Morgan and Brother Manhattan Storage Company, Inc., Appellant, v. Herbert M. Balin et al., as Copartners, Practicing Law Under the Name of Wydler, Balin, Pares & Soloway, et al., Respondents

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

39 N.Y.2d 848*; *351 N.E.2d 748*; *386 N.Y.S.2d 100*; *1976 N.Y. LEXIS 2800

April 26, 1976, Argued
June 2, 1976, Decided

PRIOR HISTORY: [**1] *Morgan & Brother Manhattan Stor. Co. v Balin, 47 AD2d 85.*

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered March 6, 1975, which affirmed a judgment of the Supreme Court, entered in New York County upon a decision of the court at a Trial Term (Andrew R. Tyler, J.), dismissing the complaint, granting judgment in favor of defendant H & W Enterprises Co. (H & W) on a counterclaim by it for specific performance of a contract for plaintiff's purchase of a building from it, and referring the matter to a referee to take testimony with respect to income and expenses and to determine the amount of debit and credit, as the case might be, to which the parties might be entitled. Plaintiff, a storage company, commenced the action to recover the down payment which it had made upon execution of the contract to purchase H & W's building, which was located in New York City. It planned to use the building for the storage of records and archives, and the contract of purchase contained provisions that it would make "prompt and diligent application" to the municipality for an amendment of the certificate of [**2] occupancy to allow for such use; that, in the event plaintiff was unable to obtain such an amended certificate within 30 days, it was to have the right to elect to cancel the contract, by giving notice within said 30-day period; that, notwithstanding any provision in the contract to the contrary, if plaintiff was required to make improvements to the premises in order to obtain the amended certificate, it was to obtain from the municipality and submit to H & W, within said 30-day period, a statement specifying the necessary improvements, and that the estimated cost thereof was to be assumed by plaintiff if not in excess of $ 5,000, and, if it was in excess of $ 5,000, H & W could elect to cancel the contract or reduce the purchase price by the estimated cost less $ 5,000. There was evidence that, two days after execution of the contract, plaintiff was informed by the Deputy Borough Superintendent of Buildings that the building did not qualify for the proposed use because of inadequate floor load capacity; that, in response to a letter which plaintiff then sent, requesting that the certificate of occupancy be amended so as to provide for that use, the same official advised it that an [**3] application would have to be filed for the proposed change of use, with appropriate plans, which application and plans would be examined for compliance with applicable building laws and, if satisfactory, a permit could be taken out to perform any desired or required work, upon the satisfactory completion of which a certificate of occupancy would be issued, but also noting that the certificate of occupancy for the building indicated that the live load capacity of certain floors was inadequate for the proposed use; that plaintiff then notified H & W of its inability to obtain an amended certificate within the prescribed 30-day period and of its election to cancel the contract, but that H & W rejected its letter of cancellation. The Appellate Division held that the contract required not only inquiry regarding the status of the extant certificate of occupancy but also required affirmative action on the part of plaintiff in the form of building improvement to obtain amendment of the certificate of occupancy; that, upon being informed that the existing certificate would not permit the contemplated use, plaintiff did not file a formal application for an amended certificate nor did it explore [**4] the possibility of reinforcing the structure to increase the load capacity to such an extent that an amended certificate would issue; that, in sum, plaintiff was "prompt" but not "diligent", and, therefore, cancellation of the contract was unavailable to it, and that H & W had the right to opt, as it did, for specific performance of the contract. The following question was certified by the Appellate Division: "Was the judgment of the Supreme Court, as affirmed by this Court, properly made?"

DISPOSITION: Order affirmed, with costs, in a memorandum. Question certified answered in the affirmative.

HEADNOTES

Vendor and purchaser -- recovery of down payment -- specific performance -- contract for purchase of building, for use for storage of records and archives, provided that purchaser would make prompt and diligent application to municipality for amendment of certificate of occupancy to allow for such use, that, in event it was unable to obtain such amended certificate within 30 days, it was to have right to elect to cancel contract, that, notwithstanding any provision to contrary, if purchaser was required to make improvements to obtain amended

certificate, it was to obtain from municipality [**5] **statement specifying those improvements, and that estimated cost thereof was to be assumed by it if not in excess of $ 5,000 and, if it was in excess of $ 5,000, seller could elect to cancel contract or reduce purchase price -- after being advised by Deputy Borough Superintendent of Buildings that floor load capacity of building was inadequate for proposed use, purchaser notified seller of its election to cancel -- in action by it to recover its down payment, trial court dismissed complaint and granted judgment in favor of seller on counterclaim for specific performance -- order of Appellate Division which affirmed judgment of trial court affirmed on majority opinion at Appellate Division, with observation that, while it might, in some situations, be argued that on advice from Deputy Borough Superintendent of Buildings that no amendment of certificate of occupancy was possible, prospective purchaser should be relieved of all further obligation to pursue attempts to obtain amendment, such contention is less supportable here, since arguably purchaser's engineers should have known that his information was erroneous, and purchaser never pressed its request for relief.**

COUNSEL: *Owen McGivern,* [**6] *Lawrence P. McGauley, Ronald S. Herzog, John E. Schmeltzer, III, Robert L. Magielnicki* and *John W. Wall* for appellant.

Francis Bergan, Harry Reiss, Samuel Kirschenbaum and *Richard H. Abelson* for respondents.

JUDGES: Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Fuchsberg and Cooke concur; Judge Wachtler taking no part.

OPINION

[*850] Memorandum. The order of the Appellate Division is affirmed on the opinion of Mr. Justice Myles J. Lane of that court. We take this occasion to add one observation. In this instance the applicant was categorically advised by the Deputy Borough Superintendent of Buildings that no amendment of the certificate of occupancy was possible. In some situations it might be urged that on receipt of such advice the prospective purchaser should be relieved of all further obligation to pursue attempts to obtain an amendment. Such a contention is less supportable here, however, since arguably the applicant's engineers should have known that the superintendent's information was erroneous, and applicant never pressed its request for relief.

[*851] Order affirmed, with costs, in a memorandum. Question certified answered in the [**7] affirmative.