Index No: 25972/03

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PRESENT:
HON. JOSEPH C. PASTORESSA

RICHARD KISTELA,

Plaintiff(s),

-against-

WILLIAM H. AHLERS and BARBARA A. AHLERS.

Defendant(s),

ATTYS FOR PLAINTIFF(S):
ERIC JAFFE, ESQ.
140 FELL COURT
HAUPPAUGE, NY 11788

ATTYS FOR DEFENDANT(S):
PAULA MILLER, ESQ.
308 W. MAIN ST.
SMITHTOWN, NY 11787

This is an action for specific performance of a contract for the sale of real property. A bench trial was conducted before this court at which the court heard testimony from the parties, and one Donald Jaffe a financier, Stephen Siwinski an architect, and William Robert Collins a property appraiser.

Based on the credible testimony and exhibits adduced, the court makes the following findings of fact and conclusions of law:

The parties entered into a contract for the sale of a vacant parcel of real property. The contract of sale was made contingent upon the plaintiff purchaser obtaining a building permit. The contract set forth a three month deadline for the plaintiff purchaser to make application to obtain a building permit, and a 10 month deadline for the closing to occur. The contract provided that in the event that title did not close within the 10 month deadline the contract would terminate and the defendant sellers would return the plaintiff's down payment. There is no dispute as to the terms of the contract, nor is there any dispute as to the plaintiff vendee's default thereunder.

The issue in the case is narrow. The plaintiff can receive an order directing specific performance of the subject contract only if he has established that the defendants waived the specific deadline contained in the contract requiring closing to take place within 10 months of signing, and were operating under said contract, with all its terms extant and intact, after the deadline had come and gone. The unfortunate reality is that either side could have avoided this lawsuit and avoided this court having to make a credibility determination as to what actually transpired between the parties had either side availed themselves of a lawyer's good services to execute a written memorialization of what the parties intentions were post expiration of the original contract deadline. The plaintiff, a spec developer with prior experience building as many as seven other homes, admitted that he "never contacted his attorney to request an extension" agreement be drafted, and that he "never requested anything in writing" from the defendants. The defendants, with Mr. Ahlers, a layperson, handling the negotiations himself, never even hired a lawyer to represent them, and instead used the

plaintiff's lawyer, and some ad hoc legal advice from their daughter's friend who was an out of state lawyer. As a result, the court must now determine which sides story represents what transpired. The defendant Ahlers testified that they purchased the subject property in the 1970's to build their families home on it, but that due to financial difficulties they were never able to get it built. Mr. Ahlers testified that he must have received over 50 to 100 hundred offers on the property over the years, and dozens of offers in 2000 alone, when the plaintiff first contacted him to purchase it. Mr. Ahlers said no, but plaintiff called back twice telling Ahlers that he wanted to build a home for his family there, and that he could use the proceeds from the sale of his current home to purchase the property. According to the Ahlers, Mr. Kistela represented himself to be a car pinstriper of limited means who simply wanted to build a home for his family which made the Ahlers reminiscent of their own situation as a young newlywed couple when they purchased the subject property to build their family home. The Ahlers eventually agreed to sell, but plaintiff wanted a contract subject to his receiving Town approvals and a permit to build before closing. The contract negotiations were protracted, starting on August 29, 2001 through contract signing on July 26, 2002. Mr. Ahlers, representing himself, made several revisions to the proposed contract and expressed, specifically, a concern that that the contract not be open ended without a deadline at the existing price. The original purchase price agreed to had been Two Hundred Seventy Thousand Dollars ($270,000), but given that a year had elapsed before the contract was signed, the Ahlers asked for, and the plaintiff Kistela agreed to, a new higher purchase price of Three Hundred Thousand Dollars ($300,000). After the signing, the parties remained in periodic contact once every month or two, and Mr. Kistela indicated to Mr. Ahlers that he was experiencing delays with his application to the Town which Ahlers was sympathetic to. Kistela informed Ahlers when the Health department approvals necessary for the Building Permit application finally arrived. Mr. Ahlers testified that he never made inquiry about the October 26, 2002 deadline for filing the permit application because he assumed plaintiff was adhering to the contract terms. Mr. Ahlers testified that thereafter in April 2003 Mr. Kistela contacted him and informed him that he did not think he would be able to make the contract deadline and asked for an extension. Mr. Ahlers testified that he told Mr. Kistela that he would still sell him the property, but that another year had gone by, and he had been paying the taxes on the property, and that real estate values had risen, so they would need to execute a new contract at a higher price. Ahlers testified that he never heard back from Mr. Kistela until September of that year when Mr. Kistela called him and said he wanted to get going on the new contract and that they should meet at the Golden Coach Diner to negotiate the terms. Mr. Ahlers testified that Mr. Kistela showed up at the meeting at the diner with building plans in hand saying that his wife was very excited about moving in and living there, but that they were going to need to get a variance before they could get the building permit. Although they were not able to reach an agreement on a new price, Mr. Ahlers testified that Mr. Kistela asked him to sign the variance application paperwork to get the application moving so that they could avoid the delays that occurred under the first contract. At the conclusion of the meeting, Mr. Kistela asked Mr. Ahlers to call his lawyer to give him his terms for the new contract, and Ahlers thereafter called Kistela's attorney, Mr. Prokop on September 8, 2003. Ahlers testified, however, that before new terms were ever agreed upon, and before a new contract was ever signed, he received a call on September 12, 2003 from an individual named Scott Benard who indicated that he wanted to buy the property. Ahlers met Benard at the property, and Benard had with him the very same building plans that Mr. Kistela had brought with him to the diner meeting. Benard showed Ahlers the plans along with a sales listing for the property by Mr. Kistela selling it as vacant land. Mr. Ahlers then learned for the first time that Mr. Kistela was a spec builder and unbeknownst to Ahlers had been marketing the property for sale as his own throughout the entire pendency of the contract period and beyond. Evidence of sales listing agreements were introduced at trial marketing the property on September 2, 2002 as a five bedroom home for Nine

Hundred Ninety Nine Thousand Dollars ($999,000), and on February 16, 2003 as a five bedroom home for One Million Three Hundred Thousand Dollars ($1,300,000), and on June 18, 2003 as vacant land for Seven Hundred Fifty Thousand Dollars ($750,000) (the listing which was apparently answered by Mr. Benard).

Mr. Ahlers testified that he telephoned Mr. Kistela on September 22, 2003 and told him that he was disappointed that he was trying to sell the land, but that Mr. Kistela denied that he was trying to sell the property. Ahlers told Kistela he had proof to the contrary. In subsequent exchanged written correspondence, Mr. Kistela's counsel attempted to schedule a closing of the property with a waiver of the building permit condition, and threatened to seek specific performance of the contract, while Ahlers responded that there was no viable contract in existence to enforce.

Mr. Kistela testified that after the May 26, 2003 contract deadline came and went without a closing, he could not recall when the next time was that he spoke to Mr. Ahlers. Mr. Kistela did recall speaking to Ahlers in September 2003, but testified that it was only to have the Ahlers sign the application for the variance, and there was no discussion about entering into a new contract at a new price. Kistela testified that he might have told the Ahlers that he "might" build a home for his family there, and that he pinstriped cars for a living, but he also was sure that at some point he told the Ahlers that he was a home builder, although he could not recall exactly when he conveyed that fact to them. Kistela testified that he was, in fact, marketing the property for sale throughout the time he was under contract with the Ahlers, but he never told the Ahlers because he did not believe he had to disclose that to them. Kistela testified that he learned in April 2003 that a variance would be required and that he advised Mr. Ahlers who told him "to proceed". Kistela testified that he never received any offers or interest in the property from any of the listings he ran, until the summer of 2003 when his listing agent Mr. McGuire called him to say that a Scott Benard had expressed interest in the property.

In the summer of 2003, at about the same time that Mr. Kistela learned that there was an individual interested in the property, Mr. Kistela retained the services of attorney Vincent Trimarco to apply for the requisite variance needed to build.

Kistela testified that he did not want to close at the contract deadline "because I was concerned about the variance because at that point I didn't retain a lawyer for the variance". Yet, Mr. Kistela learned of the need for the variance in April, 2003 but did not retain the Trimarco firm to make an application for the variance until August 13, 2003, right around the same time that Kistela first learned of Benard's interest in the property. The defendants have argued to this court that Mr. Kistela had simply been stringing them along until a buyer was found, and a bonafide offer on the property was in hand before closing on the sale. The defendants argue that it is no coincidence that they heard nothing from Mr. Kistela for months on end after the contract's expiration, until the Benard buyer materialized, at which point Kistela sought to resurrect the contract on the same terms as existed prior to expiration. Kistela refutes these arguments and claims that the delay was because "I needed some time to decide which plan I was going to use for the variance". It is of no moment, which version is the truth, whether Kistela had been delaying the closing throughout while waiting to get a buyer, or whether he was, as he testified, always intending to purchase the property, and proceeding diligently at his own expense. Similarly, it is of no moment whether Kistela lied to the Ahlers and misrepresented the true nature of his interest in the property, hiding the fact that he was a spec developer looking to flip the property rather than live there with his family, as this argument has been rejected by a court of coordinate jurisdiction which in a prior order dismissed the claim as barred by a merger clause in the contract of sale. A dismissal which was not appealed by either side (see, Kistela v. Ahlers, Supreme Court, Suffolk County, at page 3. [Jones, J. ,September 28, 2004]. In any event, as aforementioned, it is irrelevant to a determination here, which turns instead on the discrete question whether the Ahlers intended and agreed to waive

their contractual rights, and specifically the contractual deadline, to allow plaintiff to continue, without deadline, and without any change in purchase price, in pursuit of the variance and ultimate closing on the property. In support of that argument plaintiff Kistela has posited his own testimony that this version was what actually occurred, and also cites the fact that the Ahlers, at Kistela's request, executed the application for the variance in September 2003 after the contract deadline, and the fact that the Ahlers had not returned his down payment monies after expiration of the contract deadline. Both of these facts were cited by the Appellate Division in support of its determination that a fact issue requiring trial existed in this case (see, Kistela v Ahlers, 22 AD3d 641, 643). The court having observed the demeanor of the witnesses as they testified, and having considered the substance of their testimony decides that credibility issue against the plaintiff and for the Ahlers, both of whom testified credibly, without any significant impeachment, that it was the understanding of the parties that a new price was to be set for the purchase, given the extensive lapse of time that had occurred, and that they executed the variance application at Mr. Kistela's request only because he indicated that he did not want to delay things any further, but always with the understanding that the parties had to reach agreement on a price adjustment. The Ahlers explained and the court credits that the deposit money was not returned immediately after the contract expiration, initially because of Mr. Kistela's disappearance, and then under the good faith assumption that the parties would be negotiating a new contract utilizing the same deposit money. Unfortunately, for the plaintiff, that agreement was never reached and therefore an application for specific performance does not lie. The law is clear that the burden to establish "the intentional relinquishment of a known right" is never an easy one to bear and prove (Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 968 [1988]; see, Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, 184 [1982]; Matter of Flynn v Rockwell, 295 AD2d 672, 675 [2002]; England v Nettesheim, 222 AD2d 825, 827 [1995]. Waiver is an intentional relinquishment of a known right and should not be lightly presumed (see, S&E Motor Hire Corp. v New York Indem.Co., 255 NY 69, 72; 5 Williston, Contracts §§696, 697, at 338-340 [3d ed 1961]). In sum, the plaintiff has not provided evidence of actions or words from which a clear manifestation of intent by the defendants to relinquish the protections of their contract could be reasonably inferred, given the defendants' credible testimony at trial.

Accordingly, the court finds for the defendants and the complaint is dismissed.

Settle Judgment on Notice.

DATED: March 11, 2010

HON. JOSEPH C. PASTORESSA