7 Mansion LLC v Calvano
2021 NY Slip Op 34321(U)
June 10, 2021
Supreme Court, Nassau County
Docket Number: Index No. 600007/2021
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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7 MANSION LLC,

Plaintiff,

-against-

ANTHONY S. CALVANO and LYNN R. CALVANO,

Defendants.

IAS Part 8
Index No. 600007/2021
Motion Seq. No. 001

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendants' Order to Show Cause, Affidavits & Exhibits............................1
Plaintiff's Affirmation in Opposition & Exhibits..2
Defendants' Reply & Exhibits...3

In this action plaintiff asserts one single cause of action: specific performance of a contract to purchase real property known as 7 Mansion Drive, Old Westbury, New York ("the property"). Defendant Lynn Calvano now moves pursuant to CPLR §6514 for an order vacating and cancelling the notice of pendency filed by plaintiff on December 31, 2020 in the Office of the Nassau County Clerk against the property.[1] Calvano also seeks dismissal of plaintiff's complaint pursuant to CPLR 3211 (a)(1). For the reasons set forth below, defendant's motion is granted in its entirety and complaint is dismissed.

BACKGROUND

The following facts are uncontested. The parties entered into a contract on April 20, 2020 pursuant to which plaintiff agreed to purchase the subject property for $2,200,000. Plaintiff provided a down-payment of $110,000. The contract required that a closing of sale occur within 90-days of its execution and stated that, "if the Purchaser, through no fault of the Seller, fails to perform his obligations hereunder pursuant to the terms of this contract,

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[1] By stipulation dated March 25, 2021, plaintiff discontinued its action as against defendant Anthony S. Calvano.

the parties agree that the Seller's liquidated damages shall be ten percent (10%) of the purchase price. The down payment may be retained by Seller as a portion of the Seller's liquidated damages."

After plaintiff delayed closing for almost 3 months, on October 15, 2020 defendants served a "time-of-the-essence" letter which stated that defendants were ready, willing, and able to close and demanded a closing date of November 5. With one day remaining in that time frame, the parties amended the contract (hereinafter the "amended contract") and adjourned the closing date to December 7. In consideration of this extension, plaintiff agreed to unconditionally release its down-payment to defendant and pay, on or before November 12, an addition $6,000 as reimbursement for carrying costs. The amended contract explicitly provided that,

> "the Purchasers agree that if they fail to close title on or before December 7, 2020, time being of the essence, the contract shall, at the sole option of the Seller, be **deemed null and void** and the Purchasers **shall forfeit the down-payment as and for liquidated damages.** The Purchasers further agree that as a material inducement to the Seller, they **waive any and all rights to file a Lis Pendens** to seek the return of their down-payment." (Emphasis added).

Plaintiff breached the terms of the amended contract by failing to: 1) pay the additional $6,000, and 2) appear at the closing on December 7. Plaintiff does not dispute its breaches and admits that it was unable to secure funds to close title in December 2020.

Calvano attests that she was ready, willing, and able to complete the sale on the December 7 closing date.

On December 31, 2021, plaintiff filed a notice of pendency against the subject property and commenced this action.

Calvano contends that the notice of pendency must be canceled since: plaintiff expressly waived its right to file a notice of pendency; the cause of action underlying the notice of pendency is premised upon a terminated contract breached by plaintiff; and it was filed in bad faith. Further, Calvano asserts that the complaint must be dismissed as the documentary evidence irrefutably demonstrates that the underlying contract of sale was terminated.

LEGAL ANALYSIS

A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence may be appropriately granted where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law'. *S & J Service Center, Inc. v. Commerce Commercial Group, Inc.*, 178 A.D.3d 977, 978 (2d Dept. 2019), *quoting Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2005).

To prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff purchaser must establish that it substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the vendor was able to convey the property, and that there was no adequate remedy at law. *1107 Putnam, LLC v. Beulah Church of God in Christ Jesus of the Apostolic Faith, Inc.*, 152 A.D.3d 474 (2d Dept. 2017).

Here, surprisingly, both sides have sufficiently established that plaintiff breached the April 2020 contract of sale and was not ready, willing, and able to purchase the subject property by the July or November closing dates, an essential element of its specific performance claim. Therefore, plaintiff is not entitled to specific performance under that agreement.

Plaintiff's only argument in opposition to dismissal is that is signed the contract's November 4 amendment under economic duress, even though it was represented by counsel at all times throughout negotiations and transactions related to the property. But plaintiff does not deny that it was also in default under the *original* contract and not ready, willing or able to close within the 90 days prescribed by that contract or by the date set forth in Calvano's time-of-the-essence letter. Therefore, it is not necessary to reach plaintiff's duress argument as it relates to the amended contract; plaintiff is not entitled to specific performance of the original agreement. Importantly, plaintiff, through its member Wing

Fung Chau, attests that it still does not have the funds to effectuate the purchase of the property, undercutting its own claim.[2]

Based on the foregoing, Calvano has demonstrated that the notice of pendency was wrongfully filed, warranting cancelation, and entitlement to dismissal of the action. Further, Calvano is entitled to the costs and expenses incurred as a result of the filing of the notice of pendency, including reasonable attorney's fees. *See* CPLR 6514(c). *See also Josefsson v. Keller*, 141 A.D.2d 700 (2d Dept. 1988).

Accordingly, it is hereby

ORDERED, that defendant's Order to Show Cause seeking an order vacating and canceling the notice of pendency with respect to the subject property and dismissing plaintiff's complaint is granted.

ORDERED, that the aforesaid notice of pendency filed by plaintiff is hereby vacated and cancelled, S/B/L 19-D-204 and the Clerk of Nassau County is hereby directed to effectuate same; and it is further

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ORDERED, that defendant is awarded their costs and expenses associated with the filing and cancelation of the subject notice of pendency, including reasonable attorney's fees. Counsel for defendant shall provide a bill of costs, on notice, within twenty (20) days of the date of this order.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: June 10, 2021
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.
XXX

ENTERED
JUN 14 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

[2] Wing Fung Chau claims that plaintiff will have sufficient funds upon the sale of a hotel, which has not yet been effectuated.