

Ambroise v Palmana Realty Corp.

2023 NY Slip Op 32426(U)

July 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 518775/2018

Judge: Leon Ruchelsman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS ; CIVIL TERM: COMMERCIAL PART 8

-----x
PAUL AMBROISE,

Plaintiff,

Decision and order

- against -

Index No. 518775/2018

PALMANA REALTY CORP.,

Defendant,

July 13, 2023

-----x
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #11

The defendant has moved pursuant to CPLR §3212 seeking summary judgement on the grounds the plaintiff was not ready and willing to close by the time of the essence date. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior decisions, on April 19, 2018 the parties entered into a contract whereby the plaintiff agreed to buy property, an abandoned gas station, located at 3320 Atlantic Avenue in Kings County. The agreement contained a time of the essence clause and the closing was scheduled for July 31, 2018. The plaintiff rejected that closing date on the grounds the premises were not ready for closing. The defendant rejected the plaintiff's rejection insisting the closing was appropriate. The plaintiff instituted this action seeking specific performance (see, Ambroise v. Palama Realty Corp., 197 AD3d 1226, 153 NYS3d 572 [2d Dept., 2021]).

The defendant has now moved seeking summary judgement

arguing there are no questions of fact the plaintiff was not ready, willing and able to close by the time of the essence date. The plaintiff asserts there are questions of fact in this regard.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

It is well settled that to succeed on a claim seeking specific performance the plaintiff must demonstrate that the plaintiff has substantially performed all of its contractual obligations and was willing and able to perform its remaining obligations and that the defendant was able to convey the property, and that there was no other adequate remedy at law (see, E & D Group LLC v. Vialet, 134 AD3d 981, 21 NYS3d 691 [2d Dept., 2015]). Thus, the plaintiff is required to demonstrate it had the financial ability to close upon the property by the time of the essence date (see, Grünbaum v. Nicole Brittany Ltd., 153 AD3d 1384, 61 NYS3d 146 [2d Dept., 2017]). "When a purchaser

submits no documentation or other proof to substantiate that it had the funds necessary to purchase the property, it cannot prove, as a matter of law, that it was ready, willing, and able to close" (Fridman v. Kucher, 34 AD3d 726, 826 NYS2d 104 [2d Dept., 2006]). In this case the plaintiff has not presented any evidence at all that it had the financial wherewithal in which to close. The plaintiff acknowledges that he has been accused of not maintaining the ability to close, yet provides no evidence in this regard at all (see, Affirmation in Opposition, ¶19 [NYSCEF Doc. No. 260]).

The purchase agreement provided that notice of the closing would take place "no less than sixty (60) days prior to the Scheduling Closing Date, which shall be no earlier than forty-five (45) days after the Effective Date and no later than January 15, 2019, TIME BEING OF THE ESSENCE" (see, Agreement of Sale, ¶ 3 [NYSCEF Doc. No. 17]). Pursuant to that provision on May 29, 2018 and again on July 26, 2018 the defendant sent letters indicating the closing would be taking place on July 31, 2018. The plaintiff failed to abide the time of the essence on the grounds the date selected was not reasonable. The plaintiff presents five reasons why the date selected was not reasonable. First, plaintiff argues the contract listed a closing date of January 15, 2019 not July 2018. Second, the "time is of the essence" letter was not reasonable because the nature of the

contract was complex, as it involved a commercial space that formerly operated as a gas station" (see, Affirmation in Opposition, ¶21 [NYSCEF Doc. No. 260]). Third, the plaintiff asserts the defendant has baselessly accused the plaintiff of not having sufficient funds in which to close. Fourth, the plaintiff will be prejudiced by defendant's efforts to hold the plaintiff in default. Lastly, echoing the first reason, the plaintiff argues the time of the essence notice was not reasonable because the defendant only afforded two months in which to close whereas the contract provided the closing date until January 15, 2019.


Notwithstanding any of the substantive reasons presented, a simply reading of the contract demonstrates that the closing date was permitted forty-five days after the effective date, provided the plaintiff was afforded at least sixty days notice. That means the closing date could only be scheduled after waiting forty-five days and then another sixty days. The defendant asserts that "the Agreement unequivocally establishes that the TIME OF THE ESSENCE date was scheduled by Defendant's notice to Plaintiff provided at least sixty (60) days in advance. Defendant complied with this requirement to the letter as it sent the Closing Date Notice to Plaintiff by Federal Express overnight mail on May 29, 2018, sixty-three (63) days before the established July 31, 2018 Law Day" (see, Memorandum in Reply, pages 2,3). While that is certainly true, the agreement also

provides that no such notice can be served before forty-five days before the effective date. The 'effective date' is April 19, 2018 (see, Agreement of Sale, Preamble [NYSCEF Doc. No. 17]). Absent waiting forty-five days before sending a notice to close within sixty days would render the forty-five day provision completely meaningless. If all that is required is a notice to close sixty days later then of course such closing would take place forty-five days after the effective date. The reading of a contract which renders some of its provisions meaningless should be avoided where a simple reading of the provision actually infuses substance therein. Therefore, there are surely questions of fact whether the defendant adequately complied with the notice provisions of the time of the essence clause. Consequently, the motion seeking summary judgement is denied.

So ordered.

ENTER

DATED: July 13, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC