

<b>East Upreal LLC v Rogers Equities LLC</b>
2021 NY Slip Op 31582(U)
May 6, 2021
Supreme Court, Kings County
Docket Number: 522754/20
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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EAST UPREAL LLC,  
  
Plaintiff, Decision and order  
  
- against - Index No. 522754/20

ROGERS EQUITIES LLC and ABE WALDMAN  
Defendants, May 6, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants move pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to state any cause of action. The plaintiff has cross moved seeking summary judgement arguing there are no issues of fact and they are entitled to the ultimate relief. The motions have been opposed respectively. Papers were submitted by all parties and arguments held. After reviewing the arguments of all parties this court now makes the following determination.

Background

According to the complaint on January 13, 2020 the plaintiff, the owner of property located at 56 East 21<sup>st</sup> Street in Kings County entered into a contract with defendant Rogers to sell the property. Rogers forwarded a down payment and in July 2020 the contract was amended whereby additional down payment sums were forward and the seller could demand time of the essence with thirty days notice. On October 28, 2020 the seller forwarded a letter to buyer indicating a closing date of November

13, 2020 and expressly noting that time was of the essence. The defendant did not close on that date which prompted this lawsuit. The complaint seeks a declaratory judgment the plaintiff is entitled to the down payment as damages and for defendant Waldman to pay attorney's fees. The defendants now move seeking to dismiss the complaint on the grounds the time of the essence letter did not conform to the contract amendment since it did not afford thirty days notice. Consequently, the time of the essence letter was void and no such closing date has ever been selected. The plaintiff is therefore not entitled to the down payment. Further, since the plaintiff is not entitled to the down payment there can be no award of any attorney's fees and consequently the second cause of action must be dismissed as well. The plaintiff argues the time of the essence letter was surely timely since a prior notice had been sent which, when combined, provided the requisite thirty day notice. Therefore, the court should award summary judgment concluding there are no issues of fact the plaintiff is entitled to the down payment and attorney's fees.

#### Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action

known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]).

Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

On September 30, 2020 the seller sent a letter to the purchaser scheduling the closing for October 29, 2020 and indicated that time was of the essence. On October 28, 2020 the buyer sent a letter to the seller indicating there were still lien's on the property and that consequently the seller cannot deliver clean title. The letter stated the time of the essence date was now rendered void. Later the same day the seller sent a letter to the buyer "adjourning the closing, time of the essence as against Buyer, to November 13, 2020" (see, Letter, submitted as Exhibit E supporting the Cross-Motion). The defendants argue the initial time of the essence letter had been cancelled rendering the second letter invalid since it failed to provide the requisite thirty day notice. The plaintiff argues the second letter was merely an extension of the first letter and therefore notice was timely and the failure to close on November 13 constituted a breach.

The fourth paragraph of the First Amendment to the Contract

of Sale states that "Seller may thereafter declare time of the essence as against Purchase on thirty (30) days' notice" (id). Although the complaint does state that "a closing of the Subject Premises was scheduled for October 29, 2020" (see, Complaint, ¶15) the complaint never indicates that notice was time of the essence. In any event that notice was rejected. That notice of rejection as well as the second time of the essence letter are both exhibits to the complaint. Thus, while the first letter was not included within the complaint it was surely referenced by other inclusions. Therefore, it can be considered upon this motion to dismiss.

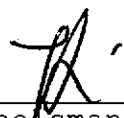
The real issue in this case is whether the defendant's rejection of the first letter was valid. The cancellation of that notice surely renders the second notice invalid since it did not afford the requisite thirty days in which to close. If that cancellation was unauthorized there are still issues that must be resolved, namely whether two infirm notices of time of the essence may combine to form a whole satisfactory one. Further discovery is necessary to understand the intent of the parties, industry custom and practice and the nature of defendant's cancellation. To be sure, the ultimate resolution of this case may be a legal one requiring the court to decide these matters. However, as noted, discovery must first be conducted on the issues noted and any other issues the parties deem relevant.

Therefore, based on the foregoing the motion seeking to dismiss the complaint is denied. Likewise, the motion seeking summary judgement is denied as well.

So ordered.

ENTER:

DATED: May 6, 2021  
Brooklyn N.Y.

  
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Hon. Leon Ruchel'sman  
JSC