

Alma Invs. Group, Inc. v Lord
2022 NY Slip Op 30334(U)
January 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 511600/14
Judge: Lawrence S. Knipel
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At an IAS Term, Part NYTRP 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 31th day of January, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

ALMA INVESTORS GROUP, INC.,

Plaintiff,

- against -

Index No. 511600/14

MARIAN LORD, GREGG STAR, ESQ., as escrow Agent, "JOHN DOE" and "JANE DOE,"

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>186-202</u>
Opposing Affidavits (Affirmations)_____	<u>207-216</u>
Reply Affidavits (Affirmations)_____	<u>204, 217</u>

Upon the foregoing papers in this action to recover a down payment under a contract of sale (Sales Contract) for the real property at 748 Madison Avenue in Brooklyn (Property), defendants Marion Lord (Lord) and Gregg Star, Esq., as escrow agent (Attorney Star) (collectively, defendants) move (in motion sequence [mot. seq. eight] for an order granting them: (1) leave to reargue plaintiff's motion (in mot. seq. seven) to vacate this court's January 30, 2020 decision and order, pursuant to CPLR 2221; (2) a declaratory

judgment, pursuant to CPLR 3001; and (3) costs, sanctions and attorneys' fees, pursuant to the parties' Sales Contract.

Background

Plaintiff Alma Investors Group, Inc. (Alma) alleges that on September 2, 2014, Lord contracted with Alma to sell the Property to Alma for \$635,000.00. Under the Sales Contract, Alma delivered to Attorney Star, as escrow agent, a \$20,000.00 down payment. The Sales Contract allegedly required that Lord deliver to Alma, at closing, clear title to the Property. Prior to closing on the property, Alma allegedly learned that Lord only held a 1% ownership interest in the Property; the remaining 99% ownership interest was held by nonparty M&D Acq. Corp. Attorney Star allegedly declared a time of the essence closing date, which required the parties to consummate the sales transaction on September 18, 2014. Alma allegedly objected to the time of the essence closing based, in part, on Lord's inability to convey 100% ownership in the Property. Thereafter, Attorney Star declared that Alma was in default under the Sales Contract and retained Alma's \$20,000.00 down payment.

On December 8, 2014, Alma commenced this action to recover its \$20,000.00 down payment by filing a summons and complaint asserting causes of action for breach of the Sales Contract, breach of the escrow agreement and unjust enrichment.

Defendants' First Dismissal Motion

On January 16, 2015, defendants, in lieu of answering, moved (in mot. seq. one) to dismiss the complaint, pursuant to CPLR 3211 (a) (1), and for summary judgment, pursuant

to 3211 (c) and 3212. Essentially, defendants argued that Alma breached the Sales Contract by failing to proceed with the time of the essence closing and repudiating the Sales Contract. Alma, in opposition, argued that the Sales Contract required the seller to be able to convey good and clear title to the Property and, at the time of the time of the time of the essence closing, Lord only held a 1% ownership interest in the Property.

By a September 15, 2015 decision and order (2015 Order), the court (Sweeney, J.) denied defendants' summary judgment motion as premature because "defendant have yet to interpose an answer." The court also denied defendants' pre-answer dismissal motion because:

"much of the evidence submitted in support of the defendants' motion including Mr. Star's affirmation and emails, are not documentary evidence within the meaning of CPLR 3211 (a) (1). Indeed, some of the documentary evidence submitted by Mr. Star raises issues as to whether defendant Lord was able to convey marketable title at the scheduled closing. The evidence that did qualify as documentary evidence did not conclusively establish the defendants' entitlement to dismissal" (see NYSCEF Doc No. 57).

On November 9, 2015, defendants collectively answered the complaint, denied the material allegations therein and asserted two affirmative defenses. After issue was joined, discovery ensued.

Defendants' Second Dismissal/Summary Judgment Motion

On July 28, 2017, after some discovery but before defendants were deposed, defendants, once again, moved (in mot. seq. five) to dismiss the complaint, pursuant to CPLR 3211 (a) (1), for summary judgment, pursuant to CPLR 3212 and a judgment

declaring that Alma defaulted under the Sales Contract and awarding Lord the down payment as liquidated damages, pursuant to CPLR 3004. Star submitted an affidavit attesting that Alma, prior to signing the Sales Contract, ordered and obtained a title search of the Property and that prior to the time of the essence date, Star never received anything from Alma's counsel or the title company informing him that title was not clear to close on September 17, 2014. Star attested that, after Alma did not attend the September 17, 2014 closing, Alma's counsel repudiated the Sales Contract and demanded the return of Alma's \$20,000.00 down payment.

Alma, in opposition, asserted that Lord did not own 100% of the Property until after the September 17, 2014 time of the essence closing date, as reflected in the October 7, 2014 deed to the Property, pursuant to which 100% of the Property was transferred to Lord. Alma noted that defendants' second dismissal motion was "duplicative" of their first dismissal motion, which was denied by the 2015 Order.

By a December 14, 2017 letter to the court (*see* NYSCEF Doc No. 139), defense counsel withdrew that portion of defendants' dismissal motion pursuant to CPLR 3211 (a) (1), since an identical motion was previously denied by the court's 2015 Order and asserted that the complaint should be dismissed pursuant to CPLR 3211 (a) (7) and 3212.

By a July 20, 2018 decision and order (2018 Order), the court (Wooten, J.) denied defendants' CPLR 3211 (a) (7) dismissal motion under the "single motion rule," since the court had previously denied defendants' CPLR 3211 (a) (1) motion in the 2015 Order. The court also denied defendants' summary judgment motion on the ground that "the

documentary evidence submitted by defendants raise triable issues of fact as to whether Lord was able to convey marketable title at the September 14, 2014 closing date” and the court took judicial notice of the October 7, 2014 deed between Lord and M&D Acq. Corp. on ACRIS, which proves that Lord only held a 1% interest in the Property on the September 17, 2014 closing date. The court noted that while defendants argued that they informed Alma’s counsel, by email, that Lord would consolidate her 1% interest in the Property and convey 100% to Alma on the September 14, 2014 closing date, “defendants fail to attach that email or any documentation evincing such communication.”

Defendants’ Motion to Reargue

On September 4, 2019, defendants moved (in mot. seq. six) for leave to reargue their dismissal and summary judgment motion, pursuant to CPLR 2221. Alma filed opposition to defendants’ motion but failed to appear for the January 30, 2020 oral argument. Consequently, this court issued a January 30, 2020 order (January 2020 Default Order) granting defendants reargument and summary judgment motions *on default* and striking this action from the calendar (*see* NYSCEF Doc No. 167).

Alma’s Motion to Vacate the January 2020 Default Order

On March 3, 2020, Alma moved (in mot. seq. seven), by order to show cause, for an order, pursuant to CPLR 5015 (a), vacating the January 2020 Default Order and restoring this action to the trial calendar because Alma’s counsel “inadvertently miscalendared the accelerated oral argument date of January 30, 2020 and failed to appear on that day to orally argue the defendants’ motion.” Alma noted that it “properly and timely

filed and served its opposition papers and appeared for several prior oral argument dates relating to defendants' motion at issue[.]” “this case has been assigned and re-assigned to three different Judges in the last few months . . .” and the oral argument on defendants' motion to reargue was originally scheduled for May 7, 2020 and was “accelerated by Judge Knipel to January 30, 2020 . . .” Alma argued that defendant's summary judgment motion was properly denied because there are issues of fact as to whether Lord could have conveyed clear title to the Property to Alma because on the time of the essence closing date Lord did not own 100% of the Property.

Defendants, in opposition, argued that Alma failed to demonstrate a meritorious opposition to defendants' motion to reargue because Alma's attorney never objected to the time of the essence closing date in the Sales Contract. Defendants, however, conceded that “[p]laintiff's default was unintentional and the result of the tribulations of being a sole practitioner,” and did not oppose Alma's motion to restore the action on that ground.

By a September 22, 2020 decision and order (September 2020 Order), this court granted Alma's motion to vacate the January 2020 Default Order and restored this action to the active calendar. Specifically, this court held that:

“Here, Alma has established a reasonable excuse for its default in appearing at the January 30, 2020 oral argument on defendants' motion to reargue, and Alma's failure to appear was neither willful nor deliberate.

“Furthermore, based on a review of the parties' moving and opposing papers submitted on defendants' motion to reargue, this court has determined that denial of defendants' motion to reargue is warranted. The court correctly determined that there

are issues of fact regarding Lord's ability to convey 100% interest in the Property. Defendants have failed to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law when it issued the July 20, 2018 decision and order denying their motion to dismiss and for summary judgment (*Haque v Daddazio*, 84 AD3d 940, 942 [2011])."

Defendants' Instant Motion to Reargue

On July 24, 2021, defendants filed the instant motion for leave to reargue Alma's motion to vacate the January 2020 Default Order and for other relief.

Star submits an affidavit asserting that this court erred in issuing the September 2020 Order based on the unsupported "finding" that "Alma *objected* to the Time of the Essence closing based, in part, on Lord's inability to convey 100% interest in the Property" (emphasis added). Star asserts that it is undisputed that: (1) the Sales Contract "made time of the essence for Plaintiff to close on the agreed upon law day"; (2) "Plaintiff refused to attend the law day closing, thereby breaching the contract"; and (3) "less than 24 hours after breaching the contract, Plaintiff repudiated the contract and demanded the return of its down payment." Star thus argues that "[t]here is no material issue of fact to be determined at a trial of this case." Star asserts that this court erred when it found that the Sales Contract required Lord to deliver *clear* title to the Property to Alma at closing because it merely required Lord to deliver *insurable* title, and not *marketable* title.

Alma, in opposition, submits an attorney affirmation asserting that this is defendants' "fourth frivolous attempt" to dismiss this action "prior to full and complete testimony of the interested parties, (including defendant Gregg Star, Esq.) . . ." Alma's

counsel argues that paragraph 13 of the Sales Contract provides that seller shall give insurable title and “[i]t is irrelevant whether Mr. Star attempts to define this as ‘marketable’ or ‘insurable’ title, because the simple fact is that Ms. Lord could convey neither marketable, not insurable title to the plaintiff on the date that the Time of the Essence closing was declared.”

Discussion

“A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d] [2]). “A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Mazinov v Rella*, 79 AD3d 979, 980 [2010] [internal quotation marks omitted]).

As a preliminary matter, there was no factual “finding” in the September 2020 Order that Alma objected to the time of the essence closing based on Lord’s inability to convey 100% interest in the Property or that the Sales Contract required Lord to deliver *clear* title. Apparently, defendants are referencing the first paragraph on page two of the September 2020 Order, which merely paraphrases the material allegations in Alma’s complaint.

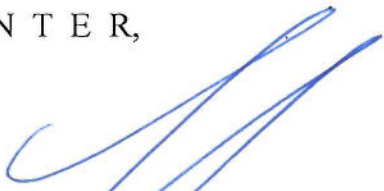
In the September 2020 Order, this court determined that it would not disturb the 2018 Order issued by Judge Wooten denying defendants’ summary judgment motion because “[t]he court correctly determined that there are issues of fact regarding Lord’s

ability to convey 100% interest in the Property [on the September 17, 2014 closing date set forth in the Sales Contract]” based on the October 7, 2014 recorded deed to the Property. The October 7, 2014 deed to the Property reflects that Lord only held a 1% ownership interest in the Property prior to its execution, and thus, Lord may not have had the right to sell the Property to Alma on the September 17, 2014 time of the essence closing date. Defendants’ instant motion merely reiterates the identical arguments that were previously asserted, considered by three different judges and properly rejected. Accordingly, it is hereby

ORDERED that defendants’ motion (mot. seq. eight) is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**