

45 Nostrand LLC v Strongin

2023 NY Slip Op 32500(U)

July 21, 2023

Supreme Court, New York County

Docket Number: Index No. 650447/2022

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

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45 NOSTRAND LLC

Plaintiff,

- v -

WENDY STRONGIN,

Defendant.

-----X

INDEX NO. 650447/2022

MOTION DATE 06/06/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 56 were read on this motion to/for DISMISS.

This action arises out of an alleged breach of a real estate contract for a property in Shelter Island, New York.¹ Defendant now moves to dismiss the complaint, pursuant to CPLR § 3211(a)(1), (7), and (8). Plaintiff opposes the instant motion, and cross-moves to extend its time to serve the summons and complaint. For the reasons set forth below, the defendant’s motion to dismiss is denied and the plaintiff’s cross-motion to extend time for service is granted.

Background

The parties executed a contract for the purchase of property in Shelter Island. The contract contained a “time of the essence” closing date of January 24, 2022. Plaintiff contends that it was ready, willing, and able to perform, but the defendant failed to appear. Plaintiff contends that days before the scheduled closing date, the defendant advised plaintiff that it would not be appearing and therefore repudiated the contract. Consequently, plaintiff did not appear at the closing either.

¹ The Court would like to thank Bani Bedi for her assistance in this matter.

Plaintiff seeks specific performance of the contract, or alternatively cancellation of the contract and return of their down payment. Defendant contends that she never repudiated the contract, but even if she did, the plaintiff chose to proceed as if the contract was valid and thus failed to tender their own performance. Furthermore, defendant argues that she was never properly served with the complaint.

Legal Standard

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. See *Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011].

Under CPLR 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83, 88 [1994].

Discussion

Specific Performance

Defendant contends that the complaint fails to adequately plead breach of contract, specifically entitlement to specific performance. Defendant argues that the plaintiff failed to tender its own performance of the contract because it did not appear at the closing.

In opposition, plaintiff alleges that three days before the closing, the defendant's attorney informed the plaintiff's attorney that the defendant would not be appearing at the closing.

Plaintiff contends defendant's conduct was an anticipatory repudiation of the contract and sent a letter to the defendant the night before the closing that their refusal to attend would be considered a material breach of the contract.

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages. *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]. To state a claim for specific performance, the pleader "... must demonstrate that a tender of his or her own performance was made, unless tender was waived or the necessity for such a tender was obviated by acts of the other party amounting to an anticipatory breach of the contract or establishing that such party was unable to perform." *Lower v Village of Watkins Glen*, 17 AD3d 829 [3d Dept 2005].

For an anticipatory repudiation of contract to excuse the plaintiff's contractual obligation, "... the expression of intent not to perform by the repudiator must be 'positive and unequivocal.'" *Princes Point LLC v Muss Dev. LLC*, 30 NY3d 127 [2017]. According to New York law, once a party has made it clear they will not live up to the contract, "the aggrieved party is relieved from the performance of futile acts." *Oak Bee Corp. v N.E. Blankman & Co.*, 154 AD2d 3, 8 [2d Dept 1990]; *see also Perez-Gurri v Steffen*, 189 AD3d 559, 560 [1st Dept 2020].

Viewing the record in the light most favorable to the plaintiff, the non-moving party, it appears that the defendant through her attorney expressed a clear intent to repudiate the contract and asserted definitively that defendant would not appear at the closing. Plaintiff's attorney's letter expressed to the defendant that plaintiff viewed this as a material breach of the contract and thus plaintiff would not conduct the futile act of appearing at the closing unless the breach was rectified. Thus, the plaintiff has sufficiently alleged that the defendant repudiated the contract

and breached its contractual obligation. Accordingly, the Court finds that defendant has failed to eliminate any triable issue of fact and plaintiff's complaint sufficiently states a cause of action for specific performance.

Service

Additionally, defendant moves to dismiss pursuant to CPLR 3211(a)(8), lack of jurisdiction, on the grounds that she was not properly served with the summons and complaint and that the process server's affidavit of service did not include a certificate of conformity pursuant to CPLR § 2309(c). Plaintiff cross-moves for an extension of time to serve the defendant upon good cause shown.

Defendant argues that the plaintiff's process server did not make reasonable attempts to personally serve the defendant or to send an additional mailing of the complaint. However, the plaintiff alleges that twelve separate attempts were made to serve the defendant with the complaint. After initial service attempts were contested by the defendant, the plaintiff sought to serve the complaint three more times in person before resorting to mail. Finally, the plaintiff attempted service three more times and alleges that the door was shut on them once.

The Court agrees with plaintiff that good cause justifies an extension of time for service here. The Court of Appeals has held that "good cause" and "interest of justice" "constitute separate grounds for extensions, to be defined by separate criteria." *Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012] (citing *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). A "'good cause' extension requires a showing of reasonable diligence in attempting to effect service upon a defendant" and is likely to be found where "the plaintiff's failure to timely serve process is a result of circumstances beyond [its] control." *Bumpus v N.Y.C. Transit Auth.*, 66 AD3d 26, 32 [2d Dept 2009].

Moreover, the absence of a certificate of conformity is a procedural irregularity that can be corrected if “the authentication of the oathgiver’s authority can be secured later.” *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009].

Based on the foregoing, the Court finds that there is good cause to grant an extension of 90 days for service. Thus, the plaintiff’s cross-motion to extend the time for service of the complaint by 90 days is granted and the defendant’s motion to dismiss based on improper service is denied. Accordingly, it is

ADJUDGED that defendant’s motion to dismiss is denied in its entirety, and it is further

ADJUDGED that the plaintiff’s cross-motion to extend the time for service of complaint is granted; and it is further

ORDERED that plaintiff is to serve the summons and amended complaint within 90 days of the date of this Order.

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LYLE E. FRANK, J.S.C.

7/21/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	