

To be Argued by:
LISA SOLOMON
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division—Second Department

JOSEPH N. MORAY,

Plaintiff-Respondent,

DOCKET Nos.:
2002-09159
2003-00175

– against –

DBAG, INC.,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the principle that, where a contract does not make time of the essence, the parties are entitled to a reasonable time in which to tender performance, is applicable to a contract term requiring a party to obtain a zoning variance by a particular date?

Plaintiff-Respondent respectfully submits that the answer is yes.

2. Whether Plaintiff-Respondent is entitled to an order declaring that Defendant-Appellant's purported cancellation of the contract at issue in this case, based on Plaintiff-Respondent's failure to obtain a zoning variance by the date specified in the contract, constitutes an anticipatory breach of that contract, entitling Plaintiff-Respondent to maintain an action for specific performance or, in the alternative, money damages?

Plaintiff-Respondent respectfully submits that the answer is yes.

3. Whether the court below properly denied Defendant-Appellant's motion to renew, based on Defendant-Appellant's failure to offer any new or additional evidence justifying renewal?

Plaintiff-Respondent respectfully submits that the answer is yes.

4. Whether the appeal of that portion of the December 10, 2002 Order of the court below denying reargument should be dismissed because the denial of a motion to reargue is not appealable?

Plaintiff-Respondent respectfully submits that the answer is yes.

COUNTERSTATEMENT OF FACTS

On October 2, 2001, Plaintiff-Respondent Joseph N. Moray (“Moray”) as buyer, and Defendant-Appellant DBAG, Inc. (“DBAG”) as seller, entered into a contract (the “Contract”) for the sale of certain real property located at 161 Saw Mill River Road in Yonkers, New York (the “Property”). (R. 29-38). The Contract contains a rider providing, in paragraph 21, that Plaintiff-Respondent’s obligations were

subject to the issuance on or before December 31, 2001 of an area variance from the City of Yonkers Zoning Board of Appeals under which the authority to convey the Premises to Purchaser is authorized by the governing municipal authority. Purchaser shall make prompt application to the City of Yonkers Building Department to obtain an objection letter and promptly thereafter file an application for an area variance to the Zoning Board of Appeals. Purchaser shall:

- a) furnish accurate and complete information as may be required.
- b) pay all fees and costs required in connection with such application.
- c) pursue such application with diligence, and
- d) cooperate in good faith with the governing authorities to which purchaser has made such application.

Purchaser shall comply with all requirements of the Yonkers Zoning Board and shall furnish Seller with a copy of Purchaser’s application and all notices received by Purchaser in connection with the said application. If Purchaser fails to receive the area variance on or prior to December 31, 2001, Seller may cancel this Contract by giving notice to Purchaser in which case this Contract shall be deemed cancelled and thereafter neither party shall have any further rights against, or obligations or liabilities to, the other by reason of this Contract, except that the down payment shall promptly be refunded to Purchaser.

(R. 36a-37). The contract did not make time of the essence. (R. 29-38).

The Yonkers Zoning Board of Appeals did not issue an area variance before December 31, 2001. Accordingly, on February 14, 2002, Moray’s attorney requested an extension of time to obtain

the necessary variance until March 31, 2002. (R. 39). On March 13, 2002, DBAG, through counsel, purported to cancel the Contract based on Moray's failure to obtain the necessary approvals by December 31, 2001, as set forth in paragraph 21 of the Contract. (R. 41). DBAG also returned Moray's down payment at that time.

Meanwhile, on March 12, 2001, the Yonkers Department of Housing & Buildings conditionally denied Moray's application for a variance. (R. 40). However, the denial letter provided that Moray could cure the defects in the original application. (R. 40). Moray did not subsequently request that DBAG's principals sign an additional application for a variance, as DBAG had already returned Moray's down payment and purported to cancel the contract. (R. 65). By letter, dated March 18, 2002 Moray's counsel rejected DBAG's tender of the down payment funds, and requested that DBAG's counsel contact him to schedule the closing. (R. 42).

Moray commenced this action on or about May 10, 2002 by filing a Summons and Verified Complaint. (R. 22-27). Moray also filed a Notice of Pendency with respect to the Property at that time. (R. 44-46). The Verified Complaint explicitly alleged that Moray was "at all times hereinafter mentioned . . . ready, willing and able to continue with the terms of the Contract, and . . . still is ready to duly perform all of the conditions of such Contract on his part to be performed" (R. 25). Moray sought specific performance of the Contract or, in the alternative, damages in the amount of \$136,000. (R. 26).

By notice of motion, dated June 13, 2002, DBAG purportedly moved to dismiss this action, pursuant to CPLR 3211, asserting that Moray's Verified Complaint failed to state a claim upon which relief could be granted. (R. 18). However, DBAG did not argue that Moray failed to plead any elements of its breach of contract and specific performance claims. (R. 19-21). Rather, DBAG

argued that “it is clear that the Contract became terminable as a result of plaintiff’s failure to obtain the area variance on or before December 31, 2001. The plaintiff’s attorneys unsuccessfully requested an extension in Contract time for obtaining the area variance, and the Contract was thereafter terminated in strict accordance with its terms.” (R. 21).

By Order, dated September 9, 2002 and entered September 10, 2002, the court below (Nastasi, J.) denied DBAG’s motion to dismiss and directed Moray to serve an amended complaint within thirty (30) days after the date of entry of its order. (R. 6-10). Inexplicably, despite the fact that the Verified Complaint specifically alleged that Moray was “at all times hereinafter mentioned . . . ready, willing and able to continue with the terms of the Contract, and . . . still is ready to duly perform all of the conditions of such Contract on his part to be performed . . .” (R. 25), the court held that Moray “fails to allege that he was ready, willing and able to perform the parties’ contract.” (R. 7).

The court further held that, aside from Moray’s supposed failure to allege that he was ready, willing and able to perform its obligations under the Contract, the Verified Complaint stated a valid claim. (R. 10). The court explained that, since the Contract did not contain a provision making time of the essence, and since DBAG did not give sufficiently specific notice that time was of the essence, Moray was afforded a reasonable time in which to tender his performance. (R. 9-10). Accordingly, the Court concluded that DBAG’s declaration of Moray’s default was not dispositive and, “indeed, was simply improper.” (R. 10).

By notice of motion, dated October 23, 2002, DBAG moved for “renewal/reargument” of its previous motion. (R. 11). By Order, dated and entered December 10, 2002, the court below (Nastasi, J.) denied DBAG’s motion to renew and reargue on the grounds that the motion was

untimely (CPLR 2221(d)(3)) and failed to comply with the requirements set forth in CPLR 2221(f); DBAG failed to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law; and there were no new or additional facts which, although in existence at the time of the original motion, were not known to DBAG. (R. 3-4).

ARGUMENT

I. THIS COURT IS EMPOWERED TO SEARCH THE RECORD AND GRANT PARTIAL SUMMARY JUDGMENT IN FAVOR OF MORAY DECLARING DBAG TO BE IN BREACH OF CONTRACT

As the court below correctly stated, the test on a motion to dismiss for failure to state a cause of action is “whether the pleading gives notice of the transactions relied upon by the plaintiff and whether sufficient material elements of the cause of action have been asserted.” (R. 6); see also, e.g., Bayside Controls, Inc. v. Telyas, 295 A.D.2d 343, 743 N.Y.S.2d 153 (2d Dep’t 2002); Fireman’s Fund Ins. Co. v. Farrell, 289 A.D.2d 286, 734 N.Y.S.2d 217 (2d Dep’t 2001); Chaudhry v. Abadir, 261 A.D.2d 499, 692 N.Y.S.2d 399 (2d Dep’t 1999). However, DBAG simply did not argue in its June 13, 2002 motion, which purported to seek dismissal pursuant to CPLR 3211, that the complaint failed to plead all of the material elements of a cause of action for breach of contract and specific performance. (R. 18-21). Instead, DBAG argued that it properly terminated the contract — in other words, that it was not in breach of contract, as alleged in the complaint. (R. 21). Thus, DBAG’s motion was improperly denominated as one to dismiss under CPLR 3211, when it was, in actuality, a motion for summary judgment pursuant to CPLR 3212.

Although the court below did not explicitly state in its September 10, 2002 Order that it was treating DBAG’s motion as the summary judgment motion that it was, it addressed the merits of

DBAG's argument that it did not breach the Contract.¹ The court properly analyzed this issue, focusing on Moray's right to a reasonable time in which to tender its performance and concluding that DBAG, rather than Moray, had breached the Contract.² Thus, although Moray did not move for summary judgment in the court below, this Court is empowered to search the record and grant partial summary judgment in favor of Moray declaring DBAG to be in breach of contract. See, e.g., Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 472 N.Y.S.2d 592, 460 N.E.2d 1077 (1984) (Appellate Division may search record and grant summary judgment to nonmoving party even where nonmovant did not appeal); Selter v. MCM Distributors, Inc., ___ A.D.2d ___, 749 N.Y.S.2d 94 (2d Dep't 2002) (CPLR 3212(b) authorizes Appellate Division to search record and grant summary judgment to nonmoving party with respect to issue that was the subject of motion before Special Term); Zinker v. Makler, 298 A.D.2d 516, 748 N.Y.S.2d 780 (2d Dep't 2002) (same); Image Clothing, Inc. v. State Nat. Ins. Co., 291 A.D.2d 377, 736 N.Y.S.2d 885 (2d Dep't 2002) (same).³

¹Although, pursuant to CPLR 3211(c), the court below should arguably have given notice to the parties that it was treating DBAG's motion as one for summary judgment, DBAG cannot now complain of the court's failure to do so, since DBAG — which argued the merits of the action in the first place — was not prejudiced by the conversion. Moray did not, and does not, object to the conversion. Furthermore, by seeking summary judgment pursuant to CPLR 3212 in its renewal/reargument motion (R. 11), DBAG implicitly recognized that its initial motion was really one for summary judgment pursuant to CPLR 3212, rather than dismissal pursuant to CPLR 3211(a)(7).

²The merits of the court's decision on this issue are discussed *infra*, at Point II.

³The court below clearly erred in finding that Moray did not allege that he was ready, willing and able to perform the contract, since he explicitly asserted in paragraph 15 of the Verified Complaint that "at all times hereinafter mentioned . . . [he was] ready, willing and able to continue with the terms of the Contract, and . . . still is ready to duly perform all of the conditions of such Contract on his part to be performed . . ." (R. 25). Although Moray did not appeal from that portion of the September 10, 2002 Order directing him to replead, the doctrine of law of the

II. SINCE TIME WAS NOT OF THE ESSENCE, MORAY'S INABILITY TO OBTAIN A VARIANCE BY DECEMBER 31, 2001 DOES NOT CONSTITUTE A MATERIAL BREACH OF CONTRACT, AND DBAG'S CANCELLATION OF THE CONTRACT BASED ON THE FAILURE TO OBTAIN A VARIANCE BY DECEMBER 31, 2001 CONSTITUTES AN ANTICIPATORY BREACH OF THE CONTRACT

As the court below correctly held, when a contract for the sale of real property does not make time of the essence, the parties are entitled to a reasonable time in which to tender performance,

case does not preclude this Court from examining the validity of that order, and modifying it to the extent that it calls for dismissal of the complaint if Moray did not serve an amended complaint within 30 days. *See, e.g., Klein v. Smigel*, 44 A.D.2d 248, 250, 354 N.Y.S.2d 117, 117 (1st Dep't 1974), *aff'd*, 36 N.Y.2d 809, 370 N.Y.S.2d 897, 331 N.E.2d 679 (1975) (prior order determining motion to dismiss, not appealed, "constitutes no impediment to an appellate court in the proper and just disposition of the motion on its merits, freed from any procedural stumbling block."); *Atlantic Mut. Ins. Co. v. Lauria*, 291 A.D.2d 492, 739 N.Y.S.2d 394 (2d Dep't 2002) (doctrine of law of the case does not apply in an appellate court when prior order was made by a court of subordinate jurisdiction and no appeal was taken); *Gargiulo v. Oppenheim*, 95 A.D.2d 484, 467 N.Y.S.2d 276 (2d Dep't 1983), *aff'd*, 63 N.Y.2d 843, 482 N.Y.S.2d 256, 472 N.E.2d 32 (1984) (same).

In this regard, this Court's decision in *Bellavia v. Allied Electric Motor Service*, 46 A.D.2d 807, 361 N.Y.S.2d 193 (2d Dep't 1974) is on all fours with this case. In *Bellavia*, the defendant moved for an order of conditional preclusion following the receipt of a bill of particulars that it deemed insufficient. *Id.*, 361 N.Y.S.2d at 195. The court granted the motion and directed plaintiffs to serve a supplemental bill of particulars. *Id.* The defendant deemed the supplemental bill of particulars to also be deficient, and it made another motion for a conditional order of preclusion, which was granted on default. *Id.* Special Term held that, while the supplemental bill of particulars might have been sufficient, the plaintiffs' default on the second motion established, as law of the case, the defendant's right to the additional particulars sought. *Id.* This Court, on the plaintiffs' appeal from the second order, reversed, holding that it is "not bound by the doctrine of law of the case and, hence, is not constrained by the prior default conditional order of preclusion." *Id.* The Court further noted that, before the second order was granted, the supplemental bill of particulars was amended by stipulation, thus making it sufficient. *Id.* at 808, 361 N.Y.S.2d at 195. The Court thus concluded that, "[i]n the interests of judicial economy and substantial justice," the plaintiff was not required to serve a further bill of particulars. *Id.* Similarly, here, this Court is not bound by the September 10, 2002 conditional preclusion order. Furthermore, since the Verified Complaint has at all times sufficiently alleged that Moray is ready, willing and able to perform his obligations under the Contract, this Court, in the interests of judicial economy and substantial justice, should modify the September 10, 2002 Order by striking that portion directing Moray to serve an amended complaint.