

Wieder v Bracero
2025 NY Slip Op 35542(U)
February 10, 2025
Supreme Court, Rockland County
Docket Number: Index No. 031776/2023
Judge: Rachel E. Tanguay
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
SIMY WIEDER and YOM TOV LIPA WIEDER,

Plaintiffs,

-against-

EDWIN BRACERO,

Defendant.

-----X
Rachel E. Tanguay, J.S.C.

DECISION & ORDER

Index No.: 031776/2023

Motions # 1 and 2

The following papers, NYSCEF documents numbered 45-84 and 86-87 were considered in connection with Plaintiffs' Notice of Motion for an Order (Motion #1), pursuant to CPLR § 3212, granting summary judgment on their first and second causes of action for specific performance and breach of contract and for such other relief as this Court deems just and proper; and Defendant's Notice of Cross-Motion for an Order (Motion #2), pursuant to CPLR § 3212, dismissing Plaintiffs' Complaint in its entirety with prejudice, entering judgment in Defendant's favor on the counterclaim for breach of contract, and cancelling and discharging Plaintiff's Notice of Pendency, and for such other relief as this Court deems just and proper.

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff on April 24, 2023 with the filing of the Summons and Complaint through the NYSCEF system. NYSCEF Doc. 1. Issue was joined as to Defendant, through the NYSCEF system on June 2, 2023. This action arises out of alleged contract dispute. Plaintiff alleges that on or about March 29, 2022, Plaintiffs and Defendant entered into a written contract (the "Contract"), wherein Defendant agreed to sell and convey to Plaintiffs real property, located at 76 Hillside Avenue, Orangetown, New York 10965 (the "Subject Property"). Plaintiffs were aware that the property was occupied when they entered into the Contract; however, Plaintiffs

aver that the Contract required Defendant to deliver the Subject Property free of occupants. After securing the proper financing and despite almost a year of attempting to close, even agreeing to close subject to the tenants, Defendants refused to close. Plaintiffs argue that on February 10, 2023, Defendant attempted to anticipatorily breach the contract by indicating a desire to return Plaintiffs' deposit, claiming that they were unable to deliver the Subject Property vacant, and cancel the contract.¹ They further allege that there was no basis within the contract that would permit Defendant to cancel the contract for this reason.

Plaintiffs' instant motion (Motion #1) was filed on October 29, 2024, seeking summary judgment for specific performance in their favor, pursuant to CPLR § 3211. In support of the motion, Plaintiffs submit documentation, including the Contract (NYSCEF Doc. 48), Defendant's deposition transcript (NYSCEF Doc. 49), and Plaintiffs' deposition transcripts. NYSCEF Doc. 53. Plaintiffs claim that Defendant's deposition testimony is contrary to what was communicated to Plaintiffs by his counsel. Specifically, Defendant was clear that the tenants agreed to move once the deal closed, whereas Defense counsel claimed that Defendant tried to cancel the contract because the tenants were still living in the property despite taking all steps to have the tenants vacate prior to closing. NYSCEF Doc. 49.

On November 16, 2024, Defendant filed opposition to Motion #1 and a Notice of Cross-Motion (Motion #2) for summary judgment seeking an Order, pursuant to CPLR § 3211, dismissing Plaintiffs' Complaint in its entirety with prejudice, entering judgment in Defendant's favor on the counterclaim for breach of contract, and canceling and discharging Plaintiffs' Notice of Pendency. In support of the motion, Defendant submits documentation, including the Contract (NYSCEF Doc. 48) and the Assignment in Interest in Contract of Sale, dated May 9, 2022

¹ Plaintiffs allege that the tenants were month-to-month tenants.

(NYSCEF Doc. 62). Defendant argues that he was not in breach of the Contract. He avers that around the time the Contract was executed, he rented the Subject Premises to friends of his family. He had informed them that they would have to vacate once a closing date was set which, pursuant to the Contract, projected to be in or about May 2022. Defendant avers that he was never informed that a firm closing date had been set and was never provided a firm mortgage commitment from Plaintiffs. Defendant claims that the only thing he received from Plaintiffs was a pre-approval or pre-qualification letter. NYSCEF Doc. 52.

Defendant further alleges that he heard nothing further until January 2023, when his real estate attorney, Ivonne Santos, received a letter from Plaintiff's attorney declaring that he was in default of the Contract. NYSCEF Doc. 50. At this time, Defendant instructed his attorney to return the down payment to Plaintiffs. Despite Plaintiffs' insistence that he sell the property to them, Defendant claims that Plaintiffs have never demonstrated that they were ready, willing and able to purchase the Subject Premises. Additionally, Defendant claims that Plaintiffs assigned the Contract to a limited liability company in violation of the terms of the Contract which requires written consent from Defendant prior to any assignment. NYSCEF 48, 61.

On November 26, 2024, Plaintiffs filed an Affirmation in Opposition to the Cross-Motion (Motion #2) and in Reply (Motion #1). Plaintiffs argue that they have met their *prima facie* burden of establishing entitlement to specific performance and that Defendant fails to raise a triable issue of fact. Defendant relies on flawed arguments in an attempt to avoid summary judgment. Plaintiffs aver that the failure to close by the "on or about" date in the Contract holds no weight since the Contract did not stipulate to a "time is of the essence" closing date, nor did either side issue such a letter. Plaintiffs claim that by submitting their mortgage commitment, financial submission thereto, and the affirmation from Plaintiff Simy Wieder's cousin affirming his ongoing willingness

to lend Plaintiffs money to bridge the gap between the financing amount and the purchase price, they clearly demonstrated their readiness, willingness, and ability to close.²

In addition to Plaintiffs' argument that through submission of documentary evidence they have proven their entitlement to specific performance, they argue that Defendant has not proven his entitlement to dismissal of the Complaint. Plaintiffs argue that the failure to close does not put them in breach of the Contract since Defendant never served a "time is of the essence" letter or otherwise advised them of a closing date. Further, Defendant's allegation as to the assignment of the Contract is nothing more than "classic misdirection." Plaintiffs' attempted assignment of the Contract is not a material breach and is resolved under the terms of the Contract. The relevant language in the Contract states that "any purported assignment made without such consent shall be void." NYSCEF Doc. 49. Given Defendant's claim that he did not consent to an assignment, Plaintiffs' attempted assignment would thus be void, rather than result in a breach of Contract.

On December 5, 2024, Defendant filed a Reply to Motion #2. Defendant argues that Plaintiffs have failed to provide evidentiary proof in admissible form sufficient to require a trial of questions of fact. They claim that Plaintiffs have acted in bad faith throughout the pendency of the contract, as well as the litigation itself, especially in regard to the 123 Funding LLC.³ Defendant argues that the alleged mortgage commitment letter submitted by Plaintiff was wholly insufficient and could not be considered a mortgage commitment. Further, Plaintiffs' failure to declare "time is of the essence" is fatal to their claim for specific performance.

Defendant notes that Plaintiffs' refusal to provide an authorization to their lender, 123

² Plaintiffs argue that even if this Court were to accept Defendant's position that the mortgage commitment was nothing more than a prequalification letter, additional documentation was submitted, including an authorization for Defendant's to communicate with Plaintiffs' lender, establishing their financial ability to close.

³ Defendant alleges that Plaintiff has failed to address the discrepancy between "123 Funding LLC" and "123 Funding, LLC," the latter of which is a Delaware LLC not authorized to do business in New York.

Funding LLC, to provide the mortgage application, resulted in Court intervention directing that Plaintiffs provide the authorization. Counsel for Defendant claims that after multiple attempts at communication, she spoke with Alex Weisz, President of 123 Funding LLC, who informed her that his company only lends to limited liability companies. However, Mr. Weisz refused to confirm same in writing.

Legal Analysis

In deciding a motion for summary judgment, the Court's role is solely to determine whether triable issues of fact exist, not to decide those issues. F. Garofalo Electric Co. v. New York Univ., 300 A.D.2d 186, 754 N.Y.S.2d 227 (1st Dept. 2002). This is because the remedy of summary judgment is a drastic one and it should only be granted when it is clear that no triable issue of material fact exists. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); Andre v. Pomeroy, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003); see Alvarez, *supra*.

Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. Alvarez, *supra*. The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. Dowsey v. Megerlan, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dept. 1986); Gitlin v. Chirkin, 98 A.D.3d

561, 949 N.Y.S.2d 712 (2d Dept. 2012). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even “arguable”, the motion must be denied. Phillips v. Kantok & Co., 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982); Andre, *supra*.

“The elements of a cause of action for specific performance of a contract [for the sale of real property] are that the plaintiff substantially performed its contractual obligations and was [ready,] willing, and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law.” Finkelstein v. Lynda, 166 A.D.3d 948, 949, 88 N.Y.S.3d 225 (2d Dept 2018) (internal citations omitted). “Any evidence of a breach or repudiation of the contract by the seller would not obviate the plaintiff’s obligation to establish that he was ready, willing, and able to close as of the closing date.” Id. at 949 (internal citations omitted). Further, “in moving for summary judgment on a complaint seeking specific performance of a contract, the plaintiff purchaser must submit evidence demonstrating financial ability to purchase the property in order to demonstrate that it was ready, willing, and able to purchase such property.” Ashkenazi v. Miller, 183 N.Y.S.3d 185, 188, 190 A.D.3d 668 (2d Dept. 2021).

In Motion #1, the burden is on Plaintiff to establish *prima facie* entitlement to judgment as a matter of law with sufficient evidence to eliminate any material issues of fact. Plaintiffs argue that their mortgage commitment, financial submission thereto, and the affirmation from Plaintiff Simy Wieder’s cousin affirming his ongoing willingness to lend Plaintiffs money to bridge the gap between the financing amount and the purchase price is *prima facie* proof of their readiness, willingness, and ability to close. However, a review of the commitment letter Plaintiffs sent to Defendant indicates that while signed by a purported lender, it simply states that funding up to an amount certain has been approved provided the transaction is completed no more than ninety (90)

days from the letter, dated May 12, 2022. There is no further evidence that it was in accordance with the terms of the Contract. In addition, the affirmation from Plaintiff's cousin regarding his willingness to lend money to bridge the gap between the financing amount and purchasing price is unsubstantiated by documentation proving the ability to do so.

In an analogous matter, the Second Department held that a Plaintiff purchaser whose: (i) commitment letter was deemed insufficient as it was not signed by a lender and did not include evidence that it was accepted in accordance with the terms of the contract; and (ii) who had a companion provide a sum of money towards the purchase without any documentary evidence proving such, were insufficient to establish that they were ready, willing, and able to close, and thus insufficient to establish entitlement to judgment as a matter of law in an action for specific performance. Chernow v. Chernow, 39 A.D.3d 684, 686, 833 N.Y.S.2d 660 (2d Dept. 2007). While, in the instant matter, the commitment letter was signed by a lender, whether the lender is one that only loans to LLC's or also loans to individuals has not been established. As such, the Court finds that Plaintiffs have not sufficiently established, *prima facie*, that they were ready, willing, and able to close and, therefore, have not established entitlement to judgment as a matter of law on a cause of action for specific performance.

As to Plaintiffs' cause of action for breach, on the basis of Defendant's alleged anticipatory breach of contract, Plaintiffs argue that Defendant testified that he never attempted to have the tenants vacate the property and was waiting until he had a closing date to tell them to vacate. Plaintiffs claim this is in violation of the clause in the contract wherein they promised to deliver the Subject Premises vacant and broom clean, at closing. The Court notes that Defendant's deposition testimony is in direct contradiction to the email Plaintiff's counsel received from counsel for Defendant indicating that Defendant was in the process of trying to get the tenants to

vacate. Plaintiffs argue that Defendant's testimony and his February 10, 2023 letter attempting to cancel the contract is sufficient to establish anticipatory breach of contract. Case law is clear that "a purchaser who seeks specific performance of a contract for the sale of real property must demonstrate that he or she was ready, willing, and able to perform the contract, regardless of any anticipatory breach by a seller." Fridman v. Kucher, 34 A.D.3d 726, 717, 826 N.Y.S.2d 104 (2d Dept. 2006). The Court has already found that Plaintiffs have not established entitlement, prima facie, to judgment as a matter of law on the basis of the readiness, willingness and ability to perform the contract standard and, as such, need not address the alleged anticipatory breach of contract. The Court finds that Plaintiffs have not met their burden of proof and, as such, the burden never shifts to Defendant to demonstrate the existence of a material issue of fact. Plaintiffs' Motion for Summary Judgment (Motion #1) is denied in its entirety.

The Court now turns to Defendant's Cross-Motion for Summary Judgment (Motion #2) seeking an Order, pursuant to CPLR § 3211, dismissing Plaintiffs' Complaint in its entirety with prejudice, entering judgment in Defendant's favor on the counterclaim for breach of contract, and canceling and discharging Plaintiffs' Notice of Pendency. "A defendant seller moving for summary judgment dismissing a cause of action for specific performance of a contract for the sale of real property has the burden of demonstrating the absence of a triable issue of fact regarding whether the plaintiff buyer was ready, willing, and able to close." Schnob v. Calla, 228 A.D.3d 894, 895, 215 N.Y.S.3d 113 (2d Dept. 2024) (internal citations omitted). "The defendant seller must [also] demonstrate, prima facie, that the plaintiff buyer was in default." Id. at 895 (internal citations omitted) (brackets added); *see also* Ashkenazi, 138 N.Y.S.3d at 188.

In the instant matter, the Court finds that Defendant did not meet its burden of proving that no triable issues of fact exist regarding whether Plaintiffs were ready, willing, and able to close.

Defendants argue that Plaintiffs' commitment letter was insufficient to establish readiness and adequate financial documentation was never provided. This remains a material question of fact to be determined at trial. As such, Defendant's motion to dismiss Plaintiffs' Complaint is denied.

As to Defendant's motion for judgment on the counterclaim for breach of contract, Defendant "must establish that [he or she] was ready, willing and able to perform on the time-of-the-essence closing date, and that the purchaser failed to demonstrate a lawful excuse for [his or her] failure to close." Sweeney v. Stark, 190 N.Y.S.3d 140, 145, 216 A.D.3d 1193 (2d Dept. 2019). Similar to Plaintiffs, Defendants did not establish that they were ready, willing, and able to perform on a time-of-the-essence closing date. While the issue of whether Defendant took actual steps to attempt to vacate the tenants from the Subject Premises is an issue of material fact, Defendant never got the tenants out and, as such, the property was never fully vacant, as required under the Contract. The Court finds that Defendant has not met its burden for establishing judgment on the breach of contract counterclaim. Any other contentions are either moot or without merit and need not be addressed by the Court.

Accordingly, it is hereby

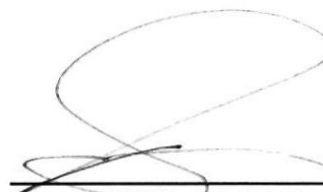
ORDERED that Plaintiffs' Notice of Motion for an Order (Motion #1), pursuant to CPLR § 3212, granting summary judgment on their first and second causes of action for specific performance and breach of contract is DENIED in its entirety; and it is further

ORDERED that Defendant's Notice of Cross-Motion for an Order (Motion #2), pursuant to CPLR § 3212, dismissing Plaintiffs' Complaint in its entirety with prejudice, entering judgment in Defendant's favor on the counterclaim for breach of contract, and cancelling and discharging Plaintiff's Notice of Pendency is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear for a compliance conference on **February 13, 2025 at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motions #1 and 2.

Dated: New City, New York
February 10, 2025

A handwritten signature in black ink, appearing to read 'R. Tanguay', is written over a horizontal line.

HON. RACHEL E. TANGUAY
Justice of the Supreme Court

TO: (all parties via NYSCEF)