

Jefferson Ave Partners, LLC v Hussain

2015 NY Slip Op 30593(U)

March 13, 2015

Sup Ct, Kings County

Docket Number: 507827/14

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X
JEFFERSON AVE PARTNERS LLC,,

Plaintiff,

Index No: 507827/14

-against-

:

DECISION AND ORDER

SAHADAT HUSSAIN,

Defendants,

X

Recitation as required by CPLR 2219(a), of the papers considered in.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Motion and Affidavits Annexed.	1, 2
Answering Affidavits.....	3, 4
Reply Papers.....	5, 6
Memoranda of Law.....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action for specific performance of a contract for the sale of real property, defendant moves for an order pursuant to CPLR 3211(a) dismissing plaintiff’s complaint. Plaintiff cross-moves pursuant to CPLR 3212 for an order awarding summary judgment in plaintiff’s favor and against the defendant.

This action arises out of a dispute over the sale of real property located at 146 Jefferson Avenue, Brooklyn. It is alleged in the complaint that plaintiff as purchaser and defendant as seller entered into a contract of sale dated April 9, 2014, pursuant to which defendant agreed to sell and plaintiff agreed to purchase the subject property. Under the contract, the closing date was to “occur on or about July 1, 2014.” It is alleged that defendant never agreed upon a date and time for closing and therefore on July 25, 2014, plaintiff’s counsel delivered to defendant’s real estate attorney a letter scheduling the closing for August 25, 2014 and notifying defendant that time was of the essence. The letter further notified defendant that should he fail to appear and provide a deed in accordance with the contract, he will be in default of the material terms of the contract. It is further alleged that prior to the scheduled time of the essence closing date, defendant’s real estate attorney advised plaintiff’s counsel that defendant was refusing to accept tender or convey the property. On August 25, 2014, plaintiff and his attorney appeared for the closing at the time, date, and location set forth in the time of the essence letter. Also appearing at the closing was a representative from plaintiff’s title company as well as a court reporter to transcribe the events. Plaintiff appeared

at closing with a cashier's check in the amount of \$1,260,000, the balance of the amount payable to defendant under the contract as well as a check in the amount of \$6,972.38 made payable to plaintiff's title company. Defendant failed to appear at the closing. Plaintiff then commenced this action for specific performance. Defendant now moves to dismiss the complaint pursuant to CPLR 3211(a).

Defendant contends that this contract was procured through a fraud arranged by a broker, plaintiff, and the attorneys in order to "steal my and my family's home from me and for less than what it is worth." Defendant alleges that a broker, who was familiar with plaintiff and the attorneys, and aware that his home was in foreclosure, approached him in regard to selling his property. The broker then allegedly set a sale price that was well below the value of comparable properties in the neighborhood and also arranged for an attorney to represent defendant. Defendant alleges that the broker took advantage of his situation as he was aware that defendant could not read English and told him that any papers he signed would not matter as defendant would be able to cancel the sale at any time including the date of closing. Defendant also alleges that the broker discouraged him from telling his foreclosure attorney about any sale. Defendant further alleges that the plaintiff is in the business of buying distressed properties and then selling them at massive profits and that with the help of the broker and the attorneys designed this sale as a sham to steal his home from him.

Initially, defendant moves to dismiss plaintiff's action on the grounds that plaintiff is unauthorized to do business in New York and therefore has no capacity to maintain this action. Despite defendant's argument, a review of the plaintiff's opposition papers as well as the NYS Department of State's website indicates that plaintiff filed its articles of organization on March 24, 2014 (see Limited Liability Company Law §203), prior to commencement of this action in August, 2014. Plaintiff has since been duly registered as a domestic limited liability company in this State. Accordingly, defendant's argument that plaintiff had no capacity to sue and is unable to maintain this action is without merit.

Defendant also seeks to dismiss this action based upon improper service. "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*Mortgage Elec. Registration Sys., Inc. v Losco*, 2015 NY Slip Op 01250 [2d Dept] quoting *Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983, 984-985 [2d Dept 2010]). Here, plaintiff's process server's affidavit of service constitutes *prima facie* evidence of proper service pursuant to CPLR 308(1) (see *Abdelqader v Abdelqader*, 120 AD3d 1275 [2d Dept 2014]). Defendant's affidavit, which contains nothing more than bare and conclusory denials of service, is insufficient to rebut the presumption of proper service (see *Associates First Capital Corp. v. Wiggins*, 75 AD3d 614 [2d Dept 2010]). Thus, defendant's claim that he was not properly served in this action is

without merit.

Moreover, defendant seeks to dismiss plaintiff's complaint for failure to state a cause of action pursuant to CPLR 3211 (a)(7). On a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the allegations of the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Morris v Chase Bank*, 2015 NY Slip Op 01249 [2d Dept 2015]). Contrary to the defendant's contentions, applying this standard, the complaint sufficiently pleads a cause of action for specific performance of this real estate contract (*see Jannetti v Whelan*, 97 AD3d 797 [2d Dept 2012]) as it alleges the parties' agreement, the plaintiff's performance of its contractual obligations under said agreement and that plaintiff was ready, willing and able to perform its remaining obligations at closing (*see EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45 [1st Dept 2004]). Despite defendant's contention, although the contract provided for a closing date of July 1, 2014, time was not made of the essence and the failure to close by that date did not terminate the contract. When a real estate contract 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 902 [2d Dept 2013]). Here, the complaint alleges that plaintiff was ready, willing, and able to close on August 25, 2014, the time of the essence closing date scheduled by plaintiff's counsel. Included with the complaint is a copy of a cashier's check dated August 25, 2014, in the amount of \$1,260,000, made out to Sahadat Hussain from Jefferson Ave Partners, LLC, as the balance of the money due under the parties' agreement.


A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7) (*see* CPLR 3211[c]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action" (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682 [2d Dept 2012] [internal quotation marks omitted]). Here, the complaint states a cause of action, and defendant's affidavit does not conclusively demonstrate that the plaintiff has no cause of action (*see Clarke, v Laidlaw Transit, Inc.*, 2015 NY Slip Op 10602 [2d Dept 2015]). Further, although defendant's affidavit in support of his motion raises a number of defenses to this action including the "fraudulent nature of the contract", unconscionability, and bad faith, on a motion pursuant to CPLR 3211(a)(7), the burden never shifts to the plaintiff to rebut defenses asserted by the defendant and the plaintiff will not be penalized for not making an evidentiary showing in support of the complaint (*see Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

In view of the foregoing, defendant's motion to dismiss is denied in its entirety. The plaintiff's cross-motion for summary judgment is denied as premature; issue having not yet been joined (see CPLR 3212(a); *Markle Foundation v Manufacturers Hanover Trust Co.*, 173 AD2d 784 [2d Dept 1991]).


This constitutes the decision/order of the court.

Dated: March 13, 2015

Enter,



Karen B. Rothenberg
J.S.C.
Karen B. Rothenberg
Justice, Supreme Court


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