

Wuensch v Wyatt

2021 NY Slip Op 32188(U)

November 5, 2021

Supreme Court, Kings County

Docket Number: Index No. 520635/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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**SCHNEUR ZALMAN WUENSCH and
ROCHEL PINSON,**

Plaintiffs,

-against-

**LORI WYATT, Individually and as Trustee of the
LINDY-LORIE TRUST,**

Defendants.

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DECISION/ORDER

**Index No.: 520635/2019
Submitted: 10/21/21
Motion Seq. No.: 3**

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the plaintiffs' motion for an order granting them specific performance of the contract of sale.

Papers	NYSCEF Doc.
Order to Show Cause, Affirmations and Affidavits Annexed	<u>65-90</u>
Affirmation in Opposition	<u>92</u>
Reply Affirmation	<u>93</u>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiffs move, in Motion Seq. #3, for an order granting them specific performance of the contract of sale for the real property known as 1252 President Street, Brooklyn, NY, Block 1283, Lot 34. The property is a two-family house. They also ask that the court order defendant, who has already vacated the premises pursuant to the terms of the contract and the court's prior order dated November 21, 2019, not to move back into the premises. Finally, they ask that a sum be held in escrow after the

closing “to be held against attorney's fees, sanctions, monetary damages and other awards for the defendant’s violation of the court’s November 19, 2019 order.”

This action was commenced on September 19, 2019, as soon as the purchasers, the plaintiffs, detected an unwillingness to close on seller’s part. The contract was signed on August 13, 2019, for \$1,250,000, and does not have a financing contingency clause, although defendant agreed to grant access to the premises for inspections by plaintiffs’ lender or engineer. Plaintiffs paid a contract deposit of \$120,000, which is still held by defendant’s attorney in escrow. The complaint, as relevant here, for its first cause of action, seeks specific performance. The second cause of action is for breach of contract, and specifies that plaintiffs,

“In reliance on the subject contract, . . . have incurred, or will incur, costs and expenses to extend and/or obtain new mortgage commitment(s), title report(s), appraisal report(s), surveyor report(s) and such other miscellaneous damages. As a result of Defendants' breach of contract and bad faith, Plaintiffs have retained counsel and will continue to incur costs and expenses to litigate the within action. As a result of Defendants' breach of contract and bad faith, Plaintiffs have incurred, and will continue to incur, consequential and/or incidental damages. In light of the foregoing, Plaintiffs are entitled to incidental and/or consequential damages, with interest from the date of breach, to be determined by the trier of facts.”

Defendant did not respond to the complaint, and plaintiffs brought an order to show cause to obtain access so their lender could inspect. This motion was resolved by a so-ordered stipulation of the parties dated November 19, 2019. Counsel appeared for defendant but did not submit any papers in opposition to the motion or a notice of appearance. In this stipulation, there are nine separate paragraphs, including one that states that the closing will take place no later than January 28, 2020, that defendant’s time to answer the complaint was extended to December 20, 2019, and that defendant

will “permanently vacate the premises” by January 24, 2020. The closing did not take place.

Plaintiffs then brought an order to show cause (Mot Seq. #2) for a default judgment and specific performance and related relief, which was filed on March 5, 2020. The court signed it the next day, and required service on defendant, as no attorney had filed a notice of appearance or any document in this action on her behalf by that date. Plaintiffs’ attorney nonetheless mailed the motion papers to the attorney who appeared in court on November 19, 2019, resulting in the denial of the motion on November 13, 2020 for improper service. The court notes that by the return date, defendant’s current attorney had filed his appearance (consent to change attorneys was filed July 6, 2020), but he failed to oppose that motion.

Plaintiffs then renewed their motion by filing the instant motion on August 31, 2021. Presumably negotiations continued in the interim. Plaintiffs support their motion with an affirmation from counsel in this matter, an affirmation from plaintiffs’ attorney for the purchase, affidavits from each plaintiff, a copy of their contract of sale, mortgage commitment, copies of correspondence and emails to support plaintiffs’ claim that defendant was, and is, in breach of the contract, and various other items. Noteworthy is the affirmation from Mr. Rosenberg, plaintiffs’ attorney for the purchase (Doc. 68). He states that “On August 13, 2021, I was informed by Aiman Khan, real estate broker for the Defendant, that he secured an apartment for the Defendant, that she executed the lease, and would be out of the premises by August 15, 2021, and that we could close.” However, he then states, “On August 30, 2021, Mr. Khan informed us that he had no

other updates as to the scheduled closing as the Defendant was simply refusing to close.”

The first cause of action seeks specific performance of the contract. “[S]pecific performance is an equitable remedy” (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 106 [1st Dept 2015], *affd in part, mod in part*, 30 NY3d 572 [2017]), which is “intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced” (*Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 181 [1990] [internal quotation marks and citations omitted]). “To that end, specific performance has been held to be a proper remedy in actions for breach of contract for the sale of real property” (*Cho v 401-403 57th St. Realty Corp.*, 300 A.D.2d 174, 175 [1st Dept 2002] [internal quotation marks omitted]). However, “the imposition of an equitable remedy must not itself work an inequity, and that specific performance should not be an undue hardship” (*Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 195 [1986]). It is within the court's discretion to award specific performance (*see Cho*, 300 AD2d at 175).

“The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law” (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004], *lv denied* 3 NY3d 607 [2004], *lv dismissed* 3 NY3d 656 [2004] [citation omitted]). However, “a party cannot seek specific

performance of a cancelled real estate contract" (*Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 298 [1st Dept 2006]).

Here, plaintiffs have established that defendant is in default, for failing to answer the complaint, and they are entitled to specific performance of the contract. While defendant has never answered the complaint, her latest attorney (there have been three) appears and opposes the motion, not with a cross motion for leave to answer the complaint a few years late, not by any claim that the contract was cancelled or that plaintiffs breached the contract, or that plaintiffs were not ready willing and able to close on the closing date. It does not seem that defendant has ever set a closing date. Instead, defendant's counsel argues that "Plaintiff can only obtain the affirmative relief of Specific Performance, demanded in Plaintiffs' Amended Verified Complaint (in the absence of a verified answer), by making a motion for a default judgment, for Specific Performance." Plaintiffs' motion for such relief, the court finds, (Mot. Seq. #2) was renewed by the filing of this motion.

The court further finds that plaintiffs are entitled to the relief sought in the other branch of their motion, for an escrow to protect their rights to their second cause of action, for damages which have arisen as a result of defendant's breach of the contract, to be held until a hearing can be conducted to ascertain the amount of plaintiffs' damages.

Accordingly, it is hereby

ORDERED AND ADJUDGED that plaintiffs are awarded specific performance of the contract to purchase the subject property from defendant, and defendant shall execute a deed and any other documents necessary to effectuate the transfer of the

real property known as 1252 President Street, Brooklyn, NY (Block 1283, Lot 34) to the plaintiffs, to be done within 30 days from the service of this order with notice of entry, and in compliance with all of the terms of the contract; and it is further

ORDERED that defendant shall not re-occupy the subject premises; and it is further

ORDERED that \$40,000 of the defendant's sales proceeds shall be deposited with the court by plaintiffs' attorney, to be held until an Inquest on damages with regard to plaintiffs' second cause of action has been conducted. Plaintiffs' counsel shall file a receipt for such deposit, along with a Notice of Inquest, in order for the court to calendar the hearing.

IT IS FURTHER ORDERED THAT, in the event the defendant does not cooperate and close title on or before December 30, 2021, plaintiffs may seek enforcement of this order by means of a transfer of title by the Kings County Sheriff, or may move for the appointment of a referee to sell, or may move to hold defendant in contempt of court.

Any other relief requested in the order to show cause, in particular the plaintiffs' request that the court remove defendant as trustee of the trust which owns the property and appoint a different trustee, is denied.

This shall constitute the decision and order of the court.

Dated: November 5, 2021

ENTER:



Hon. Debra Silber, J.S.C.