

Kaplun v Global Am. Commercial Corp.

2026 NY Slip Op 30640(U)

February 10, 2026

Supreme Court, New York County

Docket Number: Index No. 656234/2021

Judge: Verna L. Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

INDEX NO. 656234/2021

ALLEN KAPLUN, Plaintiff, MOTION SEQ. NO. 002

- v -

GLOBAL AMERICAN COMMERCIAL CORPORATION, Defendant. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGMENT

In this breach of contract action, plaintiff moves the court, (i) pursuant to CPLR 3212(a), for summary judgment in his favor as against defendant with respect to his first cause of action (breach of contract);

The background facts giving rise to this dispute are as follows. On January 14, 2021, plaintiff entered into a contract of sale ("Contract of Sale") with defendant for the purchase and sale of condominium unit 13(d) in the building located at 250 East 65th Street, New York, New York (the, "Unit")

The agreed upon purchase price of the Unit was \$985,000.00, ten (10%) percent (\$98,500.00) of which was tendered as a down payment on January 11, 2021 (the, "Down Payment") pursuant to paragraph 3 of the Contract of Sale

1 Plaintiff in his original complaint (NYSCEF Doc. No. 1, complaint) raised two causes of action—first, breach of contract and second, breach of the covenant of good faith and fair dealing. Defendant moved to dismiss the second cause of action (NYSCEF Doc. No. 6) and on March 21, 2023, the court granted defendant's motion to dismiss plaintiff's second cause of action (NYSCEF Doc. No. 13).

designated as the escrowee in Paragraph 16 of the Contract of Sale (NYSCEF Doc. No. 22, *Kaplun affidavit* ¶ 8;).

To finance the remainder of the purchase, plaintiff submitted a loan application to HSBC Bank USA, N.A. (“HSBC”), seeking a loan of \$788,000.00 (*Kaplun affidavit* ¶ 9). On February 4, 2021, plaintiff received a letter of commitment from HSBC stating that plaintiff’s application for a mortgage loan was approved by HSBC in an amount of \$738,750.00 (“Letter of Commitment”) (NYSCEF Doc. No. 23, *commitment letter*). The Letter of Commitment under the heading “Important Disclosures” included the following statement:

“In the event the Lender discovers anything which it feels may adversely affect...your creditworthiness, your qualifications for a particular loan program or your ability to repay the loan or if it discovers you have made any false or misleading Statements in your application, the Lender reserves the right, in its sole discretion to withdraw this commitment.”

On March 11, 2021, plaintiff received correspondence from HSBC titled “Notice of Action Taken” which purported to revoke HSBC’s offer contained in the Letter of Commitment (“Revocation Notice”). Marked as “principal reasons” for this revocation on the Revocation Notice were (i) “Insufficient income for amount of credit requested” and (ii) “Excessive obligations in relation to income” (NYSCEF Doc. No. 25, *commitment revocation*).

On March 27, 2021, plaintiff informed Stark by e-mail that his “lender declined us and we will not be moving forward with this closing”. Plaintiff, in that same e-mail, asked “how [he] can go about getting [his] deposit back” (NYSCEF Doc. No. 26, *March 27, 2021 e-mail*). It should be noted that Paragraph 21 of the Second Rider provides (*emphasis added*):

“If at any time prior to closing, Purchaser’s lender fails or refuses to fund the loan, *due to a factor not within Purchaser’s control*, prior to closing, Purchaser may cancel this Contract and receive a prompt refund of the Down Payment.”

In response to this e-mail, Stark wrote:

“While I’m sorry to hear that, a commitment letter was issued and in any event you are well past the mortgage contingency date in the contract. You do not have a right to a return of your Downpayment.”

Between March 19, 2021, and September 27, 2021, plaintiff, initially, directly and subsequently, through counsel, wrote to Stark, requesting return of the Down Payment (*Kaplun affidavit* ¶ 20-27). On October 31, 2021, defendant, through its attorney, rejected plaintiff’s demand for return of same (*Kaplun affidavit* ¶ 31).

Plaintiff now moves for summary judgment on its breach of contract claim (first cause of action), pursuant to CPLR 3212(a), on the basis that HSBC’s revocation of financing was “not within [his] control” within the meaning of Paragraph 21 of the Second Rider, therefore entitling plaintiff to return of the Down Payment. Defendant in opposition argues that there is a triable

issue of fact as to the reasons for HSBC's revocation of financing including whether the factors listed in the Revocation Notice constitute "factor[s] not within [plaintiff]'s control" within the meaning of the language in Paragraph 21 of the Second Rider. Defendant also argues that there is a triable question as to whether Paragraph 21 of the Second Rider is inconsistent with terms in the Contract for Sale such that it supersedes those terms.

It is well-established that summary judgment may be granted only when it is clear that no triable issue of fact exists. (See *Alvarez v Prospect Hosp.*, 68 NY2d 320,324 [1986]; see also *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851,853 [1985].) The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. (See *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065,1067 [1979].) Failure to make such a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. (See *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].)

Determination of this motion centers primarily upon two issues. The first is whether there is an inconsistency between the terms of the Second Rider and the Contract for Sale such that Paragraph 21 of the Second Rider applies. The second concerns whether the reasons for which HSBC purportedly revoked its commitment to offer financing were "reasons within [plaintiff]'s control". If those reasons were not within plaintiff's control, and if Paragraph 21 of the Second Rider supersedes provisions concerning return of the Down Payment in the Contract of Sale, plaintiff would be entitled to return of his Down Payment.

The first question concerning inconsistency arises because Paragraph 22(a) of the Contract of Sale also contains a clause governing the situation where a lender revokes a financing commitment. That clause provides that "[o]nce the Commitment is issued, Purchaser is bound under this contract even if the lender fails or refuses to fund the loan for any reason". However, as noted above, Paragraph 1 of the Second Rider provides that its terms prevail in the event of any inconsistency between the Second Rider and the Contract for Sale. Paragraph 22(a) of the Contract of Sale is inherently inconsistent with Paragraph 21 of the Second Rider as they inconsistently allocate risk in the case of a lender's revocation of commitment. In that case, Paragraph 1 is clear in providing that the terms of the Second Rider prevail. Where the meaning of a contractual provision is clear on its face, it must be interpreted accordingly. (See *South Road Associates, LLC v International Business Machines Corp.*, 4 NY3d 272, 277 [2005].) As such, Paragraph 21 of the Second Rider governs what happens to the Down Payment in the event a lender revokes financing.

Turning to the second issue, plaintiff argues that the factors HSBC listed in the Revocation Notice, which he describes together as his "Income to Debt Ratio" are not within his control. More specifically, plaintiff, in his affidavit in support of this motion, avows that in the time between the initial application for the loan and receipt of the Revocation Notice, he "did nothing that caused [his] financial situation or debt-to-income ratio to materially change and [he] did not seek to change the terms of the loan" (*Kaplun affidavit* ¶ 31). In opposition, defendant argues that plaintiff's evidence exists only in a "self-serving affirmation" and notes that a person's Income to Debt Ratio can change for reasons exclusively under a person's control including, for example, by incurring new debts, paying off existing debts, or affecting the source

of income, and its increase or decrease. Defendant does not identify any evidence to suggest any of these situations have occurred with respect to plaintiff's loan request but simply notes them as possible reasons an individual's Income to Debt Ratio might change. Defendant also argues that even if plaintiff demonstrates through evidence in the record that his Income to Debt Ratio is not within his control, the fact that the reasons listed in the Revocation Notice are described as "principal reasons" does not foreclose the possibility that HSBC's revocation of financing was on the basis of some other factors, including factors within plaintiff's control. Defendant therefore characterizes plaintiff's motion for summary judgment as "at best, premature".

Plaintiff relies primarily on three cases in support of his argument that revocation of financing is sufficient to compel a return of a down payment: *MD3 Holdings, LLC v Buerkle*, 159 AD3d 1483 (4th Dept 2018); *Manjarrez v Tannenbaum*, 2013 WL 6817742 (Sup Ct, Bronx County, Aug. 7, 2013, Brigantti-Hughes J., index No. 301463/2012); and *Heilig v Maron-Ames*, 25 Misc 3d 838 (Sup Ct, Kings County 2008).

In *MD3 Holdings*, the purchaser's lender withdrew its mortgage commitment after receiving projections about the purchaser's business that cast doubt on the purchaser's financial circumstances. In *Manjarrez*, the purchaser's lender withdrew its mortgage commitment because rental income, which had initially been considered in the application, was determined not to be able to be considered on the basis that such income was not disclosed on previous tax returns. In *Heilig*, the purchaser's lender withdrew its mortgage commitment after the purchaser was terminated from her employment. In each of these cases, the court ordered that the down payment be returned.

However, each of these cases can be distinguished on one critical basis: these cases concern contracts for sale which did not contain a provision of the kind present in Paragraph 21 of the Second Rider. As such, those cases were decided under the good faith standard which generally applies where a contract for sale contains a mortgage contingency clause. That standard provides that "[w]hen a condition of a mortgage loan commitment is not fulfilled through no fault of the purchasers, their performance is excused, so long as they acted in good faith" (*Kapur v Stiefel*, 264 AD2d 602, 603 [1st Dept 1999].) The common law development of the good faith standard accounted for the silence in numerous contracts for sale on terms concerning return of down payments for failure to secure financing. Here, however, Paragraph 21 does contain a contractual provision to the contrary that governs. Thus, that impetus does not apply as the Second Rider explicitly contemplates that within scenario and provides the standard to be applied. Put another way, the "good faith" standard applied in the cases relied upon is the default standard absent specific contractual language to the contrary. Here, the Second Rider provides such language. (See *Chase Equipment Leasing Inc v Architectural Air, L.L.C.*, 84 AD3d 439 [1st Dept 2021].)

Accordingly, the proper analysis in this case requires considering not just that the financing was revoked but whether the reasons for HSBC's revocation of financing were within plaintiff's control. As noted above, plaintiff affirms that he "did nothing that caused [his] financial situation or debt-to-income ratio to materially change and [he] did not seek to change the terms of the loan" (*Kaplun affidavit* ¶ 31). Plaintiff refers to e-mail exchanges he had with HSBC concerning the revocation in support of this statement (NYSCEF Doc. No. 24). While

HSBC's "principal reasons" for revocation are set out in general terms in the Revocation Notice, the specific reason is provided in an e-mail from Matthew Ohrvall ("Ohrvall"), Premier Mortgage Consultant at HSBC, to plaintiff dated March 15, 2021, sent at 2:32 PM. In that e-mail, Ohrvall described the reason for revocation as follows (*emphasis added*):

"I was waiting on confirmation from my Underwriting management team but we now have an issue with the income to debt ratio's [sic]. The combination of both *us now counting* the housing debt against you and Eternity Mart West P&L have put our ratio's [sic] much higher.

Net business income from the US Corporations, Eternity Mart and Eternity Sales Corp. are not considered in applicants qualifying. This is business income in which the business pays the income tax on the net proceeds and does not flow to the applicants [sic] personal returns therefore not considered applicants income for qualifying. Eternity Mart West Inc. is a S Corporation where the net income/loss from the business flows to applicants [sic] Federal income tax returns as taxable income if applicable."

This description is dispositive of the issue. While defendant is correct to say that an individual's Income to Debt Ratio *may* change due to factors within their control, as the e-mail from Ohrvall makes clear, HSBC's decision to revoke financing resulted from a change to how it calculated that ratio—that is, the inputs it used to determine plaintiff's income and debt. That much is clear from Ohrvall's e-mail which indicates that HSBC did not revoke its financing commitment based on new information but rather on its own revised treatment of income and debt levels based on existing information.

In light of the above, plaintiff has made a *prima facie* showing of entitlement to summary judgment as a matter of law. Defendant's attempts to raise hypothetical reasons why plaintiff's Income to Debt ratio may have been in his control, or why HSBC's reasons for revocation may go beyond the evidence presented by plaintiff amount only to speculation. Such speculation is insufficient to defeat plaintiff's *prima facie* showing of entitlement to summary judgment. Instead, "[w]here the moving party has established *prima facie* that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion, or speculation" (*Leggio v Gearhart*, 294 AD2d 543, 544 [2d Dept 2002]; See *Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270, 270-1 [1st Dept 2009]). Defendant has not met that burden in this case.

Defendant then argues that summary judgment would be premature on the basis that it has not had an adequate opportunity to seek discovery and to depose plaintiff on issues subject to his summary judgment motion. It is accepted at the outset that a party may move for summary judgment at any point after issue has been joined, including before discovery has been taken. (See *Harman Agency, Inc. v Wilhelmina Licensing LLC*, 211 AD3d 470, 471 [1st Dept 2022]). While it is true that in some cases, summary judgment motions are denied as premature when the movant's deposition has not yet been taken, it is incumbent on the opposing party—here, defendant—to submit an affidavit which specifies details which convince the court that "facts essential to justify opposition may exist but cannot be stated" (CPLR 3212(f)). Neither affidavit

in opposition to the motion provides those details (NYSCEF Doc. No. 47; *Stark affidavit* and NYSCEF Doc No. 52; *Hinden affidavit*).

Moreover, in this case, issue was joined in April 2023, some two years before the filing of the present motion. In that period, defendant did not make meaningful attempts to seek the discovery it now complains of not having had an opportunity to attain. There was no attempt to advance and/or finalize plaintiff's deposition after the filing of an initial notice of deposition on plaintiff's prior counsel (NYSCEF Doc. No. 60; *Teig affidavit* ¶ 5); nor has defendant made efforts to seek discovery from HSBC, a third-party, which it now claims would have evidence which could contradict plaintiff's assertions. Further, defendant has not sought supplemental discovery after being provided, by plaintiff, requested documents including approximately 1,400 pages of communications between plaintiff and HSBC relating to the mortgage loan, as well as, documents, financial statements, or information submitted by plaintiff (*Teig affidavit* ¶ 9-11). Under these circumstances, defendant's argument that it lacks discovery is unavailing and fails to provide a sufficient basis to defeat plaintiff's motion for summary judgment. (See *Singh v New York City Hous. Auth.* 177 AD3d 475, 476 [1st Dept 2019]).

Additionally, the court grants the branch of plaintiff's motion seeking dismissal of defendant's three affirmative defenses: (i) failure to fulfill certain conditions precedent; (ii) failure to state a cause of action; and (iii) plaintiff's failure to perform under the contract at issue.

The first defense, failure to fulfill certain conditions precedent, is entirely conclusory. No factual allegations are raised in support of the defense, and no specific condition precedent is identified as not having been fulfilled. As to the second and third defenses, failure to state a cause of action and plaintiff's failure to perform under the contract at issue, these defenses are dismissed as moot given the court's above determination as to summary judgment. Here, there is no doubt that plaintiff has properly stated a cause of action for breach of contract. And, further, as forth above, Paragraph 21 of the Second Rider excused plaintiff's performance under the Contract of Sale once his financing was revoked.

Accordingly, the branches of plaintiff's motion seeking an order for summary judgment, an order dismissing defendant's affirmative defenses, and an order compelling the return of the down payment are hereby granted.

Turning now to the branch of plaintiff's motion seeking an order to set the matter down for an inquest to determine an award of attorney's fees, pre-judgment interest, and costs. Plaintiff makes a meritorious claim for an award of statutory interest dating from the date of defendant's breach of contract, March 17, 2021 and reasonable attorney's fees pursuant to Paragraph 18 of the Second Rider which provides:

“[i]n the event that either party hereto shall commence litigation against the other in connection herewith, the non-prevailing party shall reimburse the prevailing party for its reasonable attorney's fees incurred in such action.”

Defendant fails to address these arguments in its opposition papers. Thus, the branch of plaintiff's motion seeking an order to set the matter down for an inquest to determine an award

of attorney’s fees, pre-judgment interest, and costs is granted. All other arguments have been considered and are either without merit or need not be addressed in light of the foregoing. Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted; and it is further

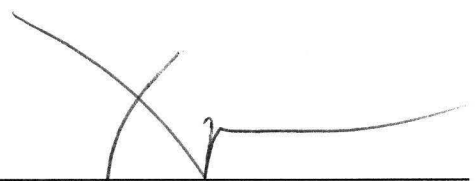
ORDERED that the branch of plaintiff’s motion seeking attorney fees and other expenses incurred in this action (second cause of action) is referred to a special referee to hear and determine; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant, Special Referee Clerk as well as the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Special Referee Clerk and Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this court.

February 10, 2026



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	