

ORIGINAL

SHORT FORM ORDER

INDEX NO. 604212/2016

**SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

SUITES IN BOCA, LLC,

Plaintiff,

-against-

SANDBAR NORTH LLC and SANDBAR
SOUTH LLC,

Defendants.

ORIG. RETURN DATE: MAY 12, 2016
FINAL SUBMISSION DATE: MAY 26, 2016
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: MAY 12, 2016
FINAL SUBMISSION DATE: MAY 26, 2016
MTN. SEQ. #: 002
CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 10 read on this motion _____
TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT

Order to Show Cause and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-
motion and supporting papers 5-7; Memorandum of Law 8; Reply Memorandum of Law
9; Reply Memorandum of Law 10; it is,

ORDERED that this motion (seq. #001) by defendants SANDBAR
NORTH LLC and SANDBAR SOUTH LLC (collectively "defendants") for an
Order:

(1) pursuant to CPLR 3211 (a) (1) and/or (7), dismissing plaintiff's
complaint upon the grounds that a defense is founded upon documentary
evidence and/or the pleading fails to state a cause of action, or alternatively,
pursuant to CPLR 3212, granting defendants summary judgment;

(2) cancelling the notice of pendency filed by plaintiff;

(3) pursuant to CPLR 6514 (c), awarding costs and expenses to defendants based upon plaintiff's wrongful filing of the notice of pendency, and scheduling a hearing to determine the amount of such costs and expenses;

(4) severing defendants' counterclaims for damages based upon plaintiff's malicious prosecution and/or abuse of process; and

(5) granting a preference on the hearing calendar for the instant motion, upon the grounds that the bad faith and frivolous filing of the notice of pendency unreasonably restricts defendants' ability to convey the underlying real property,

is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #002) by plaintiff SUITES IN BOCA, LLC for an Order, pursuant to CPLR 3212, granting plaintiff summary judgment, or in the alternative, granting plaintiff the opportunity to conduct discovery and establish at trial its specific performance claim, is hereby **DENIED**, given the Court's ruling on defendants' instant motion to dismiss.

This action was commenced by the filing of a summons, complaint and notice of pendency on or about March 15, 2016. Issue was joined by the service of a verified answer dated April 18, 2016. Plaintiff has asserted a single cause of action for specific performance, and defendants have interposed an affirmative defense of the Statute of Frauds and two counterclaims for malicious prosecution and abuse of process.

The action arises from the sale of two parcels of real property located at 41 Robertson Drive and 43 Robertson Drive, in Sag Harbor, New York ("Property"), owned by defendants, consisting of a residence and vacant land. On Friday, March 11, 2016, plaintiff made an offer to defendants to purchase the Property for the total sum of \$26 million, and executed and delivered two residential contracts of sale to defendants' attorney ("Contracts"). Defendants indicate that on even date, a third party also made an offer to purchase the Property by executing and delivering two contracts, as well as a downpayment check, to defendants' attorney. Defendants allege that prior to plaintiff tendering a downpayment, and prior to defendants delivering executed Contracts to plaintiff, defendants elected to sell the Property to the third-party purchaser instead of plaintiff. Defendants contend that they notified plaintiff of their intention to sell to the third party on Sunday, March 13, 2016. Notwithstanding the foregoing, plaintiff wire transferred the Contracts deposit in the sum of \$2.6

million to defendants' attorney's escrow account on Monday, March 14, 2016, which was promptly returned to plaintiff. Plaintiff then commenced this action the following day, March 15, 2016, seeking specific performance of the Contracts.

Defendants have now filed the instant motion for dismissal, arguing that no contracts were ever formed between the parties, as: (1) plaintiff failed to tender a downpayment at the time it executed the Contracts or at any time prior to defendants' rejection of plaintiff's offer; and (2) defendants never delivered fully executed Contracts to plaintiff. Defendants also seek an award of costs and expenses based upon plaintiff's alleged wrongful filing of the notice of pendency. Defendants claim that plaintiff filed the notice of pendency in bad faith in order to hold the Property hostage and to thwart defendants' agreement to sell the Property to a third party.

In response thereto, plaintiff has filed a cross-motion for summary judgment in its favor, arguing that a complete and binding agreement was formed as of an email sent by defendants' attorney on Saturday, March 12, 2016, wherein the attorney indicated that he had "fully executed contracts which I will forward to [plaintiff's attorney] Monday after I receive the wire transfer." As such, plaintiff seeks summary judgment granting it specific performance of the Contracts.

Where a defendant moves to dismiss an action, pursuant to CPLR 3211 (a) (1), asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

Furthermore, on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether plaintiff has a cause of action and not whether he may ultimately be successful on the merits (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]). In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by a plaintiff to

remedy any defects in the complaint (see *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]).

To establish the existence of a contract under New York law, a plaintiff must allege an offer, acceptance, consideration, mutual assent, and an intent to be bound. That meeting of the minds must include agreement on all essential terms (see e.g. *Kowalchuk v Stroup*, 61 AD3d 118 [2009]). Further, it is well-settled that the Statute of Frauds prohibits the transfer of an interest in real property without a written contract signed by the party to be charged (General Obligations Law § 5-703 [1]; see e.g. *Pinkava v Yurkiw*, 64 AD3d 690 [2009]). Any modification to a contract concerning real property must also be in writing signed by the party to be charged, or by his lawful agent thereunto authorized by writing (General Obligations Law § 5-703 [2]; *Gold Coast Homes at Evert St., Inc. v Cannuscio*, 62 AD3d 748 [2009]).

Moreover, with respect to the delivery requirement of contracts concerning real property, the Court of Appeals has held, albeit in the context of a lease agreement:

It is the well-established rule in this State that delivery is one such requirement, the absence of which, without more, renders the lease ineffective . . . The requirement that a lease be delivered to be effective as a conveyance of an interest in land is not peculiar to this State alone, but is ingrained in the common-law principles of real property in many States . . . The underlying justification for viewing delivery as fundamental to the conveyance of an interest in land is not grounded in the blind application of what some may consider archaic principles of property law. On the contrary, delivery serves a very practical end. It is a common practice in the contemporary business world for parties to draft and sign instruments of conveyance prior to the time at which they intend their contemplated transaction to become irrevocable. By requiring delivery, the law facilitates the true expectations of the parties by ensuring that the interest in the property is not conveyed until that moment when the parties so intend . . . The due signature of the lease instrument is but one step in the process of conveying an interest in land. Delivery requires something more. There must be evidence of an

unequivocal intent that the interest intended to be conveyed is, in fact, being conveyed. The mere signing of the instrument by parties not in the presence of each other, without more, does not evince such intent

(*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 511-512 [1979] [citations omitted]). The Second Department in *Eugene Racanelli, Inc. v Incorporated VII. of Babylon*, 66 AD3d 954 (2009) has adopted and applied the analysis of the Court of Appeals in *219 Broadway Corp.* in the context of a contract for the sale of real property.

Here, the Contracts¹ contain the following provisions concerning the timing and method of payment:

¶ 3. **Purchase Price.** The purchase price is . . . payable as follows:

(a) on the signing of this contract, by Purchaser's check payable to the Escrowee (as herein defined), subject to collection, the receipt of which is hereby acknowledged, to be held in escrow pursuant to paragraph 6 this contract (the "Downpayment") . . .

* * *

¶ 7. **Acceptable Funds.** All money payable under this contract, unless otherwise specified, shall be paid by:

* * *

(b) Good certified check of Purchaser drawn on or official check issued by any bank, savings bank, trust company or savings and loan association having a banking office in the State of New York . . .

* * *

(d) As otherwise agreed to in writing by Seller or Seller's attorney **including wiring of the funds to a designated account** (emphasis in original).

¹ The contract for the sale of the parcel containing the residence and the contract for the sale of the vacant parcel contain identical provisions.

It is undisputed herein that plaintiff did not tender the downpayment until Monday, March 14, 2016, after defendants had rejected plaintiff's offer the prior day. The Court finds that the email correspondence exchanged did not alter the terms of the Contracts to make the downpayment a condition subsequent to the agreement.

Furthermore, with respect to the requirement of delivery, the Contracts provide:

¶ 28. (e) This contract shall not be binding or effective until duly executed and delivered by Seller to Purchaser.

In addition, the Rider to the Contracts provides in pertinent part:

¶ 30. The submission of the foregoing instrument does not constitute an offer to sell. The property owner reserves the right, any time prior to Seller's execution and delivery of the contract itself to the attorney for the Purchaser, to withdraw the property from the market or deal with the property in any other manner.

It is further undisputed that defendants never delivered the Contracts executed by defendants at any time prior to rejecting plaintiff's offer and, pursuant to paragraph 30 of the Rider, defendants reserved their right to withdraw the Property from the market prior to delivery of the Contracts to plaintiff.

Accordingly, the Court finds that under facts presented and pursuant to the express terms of the Contracts, no binding agreement was created between plaintiff and defendants. Where the parties have agreed that delivery is essential to the making of a contract, there is no agreement without it (*see 219 Broadway Corp.*, 46 NY2d 506; *Eugene Racanelli, Inc.*, 66 AD3d 954; *Felipe v 2820 W. 36th St. Realty Corp.*, 20 AD3d 503 [2005]; *Malik v Ingber*, 217 AD2d 535 [1995]; *Brois v DeLuca*, 154 AD2d 417 [1989]; *Apostle v Kac*, 113 AD2d 912 [1985]).

Therefore, upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submission (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that as

there was never a contract reached between the parties, plaintiff has failed to state a cause of action for specific performance.

As such, that branch of defendants' motion for dismissal pursuant to CPLR 3211 (a) (1) and/or (7) is **GRANTED**, plaintiff's complaint is hereby dismissed, and the notice of pendency filed in this matter is vacated. The Clerk of the County of Suffolk is directed to cancel and vacate the notice of pendency filed herein on or about March 15, 2016, affecting the real property commonly known as 41 Robertson Drive, Sag Harbor, New York and 43 Robertson Drive, Sag Harbor, New York. Defendants' counterclaims are hereby severed and continued.

That branch of defendants' motion for an award of costs and expenses, pursuant to CPLR 6514 (c), based upon plaintiff's wrongful filing of the notice of pendency, is **GRANTED** to the extent that the parties are directed to appear for a hearing on this issue on **September 22, 2016, at 10:00 a.m., in Part 37, Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead.**

Finally, given the Court's ruling on defendants' motion to dismiss, plaintiff's cross-motion for summary judgment, or in the alternative, for the opportunity to conduct discovery and establish its claim at trial, is hereby **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: July 19, 2016



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION