

Ahsanuddin v Addo
2024 NY Slip Op 34999(U)
August 19, 2024
Supreme Court, Bronx County
Docket Number: Index No. 30571/2017E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 8**

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MOHAMMED AHSANUDDIN,

Index No. 30571/2017E

Plaintiff,

-against-

Hon. Bianka Perez

Justice Supreme Court

JOSEPH ADDO and VERONICA ADDO, 2056
CROSS BRONX SOUTH LLC, and NASSIM
KASSIB a/k/a NISSIM KASSAB,

Defendants.

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The following were read on this motion (Seq 8) for **Summary Judgment** submitted on February 1, 2024.

Notice of Motion - Exhibits and Affidavits Annexed	Nyscef No(s). 163-175
Cross-motion, Answering Affidavit and Exhibits	Nyscef No(s). 178-204, 205-206, 220
Reply Affidavit and Exhibits	Nyscef No(s). 213-217

Upon the foregoing papers, defendants Joseph Addo, Veronica Addo (Addo defendants) and attorney Morris Fateha (Fateha) move for an Order pursuant to CPLR § 6514(b) granting an immediate discretionary cancellation of plaintiff’s expired notice of pendency and removing of record any lis pendens encumbering the premises in question. Defendants also move for an Order pursuant to CPLR § 3212(a), granting summary judgment to all defendants and dismissing plaintiff’s causes of action as against them, and pursuant to 22 N.Y.C.R.R. §130-1.1, for an Order awarding costs and sanctions against plaintiff and his attorney. Plaintiff opposes and cross moves pursuant to CPLR§3212 for an Order granting summary judgment in his favor on his First Claim for specific performance, and on the Seventh Claim for an Order setting aside the sale of the property in question to defendant 2056 Cross Bronx South, LLC (Cross Bronx). The Addo defendants, Fateha and Cross Bronx oppose the cross motion.

Plaintiff commenced the instant action seeking, among other things, to set aside the transfer of the premises known as 2056 Cross Bronx Expressway, Bronx, NY, located in the County of Bronx, State of New York, and for specific performance, in connection with a contract of sale that was executed on October 23, 2017, for the sale of the subject premises. Movants now request the

herein relief on the basis that the contract of sale became an impossibility after movants took all possible steps to fulfill their obligations under the contract, because plaintiff's notice of pendency expired after a request for extension was denied, and because the plaintiff continues to prosecute the action even though it is allegedly patently frivolous and without merit.

Plaintiff opposes the motion arguing, among other things, that the motion should be denied based on the law of the case and because the notice of pendency has already expired and is thus moot. Plaintiff also argues that the motion should be denied as movants failed to annex a statement of material facts, the short sale deadline did not support an impossibility defense, and because plaintiff was willing and able to perform on the contract.

Addo Defendants' Motion for Summary Judgment

Summary judgment is the procedural equivalent of a trial (*Mendoza v Highpoint Associates, IX, LLC*, 83 AD3d 1 [1st Dept 2011]). It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Rotuba Extruders Inc., v Ceppos*, 46 NY2d 223 [1978]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

In support of their motion, movants refer to the pleadings previously uploaded to NYSCEF¹ and annexed various documents, including an affidavit by defendant Joseph Addo, the Addo defendants' bankruptcy petition and bankruptcy dismissal, the contract of sale, a short sale approval letter from Bayview, emails concerning an extension on the short sale approval letter,

¹ Per CPLR § 2214 (c), in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system.

plaintiff's bank account statements, and a Tax lien sale certificate. Defendant Joseph Addo's affidavit avers that the Addo defendants were represented by defendant attorney Fateha in a bankruptcy action in the Eastern District of New York (NYSCEF Doc. No. 165). It states that per contract of sale dated October 23, 2017, the Addo defendants agreed to sell the subject premises to plaintiff for \$250,000.00 "if all conditions precedent to closing were met." It also avers that their attorney informed them that "as required by the Bankruptcy Courts, the provisions in the Contract of Sale included a provision that required bank approval for a 'short sale' as a prerequisite for the Contract of Sale to proceed to close." (*Id.*). It avers that they received bank approval for the short sale, requiring that the closing take place "on or before October 30, 2017, only seven business days after approval of the short sale was received" and that defendant attorney Fateha "attempted to receive an extension on the deadline for closing by having the broker contact the bank but was only able to secure one more day with a new closing date of October 31, 2017" (*Id.*). It also states that their attorney informed them "that the Bankruptcy Code requires all creditors to be given at least (10) days in order to object to a sale or the Bankruptcy Court will not approve any such sale" and that since "the proper ten (10) days' notice was impossible . . . the Contract of Sale became an impossibility" and "returned the \$20,000 downpayment to Plaintiff's attorney" (*Id.*). Finally, the affidavit states that "paragraph 31 of the Contract of Sale . . . prevented closing unless it was within the terms of the bank's approval as stated," that "[p]laintiff and his company refused to close on October 31, 2017," and that they "took all steps possible to consummate the Contract of Sale" (*Id.*).

Moreover, paragraph 41 of the contract states in relevant part that the agreement was "subject to the approval of the United States Bankruptcy Court" and that if the Addo defendants were "unable to obtain the Approval Order or . . . otherwise unable to perform their obligations under this Agreement, Sellers will cancel this Agreement and, if Purchaser is not in default hereunder, refund the Downpayment, together with interest earned thereon, if any, whereupon this Agreement will wholly cease and terminate and neither of the parties will have any further claim against the other under this Agreement. Purchaser's exclusive remedy for Seller's inability to obtain the Approval Order or to perform its obligation is its entitlement to the return of the Downpayment as aforesaid" (NYSCEF Doc No. 167, Exhibit B). Further, the contract also provides that the Addos would "seek Bankruptcy Court approval of the terms and conditions of this Agreement, and, consistent with §363 (b) and (f) of the Bankruptcy Code, such approval will

be sought *subject to any higher or better offers that may be tendered to the Debtor in possession, and the Court, at the Sale Hearing. A 'higher or better offer' is defined as any offer, other than the offer set forth in this Agreement, that is approved by the Court*" (*Id.*).

Here, movants satisfied their prima facie showing demonstrating the absence of any triable issues of fact as under the contract, the Addo defendants were allowed to terminate the agreement if they were otherwise unable to perform their obligations under the contract, and given that the contract was subject to the approval of the United States Bankruptcy Court (see, NYSCEF Doc No. 167, Exhibit B, pg. 14-17 at ¶¶ 41-42). The annexed exhibits show that the Addo defendants would not have been able to consummate the sale to plaintiff on October 31, 2017, as the bank required (see NYSCEF Doc. No. 168, Exhibit C; NYSCEF Doc. No. 169, Exhibit D; NYSCEF Doc. No. 171, Exhibit F; NYSCEF Doc. No. 173, Exhibit H; NYSCEF Doc. No. 174, Exhibit I). The Addo defendants received the short sale approval via letter dated October 20, 2017, and the closing was required to take place on October 30, 2017 (NYSCEF Doc. No. 168, Exhibit C). The Bankruptcy Court required that a ten (10) day notice be given to all the creditors of the defendant/debtor prior to any sale. The Addo defendants attempted to get an extension of the approval until November 5, 2017, however, they were only able to get a one (1) day extension to October 31, 2017 (see NYSCEF Doc. No. 169, Exhibit D).

The evidence shows that the Addo defendants were unable to obtain additional time from the bank to close. Thus, they were entitled to end the agreement and return the downpayment. In addition, the contract explicitly provided that the Addos would seek Bankruptcy Court approval of the terms and conditions of the agreement, consistent with §363 (b) and (f) of the Bankruptcy Code, and that the approval would be sought subject to any higher or better offers tendered. While the record does not show when the Addos entered into a contract with Cross Bronx, it is clear that the closing and sale to plaintiff would not have occurred on October 31 as the bank required. Thus, the movants' motion for summary judgment in favor of all defendants dismissing plaintiff's causes of action as against them is granted and the complaint and all claims asserted against them are dismissed.

Immediate Discretionary Cancellation of the Expired Notice of Pendency

As to the aspect of movants' motion asking for an immediate discretionary cancellation of plaintiff's expired notice of pendency and removing of record any lis pendens encumbering the

premises in question, that branch of the motion is denied as moot as movants' motion for summary judgment has been granted above and the complaint and all claims asserted against them are dismissed.

Although the issue is moot per above decision, movants were entitled to a discretionary cancellation of plaintiff's expired notice of pendency. CPLR §6514(b) provides that upon motion a court "may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith" CPLR § 6514. Further, CPLR § 6513, provides that a notice of pendency is "effective for a period of three years from the date of filing" and an extension must be requested prior to the expiration of the prior notice (*see* CPLR § 6513). However, a "notice of pendency that has expired without extension is a nullity," and "there is no distinction between the effect of an expired or cancelled notice of pendency" as "both are void." (*See In re Sakow*, 97 N.Y.2d 436, 442 [2002]). Here, as the notice of pendency expired by law on November 6, 2020, the notice of pendency became a nullity, and thus, defendants were entitled to have the same cancelled (*see* NYSCEF Doc. No. 105).

Motion for Costs and Sanctions

On a motion for sanctions/costs pursuant to 22 NYCRR § 130-1.1, the burden of proof lies with the party seeking the imposition of the sanctions (*See Miller v. Miller*, 96 A.D.2d 943, 944 [2d Dept 2012]). To determine the propriety of sanctions, the Court looks to the broad pattern of sanctioned litigants' conduct, not just whether the conduct evidences merit (*Levy v. Carol Mgt. Corp.*, 260 A.D.2d 27, 33 [1st Dept 1999]). The Court's exercise of discretion is dependent on the impact of the alleged frivolous conduct (*Levy*, 260 A.D.2d at 34). Conduct is frivolous if it is completely without legal merit; undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or asserts material factual statements that are false (22 NYCRR 130-1.1[c]; *Id.* at 34. The standard for a showing of frivolity is high (*See West Hempstead Water Dist. v. Buckeye Pipeline Co., Inc.*, 152 A.D.3d 558, 559 [2d Dept 2017]). The movant has failed to meet the high standard required. Thus, the branch of the motion seeking costs and sanctions against the plaintiff is denied.

Plaintiff's Cross Motion for Summary Judgment

Plaintiff also cross moves for summary judgment arguing that plaintiff is entitled to specific performance as the parties had an enforceable contract and because the Addo defendants' breach of the contract created an equitable lien on the property in his favor. Plaintiff annexed, among other things, the pleadings, plaintiff's affidavit, the contract, various emails, an NYDOS filing for Cross Bronx, a Deed from the Addo defendants to defendant Cross Bronx, a decision from judge Miles denying movants' prior motion to dismiss, a decision from the First Department affirming Judge Miles' decision, and plaintiff's financial and Citibank statements.

For the reasons set forth above in connection with the Addos' motion for summary judgment, plaintiff's cross motion is denied in its entirety.

The Court has considered the parties remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED, that the Addo defendants' motion granting summary judgment in favor of all defendants and dismissing plaintiff's causes of action as against them is granted, and the complaint against all defendants is dismissed, it is further,

ORDERED, that the Addo defendants' motion for an immediate discretionary cancellation of plaintiff's expired notice of pendency and removing of record any lis pendens encumbering the premises in question is denied as moot, it is further

ORDERED, that the Addo defendants' motion for costs and sanctions is denied in its entirety, it is further

ORDERED, that plaintiff's cross motion is denied in its entirety, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint, and mark this matter as disposed in its entirety.

This constitutes the decision and order of the Court.

Dated: August 19, 2024

HON.  _____
BIANKA PEREZ, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT