2018 NY Slip Op 01020

PRIMAX PROPERTIES, LLC, PLAINTIFF-RESPONDENT,
v.
MONUMENT AGENCY, INC., MARLENE KERNAN, WATERBURY SQUARE, INC., FORMERLY KNOWN AS 107 RIVER STREET, INC., DEFENDANTS-APPELLANTS, AND PETER C. EARLE, DEFENDANT-RESPONDENT.

1329 CA 16-01844

SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department

Decided on February 9, 2018

PRESENT: SMITH, J.P., CENTRA, CURRAN, AND TROUTMAN, JJ.

KERNAN PROFESSIONAL GROUP, LLP, ORISKANY (JAMES M. KERNAN OF COUNSEL), AND KERNAN AND KERNAN, P.C., UTICA, FOR DEFENDANTS-APPELLANTS.

MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C., ALBANY (SCOTT C. PATON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

WOODRUFF LEE CARROLL, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), dated August 3, 2016. The order and judgment, among other things, granted plaintiff's motion for partial summary judgment on its third and sixth causes of action.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: In 2014, plaintiff, a commercial real estate developer, entered into two separate real estate contracts with the intention of building a Dollar General store in the Village of Oriskany, New York. In the first contract, defendant Peter C. Earle agreed to sell plaintiff his entire parcel of land (hereafter, Earle parcel) in exchange for $190,000. In the second contract, defendant Monument Agency, Inc. (Monument), through its agent defendant Marlene Kernan, agreed to sell plaintiff a portion of a parcel neighboring the Earle parcel (hereafter, Monument parcel) for $10,000. As of March 20, 2015, plaintiff had fulfilled all of its obligations under the contract with Monument and sent Monument a letter indicating that it was ready to close. Plaintiff did not receive any response to that letter nor to any of its repeated phone calls requesting that Monument close on the contract. In April 2015, plaintiff sent two letters to Monument indicating that it remained ready, willing, and able to close, and demanding specific performance of the contract. After receiving no response from Monument, plaintiff filed the instant action against Monument, seeking, inter alia, specific performance of the contract. In its answer, Monument asserted as an affirmative defense that it was unable to close on the contract because the description of the property to be conveyed was incorrect.

Thereafter, plaintiff was forestalled from closing on the Earle parcel because of a claim made by another entity, defendant Waterbury Square, Inc., formerly known as 107 River Street, Inc. (Waterbury), that the Earle parcel was incorrectly described in the contract

between plaintiff and Earle. Specifically, Waterbury stated that it had purchased land at a tax sale in 2014 (hereafter, Waterbury parcel), and that purchase included a portion of the land that Earle was attempting to sell to plaintiff. As a result, plaintiff amended its complaint to include Waterbury and Earle as defendants. Plaintiff then moved for partial summary judgment on its third cause of action, for specific performance of the contract with Monument, and on its sixth cause of action, seeking a declaration as to the location of the boundary line between the Waterbury parcel and the Earle parcel. Supreme Court, inter alia, granted plaintiff's motion, ordered that Monument fulfill its obligations under the contract and issued a declaration that the boundary line between

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the Earle parcel and the Waterbury parcel is the same boundary line as is set forth in the survey of plaintiff's expert surveyor. Waterbury, Kernan and Monument (hereafter, defendants) appeal.

Contrary to defendants' contention, the court properly awarded plaintiff specific performance of the contract with Monument. "To obtain summary judgment for specific performance of a real estate contract, [the] plaintiff must demonstrate that [it] substantially performed [its] contractual obligations and [was] ready, willing and able to fulfill [its] remaining obligations, [and] that [the] defendant was able but unwilling to convey the property' " *(Fallati v Mackey,* 31 AD3d 879, 880 [3d Dept 2006], lv *denied* 7 NY3d 711 [2006]; *see Pasquarella v 1525 William St., LLC,* 120 AD3d 982, 983 [4th Dept 2014]). Here, plaintiff presented evidence establishing that it sent Monument three letters stating that it was ready, willing, and able to close, and that Monument failed to respond to those letters or to close on the transaction. Plaintiff further submitted the affidavit of an expert surveyor, who opined that the boundary line between the Earle parcel and the Monument parcel was the same as described in the contract with Monument. Moreover, plaintiff submitted the affidavit of a title researcher, who reviewed the parcels' deeds, title commitment paperwork, and tax maps, and agreed with the expert surveyor's opinion. Therefore, we conclude that plaintiff met its burden of establishing its entitlement to specific performance of the contract with Monument, and that the burden then shifted to defendants "to produce evidentiary proof in admissible form sufficient to raise a material issue of fact to avoid summary judgment" *(Fallati,* 31 AD3d at 880; *see Bergstrom v McChesney,* 92 AD3d 1125, 1126 [3d Dept 2012]; *see also Piekunka v Straubing,* 149 AD3d 1483, 1483-1484 [4th Dept 2017]).

In response, defendants submitted the affidavit of a title researcher who did not survey the relevant parcels, but who opined that plaintiff's expert surveyor had incorrectly relied on the tax maps of the parcels when conducting his survey. Defendants also submitted the affidavit of their expert surveyor, who did not survey the parcels and offered no criticisms of the work of plaintiff's surveyor. We conclude that, without a competing survey accompanied by an affidavit of a surveyor, defendants failed to raise a triable question of fact *(see Piekunka,* 149 AD3d at 1484; *see also City of Binghamton v T & K Communications Sys.,* 290 AD2d 797, 799 [3d Dept 2002], lv *dismissed* 98 NY2d 685 [2002], *rearg denied* 98 NY2d 728 [2002]; *see generally Bergstrom,* 92 AD3d at 1126-1127), and the court therefore properly granted that part of plaintiff's motion seeking specific performance of the Monument contract.

We reject defendants' further contention that the court erred granting that part of plaintiff's motion seeking a declaration with respect to the boundary line between the Waterbury parcel and the Earleparcel. It is well settled that, "[t]o prevail in a proceeding pursuant to RPAPL article 15, a party must demonstrate good title in itself; it may not rely on the weakness of its adversary's title" *(LaSala v Terstiege,* 276 AD2d 529, 530 [2d Dept 2000]; *see State of New York v Moore,* 298 AD2d 814, 815 [3d Dept 2002]; *see generally*

Mazzoni v Village of Seneca Falls, 68 AD3d 1805, 1806 [4th Dept 2009]). Here, plaintiff established through expert affidavits that Earle had good title to the Earl parcel, as that parcel is described in the Earl contract, and defendants failed to raise a triable issue of fact (see *Bergstrom,* 92 AD3d at 1126-1127; T&K *Communications Sys.,* 290 AD2d at 799).

We have considered defendants' remaining contentions and conclude that they are without merit.

Entered: February 9, 2018

Mark W. Bennett

Clerk of the Court