2018 NY Slip Op 30355(U)

SSJI 176 SKILLMAN LLC, Plaintiff,
v.
MICHELANGELO BAGLIVO AND GIUSEPPE BAGLIVO, AS TRUSTEES OF THE MARIANNA BAGLIVO TRUST
AND AS AUTHORIZED AGENTS OF THE 176 SKILLMAN AVE. LLC, Defendants.

INDEX NO. 513622/2017

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: PART 9

February 27, 2018

NYSCEF DOC. NO. 45

DECISION / ORDER / JUDGMENT
Motion Seq. No. 2 & 3
Date Submitted: 2/8/18
Cal. No. 52
RE: 176 Skillman Ave.
Brooklyn, NY
Block 2755
Lots 15 and 115

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion and defendants' cross-motion for summary judgment

Papers	Numbered
Motion and Cross-Motion and Exhibits Annexed	1-15, 16-30
Reply	31
Other: _____	_____

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

Defendants initially moved, pre-answer, on August 22, 2017, (Mot. Seq. #1) to dismiss the complaint in this action. Plaintiff then amended its complaint and cross-moved (on November 16, 2017) for summary judgment on its amended complaint (Mot. Seq. #2). Defendants then withdrew their motion to dismiss, as it was addressed to the initial complaint, which was by then a nullity, answered the amended complaint and then cross-moved (January 18, 2018) for summary judgment dismissing the complaint (Mot. Seq. #3). For the reasons which follow, the defendants' motion is granted to the extent

provided below, and plaintiff's motion is denied. It is noted that on the date of oral argument, February 8, 2018, the court issued an order, as requested in the "wherefore" clause of defendants' answer, vacating and discharging the notice of pendency filed by plaintiff, as the only relief sought in the amended complaint is the return of the down-payment. See CPLR 6501.

This action was commenced on or about July 13, 2017. The initial complaint (Exhibit J to Mot. #2) had one cause of action, for specific performance of a contract of sale dated on or about November 15, 2016, for real property located at 176 Skillman Avenue, Brooklyn. New York.[1] The contract (Exhibit A) is an "all cash," "as is" transaction and required a down-payment of 5% of the purchase price, in this matter, the sum $112,500, and the designated escrow agent is Sellers' attorneys, Silvagni and Como, PLLC, who were not required to keep the money in an interest-bearing account, and were authorized to keep it in an IOLA account (¶ 27 of the first rider). At the time the contract was executed, the property owner of lots 15 and 115 was "176 Skillman Ave., LLC," subject to a life estate in the grantor, (Marianne aka Anna aka Marianna) Baglivo." Ms. Baglivo passed away prior to the date the contract was executed, as indicated on the death certificate passed up to the court at oral argument. The purchaser in the contract of sale is "SSJI 176 Skillman LLC or an entity to be formed for the purchase," hereinafter "Purchaser." It is noted that while the summons, complaint and contract all specify "SSJI" the entity is actually on file with the Department of State as "SSJL."

Page 3

The contract of sale was signed on the Seller's behalf by Michaelangelo Baglivo and Giuseppe Baglivo, "as Trustees of the Marianna Baglivo Trust and authorized agents of the 176 Skillman Ave, LLC, Seller," hereinafter "Seller."

On November 5, 2017, plaintiff amended its complaint to instead seek rescission of the contract and the return of its down-payment, (plus, as is alleged by plaintiff to be provided for in the contract of sale, interest, costs and attorneys' fees) as a result of defendants' alleged breach of the contract. Defendants did not reject the amended complaint, served an answer (without any counterclaims) dated November 27, 2017, and then withdrew their pre-answer motion to dismiss. They subsequently cross-moved for summary judgment and a declaration that the Seller is entitled to cancel the contract and retain the down-payment as their liquidated damages.

Both sides have submitted numerous e-mails and letters between the attorneys in support of their positions, along with affirmations from counsel. Defendants' counsel is the same firm as represented Seller in the sale transaction, while plaintiff's counsel was not initially representing plaintiff, and first communicated with defendants' counsel as "litigation counsel" by letter dated July 7, 2017 [Exhibit H to plaintiff's motion].

Plaintiff's attorney asserts in his affirmation that the closing date was supposed to be on or about May 15, 2017. He states that the first rider to the contract provides that either side could send a "time of the essence" notice with 30 business days' notice, that is, excluding weekends and legal holidays. The contract also provides that the notice could not be sent before the "on or about" date. See ¶4 of the first rider. On May 9, 2017, plaintiff's counsel notified defendants' counsel that the Purchaser's principal needed more time to close, as his father had passed away and he had to go to Israel.

Page 4

He requested thirty days, the period for mourning known as "shloshim" for observant Jews, counted from the date of burial. Defendants acquiesced.

On June 9, 2017, thirty days later, respecting plaintiff's religious observance, defendants' counsel sent a "time is of the essence notice," setting the closing date for July 10, 2017 [Exhibit E]. The letter states, unequivocally, that if plaintiff didn't close on that date, defendants would deem the contract cancelled and would keep the down-payment. Plaintiff's attorney responded by e-mail dated

June 21, 2017 that the notice was not in compliance with the contract's terms, as the time is of the essence date did not provide 30 business days' notice, because the contract states that weekends and legal holidays were to be excluded. He suggested August 10, 2017 as a time of the essence date [Exhibit F]. Defendants' attorney responded by e-mail [Exhibit G to plaintiff's motion] that July 10, 2017 was the closing date pursuant to her letter, and that the Sellers and a legal stenographer would be at her office on that date to record the Purchaser's failure to appear if they did not close. On July 7, 2017, plaintiff's counsel e-mailed and mailed another letter [Exhibit H] reasserting that the defendants' notice was defective, that plaintiff would close on 60 days' notice, and that the down-payment should remain in escrow until this matter is resolved,

On July 13, 2017, defendants' counsel sent plaintiff's counsel a letter [Exhibit I] which states that, as plaintiff did not close on July 10, 2017, and defendants were at their lawyer's office and ready to close, with a legal stenographer's transcript annexed, the plaintiff was now in willful default, entitling defendants to deem the contract terminated and to retain the down-payment as liquidated damages. The same day, plaintiff commenced this action by e-filing, seeking, in the initial complaint, specific

performance. Plaintiff's attorney then sent an e-mail [Exhibit K] offering to withdraw the suit if the deposit was returned, or if defendants agreed to close "upon adequate notice." Defendants' attorney did not respond. Plaintiff's attorney made the same offer twice more [Exhibit L] in August 2017. At ¶ 21 of his affirmation, plaintiff's counsel states "by . . . October 2017, too much time had passed and plaintiff was no longer willing to purchase the property. As such, plaintiff amended its complaint and plaintiff is now seeking the return of its down-payment." Demand letters for the return of the down-payment were sent on several occasions. Plaintiff's counsel, at ¶ 32 of his affirmation, urges the court to enforce the provision of the contract which provides that the Seller must return the deposit within 15 days if the closing does not occur, without any requirement that the buyer be free from fault.

Defendants' papers annex essentially the same items to their attorney's affirmation as plaintiff, with the addition of some further e-mails and letter correspondence.

Defendants' counsel points out that the contract of sale gave plaintiff six months to close (May 15, 2017) from the contract date, that plaintiff did not close on or before July 10, 2017, the closing date in the time is of the essence letter, and that plaintiff has not provided any reason for refusing to close. Defendants' counsel claims to have reached out to plaintiff's attorney on numerous occasions to schedule a closing, even after the time is of the essence date of July 10, 2017, and even after the plaintiff filed suit, but plaintiff's counsel refused to set a closing date (¶ 13). She further avers that defendants were willing to agree to the August 10, 2017 date proposed by plaintiff's counsel, but "we were never given a straight answer" (affirmation ¶ 16).

Defendants' counsel further avers that defendants did not breach the contract and were always ready, willing and able to close, but plaintiff chose to file suit instead. Further, she avers that she has provided the additional e-mails and letters to provide a complete picture of the transaction, to demonstrate that the plaintiff's suit is frivolous and solely intended to intimidate defendants into returning the down-payment, which defendants should be permitted to keep as liquidated damages due to plaintiff's breach. Finally, she avers that defendants have kept four of the six apartments at the premises vacant at plaintiff's request, pending the closing, had to hire a lawyer to defend the plaintiff's suit, that the value of the subject property has decreased during these delays, and that

defendants cannot sell the property due to the *lis pendens* plaintiff filed, all costing defendants considerable expense.

The court then reviewed the contract of sale. It is dated November 15, 2016. The first rider has the provision with regard to setting the closing date, as is described above. See ¶4 of the first rider. The contract provides that notices to counsel are sufficient for all notices, and has no provision that notices need to be sent to the parties as well. See ¶24 of the first rider. The second rider is almost solely addressed to matters with regard to the tenants, and has no bearing on these motions. The third rider provides terms which permit the escrow agent to withdraw part of the down-payment for Sellers' use, with Purchaser's subsequent written permission, so one of the Sellers could purchase a new home and move out of the subject premises prior to the closing date and thereby deliver that apartment vacant. From comments in the e-mails it appears that the Purchaser did allow the escrow agent to turn some of the escrowed funds over to Sellers, and a UCC-1 was recorded by Purchaser against the property, to

secure and notice the lien as permitted in the third rider. It is in this third rider that the language cited by Purchaser appears, that is, that [if part of the down-payment is given to the Sellers and] "the closing . . . does not occur, the Seller shall return said funds received from the down-payment escrow funds within fifteen (15) days of receipt of a written demand for the same." The court agrees with the defendants that this clause does not change the terms of the rest of the contract to mean that no matter why the closing does not occur, the Purchaser shall receive the return of the down-payment. This third rider, also the rider that has the provision that the down-payment be returned to the Purchaser with interest if the Purchaser must commence litigation to obtain a return of the down-payment, is solely addressed to the Purchaser's remedies if it agrees to release some part of the down-payment to the Sellers before the closing, but, for reasons permitted in the contract, the Sellers cancel the contract and do not close. For example, the contract provides at ¶6 of the first rider, that if the estimated cost of remedying a violation or curing a title defect, or other items enumerated therein is more than $2,500, the Seller can cancel the contract. Thus, this clause in the third rider, a rider solely with regard to releasing part of the down-payment to Sellers before the closing, cannot be interpreted to modify the provisions of the rest of the contract which address remedies for a default under the contract.

Standards for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary

judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*,70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562;*Winegrad v New York Univ*. *Med*. *Ctr*., 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co*., 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil*. *of Patchogue Fire Dept*., 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicktas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; *see also Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp*.,161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987];*Strychalski v*

Mekus, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve ail inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America*, *Inc*., 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors*,*Inc*. *v Tocqueville Asset Mgt*., *L*.*P*., 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop*. *Cas*. *v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is*. *Power Auth*., 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D*.*J*. *Stapleton*, *Inc*.,43 AD3d 839 [2d Dept 2007]).

As is more specifically applicable to matters such as these, that is, motions for summary judgment involving real estate contracts, the Second Department has unequivocally stated that:

When, as here, a contract for the sale of real property does not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date for

performance (*see Revital Realty Group*, *LLC v Ulano Corp*., 112 AD3d at 904). What constitutes a reasonable time to perform turns on the circumstances of the case (*see id*.). Time may be made of the essence by clear, distinct, and unequivocal notice to that effect, giving the other party a reasonable time in which to act (*see id*.;*Zev v Merman*, 134 A.D.2d 555, 557, 521 NYS2d 455 [1987], *affd* 73 NY2d 781, 533 N.E.2d 669, 536 NYS2d 739 [1988]). Moreover, notice must be given that, if the other party does not perform by the designated date, it will be considered in default (*see Decatur [2004] Realty*, *LLC v Cruz*, 73 AD3d 970, 971, 901 NYS2d 368[2010]; *Nehmadi v Davis*, 63 AD3d at 1127). A party need not state specifically that time is of the essence, as long as the notice specifies a time on which to close and warns that failure to close on that date will result in

default (*see Westreich v Bosler*, 106 AD3d 569, 569, 965 NYS2d 467 [2013]). (*Point Holding*, *LLC v Crittenden*, 119 AD3d 918, 919-920 [2d Dept 2014] *emphasis added*).

Conclusions of Law

As a preliminary matter, the court must note that both sides agree that the contract deposit is what was agreed to be the liquidated damages in the event of a breach, and there is no mention in the pleadings of any other damages or any dispute that this is the appropriate measure of damages. See ¶16 of the first rider. Thus, the court will limit its analysis to this claim, and will not address defendants' legal arguments with regard to the expenses they allegedly incurred due to plaintiff's breach, as defendants have not asserted any counterclaims. *See White v Farrell*, 20 NY3d 487 (2013).

The first matter which must be determined is whether the defendants properly set a closing date and provided proper notice that the plaintiff's failure to close on the date specified would result in its default. (See *Point Holding*, *LLC v Crittenden*, 119 AD3d 918 [2d Dept 2014].) The court finds that the closing date set by defendants in the letter

Page 11

from their attorney dated June 9, 2017, which was sent to plaintiff's attorney by both certified mail and by e-mail, which set July 10, 2017 as the closing date and which states clearly and unequivocally that "if your client does not close, my client has instructed me to cancel the contract, retain the down-payment as liquidated damages and deliver same to their order," was proper notice. While it is true that it was not thirty business days' notice, the date set was almost two months after the "on or about" date in the contract, an all-cash, as-is contract, which already provided six months for the Purchaser to close from the date it was executed, a contract without any financing or other contingency. Further, defendants' counsel clearly avoided communicating with plaintiff's counsel for the thirty-day mourning period as requested, so plaintiff's counsel would not need to contact his client in Israel during this time period. It is therefore, in the face of defendants' attorneys' attempt to be respectful, unavailing for plaintiff to then claim that the notice to close was too short and therefore ineffective.

As the defendants properly set a closing date, in order for the plaintiff to prevail on its motion, it had to demonstrate either that it properly demanded performance of the contract, or that its failure to close on the date set by defendants was excusable. Otherwise, the defendants were entitled to cancel the contract. Plaintiff has failed to do so. (*See Decatur (2004) Realty*, *LLC v Cruz*, 73 AD3d 970, 971 [2d Dept 2010]; *Smith v Lynch*, 50 AD3d 881, 856 NYS2d 200 [2008]; *Weiss v Feldbrand*, 50 AD3d 673, 674, 854 NYS2d 740 [2008]; *Hand v Field*, 15 AD3d 542, 543-544, 790 NYS2d 681 [2005];*Guippone v Gaias*, 13 AD3d 339, 786 NYS2d 112 [2004]; *Charchan v Wilkins*, 231 AD2d 668, 669, 647 NYS2d 550 [1996];*see generally ADC Orange*, *Inc*. *v Coyote Acres*, *Inc*., 7 NY3d 484, 489-490, 857 NE2d 513, 824 NYS2d 192 [2006].)

Page 12

Turning to the defendants' motion, the law provides that the Seller must demonstrate, *prima facie*, that the Purchaser refused to close in accordance with the Seller's properly given notice to close. See *Point Holding v* Crittenden, 119 AD3d 918[2d Dept 2014]; *Eichengrun v* Matarazzo, 136 AD3d 1184 [3d Dept 2016]. Defendants herein have met their burden of proof. Again, while the contract of sale did not provide that time was of the essence as to the closing date, as the court states in*Point Holding v* Crittenden, 119 AD3d 918 [2d Dept 2014], "the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date

for performance. What constitutes a reasonable time to perform turns on the circumstances of the case. Time may be made of the essence by clear, distinct and unequivocal notice to the effect of giving the other party a reasonable time in which to act. Moreover, notice must be given that, if the other party does not perform by the designated date, it will be considered in default. [citations omitted]."

In this matter, the Purchaser would not agree to a closing date and would not provide any reason for its refusal to agree to a closing date. The Seller agreed to adjourn the "on or about" date due to an alleged death in the family of one of the principals of the Purchaser, but after that, each and every communication was based upon the Purchaser's demand for either 30 business days' notice or 60 days' notice, not for any specified or legitimate reason. In the meantime, the Seller had vacated the premises, kept three other apartments empty, and was not given any explanation for Purchaser's repeated delays. The fact that the Purchaser has amended the complaint to withdraw its demand for specific performance further emphasizes the point, that is, that Purchaser either was unable to close or did not want to close.

Page 13

The court notes that there are no claims in plaintiff's motion that there were any problems that arose in the title report, or that plaintiff asserted any objections to title. There is no evidence that there was any hindrance to closing on defendants' part. There is no indication that there were any liens or other issues that arose in the title report. In fact, there is no specific statement that a title report was ordered, although it is implied in the e-mails. There is no affidavit from plaintiff's transactional attorney, nor is there one from a principal of plaintiff. There is no evidence that the father of any principal of plaintiff died in May of 2017, nor is there any evidence that plaintiff had the funds to close.

In conclusion, the plaintiff's motion is denied in its entirety and the defendants' motion is granted to the extent provided herein. The branch of the defendants' motion which asks for summary judgment dismissing the complaint is granted. The branch of the motion which asks for attorneys' fees is denied, as there is no provision in the contract of sale for attorneys' fees on these facts. The branch of the motion which asks for the cancellation of the *lis pendens* is granted (and an order was already issued, as described above), and the branch of the motion which seeks a declaratory judgment that the contract is cancelled and the defendants are entitled to retain the contract deposit as liquidated damages is granted. While it is true that the defendants did not assert a counterclaim in their answer to the amended complaint for a declaratory judgment, their notice of motion does request this relief and provides for "such other and further relief as the court may deem just and proper." it would be an inequitable result to dismiss the complaint and not resolve the issue of which party is entitled to retain the down-payment.

Page 14

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross motion for summary judgment is granted to the extent that it is hereby

ORDERED that plaintiff's complaint is dismissed and the notice of pendency vacated; and it is further

ADJUDGED AND DECLARED that plaintiff breached the contract of sale between the parties, that defendants properly terminated the contract thereafter, and that defendants are entitled to retain the down-payment of $112,500 as and for the agreed-upon liquidated damages; and it is further

ORDERED and ADJUDGED that a UCC-3 termination statement terminating the UCC-1 financing statement that plaintiff filed against 176 Skillman Avenue, Brooklyn, NY, Block 2755, Lots 15 and 115, shall be filed within 10 days after service of a copy of this order with notice of entry on plaintiff's counsel; and it is further

ORDERED that the County Clerk is directed to enter judgment accordingly, with costs and disbursements to defendants.

This shall constitute the decision, order and judgment of the court.

Dated: February 27, 2018

ENTER:

/s/ _____
Hon. Debra Silber, **J.S.C.**

Footnotes:

[1] Block 2755, Lots 15 and 115. Lot 115 is vacant land adjacent to 15, which is a six-family multiple dwelling, according to the contract.
