

2015 NY Slip Op 31427(U)

**SJSJ Southold Realty, LLC, Plaintiff(s),**

**v.**

**Elizabeth Fraser, as Executrix of the Estate of Mary Adamowicz, Deceased, and Michael Adamowicz, Defendant(s).**

Docket No. 27515/2004, Motion Sequence Nos. 006 MD, 009 MG.

**Supreme Court, Suffolk County.**

July 30, 2015.

RALPH T. GAZZILLO, Judge.

It is

**ORDERED** that this motion by the plaintiff for an order, pursuant to CPLR § 3212 is denied, and it is further

**ORDERED** that this cross motion by the defendants for an order pursuant to CPLR § 3212 is granted in its entirety, and the plaintiffs complaint is dismissed, and it is further

**ORDERED** that in accordance with the stipulation of the parties forwarded to the Court on October 1, 2014, the caption is amended to included Deborah Adamowicz as the Preliminary Executrix of the Estate of Michael Adamowicz, and it is further

**ORDERED** that the plaintiffs application for judicial notice of certain exhibits is denied without prejudice to renewal before the trial court, and it is further

**ORDERED** that counsel for defendants shall serve a copy of this Order with Notice of Entry upon the counsel for all other parties pursuant to CPLR §§ 2103(b)(1), (2) or (3) within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

This is an action seeking specific performance and/or damages based upon the alleged breach of a contract of sale for vacant real property located in Peconic, New York. The parties herein stipulated to the following facts: The subject of the litigation is a parcel of real property located at 29575 County Road 48 (a.k.a. Middle Road). The property is unimproved and is comprised of approximately 52 acres. The property was purchased on August 14, 1986 by Michael Adamowicz and Mary Adamowicz, his wife, and Michael Adamowicz III as tenants in common.

Michael Adamowicz died on October 29, 1990 and devised his interest in the property to his wife Mary Adamowicz. In October of 2001 the property was appraised for \$2,660,000.00. In March of 2002 Mary Adamowicz passed away leaving a Last Will and Testament dated September 1, 1999. A probate petition was filed with the Surrogate's Court Suffolk County on or about March 22, 2002. The Probate Petition filed by the Estate indicated that Mary Adamowicz owned 50% of the subject property. In April 9, 2002 letters testamentary were issued to Elizabeth Fraser and Michael Adamowicz as co-executors of the Estate. The Executors retained Frederick Sembler, Esq. to prepare the Estate tax return form 706.

Pursuant to 26 USC § 6324, upon the death of Mary Adamowicz, an automatic federal tax lien in favor of the IRS arose by operation of law over the property of the Estate and including the subject property. Pursuant to § 982 of the New York State Tax Law, upon the death of Mary Adamowicz, a New York State Estate tax lien in favor of the New York State Department of Taxation and Finance arose by operation of law over the property of the Estate, again including the subject property.

In April 2002, the Estate and Jan Burman entered into the following contracts of sale for the purchase and sale of other land, owned in whole or in part by the Estate: 1) 154 Marine Street a.k.a 153 Allen Boulevard, 2) 160 Marine Street a.k.a 155 Allen Boulevard, 3) 120-160 Adams Boulevard. On or about October 28 and 29, 2002 the Estate obtained a certificate discharging the federal and state estate tax liens for each of the above listed properties.

Thereafter on or about May 29, 2003, the Estate filed the estate tax return for the Estate of Mary Adamowicz, which reported that approximately 6 million dollars in estate taxes due. The Estate reported on its Federal estate tax return that the decedent owned 50% of the subject property. The Estate has previously paid approximately 2.9 million in federal estate taxes and elected on Form 706 to defer payment of the remaining tax liability by electing to make annual installments as permitted under § 6166 of the IRS Code. That section allows an estate to pay interest only for four years and then to pay off the balance of the tax liability over a 10 year term if more than the 35% of the adjusted gross estate consists of closely held businesses. At the time that the Estate tax return was filed in 2003, IRS Manual, § 4.25.1.4.9(1) provided that: "[t]he Services requires estates to furnish a surety bond as a prerequisite for granting the installment payment election. Instead of furnishing a surety bond, the estate may choose to elect the special lien provided for in IRC 6324A that requires the estate to have a lien placed on a specific property. The property must have a value equal to the total deferred tax plus four years of interest and must be expected to exist until the entire tax is paid."

In July 2003 the Estate filed a "Lists of Assets-Inventory" with the Suffolk County Surrogate's Court which states that the decedent owned 50%, or one half, of the subject property. On or about August 25, 2003, the IRS sent a letter to the defendants advising them that the IRS requires estates election pursuant to § 6166 to "furnish a surety bond or a § 6324A lien having a value equal to the total deferred tax plus four years of interest. The lien must be expected to exist until the entire tax is paid. A bond or lien is also required for the QFOBI."

On or about December 23, 2003 a draft contract of sale was conveyed to the defendants to the plaintiff. An audit of the Estate was triggered and Susan LeBoff of the IRS was assigned to the case as the IRS Examiner. On January 14, 2004, Leboff sent a letter to the Estate stating that she was assigned to the audit of the Estate tax return and to evaluate the Estate's 6166 election. She requested various documents in connection with same. On January 27, 2004 defendants sent plaintiff an amended proposed contract of sale.

On or around February 4, 2004, plaintiff **SJSJ** returned an executed contract of sale to the Estate with a check for the downpayment of \$100,000.00. On March 9, 2004, Sembler met with Leboff in his office to review documents. Leboff advised Sembler that in order to obtain the IRC 6166 election, the Estate would have to provide security in the form of a bond or lien. On March 9, 2004, plaintiff sent a replacement downpayment check of \$100,000.00 payable from **SJSJ** Southold Realty, LLC. On March 16, 2004, defendant's attorney Lee Aitken sent the defendants a corrected first page of the contract which corrected the seller from being the Estate of Mary Adamowicz to Estate of Mary Adamowicz and Michael Adamowicz as tenants in common. On or about March 18, 2004, the defendants executed a contract of sale to sell the subject property to **SJSJ** Southold Realty, LLC for 2,350,000.00. At all times relevant to the action, the principals of **SJSJ** Southold Realty, LLC have liquid assets of over \$20,000,000.00 and were ready, willing and able to pay the purchase price to the defendants.

On or about March 29, 2004, the plaintiff obtained a title report for the subject property from Commonwealth Land Title Insurance Company. By letter dated April 9, 2004, Sembler, on behalf of the defendants, requested the IRS to discharge the Federal estate tax lien on the subject property. On or about April 15, 2004, Sembler wrote a letter to Leboff enclosing a chart he had prepared calculating the percentage of deferred tax liability attributable to the subject property, which he calculated to be \$310,555.06. Thereafter, by letter dated April 22,

2004, counsel for the plaintiff requested that, prior to the closing, the defendants remove exceptions contained in the title report numbered 1, 2, 11, 12, 13, 15, 17 and 18 contained on Schedule B of the report. The relevant exceptions that the plaintiff demanded be removed as it relates to the Estate were 1 and 11. Specifically, exception #1 required the removal of all "taxes, tax liens, tax sales, water rates, sewer and assessment set forth in schedule herein". Exception 11 required "proof of payment of New York Estate taxes, proof of payment of Federal taxes, proof of payment of payment of enumerated legacies (there were 16 specific legacies listed in the title report).

On or about April 27, 2004 Leboff wrote to Sembler confirming that the IRS requires estates making the 6166 election to "furnish a surety bond or a section 6324A lien having a value equal to the total deferred tax plus four years of interest". The letter also enclosed a blank form of a special lien. The April 27, 2004 letter also stated "at this time, I am giving you the opportunity to advise us in writing whether your clients agree to furnish one of the forms of security referred to above. If we do not have written acknowledgment of your acquiescence to the placement of a 6166 lien within the next three weeks, I will immediately proceed to disallow the deferral of taxes and an interlocutory-type appeal can be taken on the issue. Pending your answer to this letter, it is not possible to release any lien on estate property being sold in the absence of the payment of the tax allocable to such property. If you agree at this time to permit the eventual furnishment of the lien or bond, the actual processing of the lien or bond will take place as the audit is concluding. A sample copy of the lien agreement that will be entered into is attached to this letter for your reference."

Thereafter, on or about May 6, 2004, the due diligence period under the contract was adjourned at the request of the plaintiff until June 6, 2004. The closing date was also adjourned for another 30 days until August 1, 2004. Sembler responded to the IRS's April 27, 2004 letter on May 17, 2004. He stated his understanding that the Estate could obtain a discharge of the lien by either accepting a separate lien with respect to the estate taxes deferred under IRS Code § 6166 or paying the IRS a proportionate share of the deferred estate tax attributed to the subject property (which Sembler calculated to be \$310,555.07). On May 2, 2004, Leboff called Sembler and advised that the IRS would discharge the lien on the subject property if the Estate entered into an escrow agreement. On June 7, 2004 the plaintiff requested and received a further extension of the due diligence period for 30 days, to July 6, 2004 and another extension of the closing date to September 1, 2004. On June 9, 2004 Sembler wrote to Leboff about the certificate discharging the lien and on June 10, 2004 Leboff. On June 10, 2004 Leboff faxed Sembler a draft Escrow Agreement which proposed to transfer the estate tax lien from the property to escrowed proceeds of the sale after the closing. Sembler objected to the terms of the proposed Escrow Agreement stating that "the Service should honor its previous commitment to issue as certificate discharging the federal estate tax lien on the decedents interest in the Peconic parcel in return for the proportionate payment of the federal estate taxes that have been deferred in connection with the parcel.

Thereafter, around July 1, 2004 the IRS proposed to disallow the Estate's 6166 election. By letter dated July 2, 2004, Sembler wrote to the IRS requesting a response on the discharge of the tax lien because the Estate had to inform the prospective purchaser whether the tax lien would be released since the purchaser was expending funds to prepare for a closing. On July 7, 2004 the plaintiff requested another extension of the due diligence period to August 7, 2004 and another 30 day extension of the closing date to October 1, 2004. Sembler then wrote to Leboff to confirm that IRS position that it would not release the estate tax lien upon receipt of payment in the amount proportionate amount of estate taxes due on that property. Sembler then advised Leboff that the Executors would inform the buyers of IRS's position which would preclude them from conveying clear title to the subject parcel and based upon that, he expected the buyers to cancel the contract.

On July 29, 2004. Sembler advised the buyers that the IRS was unwilling to grant a release of the lien and asked how the plaintiff wished to proceed. In addition, the Estate filed an administrative appeal of the IRS's denial of its 6166 election. On August 12, 2004, defendants wrote to the plaintiff advising that they could not deliver clear title and that, as such, they were cancelling the contract and returning the downpayment. On August 18, 2004, plaintiffs counsel wrote to Lee Aitkin, Esq. requesting confirmation of the IRS's position, returning the downpayment check and indicating that he believed the contract was still "in full force and effect." By letter dated September 28, 2004 plaintiffs counsel requested a closing and/or meeting with the defendants. Ultimately, on October 25, 2004 plaintiff proposed having a closing and keeping the Estate's one-half of the proceeds in escrow in order to pay the taxes pursuant to section 13 of the Contract of Sale. The defendants refused. On November 9, 2004, Aitken wrote to the defendants conveying potential solutions to the issue.

Unable to resolve the issues, on November 23, 2004, plaintiff commenced the instant action seeking specific performance and in the alternative return of the downpayment together with \$5,000,000.00 in damages and to foreclose on an equitable lien. Thereafter defendants' counsel took the divided the downpayment in half and deposited it into 2 separate accounts: one for the Estate of Mary Adamowicz and one for Michael Adamowicz. Defendants answered the complaint on January 18, 2004 and interposed counterclaims. An Amended Verified Complaint was served on February 4, 2005 and on February 22, 2005 defendants interposed their Amended Verified Answer and Counterclaims. The plaintiffs Reply to Counterclaims was served on March 3, 2005. On July 21, 2005 Sembler wrote Leboff and filed a complaint on behalf of the Estate and on October 2, 2007 the United States Tax Court issued a decision finding that the Estate had filed a valid 6166 election. On April 20, 2009, the IRS sent the Estate a Notice of Deficiency, alleging a deficiency of over \$25 million dollars. The Estate appealed the Notice of Deficiency to the United States Tax Court and a trial was set and adjourned to April 2, 2012.

The plaintiff now moves for summary judgment against defendants seeking specific performance of the contract of sale between the parties date March 18, 2004. Alternatively, plaintiff seeks an order for partial specific performance to compel Michael Adamowicz to specifically perform the contract of sale and convey his 50% percent interest in the subject property to the plaintiff. In support of its application, the plaintiff argues that it is entitled to summary judgment and an order compelling the defendants to specifically perform the contract since, based upon the stipulated facts, it is clear that the defendants were "unwilling" to close rather than "unable to close. Plaintiff points to the provision of the contract (specifically, Section 13.03) which addresses the disposition of liens requires that the seller discharge all liens, including liens against "corporations, estates, or other persons in the chain of title" arguing that the defendants' unwillingness to close rather than obtain a discharge of the estate tax lien creates a breach of the contract of sale. Plaintiff also asserts that defendants failed to disclose that the Estate had sought an extension of time to file its tax returns and made an 6166 election which required the Estate to pay its tax liability in annual installments and to provide security for those payments to the IRS.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [1990]).

The stipulated facts and the papers submitted reveal that the sole impediment to closing the sale was the estate tax lien that encumbered the property and whether the seller could get the lien removed such that it would not encumber the subject property.

In support of its motion plaintiff asserts that the defendants were unwilling to close rather than being unable and that as such, they were in violation of the contract of sale for the subject property, specifically, Section 13.03 which required the defendants to discharge any liens against the property include estate tax liens. Plaintiff argues that defendants' unwillingness to enter into the escrow agreement so that the lien could be removed resulted in the defendants' breaching the contract by refusing to close. In addition, plaintiff claims that defendants also violated the Section 4.13 which required defendants to disclose "any assessment payable in annual installments, or any part thereof, which has become a lien on the Premises" because it did not disclose the fact that the Estate had elected to pay its estate taxes over ten years. Moreover, plaintiffs cite *S.E.S Importers, Inc. V. Pappalardo*, 53 NY2d 455 as authority for their position that since the estate tax lien expired in March of 2012 and that the Estate has settled the dispute with the IRS such that clear title could be conveyed at the time of the trial, the Court should grant plaintiff summary judgment as a matter of law.

In opposition, the defendants argue that because the estate tax lien was "unquantifiable" and because of an ongoing, lengthy and vociferous dispute with the IRS over the estate tax

and the defendants 6166 election, it could not provide insurable title to the plaintiffs and that the defendants were entitled to cancel the contract and, in addition, that the contract expired by its own terms on October 1, 2004, prior to the commencement of this action. Moreover, defendants argue that paragraph 13 of the rider to the contract gave them the ability to cancel the contract due to its inability to convey clear title, which it asserts that it did pursuant to the letter dated August 12, 2004. In support of this position, the defendants submit copies of all of their correspondence with the IRS concerning the estate tax lien on the subject property including the litigation that defendants entered into with respect to the estate tax lien on the subject property. According to the defendants, the IRS, despite initially agreeing to release the estate tax lien upon receipt of payment of the proportionate amount of estate taxes allocable to the subject property (to wit \$310,555.00) instead required that the defendants enter into an escrow agreement wherein all of the proceeds of the sale of the subject property would be held until the estate tax issues were resolved between the defendants and IRS. Defendants declined to enter into the required escrow agreement and, as a result, the estate tax lien remain on the subject property. When IRS refused to relent on its position with regard to the release of the estate tax lien, defendants filed a claim with the IRS seeking more than 2 million dollars in damages. Thereafter matters apparently went from bad to worse between the IRS and the defendants. According to the defendants, after they communicated their intention to commence an action against the Federal government over the dispute relating to the release of the estate tax lien relative to the subject property, IRS denied the Estate's 6166 election. Defendants appealed the IRS determination to deny the 6166 election. The appeal was denied and in January 2005, the defendants' counsel filed a petition with the United States Tax Court by which the Executors appealed the determination of the Appeals Officer with respect to the Estate's 6166 election. Ultimately, the United States Court of Federal Claims determined that Ms. Leboff did not have the authority to offer a release of the estate tax lien in exchange for the payment of a proportionate amount of the estimated estate tax or for the execution of an escrow agreement.

The sole question to be answered by the Court on these motions is whether the defendants were unable to convey title to the subject property to the plaintiffs and whether, as a result, the contract was lawfully terminated. Here, the Court finds that the plaintiffs are not entitled to specific performance since the defendants could not convey clear title prior to the expiration of the contract of sale and that, as such, they were entitled to cancel the contract when they did on August 12, 2004.

More specifically, despite their diligent efforts, on July 7, 2004, the IRS refused to discharge the estate tax lien that encumbered the title to the subject property. It is undisputed that the estate tax lien was in excess of the purchase price of the subject property. The closing date was adjourned three times with the last extension of plaintiffs due diligence period expiring on August 7, 2004 (which extended the closing date until October 1, 2014). While it is true that the defendants could have complied with the requests of the IRS to enter into an escrow agreement, they were under no contractual obligation to do so since, pursuant to Paragraph 14, Schedule D of pre-printed form of the contract, the defendants were only obligated to expend a maximum of \$23,500.00 to clear title defects. Accordingly, when no other resolution to the issue could be reached (i.e. through the plaintiff accepting title with the estate tax lien in place and/or the payment of \$23,500.00, or accepting title subject to the unquantified lien) defendants returned the downpayment and cancelled the contract. Additionally, since no closing took place and the contract expired by its own terms on October 1, 2004, specific performance is not available.

In order to obtain specific performance, a purchaser must establish that it was ready, willing and able to close pursuant to the terms of the contract (see, Lezell v. Forde, 26 Misc.3d 435). Since the plaintiffs would not accept title with the estate tax lien in place or a reduction in purchase price as set forth in Paragraph 14, Schedule D of the contract of sale, there was no way the purchaser could establish that it was ready, willing and able to close pursuant to the terms of the agreement. It is undisputed that the lien could not be discharged by the payment of money and it remained an objection to title (see, New York Property Holding Corp. v. Rosa, 26 AD3d 186). In addition, the closing time in the contract was not extended beyond the October 1, 2004 deadline. Once the contract of sale was cancelled pursuant to its terms on August 12, 2004 plaintiff lost its right to specific performance (Eckel v. Francis, 5 A.D.3d 719). Even assuming *arguendo* that the defendants August 12, 2004 cancellation of the contract was ineffective, the contracts October 1, 2004 end date concluded the time frame within which the plaintiff could have sought specific performance since the defendants, even as late as October 25, 2004 could not provide clear title to the subject property and were not obligated to accept any of the plaintiffs proposed "solutions" (which were outside the terms of their contract) (see, Gulotta v. Ippolito, 296 AD2d 380).

Although plaintiff argues that S.E.S Inporters, Inc. v. Pappalardo, 53 NY2d 45 requires specific performance based on the removal of the estate tax lien as a cloud on the defendants' title prior to trial, the case is inapplicable where, as in the instant action, the contract of sale was lawfully terminated prior to the commencement of the action (see, Eckel v. Francis, 5 A.D.3d 719). Moreover, since it is clear from the language contained in the contract that the defendant was not obligated to deposit the proceeds of the closing in escrow to clear the title (or to do anything other than reduce the purchase price by \$23,500.00 or which it offered to do), defendants were entitled to cancel the contract pursuant to Paragraph 13 of the rider (see, 101123 LLC v Solis Realty LLC, 23 A.D.3d 107). Allowing plaintiff specific performance here would require the Court modify the terms of an unambiguous contract which is prohibited. "[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 N.Y.2d 562, 569). "When a contract for the sale of real property contains a clause specifically setting forth the remedies available to the buyer if the seller is unable to satisfy a stated condition, fundamental rules of contract construction and enforcement require that we limit the buyer of the remedies for which it provided in the contract of sale." (101123 LLC v Solis Realty LLC, 23 A.D.3d 107, 108.)

The plaintiffs request that the Court take judicial notice of certain exhibits is denied without prejudice to renewal at trial. It is hornbook law that a court may take judicial notice of facts which are notorious or of common knowledge. See, e.g. Prince, Richardson on Evidence § 8 (Farrell 11th ed 1996). Stated otherwise, that it is irrefutable common knowledge within the jurisdiction. As to federal law or laws, but not necessarily case law, the rule is more flexible. *Id.* at § 18. The documents sought to be introduced into the record have no bearing on clear language in the contract which sets forth the remedies available to the parties in the event that clear title could not be conveyed. Moreover, the documents that the plaintiff requested be considered as part of the motion are outside the stipulated factual record.

Accordingly, it appropriate to grant defendants' motion for summary judgment herein.

Submit Judgment on Notice.

**Save trees - read court opinions online on Google Scholar.**