff's counsel acknowledged that plaintiff does not have the funds, and would need time to secure financing, "perhaps 60 days." As plaintiff has now had more than two years to get ready to close, the court finds that plaintiff does not overcome the defendant's prima facie case for the relief requested.

A party seeking specific performance of a real estate contract must establish that it was ready, willing, and able to perform its obligations under the contract "on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter" (*Ferrone v Tupper*, 304 AD2d 524, 525,

[2d Dept 2003]; see *Huntington Min. Holdings v Cottontail Plaza*, 60 NY2d 997, 998, 459 NE2d 492, 471 NYS2d 267 [1983]; *Zeitoune v Cohen*, 66 AD3d 889 [2nd Dept 2009]; *Kabro PM, LLC v WGB Main St., LLC*, 52 AD3d 659 [2d Dept 2008]; *Stojowski v D'Sa*, 28 AD3d 645 [2d Dept 2006]).

Plaintiff's opposition to this motion states the following: "While Plaintiff could have walked away from the agreement, Plaintiff was never under any obligation to do so and did not walk away. The contract may have provided the buyer the right to walk away, but it did not do so for the seller, and it is a factual dispute, inappropriate on a motion to dismiss, whether buyer or seller walked away from the transaction, if anyone. Therefore, Defendant [sic] has sufficiently stated a cause of action and this motion should be denied." The court does not find that this, or the remainder of the affirmation, overcomes the motion and raises an issue a fact which prevents the court from granting the motion to dismiss the cause of action for specific performance.

After reviewing all the arguments in the papers, and after (virtual) oral argument, this court makes the following determinations:

- a. There are no conditions precedent that have not been satisfied by the defendant that prevented the closing from taking place in 2019.
- b. Plaintiff failed to satisfy its obligations under the Contract of Sale so as to be ready, willing, and able to close thereunder on the law date or any reasonable time thereafter, and, as such, the contract expired by its terms on April 1, 2019.

- c. Plaintiff is entitled to a return of its down-payment, as the contract was drafted in such a fashion that if plaintiff does not close, it is entitled to the return of its down-payment.
- d. Defendant does not claim entitlement to the down-payment, but asks that it remain in escrow until its counterclaim for attorneys' fees is decided, so the award, if granted, may be satisfied from the escrowed funds. Plaintiff responds only that attorneys' fees and sanctions are not warranted as the notice of pendency was initially "not wrongful," but it does not oppose the request to keep the down-payment held in escrow.
- e. Plaintiff has not proven that it has no adequate remedy at law.
- f. Plaintiff has not proven that it is ready, willing, and able to close. In fact, none of these three words are contained in counsel's affirmation in opposition, and there is no affidavit from defendant's principal.
- g. Plaintiff has not set forth any facts to support its cause of action for an equitable lien, also included in the first cause of action.
- h. Plaintiff has not set forth any facts to support its cause of action for breach of contract.
- i. Plaintiff has not set forth any facts to support its cause of action for quantum meruit/unjust enrichment.

Accordingly, the branch of the motion which seeks to dismiss plaintiff's complaint is granted, and the complaint is dismissed. It is further

ORDERED that the Notice of Pendency, dated January 10, 2020, filed by plaintiff against the property known as 712 Third Avenue, Brooklyn, New York, Block 644, Lot

85 in Kings County is hereby canceled, and the County Clerk is directed to mark her records accordingly; and it is further

ORDERED that the defendant's counterclaims are dismissed, as they have all been asserted in their (subsequently filed) related action, *G.S.A. Holding Corp. v Morad Nasiri*, Ind. 517756/2020. Perhaps the plaintiff therein should move to add Chic Realty as a party defendant, as they have only named its principal. And it is further

ORDERED that the down-payment shall remain in escrow with Riverside Abstract during the pendency of the related action brought by defendant against plaintiff's principal, 517756/2020, pending further order of the court in that action.

Any other relief requested in the order to show cause but not granted herein is denied.

The foregoing constitutes the decision and order of the court.

Dated: March 15, 2021

ENTER :



Hon. Debra Silber, J.S.C.