

2020 NY Slip Op 31236(U)

345 CHAUNCEY STREET LLC, Plaintiff,

v.

FID HOLDINGS LLC, COURTNEY CHARLES & DAVID A. GALLO & ASSOCIATES LLP, Defendants.

Docket No. 524110/2018.

Supreme Court, Kings County.

April 27, 2020.

Decision and Order

LEON RUCHELSMAN, JSC.

The plaintiff has moved pursuant to CPLR § 3212 seeking summary judgement on the first two causes of action declaring the defendants in default and returning the plaintiff's deposit and for attorney's fees and cancelling the notice of pendency. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On October 24, 2017 the defendant Courtney Charles who owned 345 Chauncey Street entered into a contract to sell the property to defendant FID Holdings for \$1,500,000. On December 6, 2017 the contract was amended to reflect that if the property could not be delivered vacant then the price would be reduced to \$1,450,000. Specifically, the handwritten amendment stated that "if the premises cannot be delivered vacant by 4/30/18, either party may cancel this contract after 4/30/18, however, Purchaser may elect upon notice to the Seller to close on the premises at a reduced price of Fifty Thousand, thereby making the purchase price to \$1,450,000.00 closing to take place 20 days ..." (see, Amendment of Contract, 13). Further a rider to the contract was executed on December 24, 2017 and it provided that "Seller represents that the premises is compliant with all laws, rules and regulations governing the premises. There are no violations affecting the premises and if any exist, they shall be cured on or before closing" (see, Rider to Contract dated 24th day of December 2017, 14). Further the rider provided that "Seller shall deliver the Triplex apartment vacant at closing" (id, at ¶16). FID Holdings tendered a down payment of \$35,000 and assigned their rights to plaintiff. The assignment was executed by the plaintiff and FID Holdings LLC. Pursuant to the assignment, the plaintiff forwarded \$135,000 to FID Holdings' escrow agent on February 28, 2018. The closing never took place and the plaintiff sued seeking essentially a return of the \$135,000. The plaintiff has now moved seeking summary judgement that there are no questions of fact they are entitled to a return of those funds. The defendants oppose the motion arguing there are questions of fact whether the plaintiff is entitled to the funds sought.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

The plaintiff has asserted that on July 9, 2018 it terminated the assignment. The defendant, David A. Gallo & Associates LLP, the escrow agent argues the termination of the assignment was never received but acknowledges that on October 26, 2018 they were informed of such termination. In any event, there is evidence the plaintiff intended to proceed with the closing notwithstanding such termination. First, on August 15, 2018 counsel for the plaintiff sent an email to Gallo which stated "my client has finally been given access to the property and would like to also speak to the tenants. Please obtain contact information for the tenants so my client can reach out to them" (see, Email from Benzion Frankel dated August 15, 2018 4:06 PM). Further, on September 20, 2018 counsel for the plaintiff sent an email to Gallo in response to an inquiry about a closing date which stated in part "Once you provide the title company with a comfort level to close they will advise

us and we will schedule with you" (see, Email from Benzion Frankel dated September 20, 2018, 3:39 PM). Again, on October 17, 2018, Chesky Engel the sole member of the plaintiff sent an email in response to Gallo whether in fact Engel wanted to close the deal that "I need a Status with the tenants" (see, Email from Chesky Engel dated October 17, 2018, 1:55 PM). Gallo responded that he would check, however, that had nothing to do with the closing (see, Email from David Gallo, dated October 17, 2018 2:28 PM). A short while later Engel responded "Thank you keep me posted please" (see, Email from Chesky Engel dated October 17, 2018, 3:27 PM). Thus, notwithstanding any termination sent by the plaintiff, clearly the plaintiff demonstrated an interest to proceed with the closing. Thus, a few weeks later the defendants scheduled a time of the essence closing for November 13, 2018. Indeed, a day before the closing Benzion Frankel counsel for the plaintiff sent an email to the representative of the title company as well as Gallo that "please confirm that they have scheduled a closer to come tomorrow" (see, Email from Benzion Frankel dated November 12, 2018 1:42 PM). Thus, it is difficult to characterize the closing as a "sham" closing (see, Plaintiff's Reply Memorandum of Law, page 4). Likewise, in Plaintiff's Reply Memorandum plaintiff argues that "Plaintiff's alleged failure to appear on the Sham Closing Date is a red herring because the Plaintiff terminated the Contract prior to the Sham Closing Date" (see, Plaintiff's Reply Memorandum of Law, page 4, Footnote 3). However, as just noted, there are certainly questions whether indeed the termination was effective or operative since the plaintiff was still participating in the closing only a day before it was scheduled.

The plaintiff counters that there were conditions prior to closing that were not satisfied and that consequently the defendants breached the contract. Specifically, the plaintiff notes the conditions the "triplex unit" was required to be tenant free and that the property was required to be free of any violations was not satisfied. The defendants counter those allegations are "nothing more than self-serving allegations manufactured to avoid its obligation under the Contract and the Assignment" (see, Affirmation in Opposition, ¶27). Matthew Newman an authorized representative of FID Holdings LLC submitted an affidavit wherein he likewise notes that there is no proof the above noted conditions were not satisfied (see, Affidavit of Matthew Newman, ¶20).

Therefore, based on the foregoing there are questions of fact which foreclose any summary determination. Consequently, the motion seeking summary judgement is denied.

So ordered.

Save trees - read court opinions online on Google Scholar.