

Hall v 1885-93 7th Ave. HDFC
2006 NY Slip Op 30819(U)
August 1, 2006
Supreme Court, New York County
Docket Number: 116963/05
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 12

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MELISSA HALL,

Plaintiff,

- against -

1885-93 7TH AVENUE HDFC and JOHN DOE
and/or JANE DOE,

Defendants.

-----x
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 116963/05
Motion Seq. No. 001

FILED
AUG 09 2006
NEW YORK
COUNTY CLERK'S OFFICE

In or about June 2003, plaintiff Melissa Hall and defendant 1885-93 7th Avenue HDFC entered into a contract, by which plaintiff was to purchase apartment 2B in the cooperative building owned by the defendant 1893 7th Avenue, New York, New York. However, plaintiff claims that she has been unable to obtain financing because defendant has failed and refused to provide her with a financial statement and/or with documentation which indicates that it has paid its real estate taxes.

Plaintiff's Complaint seeks a judgment: (a) enjoining defendant from conveying the apartment to John Doe and/or Jane Doe or any third party; (b) directing defendant to provide plaintiff with a financial statement and/or statements of proof of payment of taxes; (c) in the event that the apartment has been conveyed to John Doe/Jane Doe or any third party, a judgment setting aside said conveyance; (d) in the alternative, money damages equal to the difference between the sales price under the Contract and the

market price of the apartment; and (e) awarding attorneys' fees and the costs and disbursements of this action.

Defendant now moves for an order:

(1) dismissing the Complaint in its entirety, on the grounds that plaintiff has failed to state a cause of action upon which relief can be granted, and the relief is barred by documentary evidence; and

(2) granting a declaratory judgment releasing the contract deposit in the amount of \$9,000.00 currently being held in escrow to the defendant as liquidated damages.

Specifically, defendant argues that plaintiff cannot demonstrate that she was "ready, willing and able to tender performance of [her] obligations as purchaser" under the Contract (28 Properties, Inc. v. Akleh Realty Corp., 22 A.D.3d 432 [1st Dep't 2005], lv. to app. denied, _ N.Y.3d _ [May 9, 2006]), and contends that plaintiff has defaulted on the Contract by failing to secure the necessary financing and to close within a reasonable period of time.

Defendant further argues that plaintiff's Complaint, which is founded on the Corporation's purported lack of financial statements, must be dismissed because paragraph 5 of the Contract of Sale specifically provides that

Purchaser has examined and is satisfied with, or (except as to any matter represented in this Contract by Seller) accepts and assumes the risk of not having examined, the Lease. The Corporation's Certificate of Incorporation, By-laws, House Rules, minutes of shareholders' and directors' meetings, most recent audited financial statement and most recent statement of tax deductions available to the Corporation's shareholders under Internal Revenue Code ("IRC") §216 (or any successor statute).

Thus, defendant contends that plaintiff affirmatively accepted and assumed the risk of not having examined the defendant's financial statements prior to signing the subject agreement.

However, plaintiff never assumed the risk that said documents would not be made available to her after the signing of the Contract, and argues that defendant failed to comply with paragraph 24.1 of the Contract, which provides that

The Parties shall each cooperate with the other, the Corporation and Purchaser's Institutional Lender and title company, if any, and obtain, execute and deliver such documents as are reasonably necessary to consummate this sale.

Although by letter dated August 7, 2003, Cassandra Clifton, a legal assistant at the offices of plaintiff's counsel, Mallin & Goldstein, P.C. (now known as Barry Mallin & Associates), represented to plaintiff that "Our client has informed us that the financial statements will follow shortly", defendant contends in its reply papers that plaintiff knew, prior to execution of the contract, that the defendant corporation was not in possession of any financial statements or proofs of payment of tax arrears, and

argues that defendant should not be required to incur the expense of creating such documents.

Based on the papers submitted and the oral argument held on the record on June 14, 2006, this Court finds that there are issues of fact as to what documents exist and/or which documents the defendant could reasonably be expected to provide to plaintiff in accordance with its obligations under the Contract, and as to whether plaintiff's failure to perform under the Contract was solely the result of defendant's own breach of its obligations under the Contract.

Accordingly, defendant's motion to dismiss the Complaint and for a declaratory judgment is denied.

Defendant shall serve an Answer within 20 days of entry of this Order.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on October 11, 2006 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: August 1, 2006

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J.S.C.

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