

**Kensington Realty LLC v Butler**

2024 NY Slip Op 34917(U)

July 23, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 629208/2023

Judge: Christopher Modelewski

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.

SHORT FORM ORDER

Index No. 629208/2023

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

HON. CHRISTOPHER MODELEWSKI  
Justice of the Supreme Court

MOTION DATE 04/12/2024 (001)  
MOTION DATE 04/26/2024 (002)  
ADJ DATE 06/17/2024 (001&002)  
Mot. Seq. #001-MD  
Mot. Seq. #002-MG

-----X  
KENSINGTON REALTY LLC,

Plaintiff,

- against -

STACIE BUTLER, as Surviving Tenant by the  
Entirety of JOHN BUTLER,

Defendant.  
-----X

MARTIN SILVER, P.C.  
Attorneys for Plaintiff  
330 Motor Parkway, Ste. 201  
Hauppauge, New York 11788

DANIELS NORELLI CECERE & TAVEL, PC  
Attorneys for Defendant  
272 Duffy Avenue  
Hicksville, New York 11801

Upon the E-file document list numbered 8 to 15, 17 to 30, 35 and 36, read and considered on the motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant and dismissing plaintiff's complaint and on the cross-motion of plaintiff for an order granting it partial summary judgment on its claim for a declaratory judgment; it is

**ORDERED** that the motion by plaintiff for an order granting it partial summary judgment on its claim for a declaratory judgment, is granted, for the reasons set forth herein; and it is further

**ORDERED** that motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant and dismissing plaintiff's complaint, is denied.

This is a declaratory judgment action seeking a determination as to the contractual rights of the parties hereto in regard to a contract of sale (the "contract of sale") and the amendments thereto (the "amended contract of sale"), for the purchase of the real property located at 81 Old Broadway Avenue, Sayville, New York 11782. The complaint also seeks specific performance of the contract of sale and transfer of the subject real property in accordance with its terms. Issue was joined by the serving and filing of an answer with counterclaims on December 28, 2023. Plaintiff filed an amended complaint on January 9, 2024 and defendant filed an answer with counterclaims on January 10, 2024. Plaintiff replied to the counterclaims on January 30, 2024. Defendant now moves for summary judgment dismissing the complaint and submits an attorney affirmation, her sworn affidavit, a statement of material facts, the contract of sale, the amendments to the contract of sale, and various correspondence. Defendant argues that she had the right to cancel the contract at any time prior to the Town's decision on plaintiff's building permit application and contends that she rightfully exercised that right on December 19, 2023. Plaintiff opposes defendant's motion and cross moves for summary judgment on its declaratory judgment cause of

Kensington Realty LLC v Butler  
Index No. 629208/2023  
Page 2

action. In support of its cross-motion, plaintiff submits an attorney affirmation, the sworn affidavits of Gary Burke, William Votta, manager of plaintiff, Lucy Pellegrino, principal of JABA Realty Holdings, LLC, and Scott Young. Plaintiff asserts that neither party had the right to cancel the contract until after the Town issued its decision on plaintiff's building permit application and only in the event of a denial of that application. Defendant opposes plaintiff's cross-motion and replies through the submission of an attorney affirmation and her sworn affidavit with attached exhibit. Plaintiff submits an attorney affirmation in reply.

At issue in this action is the interpretation to be given to an amendment to the contract of sale between parties. The original language at paragraph twelve of the rider to the contract of sale provided that:

The parties acknowledge that the Purchaser's obligations are contingent upon the granting of full municipal approval for the Construction of a 3,000 square foot house on the subject premises. Should this approval not be granted on or before March 1, 2023, either party may cancel the Contract, and the down payment shall be refunded. Upon the refund of the down payment, the parties shall have no further rights and obligations to one another. In the event the permits are issued prior to March 1, 2023, Purchaser will close within 45 days from the date permits are issued.

The amendment to paragraph twelve of the rider to the contract of sale at issue herein provides as follows:

1. The parties hereby agree that the language relevant to the right to cancel contained in paragraph 12 of the Rider of the contract shall be changed and shall now read as follows:  
In consideration of the Purchaser filing a TRO with the Court to stop the planned demolition of the above property, the shall Seller provide the Town with a copy of the contract of sale between the parties, and written authorization granting the Purchaser the right to file for a Building Permit to construct a 3,000 square foot house on the property. In addition the Seller and Purchaser hereby agree that **neither party will have the right to cancel the contract until after November 1, 2023**. The parties further agree that if the Building Permit has been submitted, and the Purchaser is waiting on their Decision, **the right to cancel will be extended until such time as it takes the Town to issue said decision** (emphasis added).

“An action for a declaratory judgment must be supported by the existence of a justiciable controversy” (*Krawczyk v Incorporated Vil. of Lindenhurst*, 216 AD3d 929, 931, 189 NYS3d 676 [2d Dept 2023]). In other words, declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (see CPLR 3001; *Rockland Light & Power Co. v City of New York*, 289 NY 45, 43 NE2d 803 [1942]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 890 NYS2d 16 [1st Dept 2009], lv denied 15 NY3d 703, 906 NYS2d 817 [2010]). “The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or future obligations” (*James v Alderton Dock Yards*, 256 NY 298, 305, 176 NE 401 [1931]).

Kensington Realty LLC v Butler  
Index No. 629208/2023  
Page 3

In determining the rights and obligations of the parties to a contract, it is well-established that “a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records* 98 NY2d 562, 569, 750 NYS2d 565 [2002]; *R/S Assoc. v N.Y. Job Dev Auth.*, 98 NY2d 29, 32, 744 NYS2d 358 [2002]). “In construing a contract, one of a court’s goals is to avoid an interpretation that would leave contractual clauses meaningless” (*Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403, 482 NYS2d 465, 468 [1984]). The aim of the court when interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a “practical interpretation of the expressions of the parties so that their reasonable expectations will be realized” (see *Pellot v Pellot*, 305 AD2d 478, 759 NYS2d 494 [2d Dept 2003]; *Gonzalez v Norrito*, 256 AD2d 440, 682 NYS2d 100 [2d Dept 1998]; *Joseph v Creek & Pines, Ltd.*, 217 AD2d 534, 535, 629 NYS2d 75 [2d Dept], lv denied 89 NY2d 804, 653 NYS2d 543 [1996]; see also *Matter of Matco-Norca, Inc.*, 22 AD3d 495, 802 NYS2d 707 [2d Dept 2005]; *Tikotzky v City of New York*, 286 AD2d 493, 729 NYS2d 525 [2d Dept 2001]; *Partrick v Guarniere*, 204 AD2d 702, 612 NYS2d 630 [2d Dept], lv denied 84 NY2d 810, 621 NYS2d 519 [1994]). “If the language of the agreement is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence” (*Salerno v Odoardi*, 41 AD3d 574, 575, 838 NYS2d 156 [2d Dept 2007]). As it is a question of law whether or not a contract is ambiguous (*W. W. W. Assoc. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (see *Chimart Assoc. v Paul*, 66 NY2d 570, 498 NYS2d 344 [1986]). When a contract term or clause is ambiguous, and the determination of the parties’ intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language presents a question of fact and the determination is a matter for trial (see *Ashland Management v Janien*, 82 NY2d 395, 401-402, 604 NYS2d 912 [1993]; *Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290-91, 344 NYS2d 925 [1973]; *Brook Shopping Ctrs v Allied Stores Gen. Real Estate Co.*, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]).

This declaratory judgment action involves a justiciable controversy regarding the meaning of paragraph one of the amendment to paragraph twelve of the rider to the contract of sale. Again, the relevant and operative language provides that “**neither party will have the right to cancel the contract until after November 1, 2023**” and “if the Building Permit has been submitted, and the Purchaser is waiting on their Decision, **the right to cancel will be extended until such time as it takes the Town to issue said decision** (emphasis added). When viewing this language as a whole, and giving a fair and consistent interpretation to the provision, it is clear to the Court that “neither party” would “have a right to cancel the contract until November 1, 2023,” such that the “right to cancel” language was in the negative, not the positive, as was reflected in paragraph twelve of the rider to the contract of sale.<sup>1</sup> The amendment then states that, as long as the building permit application was submitted, which there is no suggestion it has not been, and further, as long as the purchaser was waiting for a decision from the Town, which there is no dispute the purchaser indeed was, then “neither party” would “have the right to cancel until such time as the Town issues its decision.” Furthermore, the amendment to paragraph 12 of the contract of sale only modified the time period during when the parties could not exercise the right to cancel the contract of sale. The obligation to proceed to closing in the event the Town granted the plaintiff’s building permit application was not altered. As such, a fair and practical interpretation of the contract of sale afforded either party the right to cancel the contract of sale only in the event the Town

---

<sup>1</sup> Paragraph twelve provides, in relevant part, “[s]hould this approval not be granted....either party may cancel the contract” (emphasis added).

Kensington Realty LLC v Butler  
Index No. 629208/2023  
Page 4

denied plaintiff's building permit application, thus first requiring a decision by the Town on plaintiff's building permit application prior to any party exercising such right.

Accordingly, plaintiff's motion for summary judgment on its declaratory judgment claim is granted to the extent that defendant did not have the right to cancel the contract of sale prior to the Town's decision on plaintiff's building permit application and that any right to cancel the contract of sale could only be exercised in the event the Town denied plaintiff's building permit application. Defendant's motion for summary judgment dismissing the complaint, therefore, is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: July 23, 2024

  
\_\_\_\_\_  
HON. CHRISTOPHER MODELEWSKI, J.S.C.

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION