

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 15

X

EUGENE COIZZA II and ANNE DELLAQUILA,
Plaintiffs,

- against -

164-50 CROSSBAY REALTY CORP., VINCENT
SODANO and 164 CROSSBAY CORP.,

Defendants.

INDEX NO. 26004/04

MOTION SEQ. NO. 10

BY: TAYLOR, J.

DATED: June 20, 2008

At the outset, the court notes that the procedural history of this action for specific performance of a contract for the sale of real property, was set forth in the prior order of the Appellate Division, Second Department dated February 20, 2007 (Coizza v 164-0 Crossbay Realty Corp., 37 AD3d 640) and the prior order of this court dated October 26, 2007. Issue has been joined with respect to the allegations in the amended complaint.

Plaintiffs, as prospective purchasers, now move for summary judgment on their amended complaint, directing specific performance in accordance with the contract of sale of real property dated August 9, 2002, and directing defendants to perform all necessary acts to convey the property in accordance with the contract, to direct defendants to perform all acts necessary and within their power to convey insurable and marketable title in the premises in accordance with the contract of sale, to direct the

conveyance be made without prejudice to a hearing, either before or after the conveyance, on the issue of damages, including a reduction in the purchase price or other monetary adjustments, to enjoin preliminarily, defendants from: 1) modifying, voluntarily terminating, amending or otherwise affecting any existing lease or occupancy without plaintiffs' written consent, 2) altering the premises pending the closing, 3) doing any act or thing to modify, alter, rescind or otherwise affect the existing leases pending the conveyance. Defendants oppose the motion and cross-move for summary judgment dismissing the complaint and declaring that plaintiffs are not entitled to specific performance.

Plaintiffs assert that they are ready willing and able to perform under the contract of sale, and that defendants are in breach thereunder, insofar as defendants' counsel advised, by letter dated November 5, 2004, that the seller had repudiated the contract and would not convey title. Defendants contend that the contract was contingent upon delivery of a valid certificate of occupancy at closing, and that insofar as no valid certificate existed by the closing date originally set in the contract, or within a reasonable period thereafter, the contract expired and is no longer unenforceable.

It is well established that 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

demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

The contract of sale provided a purchase price of \$1,200,000.00, to be financed entirely by a purchase money mortgage, and for a closing "on or about January 15, 2003." The contract also provided that the premises was comprised of a "'Strip Mall' consisting of a boat yard, Florist Shop, and recent addition retail space and office space." There was no express representation in the contract by the seller as to whether any valid certificate of occupancy existed for the premises covering such uses. Rather, the contract provided that:

"This contract and Purchaser's obligation to purchase the Premises are also subject to and conditioned upon the fulfillment of the following conditions precedent:

...

(b) The delivery by Seller to Purchaser of a valid and subsisting Certificate of Occupancy or other required certificate of compliance, or evidence that none was required, covering all structures on the subject Premises authorizing their current usages as a marine supply store, floral shop, retail store and upstairs storage space.

...."

The contract, however, also provided that:

"The Seller shall not be required to bring any action or proceeding to render title marketable or insurable, or to make the Premises legal for the use represented above."

In this case, the contract of sale did not make time of the essence. "When time is not of the essence of a contract for the sale of real property, either party to the contract is entitled to a reasonable adjournment of the designated closing date without the passage of the law day amounting to an incurable contractual default" (Tarlo v Robinson, 118 AD2d 561, 565 [1986]) (citations omitted).

Contrary to defendants' argument, the "certificate of occupancy" condition was included for the sole benefit of plaintiffs (see Laxrand Const. Corp. v R.S.C.A. Realty Corp., 135 AD2d 685 [1987]; BPL Dev. Corp. v Cappel, 86 AD2d 591 [1982], lv denied 56 NY2d 506 [1982]). The contract did not provide the seller with the option of rescinding or cancelling the contract upon its inability to deliver a valid certificate or proof of its lack of necessity (see Laxrand Const. Corp. v R.S.C.A. Realty Corp., 135 AD2d 685 [1987]; DeFreitas v Holley, 93 AD2d 852 [1983]). Rather, the condition was intended to protect plaintiffs from having to purchase the property in the event that the premises was not legal for the uses represented in the contract. The contract required both parties to take such action "as may reasonably be requested by the other to carry out the intent and purpose of [the] contract," short of requiring the seller to bring an action or proceeding to render the title marketable or insurable or to make the premises legal for the use represented in the

contract. Plaintiffs learned from the title search report, obtained following the execution of the contract, that a certificate of occupancy dated July 18, 1990 for the property permitted use of the first floor of the building at the property as a motor vehicle repair shop, with accessory parking and that New York City computer records indicated plans had been filed to construct interior partitions and install plumbing fixtures. The title report indicated that the actual plans had not been found.

Where provisions are inserted in a contract for the benefit of the purchaser, the purchaser has the right to waive them (see W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 [1990]; Xhelili v Larstanna, 150 AD2d 560 [1981]; Poteralski v Colombe, 84 AD2d 887 [1981]; see also 28 Properties, Inc. v Akleh Realty Corp., 309 AD2d 632 [2003]). In this instance, where the "certificate of occupancy" contingency was to be satisfied by the seller by the date of closing or by an adjourned date, plaintiffs are free to waive the provision and accept performance of the contract "as is" (see Satterly v Plaisted, 52 AD2d 1074 [1976], affd 42 NY2d 933 [1977]; Weinprop, Inc. v Foreal Homes, 79 AD2d 987 [1981]).

On January 15, 2003, the date originally contemplated in the contract for the closing, the seller failed to inform plaintiffs that it would be unable to deliver a valid certificate of occupancy or that a certificate of occupancy was unnecessary. Instead, the seller gave the impression, by its counsel's letter of

that date, that a certificate of occupancy was necessary and capable of being obtained. The seller's counsel stated that the survey, needed for obtaining a certificate of occupancy, had been ordered but not yet received, and that the survey would be forwarded to plaintiffs upon receipt. In response, plaintiffs treated the letter of seller's counsel as an adjournment request. Plaintiffs, in effect, consented to such adjournment, by continuing to make regular inquiries about the efforts of the seller to obtain a certificate of occupancy. When the seller still had not obtained a certificate of occupancy by May 25, 2004, plaintiffs informed the seller that they, themselves, would take steps to expedite the process. In response, the seller did not notify plaintiffs that it had ceased efforts to obtain a certificate of occupancy, or that it could not deliver a valid certificate of occupancy within any reasonable period, or inquire as to whether plaintiffs were willing to waive noncompliance and accept tender of title nevertheless. The seller also did not respond to plaintiffs request on August 14, 2004 to schedule tentatively a closing date.

Where, as here, there is an indefinite adjournment of the closing date "some affirmative act has to be taken by one party before [it] can claim the other party is in default; that is, one party has to fix a time by which the other must perform, and [it] must inform the other that if [the other] does not perform by that date, [the other] will be considered in default" (Tarlo v Robinson,

118 AD2d 561, 566 [1986], quoting Royce v Rymkevitch, 29 AD2d 1029). Plaintiffs attempted to fix such a time, but their effort, by letter dated November 1, 2004, to declare time to be of the essence was ineffective. As this court previously found, the letter did not clearly and unequivocally notify the seller that the seller would be deemed to be in default under the contract if the seller did not close on the purported law day. The letter instead was equivocal and failed to notify the seller that the seller had to close on November 29, 2004, and if the seller failed to tender title then, the seller would be deemed to be in default under the contract.

The seller's subsequent repudiation of the contract amounted to an anticipatory breach thereof. The seller had no right to cancel the contract based upon its own inability to obtain a certificate of occupancy authorizing the uses set forth in the contract of sale. Nor have defendants shown that the seller set a date for closing, and made time of the essence by giving "clear, distinct, and unequivocal notice to that effect giving [plaintiffs] a reasonable time in which to act" (Savitsky v Sukenik, 240 AD2d 557, 558 [1997]), and that plaintiffs failed to perform on such date. Because the seller anticipatorily breached the contract, plaintiffs do not need to demonstrate that their own performance was tendered prior to the commencement of this action (see Yitzhaki v Sztaberek, 38 AD3d 535 [2007]).

Plaintiffs have established that they are ready, willing and able to perform under the contract regardless of the anticipatory breach by the defendant. Although it appears that a valid certificate of occupancy has yet to be obtained, plaintiffs represent that their architect advises only minor ministerial acts need to be performed to permit the certificate to be issued. Plaintiffs further represent that they will perform such acts themselves, and thus, choose to waive the condition and accept tender of title without delivery of a certificate of occupancy. Defendants have failed to raise a triable issue of fact with respect to any of the parties' rights and obligations under the contract (see generally Zuckerman v City of New York, 49 NY2d at 562). Accordingly, defendants had no right to cancel the contract and plaintiffs are entitled to the benefit of their bargain. Plaintiffs have established they entitled to a judgment declaring that the contract is in full force and effect, and directing defendants to specifically perform the contract (see McCabe v Witteveen, 34 AD3d 652 [2006]).

With respect to plaintiffs' claim for damages, in an action for specific performance, the court has broad discretion in fashioning an appropriate remedy, and thus the court may award a purchaser those damages resulting from a seller's delay in conveying title (see Lotito v Mazzeo, 132 AD2d 650 [1987]; Dambroso

v Malik, 12 Misc 3d 1192[A] [2006]; Bregman v Meehan, 125 Misc 2d 332 [1984]).

Insofar as the seller is financing plaintiffs' purchase, and the amount of the interest rate is set forth in the contract of sale, loss of favorable mortgage interest arising from the delay caused by the seller's breach of the contract is not an item of compensable damage. However, "[i]t is well-settled law that plaintiffs were entitled to seek damages equal to the rental value of the real property at issue upon the condition that they compensate defendant for any loss of use of the purchase money during the delay up to the amount plaintiffs receive for rental value " (Bregman v Meehan, 125 Misc 2d at 349) (citations omitted). To the extent plaintiffs seek such damages, it may set out to prove them in a hearing to be held after the conveyance.

However, to the extent plaintiffs seek damages related to alterations, modifications and changes made to the premises by defendants, without plaintiffs' written consent, and damages based upon lost profits as the result of defendants' leasing the premises to tenants in competition with their business, such additional damages are not in the nature of special damages arising out of the seller's delay in conveying the title in accordance with the terms of the contract of sale. Instead, they are in the nature of the usual contract damages arising out of breach of contract.

Plaintiffs, furthermore, did not make a separate claim for such damages in their amended complaint.

With respect to that branch of plaintiffs' motion seeking a preliminary injunction, plaintiffs offer evidence that defendants have altered the premises and rented the upstairs portion of the premises. Defendants have failed to submit evidence in opposition to such showing, including any proof that they obtained the consent of plaintiffs prior to doing so, or that the alterations, etc., occurred at times when no temporary restraining order was in effect.

That branch of the motion by plaintiffs for summary judgment on their claim for specific performance is granted to the extent of declaring that the contract is in full force and effect, and directing defendants to specifically perform the contract. That branch of the motion by plaintiffs for an award of damages is severed and shall be the subject of a hearing to be held after the conveyance, upon payment of the appropriate fees and filing of the note of issue.

That branch of the motion by plaintiffs for a preliminary injunction is granted to the extent of preliminarily enjoining defendants, pending the closing, from altering the premises pending the closing, and modifying, voluntarily terminating, amending, rescinding, altering and otherwise affecting any now existing leases and occupancies without the prior consent of plaintiffs.

Plaintiffs are directed to file evidence as to the amount of the bond on the settlement of the order to be entered hereon.

Settle order.

J.S.C.