99 Ash LLC v Hussein

2024 NY Slip Op 35107(U)

August 19, 2024

Supreme Court, Westchester County

Docket Number: Index No. 57257/2024

Judge: David F. Everett

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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99 ASH LLC,

Plaintiff,

-against-

FATEN HUSSEIN, and ZEV BRACHFELD, ESQ., AS ESCROWEE,

Defendant.

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INDEX NO. 57257/2024

DECISION/ORDER
Motion Seq. 1

EVERETT, J.

Upon consideration of the papers filed in the New York State Courts Filing System (NYSCEF) Doc Nos. 6-22, relative to the motion by plaintiff for summary judgment on its first cause of action for ejectment, the Court determines as follows:

In this ejectment action, the complaint states that on June 3, 2022, defendant sold plaintiff 99-101 Ash Street, Yonkers, in Westchester County (property); that the parties entered a "Post Closing Possession Agreement (Agreement) to allow Faten Hussein (Hussein) to remain in possession of one apartment unit from June 3, 2022 to October 31, 2022, when with "Time Being of the Essence," Hussein was to vacate the property; that $200,000 of the sale price was to be held in escrow, and if Hussein did not vacate, plaintiff would be permitted to recover $300 per day, as liquidated damages; that the Agreement states there is no landlord-tenant relationship and in any action initiated pursuant to said agreement, the prevailing party would be entitled to recover reasonable attorney fees, costs and expenses; that Hussein has remained in possession of the unit.

The complaint consists of three causes of action – ejectment, liquidated damages, and costs and expenses in prosecuting this action, including attorney fees.

In the affirmation is support (NYSCEF Doc No. 7), plaintiff's attorney adds that on March 31, 2022, defendant and 633 West 185 LLC entered into an agreement to sell the property to 633 West 185 LLC; that in a rider to the sale agreement, it was stated that the property would be delivered free of any tenancies; that defendant entered into a relocation agreement whereby 633 West 185 LLC would pay twelve months of rent in a one-bedroom apartment at $2,500 per month; that 633 West 185 LLC assigned the contract to plaintiff, which closed on the sale of the property with defendant; and that there is no question plaintiff owns the property; that the intention was not to pay Hussein moving expenses, but to pay $2,500 per month to defendant's landlord after she moved; and that if Hussein expected to receive payment instead of the landlord, the remedy was to sue for non-payment, if owed. In her affidavit (NYSCEF Doc No. 8), plaintiff's principal avers that plaintiff purchased the property and Hussein has continued to reside in the unit past the October 31, 2022, vacate date.

In opposition (NYSCEF Doc No. 18), pro se Hussein explains that "[i]n March of 2022 [she] entered into an agreement with Nathan and Aron through the company that they represented as members/principals of 633 West 185 LLC for $1,550,000; that she was ill-treated by plaintiff's representatives, who borrowed $350,000 cash from her without giving a receipt; that the $350,000 was loaned to her by her brother to relocate; that the loan from her brother is evidenced by promissory notes from Hussein to her brother; that the funds from the sale were distributed to her siblings, with a portion for her; that she "never knew or agreed, that 633 West 185 LLC could tum around and sell the property immediately after my selling it to them"; that she was to receive the relocation fee; that she did not sign the Agreement; that she has emails showing the $350,000 debt;

that her property was put in storage and eventually was gone; that she involved the police; and that she wants to move, but needs the money borrowed and relocation fee. Defendant concludes:

> I thought after my divorce 1 would be able to enjoy my life. Instead, it is a nightmare. Every day I go home to terrorists.
> They have wasted two years of my life with this mess. I am not a well woman, they are killing me. Somedays I am so afraid, I believe they are trying to scare me to death. I would like to see that the money owed to me, is paid to me, so I can get these false "sons" out of my life. I am appealing to the court for help in dealing with these malicious characters who are swindling my money and my future.

In reply (NYSCEF Doc No. 21), plaintiff's attorney notes that defendant's opposition was filed late; that her opposition statement is "replete with untruths"; that there was a contract deposit, contrary to defendant's claim; that there is no evidence regarding the alleged loan; that in accordance with the contract, the property was to be free from tenants and 633 West 185 LLC had the right to assign the contract; that it was Hussein's responsibility to read and understand the contract; that Hussein was represented by counsel, who signed the contract, even if she contends that riders were not attached to the contract; that, although Hussein was not present at the closing, her attorney attended with a power of attorney; that Hussein signed the deed, which may have been done prior to the closing and delivered by her attorney, as well as the post possession agreement, which called for a $200,000 escrow; that the relocation money is not due and if it were paid to Hussein she could still refuse to move and the money would be lost; that there is no evidence of a $350,000 loan, rather Hussein was to receive $343,000 from the sale, $200,000 of which is in escrow; and that it is believed the remaining $143,000 is being held in escrow by Hussein's attorney.

Plaintiff's attorney concludes:

> The Defendant's arguments only touch on the Defendant's right to be there. However, said arguments are without merit because the only document that actually gave the Defendant any right to occupy the property post closing was the post possession agreement, which as shown herein, was properly entered, and even if it

> was not, the lack of an agreement would not provide the Defendant any right to the property.

Summary Judgment

Summary judgment is appropriate when there are no genuine triable issues of material fact between the parties and the movant is entitled to judgment as a matter of law (CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 326-327 [1986]). The movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A defendant's prima facie showing is governed by the allegations of liability made in the plaintiff's pleadings (*see Wald v City of New York*, 115 AD3d 939, 940 [2d Dept 2014]). To defeat a motion for summary judgment, the opposing party must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*Zuckerman v City of New York*, 49 NY2d at 562; *Moore v 3 Phase Equestrian Ctr., Inc.*, 83 AD3d 677, 679 [2d Dept 2011]).

Ejectment

> In *City of New York v Anton* (169 AD3d 999, 1001 [2d Dept 2019]), the Court explained:
>
> To demonstrate entitlement to judgment on a cause of action for ejectment, a plaintiff must establish "(1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate" (*RPAI Pelham Manor, LLC v Two Twenty Four Enters., LLC*, 144 AD3d 1125, 1126 [2016]).

Partial Performance (General Obligations Law § 5-703 [4])

In *Burns v McCormick* (233 NY 230, 232 [1922]), the Court reviewed part performance and oral agreements, as follows:

> Not every act of part performance will move a court of equity, though legal remedies are inadequate, to enforce an oral agreement affecting rights in land. There must be performance 'unequivocally referable' to the agreement, performance which alone and without the aid of words of promise is unintelligible or at least extraordinary unless as an incident of ownership, assured, if not existing.

> 'An act which admits of explanation without reference to the alleged oral contract or a contract of the same general nature and purpose is not, in general, admitted to constitute a part performance' (*Woolley v. Stewart*, 222 N. Y. 347, 351). What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done.

The Court in *Rose v Spa Realty Assoc.* (42 NY2d 338, 341 [1977]) stated: "Partial performance of an oral agreement to modify a written contract, if unequivocally referable to the modification, avoids the statutory requirement of a writing. Moreover, when a party's conduct induces another's significant and substantial reliance on the agreement to modify, albeit oral, that party may be estopped from disputing the modification notwithstanding the statute."

"Codified in New York's General Obligations Law, section 5-703 (4), the doctrine of part performance is based on principles of equity, and, specifically, recognition of the fact that it would be a fraud to allow one party to a real estate transaction to escape performance after permitting the other party to perform in reliance on the agreement (*Walter v Hoffman*, 267 NY 365; *McKinley v Hessen*, 202 NY 24, rearg denied 202 NY 587). Part performance alone, of course, is not sufficient. The performance must be unequivocally referable to the agreement (*Burns v McCormick*, 233 NY 230, 232; *Woolley v Stewart*, 222 NY, *supra*, at 351)." (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999].)

Fraud

In *Cash v Titan Fin. Servs., Inc.* (58 AD3d 785, 788 [2nd Dept. 2009]), the Court set forth the elements of fraud: " '[T]o establish a prima facie case of fraud, the plaintiff must establish (1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations' (*Giurdanella v Giurdanella*, 226 AD2d 342, 343 [1996])." The Court asserted that the plaintiffs' cause of action alleging fraud appeared to be one

of fraud in the factum rather than fraud in the inducement, since the plaintiffs were claiming they were misled by the defendants to sign certain documents which turned out to be of an entirely different nature and character from what they thought they were signing. The Court did note that a party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a document on the ground that he or she did not read it or know its contents. However, the Court recognized that there are situations where an instrument will be deemed void because the signer was unaware of the nature of the instrument being signed, such as where "the signer is illiterate, or blind, or ignorant of the alien language of the writing, and the contents thereof are misread or misrepresented to him by the other party, or even by a stranger."

Liquidated Damages

Generally, the parties to an agreement have the right to agree to liquidated damages provided the agreement is neither unconscionable nor contrary to public policy. A liquidated damages clause is deemed contrary to public policy and unenforceable when its purpose is not to compensate the injured party for breach but, rather, to impose a penalty on the breaching party by requiring payment of a sum of money grossly disproportionate to the sum of actual damages (*see Truck Rent-A-Ctr. v Puritan Farms 2nd* (41 NY2d 420, 424 [1977]).

Late Filing

CPLR 2001 provides:

> At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

(*See Ruffin v Lion Corp.*, 15 NY3d 578, 582-583 [2010].)

Here, the Court will overlook the late filing by Hussein as no substantial right has been violated, nor any prejudice shown.

Conclusion

While plaintiff does make a prima facie case of entitlement to summary judgment, Hussein raises questions of fact regarding the sales transaction and the intent of the parties regarding her possession of the unit. Plaintiff's partial performance in allowing Hussein to remain in residence supports her allegations that plaintiff's principals agreed to take care of her. While the date she was to vacate was October 31, 2022, this action was not commenced until February 15, 2024, relying on a $300 per day penalty for holding over, depleting the sum Hussein was to receive from the sale. There is a question of fact as to whether Hussein would have agreed to the liquidated damages had she understood the provision, which appears to provide for an impermissible penalty under the circumstances. In light the issues raised, summary judgment for ejectment cannot be granted.

The remaining contentions do not require a different result.

Accordingly, it is,

ORDERED that plaintiff's motion for summary judgment on the first cause of action for ejectment is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 19, 2024

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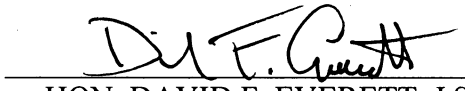

HON. DAVID F. EVERETT, J.S.C.

Filed in NYSCEF