Joseph N. **Moray,** respondent, v DBAG, Inc., appellant.(Index No. 8539/02)
2002-09159, 2003-00175

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECONDDEPARTMENT

2003 N.Y. App. Div. LEXIS 5415

April 4, 2003, Argued
May 12, 2003, Decided

NOTICE:

[*1]
THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff buyer sued defendant seller for specific performance of a real estate contract. The Supreme Court, Westchester County, New York: (1) granted the seller's N.Y. C.P.L.R. art. 3211(a)(7) motion to dismiss, but granted the buyer leave to replead; and (2) denied the seller's motion to reargue and to vacate a notice of pendency. The seller appealed.

OVERVIEW: The buyer was to, but did not, obtain an area variance by the closing date before the seller was required to sell. The seller then cancelled the contract. The buyer said the seller indicated to the buyer after the closing date that the seller was going to waive that requirement. The appeals court, in affirming the buyer's leave to replead, stated that, where there was evidence of conduct on the part of one of the seller's principals following the stated closing date that reflected an intent to waive the seller's right to cancel the contract for failure to obtain an area variance by that date, under those circumstances, it was improper for the seller to suddenly attempt to cancel the contract without first notifying the buyer that time was of the essence. The seller was required to set a new date for closing and make time of the essence by giving clear, distinct, and unequivocal notice to that effect, giving the buyer a reasonable time in which to act, and, by informing the buyer that, if he did not perform by that date, he was to be considered in default. Proof of the buyer's readiness to perform was obviated by the seller's acts amounting to an anticipatory breach of the contract.

OUTCOME: The appeals court: (1) dismissed the appeal from the motion to reargue, as not appealable; (2) affirmed the order that dismissed the action and gave the buyer leave to replead; and (3) reversed the order with respect to the notice of pendency and vacated the notice of pendency.

CORE TERMS: reargue, notice, pendency, vacate, disbursements, specific performance, leave to replead, leave to renew, denominated

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Relief From Judgment: Motions to Alter & Amend
Civil Procedure: Appeals: Appellate Jurisdiction: Interlocutory Orders
[HN1] No appeal lies from an order denying reargument.

Real & Personal Property Law: Sales, Exchanges & Remedies: Specific Performance
[HN2] With respect to an action for specific performance of a real estate contract, where there is evidence of conduct on the part of one of the seller's principals following the stated closing date that reflects an intent to waive the seller's right to cancel the contract for failure to obtain an area variance by that date, under those circumstances, it is improper for the seller to suddenly attempt to cancel the contract without first notifying the buyer that time is of the essence. The seller would be required to set a new date for closing and make time of the essence by giving clear, distinct, and unequivocal notice to that effect giving the buyer a reasonable time in which to act, and by informing the buyer that if he does not perform by that date, he will be considered in default.

Real & Personal Property Law: Sales, Exchanges &

Remedies: Specific Performance
[HN3] A real estate seller in a buyer's suit for specific performance is not entitled to dismissal on the ground that the buyer fails to demonstrate that he is ready, willing, and able to close before the commencement of thee action. Although buyers who seek specific performance must ordinarily show that they are ready, willing, and able to perform, such proof is not required where the necessity for such a tender is obviated by acts of the other party amounting to an anticipatory breach of the contract.

Civil Procedure: Relief From Judgment: Motions to Alter & Amend
Civil Procedure: Appeals: Appellate Jurisdiction: Interlocutory Orders
[HN4] A motion which is denominated as one for leave to renew and reargue that is not based upon new facts which are in existence or unavailable to it at the time of the original motion is, in effect, one for leave to reargue, the denial of which is not appealable.

COUNSEL: Kevin A. Stevens, Suffern, N.Y., for appellant.

Lubell & Koven, New York, N.Y. (Lisa Solomon of counsel), for respondent.

JUDGES: FRED T. SANTUCCI, J.P., DANIEL F. LUCIANO, SANDRA L. TOWNES, REINALDO E. RIVERA, JJ.

OPINION: DECISION & ORDER

In an action, inter alia, for specific performance of a contract for the sale of real property, the defendant appeals from (1) an order of the Supreme Court, Westchester County (Nastasi, J.), entered September 10, 2002, which, upon granting its motion pursuant to *CPLR 3211(a)(7)* to dismiss the complaint for failure to state a cause of action, granted the plaintiff leave to replead, and (2) an order of the same court, entered December 10, 2002, which denied its motion, denominated as one for leave to renew, but which was, in effect, for leave to reargue, and to vacate a notice of pendency.

ORDERED that the appeal from so much of the order entered December 10, 2002, as denied that branch of the motion which was for leave to reargue is dismissed, without costs or disbursements, as [HN1] no appeal lies from an order[*2] denying reargument; and it is further,

ORDERED that the order entered September 10, 2002, is affirmed, without costs or disbursements; and it is further,

ORDERED that the order entered December 10, 2002, is reversed insofar as reviewed, without costs or disbursements, and that branch of the defendant's motion which was, in effect, to vacate the notice of pendency is granted.

Contrary to the defendant's contention, the Supreme Court properly granted the plaintiff leave to replead pursuant to *CPLR 3211(e)*. In opposition to the defendant's motion to dismiss the complaint pursuant to *CPLR 3211(a)(7)*, the plaintiff submitted [HN2] evidence of conduct on the part of one of the defendant's principals following the stated closing date that reflected an intent to waive the defendant's right to cancel the contract for failure to obtain an area variance by that date (see *Ehrenpreis v Klein, 260 A.D.2d 532, 688 N.Y.S.2d 239*; *Dellicarri v Hirschfeld, 210 A.D.2d 584, 619 N.Y.S.2d 816*; *Kaufman v Haverstraw Rd. Lands, 158 A.D.2d 675, 551 N.Y.S.2d 855*; *Gresser v Princi, 128 A.D.2d 752, 513 N.Y.S.2d 462*).[*3] Under those circumstances, it was improper for the defendant to suddenly attempt to cancel the contract without first notifying the plaintiff that time was of the essence (see *Tucek v Hoffman, 161 A.D.2d 588, 555 N.Y.S.2d 167*; *Dwyer v Villanova, 129 A.D.2d 763, 765, 514 N.Y.S.2d 519*; *Levine v Sarbello, 112 A.D.2d 197, 200, 491 N.Y.S.2d 419*). The defendant would have been required to set a new date for closing and make time of the essence by giving "clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act" (*Savitsky v Sukenik, 240 A.D.2d 557, 558, 659 N.Y.S.2d 48*; see *Mazzaferro v Kings Park Butcher Shop, 121 A.D.2d 434, 435-436, 503 N.Y.S.2d 134*), and by informing the plaintiff that if he does not perform by that date, he will be considered in default (see *Cave v Kollar, 296 A.D.2d 370, 371-372, 744 N.Y.S.2d 497*; *Hamburger v Rieselman, 206 A.D.2d 822, 823, 615 N.Y.S.2d 143*; *Charchan v Wilkins, 231 A.D.2d 668, 647 N.Y.S.2d 550*).

Moreover, [HN3] the defendant is not entitled to dismissal on the ground that the plaintiff failed to demonstrate[*4] that he was ready, willing, and able to close before the commencement of this action. Although purchasers who seek specific performance must ordinarily show that they are ready, willing, and able to perform (see *Ehrenpreis v Klein, supra*; *Scull v Sicoli, 247 A.D.2d 852, 668 N.Y.S.2d 827*; *Madison Invs. v Cohoes Assocs., 176 A.D.2d 1021, 574 N.Y.S.2d 980*), such proof is not required where "the necessity for such a tender was obviated by acts of the other party amounting to an anticipatory breach of the contract" (*Madison Invs. v Cohoes Assocs., supra*; see also *Cohn v Mezzacappa Bros., 155 A.D.2d 506, 547 N.Y.S.2d 367*).

That branch of the defendant's [HN4] motion which was denominated as one for leave to renew and reargue was not

based upon new facts which were in existence or unavailable to it at the time of the original motion. Therefore, that branch of the motion was, in effect, one for leave to reargue, the denial of which is not appealable (see *Daughety v St. Mary's Hosp. of Brooklyn, 301 A.D.2d 558, 753 N.Y.S.2d 846*; *Muro v Bay Ready Mix & Supplies, 282 A.D.2d 584, 723 N.Y.S.2d 673*; *Bossio v Fiorillo, 222 A.D.2d 476, 477, 635 N.Y.S.2d 59*).[*5]

However, the Supreme Court should have granted that branch of the defendant's motion which was to vacate the notice of pendency based upon the plaintiff's failure to serve an amended complaint in accordance with the prior order.

SANTUCCI, J.P., LUCIANO, TOWNES and RIVERA, JJ., concur.