Van Lew v Connors
2022 NY Slip Op 30616(U)
March 2, 2022
Supreme Court, Erie County
Docket Number: Index No. 809888/2017
Judge: Raymond W. Walter

At an IAS Term, Part 29 of the Supreme Court, held in and for the County of Erie at the courthouse thereof located at 50 Delaware Ave. in the City of Buffalo, New York on the 3rd day of February 2022.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

HALSEY VAN LEW and MARY BETH VAN LEW,
Plaintiffs

-vs-

JEANETTE A. CONNORS,
Defendant.

MEMORANDUM and DECISION
(Non-Jury Trial)
Index No.: 809888/2017

ATTORNEYS:

LAW OFFICES OF RALPH LORIGO, P.C
Frank Jacobson, Esq.
Attorney for Plaintiff

SHAW & SHAW PC
Blake Zaccagino, Esq.
Attorney for the Defendant

OPINION:

WALTER, J

On July 12, 2021, the Hon. Paul B. Wojtaszek granted a motion for summary judgement against the defendant, Jeanette A. Connors. The motion was brought by the plaintiffs', Halsey L. Van Lew and Mary Beth Van Lew for breach of contract and fraud in connection with the sale of real property located at 1589 Orchard Park Road, West Seneca, New York 14224. The Court denied the motion as to damages but ordered a bench trial to determine the amount of damages, if any.

A bench trial was held before this Court on January 24, 2022 and concluded on February 3, 2022. The sole issue before the Court is the issue of damages. The Court, having had the opportunity to observe the demeanor of the witnesses who testified, weigh their credibility, consider the evidence presented, and the parties pre-trial memorandum, submits the following memorandum and decision.

The parties entered a contract for the sale of 1589 Orchard Park Road, West Seneca, New York, on August 26, 2014. The contract was contingent upon the simultaneous closing of the pet kennel property / business at 1585 Orchard Park Road, located to the east and contiguous to the subject premises. As per the contract's rented property rider, the subject property also had a tenant living in a basement apartment on a month-to-month basis paying $550 in rent. The house was marketed and sold as a two-family house and the contract stated that there were no code violations. The sale closed on November 26, 2014 and a Warranty Deed was filed with the Erie County Clerk's Office.

Mrs. Van Lew testified that at some point in 2016 her daughter was able to apply for a mortgage so she could purchase the property from Mr. and Mrs. Van Lew. As part of the mortgage approval process the lending institution discovered that the property was not zoned as a two-family house. The Van Lew's engaged the Law offices of Ralph C. Lorigo to work with the Town of West Seneca to have the zoning changed. They also engaged JDS Associates Architect P.C. to draft plans that would bring the basement apartment into compliance with the zoning codes. The Town of West Seneca eventually approved the plans, modified the zoning, and

the Van Lew's obtained an estimate from Buffalo Bungalow Inc., to renovate the apartment.

The issue of the defendant's liability for breach of contract and fraud having already been decided, the Court now turns its attention to the proper measure of damages. The plaintiff is seeking general damages for the cost of obtaining the zoning variance, the cost to bring the basement apartment up to code, and attorney's fees pursuant to the terms of the contract. The defendant argues that the proper measure of damages is the benefit of the bargain damages. They contend that the plaintiff failed to establish the difference between contract price and the actual value of the property at the time of the breach of contract. Therefore, the plaintiffs have failed to meet their burden of proof to establish any damages.

"It is well established that in actions for breach of contract the nonbreaching party may recover general damages which are the natural and probable consequence of the breach" (*Kenford Co., Inc., v County of Erie*, 73 N.Y.2d 312, 319 [1989]). The basic principle of damages in a contract action is to leave the injured party in as good a position as he or she would have been if the contract had been fully performed (*Brushton-Moira Cent. School Dist. v Fred H. Thomas Associates, P.C.*, 91 NY2d 256, [1998]). Where a contract expressly provides that the seller warrants and represents that, upon purchase, the property will not be in violation of any zoning ordinance, the purchaser is entitled to demand that the seller rectify any violation or return any moneys paid on account (*Voorheesville Rod and Gun*

Club, Inc. v E.W. Tompkins Co., Inc., 82 NY2d 564, [1993]; *Pamerqua Realty Corp. v Dollar Service Corp.*, 93 AD2d 249, [2d Dept 1983]).

In the instant case, the plaintiffs relied on the specific language in the contract that stated the property was a two-family dwelling and that it was not in violation of any applicable building codes and/or zoning violations. In fact, the property was not zoned for a two-family residence and the basement apartment was in violation of multiple building and zoning codes. The defendant was aware and on notice of these facts at the time of closing, thereby committing fraud and breach of contract.

In *Kopp v. Boyango*, 67 A.D.3d 646 (2d Dept 2009), *citing Pamerqua Realty Corp. v Dollar Service Corp.*, (93 AD2d at 252), the court stated that "in the event that the purchaser determines that the property is not in compliance with the relevant laws or ordinances, the purchaser has the right to demand that the seller rectify the situation with the authorities or to receive a refund of his or her down payment." Here, however, the discovery of the noncompliance with zoning and building codes was not discovered until two years after the closing. Additionally, the sale of the subject property was contingent upon and integral to the purchase of a dog kennel property and business attached thereto. There was no opportunity for the plaintiffs to unwind the sale and seek a refund.

For the plaintiffs to be in as good a position as they would have been had the defendant not committed fraud and breach of contract, they needed to obtain a zoning variance to change the property from single-family to two-family and the

basement apartment needed to be brought up to code. The plaintiffs are therefore entitled to have the violations rectified at the expense of the defendant. Such expenses are the natural consequence of the breach of contract.

The defendant's attempt to rely on the "benefit of the bargain" standard is unpersuasive. Where the breach of contract is a result of the seller failing to perform or willfully disregarding the contract the purchaser may recover the loss as measured by the difference between the contract price and the market value of the property at the time of the breach (*Musick v. 330Wythe Ave. Assoc., LLC*, 41 A.D.3d 675 [2nd Dept 2007]). Here, the discovery of the fraud and breach of contract did not occur until well after sale of the property and transfer of title. This delay, along with the interconnected nature of the sale of the adjacent dog kennel, makes a determination of market value at the time of the breach impractical. Regardless, plaintiffs are not only entitled to damages from the loss of the bargain but are also entitled to other damages which are a natural and direct result of the breach (*Clearview Concrete Prods. Corp. V S. Charles Gheradi, Inc.*, 88 A.D.2d 461, 469 [2d Dept 1982]; *see also Musick*, 41 A.D.3d at 676).

To determine the amount of damages, the plaintiffs provided direct testimony and documentary evidence from architect Frank Spratz and contractor Derek Sullivan. The parties stipulated to both being experts in their fields. Mr. Spratz prepared plans and specifications to bring the basement apartment up to code. Mr. Sullivan prepared a cost estimate to complete the work. Mr. Sullivan testified that

no renovations in the estimate were cosmetic, and all were necessary to bring the basement apartment up to code.

In *Lewin v. Levine*, (146 A.D.3d 768 [2d Dept 2017]) the Court determined that the proper measure of the plaintiffs' damages was the cost of completion of the construction work. Mr. Sullivan provided two estimates that were entered into evidence. The estimates were dated April 4, 2017 and September 25, 2021. To determine the cost of renovation in November of 2014, the time of the breach, Mr. Sullivan calculated the cost difference between the 2017 and 2021 estimates and worked backwards. Mr. Sullivan testified that costs of materials generally go up every year, but there was a significant increase due to supply chain issues in the last year. He stated that the increase between 2017 and 2021 was greater than the increase between 2014 and 2017. While the calculation of damages cannot be speculative or conjectural, they must be capable of measurement based upon known reliable factors (*see Bi-Economy Mkt., Inc., v Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 193 [2008] *citing Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993]). This Court finds Mr. Sullivan's methodology reasonable and reliable. In fact, any discrepancy in actual costs based on this calculation would be to the benefit of the defendant due to the rapid increase in material costs between 2017 and 2021.

Based upon this methodology, the Court finds that the price difference between the first estimate on April 4, 2017 and the second estimate on September 25, 2021 is $24,520.09. This equates to $15 per day. The date of the breach is the date of the closing, which was 860 days before the first estimate. This reduces the

amount of the estimate on the date of the breach by $12,900.00. Thus, the total amount is determined to be $41,912.00.

The cost of renovation alone does not make the plaintiffs whole. The plaintiffs incurred additional expenses when they had the property rezoned and when they retained the services of the architect. These amounts include $150.00 paid to the town of West Seneca, $945.00 for legal representation paid to the Law Offices of Ralph C. Lorigo, and $1,900.00 to JDS Associates Architect PC. These expenses, when combined with the renovation costs, brings the amount of total damages to $44,907.00. Statutory interest, calculated from the date of the breach of contract, are appropriate and authorized pursuant to CPLR § 5001.

As for attorneys' fees, it is generally the rule that a prevailing party may not recover attorneys' fees from the losing party unless an award of attorneys' fees is authorized by agreement between the parties, statute, or court rule (*Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28 [2012]; *Wright v Selle*, 27 AD3d 1065 [4th Dept 2006]. The contract in dispute contains such an agreement. Section ATC 14 (A) on page 13 reads, "in connection with any litigation concerning this contract, the prevailing party shall be entitled to recover reasonable attorney's fees and costs." The attorney's fees must be reasonable and not excessive. The award should take into consideration the nature of the services rendered, the standing of the attorney in his profession for learning, skill and proficiency, the amount involved and the importance to his client of the result (*RAD Ventures Corp. v Artukmac,* 31 AD3d 412 [2d Dept 2006]; *see also Randall v. Packard*, 142 N.Y. 47 [1894]). Taking

that standard into consideration a reasonable fee in this matter is awarded in the amount of $20,000.00 plus disbursements in the amount of $1,251.00.

Plaintiff shall submit an Order consistent with this decision.

DATED: 3/2/2022

HON. RAYMOND W. WALTER, J.S.C.