COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-257

ASSET SOLUTIONS, LLC

vs.

CARLOS R. CASTILLO & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this cross appeal we analyze whether a Land Court judge abused her discretion in denying a special motion to dismiss under G. L. c. 184, § 15 (c), and allowing a motion to dismiss for failure to state a claim under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). We also analyze whether a change in a material term between an offer to purchase real estate and a purchase and sale agreement rendered the offer to purchase unenforceable. We affirm.

Background. In 2017, the plaintiff, Asset Solutions, LLC (ASL), contacted the defendant, Jose M. Quintero, to express interest in purchasing Quintero's property (property), located in Boston. After initial communications, ASL and Quintero executed an "Offer to Purchase Real Estate" (OTP). The OTP

[1] Jose M. Quintero.

specified that Quintero agreed to sell the property to ASL for $850,000, with March 21, 2017, as the proposed date for execution of the purchase and sale agreement (P&S) and May 1, 2017, as the closing date. ASL provided Quintero with a deposit of $1,000 to bind the OTP. On March 21, 2017, ASL's attorney requested an extension of time to execute the P&S because "he had yet to see a draft of the P&S and . . . was willing to provide the first draft of the P&S to [Quintero]." Both parties to the negotiation requested extensions, and the P&S execution date was further extended to March 31, 2017. On March 27, 2017, ASL's attorney provided Quintero's attorney with a draft of the P&S and a rider thereto. On March 31, 2017, Quintero's attorney notified ASL's attorney that Quintero was canceling the transaction. On April 21, 2017, Quintero entered into a purchase and sale agreement with the codefendant, Carlos R. Castillo. On May 3, 2017, Quintero sold the property to Castillo.

ASL filed a complaint against Quintero and later added Castillo as a necessary party. ASL alleged breach of the OTP and fraudulent conveyance, and sought specific performance of the OTP. ASL also filed a "motion for approval of memorandum of lis pendens"[2] pursuant to G. L. c. 184, § 15, which the judge

[2] "A memorandum of lis pendens is a notice on the record title of real estate that reflects the pendency of any action that

eventually allowed.[3] Quintero and Castillo filed special motions to dismiss. After a hearing, the judge denied the special motions to dismiss. However, she also considered, sua sponte, the motions as having been brought as motions to dismiss under rule 12 (b) (6), and allowed them. She further ordered that the memorandum of lis pendens "is dissolved."[4] ASL appeals from the ensuing judgment. The defendants cross-appeal, arguing that the judge erred in denying the special motions to dismiss.

Discussion. 1. Allowance of motions to dismiss. ASL contends that the judge abused her discretion in allowing the motions to dismiss under rule 12 (b) (6) because the defendants only filed special motions to dismiss under G. L. c. 184, § 15.

'affects the title to real property or the use and occupation thereof.'" McMann v. McGowan, 71 Mass. App. Ct. 513, 519 (2008), quoting Wolfe v. Gormally, 440 Mass. 699, 700 (2004).

[3] The judge first denied without prejudice ASL's motion for approval of the memorandum of lis pendens to allow ASL to amend the motion to comply with G. L. c. 184, § 15 (b), which requires the verified complaint to state that "no material facts have been omitted." See DeCroteau v. DeCroteau, 90 Mass. App. Ct. 903, 906 (2016).

[4] The parties do not dispute that the judge's decision and order provided the parties with the first notice that the judge was treating the special motions to dismiss as rule 12 (b) (6) motions to dismiss. It does not appear from the record that any of the parties moved to reconsider the decision. The decision states that the judge could not allow the special motions to dismiss "because allowance requires a finding that Plaintiff's claims were devoid of any reasonable factual support, devoid of any arguable basis in law, or subject to dismissal based on a valid legal defense. The court cannot make any of those findings on the record presented."

ASL maintains that the judge's decision constituted a due process violation. We disagree.

Under G. L. c. 184, § 15, a special motion to dismiss is "a mechanism for expedited removal of an unjustified lis pendens, including dismissal of frivolous claims supporting an approved lis pendens." McMann v. McGowan, 71 Mass. App. Ct. 513, 519 (2008), quoting Galipault v. Wash Rock Invs., LLC, 65 Mass. App. Ct. 73, 81 (2005). General Laws c. 184, § 15 (c), provides that a "special motion to dismiss shall be granted if the court finds that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds." Moreover, "[i]f the court allows the special motion to dismiss, it shall award the moving party costs and reasonable attorneys fees." G. L. c. 184, § 15 (c). By contrast, for a rule 12 (b) (6) motion to dismiss, "[w]hat is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief" (quotation and citation omitted). Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). In reviewing a judge's allowance of a motion

to dismiss, we apply de novo review. Baker v. Wilmer Cutler Pickering Hale & Dorr LLP, 91 Mass. App. Ct. 835, 842 (2017).[5]

In the present case, the judge dismissed the case after a hearing, during which ASL had the opportunity to argue the merits of its amended verified complaint.[6] As ASL conceded at oral argument before this court, if the judge was correct in determining that there was a material change in terms between the OTP and the draft P&S and its rider, the motion to dismiss was properly allowed. We have conducted an independent review of the allowance of the motion to dismiss under the requisite de novo standard, and conclude, for the reasons stated, infra, that the judge did not err. On the record before us, ASL has not demonstrated any prejudice suffered from the judge's treatment of the special motions to dismiss as rule 12 (b) (6) motions.[7] See Faneuil Investors Group, Ltd. Partnership v. Board of Selectmen of Dennis, 458 Mass. 1, 2 (2010) (noting that Land

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[5] In reviewing a judge's allowance of a special motion to dismiss, we determine whether there was an abuse of discretion or an error of law. McMann, 71 Mass. App. Ct. at 519.

[6] The transcript of the hearing is not part of the record before us.

[7] While, as discussed infra, we hold that the dismissal of the amended verified complaint under rule 12 (b) (6) was warranted, it is the better practice for a judge to notify the parties of his or her intention to treat a special motion to dismiss as if it were brought under rule 12 (b) (6), and afford the parties an opportunity to be heard thereon. That notwithstanding, under the particular facts of this case, we discern no error in the judge's determination here. See Faneuil Investors Group, Ltd. Partnership v. Board of Selectmen of Dennis, 458 Mass. 1, 2 (2010).

Court judge "dismissed the board's special motion to dismiss the plaintiff's complaint, G. L. c. 184, § 15 [c], [and] treated the motion as if it were brought under Mass. R. Civ. P. 12 [b] [6]"). Contrast Wilkins v. Cooper, 72 Mass. App. Ct. 271, 277 (2008) (due process violation where, without notice, status conference was converted into hearing on merits).

2. Breach of contract. ASL argues that the OTP was an enforceable contract, which Quintero breached. We disagree and hold that because of the change in material terms between the OTP and the draft P&S and its rider, ASL's amended verified complaint was properly dismissed for failure to state a claim upon which relief can be granted. See Mass. R. Civ. P. 12 (b) (6).

"Ordinarily the question whether a contract has been made is one of fact" (quotation and citation omitted). Coldwell Banker/Hunneman v. Shostack, 62 Mass. App. Ct. 635, 640 (2004). An offer to purchase may serve as a binding contract if the facts "indicate an intent on the part of the seller and the buyer to be bound by the terms of the OTP." Id. at 639. However, an offer to purchase will not be binding where there has been a change in material terms between the offer to purchase and the purchase and sale agreement. See Blomendale v. Imbrescia, 25 Mass. App. Ct. 144, 146-147 (1987) (new terms introduced in purchase and sale agreement that were inconsistent

with accepted offer to purchase rendered accepted offer unenforceable); Goren v. Royal Invs. Inc., 25 Mass. App. Ct. 137, 140 (1987) ("language looking to execution of a final written agreement justifies a strong inference that significant items on the agenda of the transaction are still open and, hence, that the parties do not intend to be bound").

The record here reveals a change in material terms between the OTP and the draft P&S and the rider.[8] The standard form OTP signed by ASL and Quintero contains the following language added by typewritten insertion: "seller will introduce buyer to tenants at signing of [the P&S] so that buyer may obtain estoppel certificates, [tenant at will] agreements and commence eviction procedures before closing, third floor unit to be delivered vacant, property sold as is." The draft P&S and the rider contain conflicting provisions. The draft P&S states that the property will be delivered "free of all tenants." However, the P&S also provides that the provisions in the rider will

[8] We note that in its first amended verified complaint, ASL referenced the draft P&S, but neither attached a copy thereto, nor quoted specific language therefrom. However, the P&S and rider were included as attachments in the defendants' responses and were before the judge on the motions to dismiss. See Vickery v. Walton, 26 Mass. App. Ct. 1030, 1031 (1989) ("Whether a preliminary agreement which contemplates execution of a further document represents an understanding of the parties on all essential terms cannot be read from the text of the preliminary paper alone. The provisions of the subsequent agreement, or subsequent events, may expose disagreement between the parties about significant business terms").

prevail over conflicting provisions in the P&S. The rider provides that "[p]rior to the time for performance, and as a condition precedent to the Buyer's duty to tender the sale proceeds as set forth herein, the Seller shall produce to the Buyer for each and every tenant, a duly-executed tenant estoppel[] certificate, signed by each tenant, and dated within ten (10) days of the time for performance, in the form appended hereto."[9] These three conflicting provisions concern a material term, namely the actions that ASL and Quintero must take to complete the sale of the property. See Coldwell Banker/Hunneman, 62 Mass. App. Ct. at 639 (disagreement as to vacancy of part of property was material term, rendering offer to purchase not binding). The discrepancies between the provisions on this material term render the OTP unenforceable as a matter of law.[10] See Blomendale, 25 Mass. App. Ct. at 147; Goren, 25 Mass. App. Ct. at 140-141 (contrasting subsidiary matters where "norms exist for their customary resolution" with disagreement over "significant economic issues," which render the preliminary agreement unenforceable). Therefore, Quintero

[9] No form was appended to the rider.

[10] We need not address whether the provision contained in the rider would prevail over the provision contained in the P&S because both provisions differ from the OTP. Nor need we address ASL's claims that the judge utilized materials outside the pleadings or drew inferences in favor of the moving party. See Walsh v. Morrissey, 63 Mass. App. Ct. 916, 918 (2005).

did not breach the OTP, and the motions to dismiss were properly allowed. See Iannacchino, 451 Mass. at 636.[11,12]

Judgment affirmed.

By the Court (Kinder, Neyman & Desmond, JJ.[13]),

Joseph F. Stanton

Clerk

Entered: May 10, 2019.

[11] We are not persuaded by the defendants' claim that insofar as ASL failed to state a claim upon which relief can be granted, ASL's claim was frivolous within the meaning of G. L. c. 184, § 15 (c), as a matter of law. The defendants cite no authority to support this broad proposition.

[12] We decline Quintero's request for appellate attorney's fees and costs.

[13] The panelists are listed in order of seniority.