

**Federico v Dolitsky**

2016 NY Slip Op 32175(U)

August 1, 2016

Supreme Court, Suffolk County

Docket Number: 11-27061

Judge: Peter H. Mayer

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**ORDERED** that the motion by defendants David Dolitsky and JoAnn Dolitsky for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims against them, is granted to the extent indicated below, and is otherwise denied; and it is further

**ORDERED** that the cross motion by the plaintiff for an order pursuant to CPLR 3212, granting summary judgment in her favor and against defendants David Dolitsky and JoAnn Dolitsky on her first, second, and third causes of action, is granted to the extent indicated below, and is otherwise denied; and it is further

**ORDERED** that the motion (incorrectly denominated as a cross motion) by defendant Continental Home Loans, Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's fourth and fifth causes of action against it, is granted.

On or about May 3, 2010, the plaintiff, as seller, and defendants David Dolitsky and JoAnn Dolitsky, as purchasers, entered into a contract of sale with respect to the residential property located at 33 Madder Lake Circle, Commack, New York, fixing a sale price of \$492,300.00. Upon execution of the contract, the Dolitskys delivered a down payment in the amount of \$25,000.00, to be held in escrow by the plaintiff's attorney.

Section 5 of the rider to the parties' contract, entitled "Financing," is a mortgage contingency provision, paragraph 5.1 of which provides that the purchasers' obligation to purchase the premises is contingent on their obtaining a commitment for a conventional mortgage in an amount no greater than \$292,300.00. Paragraph 5.2 requires the purchasers to make a good faith application for the mortgage and to use due diligence in providing the lender with whatever documents or information it may need. Paragraph 5.3.1 acknowledges that the purchasers have provided the seller with a preapproval letter and that the seller has relied on that letter in entering into the contract. Section 5.4 states that in the event that the purchasers' mortgage application is denied, the purchasers will provide the seller's attorney notice thereof within five days. Paragraph 5.8 provides that if the purchasers are unable to obtain a mortgage commitment within 45 days, the seller may either cancel the contract or extend the purchasers' time to obtain a commitment for a period of up to 30 days, at the end of which either party may cancel without any further liability to the other. Paragraph 5.10 states that if the contract is canceled in accordance with the foregoing provisions, the seller is required to refund the down payment except for the sum of \$250.00, which is to be retained by the seller's attorney as consideration for the preparation of the contract.

Section 8 of the rider to the parties' contract is entitled "Down Payment." Paragraph 8.1 provides that in the event that any party claims a default under the contract, that party shall provide written notice to the party against whom the default is claimed, which party shall have 10 days to object to the payment of the escrow deposit to the party claiming the default; it also provides that in the event of a dispute between the parties concerning entitlement to the down payment, the down payment shall be preserved until the dispute is resolved. Paragraph 8.3 states that if the purchasers willfully default or willfully fail to carry out any of the provisions of the contract, the seller may cancel the agreement and retain the down payment as partial damages.

It appears that after the parties executed the contract, the Dolitskys applied to defendant Continental Home Loans, Inc. for a mortgage loan in the amount of \$292,300.00; that on or about May 25, 2010, they received a notification denying their application on the ground that the appraisal of the property had come in some \$70,000 under the sale price; that by letter dated May 25, 2010, the Dolitskys' attorney advised the plaintiff's attorney that her clients' application had been denied, gave notice that the contract was thereby canceled pursuant to section 5 of the rider, and requested a refund of the down payment; that the plaintiff refused the Dolitskys' request for a refund of the down payment; that the plaintiff subsequently attempted to salvage the transaction, but to no avail; that on or about August 26, 2010, the plaintiff's attorney notified the Dolitskys' attorney in writing that the Dolitskys were in default; that on or about September 3, 2010, the Dolitskys' attorney timely objected to the release of the down payment; and that the plaintiff eventually sold the property to another buyer for a price of \$440,000.00. This action followed.

Although the Dolitskys contend that their attorney provided proper and timely notice of the denial of their application and that they rightfully and properly terminated the contract in accordance with its terms, the plaintiff claims that the Dolitskys unilaterally and anticipatorily breached the contract when, upon learning that the property had appraised at only \$420,000.00, they advised their lender on May 20, 2010 that they were not going to move forward with the transaction and cut off all communication with their broker. The plaintiff also claims that when she spoke to David Dolitsky by telephone in July 2010 and asked why he had reneged on the contract, he said that his intent had been to purchase the property for his daughter and her fiancé, but that after signing the contract, he had learned that they would not be able to afford the carrying charges, and that the issue was purely financial. The plaintiff contends, therefore, that the Dolitskys committed a willful default under the terms of the contract, entitling her not only to retain the down payment but also to recover all of her actual damages flowing directly from the Dolitskys' default.

The plaintiff pleads five causes of action in her amended complaint: the first through third against the Dolitskys only, the fourth against all the defendants, and the fifth against defendants Continental Home Loans, Inc. and Consumer Settlement & Abstract Services, LLC only. The first is for breach of contract and is based, in part, on the claim that the Dolitskys specifically requested their lender to issue the "fraudulent" May 25 notification denying their mortgage application after learning that their daughter and her fiancé would not be able to afford the carrying charges on the property. The second is for breach of the implied covenant of good faith and fair dealing and is based on the same allegations relating to the May 25 notification set forth in the first cause of action, as well as on the Dolitskys' alleged failure to apply in good faith for a mortgage and to provide whatever documents or information was required by their lender. The third is for judgment declaring that the Dolitskys' various acts and omissions constituted a willful default and willful failure to carry out their obligations under the terms of the parties' contract. The fourth, sounding in fraud, alleges a conspiracy among the defendants to issue the May 25 notification for the purpose of inducing the plaintiff to refund the down payment. The fifth sounds in tortious interference with contract, premised on the allegations that sometime after May 3, 2010, the Dolitskys advised their lender that they did not intend to honor their obligations under the contract, requested that the lender cease processing their mortgage application, and further requested that the lender issue a fraudulent notification denying the application with the intent that the plaintiff would rely on that notification to her detriment.

In their answer, defendants Continental Home Loans, Inc. and Consumer Settlement & Abstract Services, LLC assert a single cross claim against the Dolitskys for common-law indemnification and contribution.

On December 14, 2015, the action was discontinued against defendant Consumer Settlement & Abstract Services, LLC by the filing of a stipulation of discontinuance.

Now, discovery having been completed and a note of issue having been filed on April 21, 2015, the Dolitskys timely move for summary judgment dismissing the complaint and the cross claim against them, and the plaintiff timely cross-moves for summary judgment in her favor on the first, second, and third causes of action. Continental, having obtained leave of court granting an extension of time to serve a motion for summary judgment, separately moves with respect to the plaintiff's fourth and fifth causes of action.

The Dolitskys' motion is granted to the extent of dismissing the plaintiff's second, third, and fourth causes of action against them, as well as so much of the cross claim as is for common-law indemnification. To the extent that the second cause of action is based on the "fraudulent" issuance of the May 25 notification, it is duplicative of the first cause of action (*see Deer Park Enters. v Ail Sys.*, 57 AD3d 711, 870 NYS2d 89 [2008]); to the extent it is based on the Dolitskys' alleged failure to apply in good faith for a mortgage and to provide whatever documents or information was required by their lender, it is evident that those promises are expressly included in the parties' contract, so the fact that the Dolitskys may have breached the implied covenant by failing to honor those promises does not state a cause of action for its breach which is distinct from the cause of action for breach of contract. As to the third cause of action, the court notes that declaratory judgment is an improper vehicle to resolve contractual rights where, as here, the plaintiff already has a full and adequate remedy at law (*e.g. Artech Info. Sys. v Tee*, 280 AD2d 117, 721 NYS2d 321 [2001]). The fourth cause of action, alleging fraud, is likewise duplicative of the first cause of action—at least as to the Dolitskys—for failure to plead a breach of duty distinct from their contractual duties (*see Gibraltar Mgt. Co. v Grand Entrance Gates*, 46 AD3d 747, 848 NYS2d 684 [2007]); in any event, as the plaintiff did not refund the down payment, it does not appear how she may be said to have changed her position in reliance the claimed misrepresentation (*see Nabatkhorian v Nabatkhorian*, 127 AD3d 1043, 7 NYS3d 479 [2015]). As to the cross claim, it appears that because any potential liability on Continental's part would be premised on its own wrongdoing and would not be purely vicarious, it would not be entitled to common-law indemnification from the Dolitskys (*see e.g. United States Fire Ins. Co. v Raia*, 121 AD3d 970, 996 NYS2d 286 [2014]).

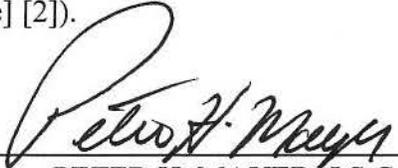
The plaintiff's cross motion is granted to the extent of granting summary judgment on the issue of liability in her favor on the first cause of action. Even assuming, as the Dolitskys claim, that they applied in good faith for a mortgage, that they did not withhold any documents or other information from their lender, that they had no input or control over the appraisal, that they did not request or cause their application to be denied, and that they had every intention of closing the transaction and purchasing the property if the application had been approved, it appears that they "canceled" the contract when they had no right under the contract to do so. Paragraph 5.8 of the rider to the parties' contract provides only

the seller a unilateral right to cancel the contract in the event that the purchasers are unable to obtain a mortgage commitment within 45 days; whatever right the Dolitskys may have had to cancel the contract in such an event would not have accrued for at least another 30 days. Whether they canceled upon the denial of their application, as they claim, or five days prior, as the plaintiff contends, is immaterial—except, perhaps, for the purpose of computing interest on a potential judgment. Either way, the court finds that the Dolitskys willfully defaulted, that their default constituted an anticipatory breach of contract, and that the plaintiff is entitled to an award of damages under paragraph 8.3 of the rider to the parties’ contract, in an amount to be determined at trial.

Continental’s motion, which is unopposed, is granted in its entirety. Irrespective of whether the May 25 notification contains any material false statements, as Continental claims, it is evident, as noted previously, that there was no detrimental reliance by the plaintiff so as to support a cause of action for fraud. As to the fifth cause of action for tortious interference with contract—one of the elements of which is the defendant’s intentional inducement of a third party to breach (*Pacific Carlton Dev. Corp. v 752 Pac.*, 62 AD3d 677, 878 NYS2d 421 [2009])—it suffices to note the absence of any allegation that Continental induced the Dolitskys to breach the contract; rather, it is claimed that it was the Dolitskys who importuned Continental to issue the notification. Accordingly, summary judgment is granted dismissing the complaint against Continental, and the remaining portion of its cross claim, which is for contribution, is dismissed as academic.

The court directs that the entry of judgment be held in abeyance pending an assessment of damages on the plaintiff’s first cause of action (*see* CPLR 3212 [e] [2]).

Dated: August 1, 2016

  
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PETER H. MAYER, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X      NON-FINAL DISPOSITION