

678 N.J. Inc. v Nunez
2021 NY Slip Op 30945(U)
March 17, 2021
Supreme Court, Kings County
Docket Number: 513923/2018
Judge: Mark I. Partnow
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of March, 2021.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

----- X
678 NEW JERSEY INC.,

Plaintiff,

- against -

JUAN NUNEZ and LOIDA NUNEZ,

Defendants.
----- X

DECISION AND ORDER

Index No. 513923/2018

The following papers numbered 35 to 53 read herein:

NYSCEF Page #

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

35-37

Opposing Affidavits (Affirmations)
Memorandums of Law _____

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Reply Affidavits (Affirmations) _____

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Pleadings - Exhibits _____

38-44 49-53

Upon the foregoing papers, 678 New Jersey Inc. (Plaintiff) moves by motion [seq. 3] for an order: 1) consolidating the instant action (index no. 513923/2018) with an action commenced by Juan and Loida Nunez (Defendants) (index no. 513327/2020, the "Nunez Action"), pursuant to CPLR 602(a); and 2) for summary judgment in favor of Plaintiff, pursuant to CPLR 3212. For the following reasons, Plaintiff's motion [seq. 3] is granted to the extent that the instant action (index no. 513923/2018) and the Nunez Action (index no.

513327/2020) shall be joined for trial. The portion of Plaintiff's motion seeking summary judgment is denied in its entirety.

Background & Procedural History

Plaintiff filed its summons and complaint in the instant action on July 6, 2018. According to the complaint, Plaintiff seeks the specific performance of a contract of sale for real property (Contract of Sale, attached as Exhibit A to the instant motion, document number 38 on NYSCEF). Plaintiff contends that Defendants agreed to sell to Plaintiff the real property located at 678 New Jersey Ave., Brooklyn, NY 11207 ("Real Property"), and that agreement was memorialized by the Contract of Sale. The Contract of Sale states that the purchase price for the Real Property is \$900,000.00. It is undisputed that Plaintiff tendered \$25,000.00 to Defendants as a down payment for the Real Property and that the down payment is being held by Defendants' attorney in an escrow account. Plaintiff alleges that Defendants breached the Contract of Sale by refusing to close on the transaction for Real Property. Plaintiff avers that it has been ready, willing and able to close on the Contract of Sale. Defendants subsequently filed their verified answer on August 16, 2018, raising sixteen affirmative defenses to the allegation that Defendants breached the Contract of Sale.

Plaintiff then filed its first motion [seq. 1] for summary judgement on May 28, 2019. In that motion, Plaintiff sought: 1) specific performance for the Contract of Sale; and 2) that Defendants' second through sixteenth affirmative defenses be struck and dismissed. Defendants opposed Plaintiff's first motion [seq. 1] and cross-moved [seq. 2] to amend their answer. By order dated November 7, 2019, the Honorable Justice Jimenez-Salta granted Plaintiff's motion [seq. 1] to the extent that Defendants' second through sixteenth affirmative defenses were

stricken and dismissed. The November 7, 2019 order also denied Defendants' cross-motion [seq. 2]. Prior to the instant motion [seq. 3] being filed, Defendants commenced the Nunez Action by the filing of a summons and complaint on July 24, 2020. In the Nunez Action, Defendants claim that it was Plaintiff that breached the Contract of Sale. Subsequently, Plaintiff filed an answer with counterclaims in the Nunez Action.

Plaintiff then filed motion [seq. 3] on December 10, 2020. Motion [seq. 3] seeks to consolidate the instant action and the Nunez Action, pursuant to CPLR 602(a), and for summary judgment on the claim for specific performance, pursuant to CPLR 3212.

Motion to Consolidate, Pursuant to CPLR 602(a)

"When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue" (*Cromwell v. CRP 482 Riverdale Avenue, LLC*, 163 AD3d 626, 627 [2d Dept 2018]; see CPLR 602[a]). "A motion to consolidate two or more actions rests within the sound discretion of the trial court" (*Rhoe v. Reid*, 166 AD3d 919, 921 [2d Dept 2018]). It is improper to grant consolidation of two actions where the parties would appear as both a plaintiff and defendant in the consolidated action (see *M & K computer Corp. v. MBS Industries, Inc.*, 271 AD2d 660, 660 [2d Dept 2000]). Where consolidation would result in parties appearing as both a plaintiff and defendant, the appropriate method to have both actions determined together is to order a joint trial. "A motion to consolidate pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Rhoe* at 921). "Consolidation is appropriate where it will avoid unnecessary duplication of trials, save

unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts” (*id.*).

Here, both actions arise from the same transaction, concern the same parties, and involve common questions of law and fact. Both actions require the determination of the enforceability of the Contract of Sale and whether either or both parties have breached their obligations required by the terms of the Contract of Sale. Defendants did not oppose the consolidation portion of Plaintiff's motion and have not demonstrated that they would be substantially prejudiced if the two actions are joined for trial. As consolidation would result in the parties appearing as both a plaintiff and defendant in the caption, both actions shall instead be joined for trial.

Motion for Summary Judgment, Pursuant to CPLR 3212

Plaintiff's motion [seq. 3], its second motion for summary judgment, pursuant to CPLR 3212, seeks specific performance on the Contract of Sale. Defendants oppose this portion of Plaintiff's motion, arguing: 1) that the Court should not entertain a successive motion for summary judgment; 2) that the instant motion is untimely; and 3) that Plaintiff did not satisfy its burden for summary judgment.

Defendants first argue that the Court must deny the motion [seq. 3] because this is Plaintiff's second application for summary judgment. “Successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment” (*P.J. 37 Food Corp. v. George Doulaveris & Son, Inc.*, 189 AD3d 858, 859 [2d Dept 2020]). “Successive motions for summary judgment

should not be entertained in the absence of good cause, such as a showing of newly discovered evidence” (*id.* at 859). “However, evidence is not newly discovered simply because it was not submitted on the prior motion; rather, the evidence must not have been available to the party at the time it made its initial motion and could not have been established through alternate evidentiary means” (*id.*).

Here, Plaintiff contends that the summons and verified complaint filed in the Nunez Action contains admissions by Defendants that establish their material breach of the Contract of Sale. Plaintiff asserts that these admissions demonstrate Defendants’ clear intention of not wanting to sell the Real Property to Plaintiff. Plaintiff argues that Defendants stated intention of not wanting to sell the Real Property to Plaintiff is newly discovered evidence that would justify the Court to permit Plaintiff to file a second summary judgment motion. Although the complaint in the Nunez Action was filed more than one year after Plaintiff’s first motion for summary judgment, Plaintiff has not demonstrated that Defendants unwillingness to sell Real Property was not a fact known to Plaintiff when it filed its first motion for summary judgment. Thus, Plaintiff’s instant motion [seq. 3] is denied as successive.

Assuming arguendo that if the Court were to entertain a second motion for summary judgment, Plaintiff’s instant motion [seq. 3] would otherwise be denied on the merits. Plaintiff did not meet its prima facie burden for a judgment as a matter of law. “Plaintiff seeking specific performance of a contract for the sale of real property bears the burden of demonstrating that it was ready, willing, and able to perform its obligations under the Contract of Sale” (*GLND 1945, LLC, v. Dorothy Ballard*, 172 AD3d 1339, 1331 [2d Dept 2019]). “Conclusory assertions that Plaintiff was ready, willing, and able to perform, are insufficient to satisfy this burden” (*id.* at 1331). “When a purchaser submits no documentation or other

proof to substantiate that it had the funds necessary to purchase the property, it cannot prove, as a matter of law, that it was ready, willing, and able to close" (*id.*). "Thus, in moving for summary judgment on a complaint seeking specific performance of a Contract of Sale of Real Property, Plaintiff must submit evidence demonstrating its financial ability to purchase the property, and in the absence of such evidence, the motion must be denied" (*id.*).

Here, Plaintiff failed to establish, *prima facie*, that it was ready willing, and able to purchase the subject property. Plaintiff submits the affidavit of Joshua Soufeh, managing member of Plaintiff's corporation, who in a conclusory manner asserts that he "remains ready, willing and able to close" (see Soufeh Affidavit, NYSCEF Doc No. 37). Without more, Plaintiff is devoid of any evidence demonstrating its financial ability to purchase the subject property (see *GLND 1945* at 1331). Therefore, Plaintiff has failed to meet its *prima facie* burden for summary judgment. Accordingly, it is hereby

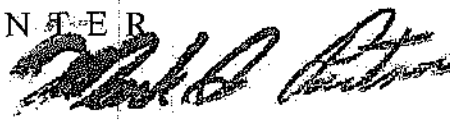
ORDERED, that the portion of Plaintiff's motion to consolidate index no. 513923/2018 with index no. 513327/2020 is granted to the extent that the two actions be joined for trial, and it is further

ORDERED, that the remaining portion of Plaintiff's motion which seeks summary judgment, pursuant to CPLR 3212, is denied in its entirety.

Joint trial order to follow.

This constitutes the decision and order of the Court.

E N T E R



Hon. Mark I. Partnow, J. S. C.